

PERSPECTIVES

Teaching Legal Research and Writing

“REALITY LEGAL WRITING”: USING A CLIENT INTERVIEW FOR ESTABLISHING THE FACTS IN A MEMO ASSIGNMENT

BY BEN BRATMAN

Ben Bratman is an Assistant Professor of Legal Writing at the University of Pittsburgh School of Law in Penn.¹

The traditional and simplest way to provide facts for a research and writing “objective” memo assignment is to write them out and give them to the students. Period. This method is easy and convenient for the professor to prepare and for the students to digest—an important factor in the fall semester when students are just beginning their training. It also provides the professor with considerable control over the parameters of the assignment.

But we should not be satisfied with that. As teachers of lawyering skills, we should seek to provide students with meaningful challenges that parallel as much as possible those they will face as attorneys in the “real world.” It may not be entirely unusual for a senior attorney to learn the facts from the client and then to paraphrase or describe them to a junior attorney in a note asking for a memo. However, it would only happen in a large law firm and only to a junior attorney who presumably will soon enough advance to a stage where he or she meets clients and does more than just respond to instruction delivered by paper. Thus, the professor-written factual narrative does little to give students a valuable and challenging real world experience.

Moreover, while the factual narrative advances a few pedagogical goals, it badly hinders others. We want to teach students to write an effective facts section, and we want generally to encourage them to use their own words.

¹ The author wishes to thank Teresa Brostoff, Ann Sinsheimer, and Marvin Fein, colleagues at the University of Pittsburgh, for their assistance in fine-tuning this article.

VOL. 12 NO. 2 WINTER 2004

CONTENTS

“Reality Legal Writing”: Using a Client Interview for Establishing the Facts in a Memo Assignment <i>Ben Bratman</i>	87
BRUTAL CHOICES IN CURRICULAR DESIGN ... Using Both Nonlegal Contexts and Assigned Doctrinal Course Material to Improve Students’ Outlining and Exam-Taking Skills <i>Charles R. Calleros</i>	91
TEACHABLE MOMENTS FOR TEACHERS ... Failing My ESL Students: My Plagiarism Epiphany <i>Alison Craig</i>	102
WRITERS’ TOOLBOX ... The Semicolon’s Undeserved Mystique <i>Anne Enquist</i>	105
TEACHABLE MOMENTS FOR STUDENTS ... Finding Low-Cost Supreme Court Materials on the Web <i>Beth Youngdale</i>	108
Toto, I Don’t Think We’re in Practice Anymore: Making the Transition from Editing as a Practitioner to Giving Feedback as a Legal Writing Professor <i>Emily Zimmerman</i>	112
Adding Method and Alleviating Madness: A Process for Teaching Citation <i>Joan Malmud</i>	117
Don’t Judge a Course by Its Credits: Convincing Students That Legal Writing Is Critical to Their Success <i>Christine G. Mooney</i>	120
Tools for Teaching the Rewriting Process <i>Jennifer Brendel</i>	123
WRITING TIPS ... Client Communications: Delivering a Clear Message <i>Joseph M. Williams and Gregory G. Colomb</i>	127
LEGAL RESEARCH AND WRITING RESOURCES: RECENT PUBLICATIONS <i>Donald J. Dunn</i>	132

Perspectives: Teaching Legal Research and Writing

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

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

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

Donald J. Dunn
University of La Verne
College of Law
Ontario, California

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. 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, William H. Gates Hall—Box 353020, Seattle, WA, 98195-3020, (206) 616-9333, Fax: (206) 543-5671, E-mail: hotchma@u.washington.edu

To subscribe to Perspectives, use the card on the back cover of this issue or contact:

Ann Laughlin
West
Customer and Product Documentation
D5-S238
610 Opperman Drive
Eagan, MN 55123
(651) 687-5349
E-mail: ann.laughlin@thomson.com

Not surprisingly, with factual narratives there is a tendency on the part of students to copy portions of the professor's narrative verbatim, and this sort of "spit back" is a meaningless and worthless exercise for students.

This realization led me two years ago to provide students with a transcript of a client interview, which eliminated the spit back problem. However, simply providing a transcript of an interview neglected teaching opportunities in the realm of fact gathering, particularly in the skill of analyzing governing law to determine what facts are important to know. This skill tends to be overlooked in persuasive writing assignments—summary judgment motions, appellate briefs, and the like—where traditionally we give students deposition or trial testimony and pleadings, or a formal record from which to cull facts. By the time such persuasive briefs are being drafted, discovery is over. But such a limitation does not have to apply to a memo assignment.²

As a result, I settled last fall on the idea of a client interview. But with 29 students, how many clients did I need? After all, a realistic client interview would not involve more than two or three attorneys. And, at first glance, the alternative of a single client being interviewed by the whole class during one 50-minute session seemed unworkable. There would be time for only one question per student, and there would be no guarantee that enough of the pertinent information would come out. That might minimize the learning experience for each student, and create headaches for me.

I did not have a crop of teaching assistants or local actors to call upon, and I was unable to recruit 10 of my former students. (Last year was my first year at a new law school, and even if it weren't, I'm not sure that I would want to try to

recruit 10 of my former students.) I began to doubt that I could create several simultaneous interviews by groups of three students. In addition, I began to sense that in an effort to mimic the realities of law practice, I would be losing control over the assignment and possibly compromising my goals of ensuring that each student had the same information and did not stray into analysis of a peripheral point. I would not be able to monitor each of the 10 interviews to confirm that each client was relating all the critical facts faithfully and fully, and the odds were that some of the clients would be less prepared than others.

The solution to me was a hybrid that, in my view, effectively balanced the aims of duplicating the real world environment and preserving teaching objectives.³ First, I provided students with a written description of some of the facts—the framework. The case involved a female employee at a grocery store who was accused by a supervisor of theft from the register because the supervisor's review of the cash drawer revealed a discrepancy. The employee denied the accusation, and the supervisor then ordered the employee into a small room to remain until she would admit to the theft and return the money. The employee heard the supervisor ask another employee to watch the door of the room and not to let her out. She waited in the room for 30 minutes until the supervisor returned, verbally berated her, fired her, and ordered her to leave. She was traumatized by the accusation and the termination, and shortly thereafter she broke up with her boyfriend and moved to another city. I related in my memo to the students that the client was hysterical on the phone describing the incident, and that as a result

² To break in my students gently, I like to treat my assignments as a chronological trip through the litigation process, beginning in the fall semester with client problems existing prior to the filing of a lawsuit, then proceeding through the filing of the complaint, and continuing all the way to appellate briefs and oral argument at the end of the spring semester. Hence, I would never provide deposition or trial testimony for a fall semester memo assignment. It puts the cart before the horse when it comes to the order in which we should introduce new skills and concepts to students. Of course, there is also no need for the subject of a memo to be litigation based.

³ Pedagogical needs or academic exigencies sometimes strongly counsel against duplicating the real world. As will be discussed, the client interview as I crafted it does not present such a situation. Two examples come to mind of situations that do: (1) Even though lawyers often have to begin and complete memos in a time span as short as one or two days, it would be counterproductive to require first-year law students to do the same. The students need the time to be taught and to develop the foundational skills necessary for completing a memo. (2) Even though lawyers regularly seek the assistance of other lawyers and nonlawyers in drafting briefs and other documents, academic prohibitions on obtaining such outside assistance are essential to ensure that students develop their own analysis and writing skills.

she did not provide additional details we may want to know. I also informed them that I had scheduled an additional interview with her for the next class meeting.

Before hatching my plan, I had found a second-year student with a yen for acting. She had been referred to me by a colleague as a conscientious person who would do well in this role. I spent some time with her and gave her a body of information from which she could draw answers to the questions students would likely ask to fill in the gaps in her story. I became comfortable that she would do well, and in fact she did. She struck a nice balance between portraying a real human being of a certain social and educational stratum—including some colloquial and off-handed remarks that made students laugh—and providing answers faithful to her script and responsive to the questions.

Students were to review a few designated cases on intentional infliction of emotional distress prior to the interview,⁴ and were to bring to class two copies of at least two questions that they wanted to ask the client. I collected one copy of the written questions to ensure good-faith compliance with the assignment, and then students took turns asking one question of the client, with one follow-up or clarifying question permitted if the answer was unavailing. As the client answered questions, I took notes on her answers, to ensure that I had a record of the additional facts with which the students would be working. Prior to beginning, I advised students not to duplicate questions already asked by classmates, hence the need for students to prepare more than one question in advance. I also told them they were not obliged to ask one of their prepared questions; indeed, they needed to pay attention to earlier questions and answers, and, where appropriate, use their turn to follow up on incomplete or suggestive answers.

Time allowed for only one full round of questions, but for the most part students used that round effectively, asking questions raised by the

governing legal standard. An intentional infliction claim requires that the conduct be extreme and outrageous, and one student therefore asked for more details on what exactly the supervisor said to the client when he accused her of theft and when he “verbally berated” her; another asked whether anybody else was present to hear him. An intentional infliction claim also requires severe emotional distress, and therefore one student asked the client to describe the symptoms of her distress, and another asked what medical attention she had received, if any. The claim also requires proof of a causal link between the outrageous conduct and the distress, and therefore students asked questions pertaining to the breakup with her boyfriend, and the timing and causes of it.

Occasionally, the client disarmed students when she claimed to not understand a legal term that they used in a question, or when she became uneasy and reticent in answering questions of a somewhat personal nature. This presented a perfect opportunity for students to rephrase questions using more lay terminology or more sensitive language.

Overall, the interview was a success. Students had to analyze law and determine what specific facts they needed to know to effectively apply that law to their client’s situation. They had to phrase questions in lay terminology so as not to confuse a client who knew little of the law. These both struck me as skills best learned by simply doing them just as a lawyer would, though with a bow to pedagogical limitations by narrowing the scope of the interview and assignment to one relatively simple claim.

The element of the interview that was perhaps least realistic—having 29 “attorneys” interview one client—served many very important teaching purposes. As mentioned, it obviated the need to find 10 people to portray clients, and ensured that all students had essentially the same assignment. But more importantly it presented the opportunity for students to learn from each other as they listened to classmates ask questions that maybe

“Occasionally, the client disarmed students when she claimed to not understand a legal term that they used in a question, or when she became uneasy and reticent in answering questions.”

⁴ To narrow the students’ focus on developing analysis and interviewing skills and to avoid substantive overload, I directed the class to ignore any potential false imprisonment or defamation claims in the assignment. In retrospect, I could have better served the students by providing a fact pattern that indisputably suggested only one type of claim. Next time.

“The variables with human behavior are endless. And almost any behavior on the part of the client presents a challenge for students to confront and react to.”

.....

they had not thought of, or that they had thought of but weren't sure if they should ask. And to ensure that important teaching opportunities were not lost amidst my effort to create a somewhat realistic interview, I interrupted occasionally to query students on why they asked a certain question. Their answers helped the learning experience as well.

Certainly, finding just the right volunteer to play the client contributed to the success of my experiment, but I was confident that success did not depend heavily on the volunteer doing such a good job. After all, clients are human beings, and in the real world of law practice, some are nervous or not very conversational, and some are forgetful. The variables with human behavior are endless. And almost any behavior on the part of the client presents a challenge for students to confront and react to. Moreover, as the teacher, I maintained control over and knowledge of what was and was not disclosed to the students. Had the client, in my judgment, not disclosed sufficient information for the assignment to work, I could have provided any missing facts in a supplemental memo or, if time permitted, scheduled a second interview.

During the interview, students seemed engaged and intrigued, and the informal feedback I later received was very positive. By way of self-critique, I have identified two areas in need of improvement. First, only one or two students asked questions following up or building on earlier answers to questions from classmates. I was so concerned by the time constraints of a 50-minute class that before we began I strongly emphasized the need for students to limit themselves to one question (and one follow-up to their own question). As a result, many students felt obliged to ask their own prewritten question and might have eschewed the opportunity to ask questions following up on earlier answers. The solution might be to advise students that they will not sacrifice the right to ask their own question if they choose first to follow up on an earlier question and answer. Careful time management could still permit this. Second, to help me identify other

strengths and weaknesses of the experiment, and to preserve the factual record in case of dispute, I should have videotaped the interview.

I look forward to trying this formula again, and I welcome ideas on improving it from my research and writing colleagues.

© 2004 Ben Bratman

USING BOTH NONLEGAL CONTEXTS AND ASSIGNED DOCTRINAL COURSE MATERIAL TO IMPROVE STUDENTS' OUTLINING AND EXAM-TAKING SKILLS

BY CHARLES R. CALLEROS

Charles Calleros is Professor of Law at the Arizona State University College of Law in Tempe, Ariz. He is the author of Legal Method and Writing (4th ed. 2002).

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.

I. Pedagogic Strategies

Exercises requiring the application of challenging legal doctrine create the risk of focusing student attention almost exclusively on mastering the doctrine and away from the critical lessons of legal method.¹ Accordingly, I have espoused the benefits of using exercises set in familiar, nonthreatening, nonlegal contexts to introduce new students to difficult concepts of legal method and to the challenges of outlining

¹ See Charles R. Calleros, *Introducing Students to Legislative Process and Statutory Analysis Through Experiential Learning in a Familiar Context* (hereafter, *Legislative Process*), 38 Gonz. L. Rev. 33, 33–34 (2003).

course material and taking essay exams.² Whether presented in orientation week as an overview of things to come, or in November as a way of consolidating skills of case analysis and easing student fears about impending exams, the nonlegal context of the exercises helps to focus student attention solely on the skills of legal method that we hope to develop.³

On the other hand, the decision to set legal method exercises in nonlegal contexts raises other risks, because the success of the enterprise depends on the abilities of students to transfer the skills that they have developed in the nonlegal contexts to their analyses of judicial opinions and to their preparation for examinations in doctrinal courses. A combined approach of assigning exercises in both legal and nonlegal settings may bring out the maximum benefits of both kinds of exercises.

In the spring semester of 2003, I presented a 90-minute workshop for our Academic Success Program (ASP), in which I experimented with a combination of exercises set both in nonlegal and in legal contexts. In this essay, I describe the workshop and reflect on its strengths and limitations.

II. Substance of the Workshop

A. Achieving a Focus on Method: Exercises in a Nonlegal Context

I began the workshop by presenting the "Rules for Monica" video and exercises, which are set in the nonlegal context of parental rulemaking but which draw close analogies to facets of common law legal method. With these exercises, workshop participants reviewed and refined their skills of analyzing and synthesizing cases, outlining course material, and composing essay examination answers; or at least they deepened their understanding of the nature of those tasks.⁴

² See Calleros, *Legislative Process*, *supra* note 1; *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis* (hereafter, *Demonstrations*), 7 J. Leg. Writing Inst. 37 (2001). Examples of such exercises are set forth in Charles R. Calleros, *Legal Method and Writing*, 133–34, 145, 167 (4th ed. 2002), and are analyzed in Charles R. Calleros, *Legal Method and Writing: Teacher's Manual* (hereafter, *Teacher's Manual*), 23–27, 28–30, 34 (4th ed. 2002).

³ See Calleros, *Demonstrations*, *supra* note 2, at 37–39.

⁴ For fuller descriptions of the Monica exercises, see Calleros, *Legislative Process*, *supra* note 1, at 34–39; Calleros, *Demonstrations*, *supra* note 2, at 49–62.

I set a fairly rapid pace for this part of the workshop, because the participants had more than a semester of law school under their belts, and some of them had even participated in the Rules for Monica exercises in their first semester. Accordingly, I alternated between (1) asking students to perform the exercises themselves and to share their interpretations in class discussion, and (2) taking the shortcut of describing the various arguments and interpretations that they likely would advance if provided more time.

Nonetheless, these students were struggling in law school and still harbored confusion on some fundamental concepts of legal method, so I devoted nearly half of the workshop to the Monica exercises. This lengthy introduction allowed workshop participants to assimilate critical concepts of legal method without fretting about whether they were fully comprehending the twists and turns of formal legal doctrine in a subject such as contracts, property, or torts. With this foundation in place, we were ready to transfer the lessons from Monica to more complicated legal doctrine.

III. Overview of Legal Method and Exam Skills in a Formal Doctrinal Setting

To infuse the second half of the workshop with maximum relevance for the ASP students, I asked them to analyze the section in a contracts casebook addressing rescission for “concealment and misrepresentation,” covering a little more than 13 pages of the Farnsworth, Sanger, and Young casebook.⁵ All contracts sections that year had begun the spring semester with this topic, so this was the first contracts topic that students would outline in preparation for examinations. Because the workshop participants had briefed and discussed these cases in class, I assumed that they were roughly familiar with most of the basic doctrinal principles and that they could—with a little help from me on rough spots in their doctrinal analysis—focus a good deal of their

⁵ E. Allan Farnsworth, William F. Young & Carol Sanger, *Contracts Cases and Materials* 352–65 (6th ed. 2001). In conjunction with this section, I also assign a footnote on “Confidential Relations” from the preceding section. *Id.* at 351 n.2. Most of the contracts sections at my school used this casebook for the two-semester contracts course in the 2002–03 academic year.

attention on the tasks of synthesis and outlining in preparation for examinations.

To give students a head start in that outlining process, I condensed the 13 pages of excerpts from the casebook into three pages quoting critical passages from cases and presenting brief notes of my own composition.⁶ This condensed format enabled students to read and review an example of underlying source material (albeit artificially condensed source material) in a few minutes of class time. From there, we addressed the process of outlining the material.

A. Outlining

As an introduction to outlining, I shared the following views with students:

I believe that a particular outlining technique is the most effective means of summarizing and reorganizing your case briefs and class notes into an effective study aid. If you find that some other method works better for you, then by all means adopt the approach that best suits you, but the traditional outline is one option for you to consider. Although it results in a document that is a very handy study guide, much more important is the activity of constructing it. It’s hard work, but the process of expressing your analyses and syntheses in your own words will prepare you well for examinations, even if you misplace your outline the day after you complete it.

1. Laundry List of Critical Points

I then invited students to review the condensed source materials and simply jot down ideas that seemed to be important to the courts in determining whether to rescind a contract for misrepresentation during contract formation. During this brainstorming session, we paid no attention to questions of organization, such as whether one critical point related to others on the list. Instead, we simply listed words or phrases that represented concepts that courts emphasized or analyzed in their case analyses. For example, the

⁶ These condensed materials are available on request from the author. The author also plans to incorporate these materials into the fifth edition of *Legal Method and Writing*, supra note 2, and its teacher’s manual.

students and I listed the following words and phrases in a vertical column on a computer projection: bare nondisclosure; false statement; justifiable reliance; material fact; opinion; arm's length transaction; fiduciary or confidential relationship; half-truth; special rules for sales of homes; active concealment; superior knowledge. Other students undoubtedly could come up with a different list, but this "laundry list" was a fine start.

2. Recognizing the Legal Significance of Points and the Relationships Among Them

Next, I asked students to explain why and how each of these points might be relevant to an analysis of rescission for misrepresentation. This assignment required students not only to analyze each case in isolation, but also to synthesize groups of cases, so that we could derive some legal norms from the cases by comparing facts and holdings. We weren't writing on a clean slate, because the students had previously prepared these cases, had discussed the cases in their contracts class, and likely had already begun reviewing the material, perhaps while consulting a commercial study aid. Still, the students gained new doctrinal insights during this process, as is typical when students review material and prepare for exams a month or more after first studying the material.

No one student had all the answers, and all of them needed some hints or other assistance from me on occasion, but they instructed each other, as members of a study group might. For example, one student synthesized two cases to recall that a misleading "half-truth" was viewed as a misrepresentation, but that bare nondisclosure of a fact generally was not. Another student remembered a note and a segment of class discussion, however, that explored a modern statutory and common law trend to require disclosure of material facts in the sale of a home. The same student also remembered a second context that gave rise to an affirmative duty to disclose: a special relationship between the parties,

such as a fiduciary or confidential relationship; I added that courts often describe the parties in such relationships as not bargaining "at arm's length." Another student recalled a pair of cases establishing that rescission generally was not available unless the misrepresentation related to facts, rather than opinion; I agreed and suggested that the distinction between the two might be less than clear in some cases. The same student added that the fact must be material, a characteristic that we agreed warranted further exploration. Another student remembered that the party seeking rescission must normally prove that he or she relied on the misrepresentation, and justifiably so. Finally, I reminded the students that rescission was an equitable remedy that allowed for some flexibility, so that a strong showing on one element of a claim for rescission, or the presence of other special circumstances, might compensate for a relatively weak showing on another element. One of our cases provided an example of this flexibility: the superior knowledge of a contractor regarding one facet of his service induced a court to relax the requirement that the misrepresentation be in the form of fact rather than opinion.

3. Reorganization of Course Material

I shared my view that some ways of reorganizing case briefs and class notes in an outline were more helpful than others. A student might distill his or her understanding of each case into a single sentence or two and then list summaries of several cases down the pages of the outline, without any attempt to synthesize them. And such a summary would at least reflect the student's analysis of each case, and it would certainly condense the mass of the material to be reviewed. But such an outline would also resemble a mediocre office memorandum, in which a student has plopped down one case brief after another, without any attempt to show each case's relationship to another or to extract some larger meaning from groups of cases—in other words, an analysis without synthesis. Such an outline would

not adequately prepare a student for examinations, because it would not substantially improve the student's ability to spot issues or to express legal rules in a meaningful way. To develop those skills, the student should synthesize the cases to derive rules of general application from them, and then should organize the outline around those rules, rather than around cases.

We had engaged in the process of synthesis and derivation of rules in step 2 above, and we had even begun at that stage to see how the rules related to one another. Our next task, then, was to state these rules in some logical fashion in outline form, constructing a legal framework into which we could insert one-sentence case summaries as illustrations of the rules. No single organizational approach can be viewed as the single correct one, but I did express views about the relative merits of a few common approaches.

First, I do not favor students simply dividing cases into those that justify relief and those that do not. Two decisions that both denied relief may have done so for very different reasons, and it advances a student's understanding very little to place in the same category a case that denied rescission for lack of a misrepresentation with one that denied rescission because the party seeking relief was the target of a misrepresentation but did not rely on it.

Conversely, two decisions that reached different conclusions about the availability of rescission might have much in common because they addressed the same issue of justifiable reliance and applied the same rule regarding that issue, even though they reached different conclusions because of critical fact distinctions between the cases. Synthesizing those cases by comparing their facts and holdings can help the student define the line between justifiable reliance and inexcusable failure to discover obvious facts. The student can then begin that section of the outline with the rule of law that he or she derives from his or her synthesis of the cases, and can illustrate the rule with a one-sentence summary of the fact-specific holding of

each case. It follows that a case with more than one holding may appear as an illustration of more than one legal principle, at different places in the outline.

By organizing the outline around rules, issues, and potential problem areas, rather than around the disposition of cases or some other superficial characteristic, students will improve their ability to spot issues. Moreover, by showing how the facts of different cases (including hypothetical ones⁷) either satisfied a particular rule or fell short of that mark, students gain an appreciation for fact analysis and better prepare themselves to construct arguments on the facts in new cases.

I also advised students to begin their outlines of each section or subsection at the most general level and then to address issues or sub-issues with increasing specificity. For example, a student would do well to begin his or her outline of misrepresentation by identifying the elements of a claim for rescission for misrepresentation and then to address more specific issues relating to each element:

I. Rescission for Misrepresentation: Because rescission is an equitable remedy, courts apply the elements flexibly.

A. General Elements:

During bargaining, a party

1. misrepresents
2. a material fact [not opinion]
3. on which the other party justifiably relies.

B. Misrepresentation: This may be a false statement, a half-truth, or active concealment, but generally not bare nondisclosure. Even an innocent misrepresentation may justify rescission.

1. Half truth: A party engages in half-truth when he or she misleadingly addresses a topic by selectively revealing some, but not all, of the material facts.

• • •

⁷ Some of the best cases for illustration in an outline are hypothetical cases raised by the professor in class for the specific purpose of defining the limits of a rule. Moreover, as one pair of authors reminds us, a sophisticated outline includes hypothetical cases devised by the student herself to illustrate a point, and it includes references to matters that remain uncertain and unresolved. Richard Michael Fischl & Jeremy Paul, *Getting to Maybe* 120–21 (1999).

At some level of specificity in the outline structure, it becomes profitable to illustrate a point with case summaries:

1. **Half truth:** A party engages in half-truth when he or she misleadingly addresses a topic by selectively revealing some, but not all, of the material facts.

a. Example: In *Kannavos*, advertisements created a false impression by revealing that property had been used as income-producing apartments, without revealing that this use violated zoning laws.

b. Example: In *Vokes*, the court hinted that dance instructors' flattery left a false impression when they failed to provide the "whole truth" about a student's potential.

•••

We did not have time in the workshop to fully construct such an outline together, but I invited students to spend a few minutes planning their basic organizational strategy; I projected sample excerpts onto the screen;⁸ and I invited students to complete the process on their own. My aim was to provide them not with an outline but with sufficient knowledge and skills to enable them to develop their own after class. In other words, I was interested not in throwing a few fish their way, but in helping them construct a net with which they could catch their own fish.

B. Taking the Examination

Once the students have engaged in the analysis, synthesis, reorganization, and expression required to construct a meaningful outline, they should have acquired the knowledge and skills to apply legal principles to new facts. With that in mind, I ended the workshop by distributing a few simple problems that were inspired by cases or other material studied in class:

1. Hilda and Louis had sexual intercourse on July 1 and July 2. Unknown to Louis, Hilda also had sexual intercourse with Alex on July 4. On none of these occasions did any of the parties use birth control. In August, Hilda

approached Louis, accurately reminded him of their two occasions of intimacy in July, accurately announced that she was pregnant, and accurately stated the doctor's estimate that Hilda conceived the baby in early July. Without disclosing more, she told Louis that she expected him to provide reasonable support and that she had a written agreement for him to sign. The agreement called on Louis to provide certain payments to Hilda in exchange for her promise not to bring a paternity suit against him, which she stated she likely would win. Based on Hilda's statements, Louis signed the agreement. Louis later discovered through blood tests that Alex fathered the child, and Louis seeks to rescind the contract for misrepresentation. What issues might arise in such an action for rescission? (In other words, what element or elements of misrepresentation might reasonably be disputed by the parties?)

2. S decides to move out of her home after her only son died there of AIDS, in his childhood bedroom, while she held his hand. Because the house is physically unaltered by her son's death, and because his illness could not possibly be transmitted to anyone else through anything in the house, S does not mention to B, a buyer, anything about her son, his illness, or his death after spending his final days in the house. Nonetheless, because of irrational fears about AIDS commonly held in the community, the market price of the house would fall if these facts were widely known. B purchases the house without knowing anything about S's son. When B later learns about S's son, he seeks to rescind the contract. What issue or issues might arise?

On either of the issue-spotting exercises above, draft a full exam answer, using IRAC (the issue, rule, application, conclusion model) as a guide and discussing arguments for both sides. Specifically, for each issue (1) identify the issue with a heading or introductory sentence, (2) summarize the rule that will help resolve the

⁸ A sample outline is available on request from the author. To encourage students to build skills while preparing their own outlines, I highly recommend that workshop facilitators refrain from distributing the sample outline and use it only as a visual aid to facilitate classroom discussion.

issue, (3) apply the applicable rule to the facts and (4) state the conclusion that you believe to be most strongly supported, even if either of two conclusions would be reasonable. You can argue both sides if the content of the applicable rule is in doubt in a material way or if the facts could support different conclusions about whether the facts satisfy the applicable rule. If you cannot construct plausible arguments for both sides in either of those ways on a given topic, then that topic is not in issue; at most, you might want to state your certain conclusion on that topic as a premise that sets up a viable issue on another matter. Neither problem is set in a particular state; you may discuss and apply general principles of contract law.

Problem 1 is a spin-off on a case that the students analyzed in the first semester of contracts, *Fiege v. Boehm*.⁹ In that case, students learned that Louis' agreement to provide child support and other payments to a pregnant Hilda was supported by consideration, because Louis exchanged his promise for Hilda's surrender of a statutory paternity claim that the parties believed had potential validity at the time of contracting, even though blood tests later established that Louis could not be the father.¹⁰ In the second semester, students are ready to return to this case, or to a similar hypothetical case, to address the separate issue of whether any contract formed might be subject to rescission for misrepresentation. The second problem raises issues related to some articles that I distributed in contracts class earlier in the semester. Both problems contain provocative themes that challenge students to remain focused even if distracted by the subject matter.

The first two problems limit the scope of the students' assignment by asking only for brainstorming about issue-spotting. In my 90-minute workshop, we had just enough time remaining to begin this process of issue-spotting, which I defined for the students as their

⁹ 123 A.2d 316 (Md. 1956).

¹⁰ See *id.*; see also Farnsworth, Sanger & Young, *supra* note 5, at 34–38 (reproducing excerpts of *Fiege v. Boehm*).

identification of matters that the parties might reasonably dispute in court in light of the law and the facts.¹¹ The ability to identify issues for discussion is obviously a critical threshold skill, so I try in workshops like these to carve out some meaningful time to discuss the thought process through which the students identify issues for discussion—which they might plausibly describe as the process of identifying issues that they believe the professor intended to raise.

Discussions about the students' thought processes in identifying issues can be prompted by asking workshop participants to spend a few minutes independently jotting down issues that they believe are raised by the problems and to explain in writing why they did so. This writing exercise, in turn, provides a basis for generating oral discussion in the group. If the workshop facilitator gently digs a little with sensitive questions, and if students are candid, discussions about their process of identifying issues may reveal some possible explanations for disappointing performance on previous exams. Some students may drop hints that they discussed certain issues because they anticipated prior to the exam that I was likely to test on those issues, because I seemed to emphasize them in class, and they read the exam question with a bias toward discussing those issues, even when the facts didn't comfortably raise them. Discussion might reveal that other students will lean toward identifying an issue that they encountered in a case earlier in the semester, simply because the general factual context of the earlier case is similar to that of the current problem (at the level, say, of both cases involving sales of homes), and even though the current problem and the earlier case raise very different issues (such as one raising an issue of materiality and the other an

¹¹ I also like the following succinct definition: "A legal issue is a question about what the law means or how (or whether) it applies to the facts of a particular situation." Cathy Glaser, Jethro K. Lieberman, Robert A Ruescher & Lynn Boepple Su, *The Lawyer's Craft* 25 (2002). I use my somewhat earthier definition in class to emphasize the concept of a reasonable dispute, stemming from uncertainty in the way in which relatively settled rules of contract law will apply to the facts. This emphasis on disputed matters may help dissuade some students from gravitating toward "safe" topics, nonissues that have certain answers and that require only statements of conclusion rather than in-depth analysis. See generally Fischl & Paul, *supra* note 7, at 143 ("Focus your fire on points in conflict").

issue about whether a statement is one of fact or opinion). Other students might reveal that they are not spotting “issues” at all, in the sense of matters that the parties might reasonably dispute, but are choosing to write about matters that would not be disputed, perhaps because that approach allows them to avoid uncertainty and to state answers that are not in doubt. If such errant approaches are revealed and discussed, the brainstorming creates a valuable opportunity for correction, adjustment, and improvement.

Of course, we should supplement our correction of problematic approaches with an exploration of the thought process that might successfully identify the issues that the examiner had in mind. For example, the first of the three problems that I distributed to the class raises a red flag to me about whether Hilda made any misrepresentation, because Hilda spoke accurately about certain facets of her pregnancy but was selective in her revelations. If students had earlier synthesized cases and constructed a well-organized outline, they should recognize that, even if Hilda uttered no false statements, (1) she arguably uttered a misleading half-truth by raising the topic of her pregnancy without stating all the material facts, including her intercourse with Alex in the first week of July (although she arguably hinted at that affair by stating that she was only “likely” to prevail on a paternity suit against Louis); and (2) Hilda arguably had a duty to disclose all material facts, including the possibility that another man was the father, because of the potentially confidential relationship between Hilda and Louis (allowing, unfortunately, for some puns about bare nondisclosure and about whether Hilda and Louis engaged in “arms-length” bargaining). A thorough student might also wonder whether Louis was justified in relying on Hilda’s implications that he is the father; after all, if Louis had bothered to ask her about other potential fathers, Hilda would have been compelled to either make a false statement or to evade the question in a way that

might have put Louis on guard that further inquiry was warranted.

Problem 2 invites students to (1) note that at least some jurisdictions require disclosure of material facts in the sale of a home, and then (2) question whether the information about the son’s death is material. This is a viable issue because the students should be able to construct factual arguments for both sides: The death of the son and the nature of his illness arguably are immaterial because they do not affect the habitability or durability of the house in the slightest, but the circumstances of the son’s death arguably are material because they in fact affect the market value of the house, even if that downward effect is the result of irrational fears or prejudice.

The third problem invites students to compose a full response to each of the first two. Because the workshop did not include time for a full in-class examination, I invited students to complete their essay answers on their own time, and I distributed annotated sample answers for them to compare with their own. As suggested by my sample response to problem 1, which covers more than a single-spaced page even when my footnoted annotations are removed,¹² even a short fact pattern can provide opportunities for substantial discussion. Moreover, even a simple set of facts may invite discussion of policy considerations in the application of law to facts.¹³ My limited aim in this workshop, however, was to explore effective approaches to preparing for examinations and spotting issues on traditional essay examinations, and to provide students with problems that tested their abilities to marshal opposing factual arguments.¹⁴

¹² My annotated sample exam answers are reproduced in Appendix A.

¹³ See, e.g., Calleros, *Teacher’s Manual*, *supra* note 2, at 34 (even a short and simple exam question set in a nonlegal setting provides an opportunity for policy analysis).

¹⁴ My advice to students about taking essay exams is found in Calleros, *Legal Method and Writing*, *supra* note 2, at 149–67. Other in-depth discussions of law school essay exams can be found in Fischl & Paul, *supra* note 7, at 215–322, and in Kenney F. Hegland, *Introduction to the Study and Practice of Law in a Nutshell* 145–89 (4th ed. 2003).

Reflections, Caveats, and Alternatives

The combination of (1) exercises set in a nonlegal context and (2) analysis of legal materials assigned in doctrinal classes appeared to help some participants take an additional step or two in the right direction. Early in the workshop, the nonlegal context helped us focus narrowly on legal method without the distraction of complicated doctrinal law; that focus carried over somewhat to the second part of the workshop, when we shifted to contracts doctrine as the vehicle for analysis. Although measures of “output” for such a workshop are difficult to define, I took some satisfaction in hearing from the ASP director that one student reported after the workshop that she “finally got it.”

The Rules for Monica video and exercises are inherently interesting to students, most of whom count themselves as part of the MTV generation and who retain fairly fresh memories of parental rulemaking in their own homes. Moreover, the students had a keen interest in analyzing course material that might be examined on their final exam in the contracts class, so they appeared to remain engaged throughout the second part of the workshop as well. My choice to use the contracts material, however, was easy because I was teaching contracts at the time. If a facilitator of such a workshop is not teaching the doctrinal course whose source materials are used in the workshop, he or she undoubtedly would want to touch base with one or more of the faculty teaching the course, to avoid stepping on any jurisdictional toes and to ensure that the analysis and synthesis explored in the workshop do not conflict with some theme advanced by the leader of the doctrinal course. At best, this courtesy might lead to professionally rewarding collaboration and development of mutual respect between the faculty. At worst, it might require the workshop facilitator to spend some tedious minutes with an unpleasant colleague.

The facilitator should be sensitive to potential criticism that the workshop is providing ASP students with some kind of inappropriate advantage on material that will be examined in a doctrinal course. Such risks should be minimal, however, if the facilitator refrains from distributing an outline of the course material and instead invites students to prepare their own, after showing some examples temporarily projected onto a screen.

The greatest weakness of the workshop—or the biggest cost of combining the nonlegal and legal contexts—was the limitation on directed skill-building activities imposed by the 90-minute format. That time constraint precluded optimum experiential learning in outlining and exam-taking, unless a workshop participant was conscientious enough to perform those tasks after the workshop and to seek feedback from a faculty member or student mentor. Significant benefits could be gained by expanding the workshop to two or three hours, ideally split into two sessions scheduled for the same week or consecutive weeks. In such a format, the first session could run the Rules for Monica portion at a quick pace and begin the process of identifying key points in the misrepresentation materials that might appear in an outline. Between sessions, students could try their hands at outlining the material, preparing them for further discussion about outlining in the first half-hour of the second session, perhaps leaving time to administer one of the misrepresentation problems as a practice exam. With any luck, the workshop facilitator will have a few minutes remaining to discuss the exam with students while the exam is still fresh in their minds. The footnotes in my sample exam answers, which form a running commentary on, and explanation of, various parts of the sample answers, provide examples of points that a workshop facilitator could raise in such discussion.

A workshop like this demands substantial time and effort from students and faculty alike. However, if it causes a few light bulbs to flicker and then to shine brightly, it will be well worth the effort.

Appendix A

Annotated Sample Responses to Problem 3 (which call for full discussion of problems 1 and 2).

Q1. Rescission for Misrepresentation:¹⁵ Louis may rescind the contract if, during bargaining, Hilda misrepresented a material fact on which Louis justifiably relied.¹⁶

Misrepresentation: A misrepresentation may be in the form of a false statement, a half-truth, or active concealment, but generally not a simple failure to disclose.¹⁷ In this case, Hilda's statements about her pregnancy, the timing of her relations with Louis, and the general timing of her pregnancy are accurate, so she is not guilty of a false statement. Neither has she actively concealed information by hindering Louis in his gathering of facts.¹⁸

Hilda could be guilty of a half-truth, however, if she addressed a topic but misleadingly stated fewer than all the facts known to her on that topic rather

than telling the whole truth.¹⁹ In this negotiation, Hilda probably stated a half-truth by addressing the topic of her pregnancy and her expectation of support from Louis without disclosing all of the facts, including the fact that another man, Alex, was nearly as likely as Louis to be the father. Hilda arguably disclosed the whole truth by stating that she "likely" would win the paternity suit, hinting at some doubt in Louis' paternity. I view Hilda's qualifying statement, however, as too vague to prevent her total presentation from being seriously misleading.²⁰

Even if we assume no half-truth,²¹ and even though parties to most transactions generally do not have a duty to affirmatively disclose material facts, such a duty may arise in the context of a confidential relationship.²² Such a relationship arises between parties when one of them is so subordinate or dependent, or places such trust and confidence in the other, that he would expect full disclosure from the other party, so that he does not fully protect his own interests as he would in "arms-length" bargaining. A close personal

¹⁵ This simple phrase is enough, in my view, to earn a point for spotting the overall issue of whether Louis can rescind for misrepresentation. I will refer to it as the "level 1 issue," which one might picture as the largest of several toy boxes that each fit inside another. This box is labeled "Rescission for Misrepresentation?" Disputes about satisfaction of individual elements of the claim will raise more specific sub-issues.

¹⁶ This is a good overview of the legal rule, to be supplemented by discussions of the legal definitions of individual elements that are in issue.

¹⁷ The exam is now analyzing an element in a separate IRAC, at a more specific level than the general discussion in the first paragraph. I'll call this sub-issue one that operates on "level 2," like a medium-sized toy box that is labeled "Misrepresentation?" and that sits alongside two others of the same size ("Material Fact?" and "Justifiable Reliance?") within the largest toy box. The first word of this paragraph identifies the sub-issue, implicitly asking whether Hilda uttered a misrepresentation, and the first full sentence supplies the general definition of that element. We can now imagine that the level 2 "Misrepresentation?" toy box contains four smaller, level 3 boxes, labeled "False Statement?," "Half-Truth?," "Active Concealment?," and "Duty to Disclose?"

¹⁸ The second and third sentences of this paragraph engage in some quick fact analysis to arrive at the easy conclusion that Hilda did not make any misrepresentations in the form of false statements or active concealment. This discussion could be viewed as part of the argument in favor of Hilda, but its real purpose is simply to state some premises that help focus attention on the more debatable questions regarding misrepresentations in the form of half-truths and bare nondisclosure.

¹⁹ We earlier opened two of the third-level toy boxes ("False Statement?" and "Active Concealment?") and found their contents to be orderly and unambiguous; however, the box labeled "Half-Truth?" reveals clashing contents that invite some analysis to make sense of them. By now, we have stepped down to yet a more specific level of IRAC, one focusing on the narrow question of whether Hilda engaged in a half-truth, a question that cannot easily be answered without some guidance on the meaning of the term "half-truth." The first sentence in this paragraph has launched this level of IRAC by identifying the issue (half-truth) and stating a rule in the form of a definition of half-truth.

²⁰ The second and third sentences of this paragraph apply the rule about half-truths to the facts, advancing arguments for both sides before reaching and justifying a conclusion. Although Louis' argument that Hilda engaged in a half-truth may indeed be stronger than Hilda's counter-argument, either conclusion is plausible, and the author of this opinion would have given equal credit (one point) for the opposite conclusion. More important than the conclusion is the student's developing arguments for both sides after recognizing this matter as one that the parties might reasonably dispute.

²¹ Even though the exam writer has potentially resolved the second-level sub-issue of misrepresentation by finding a half-truth, he or she astutely assumes a contrary conclusion to preserve the opportunity to discuss a second potentially viable form of misrepresentation.

²² Up to this point, this paragraph reviews the legal standards for confidential relationships. We now, of course, are using a level 3 IRAC to analyze the sub-issue associated with the "Duty to Disclose?" toy box sitting within the "Misrepresentation?" toy box.

relationship may be the basis of such a confidential relationship, allowing Louis to argue that his negotiations with Hilda were far from arms length bargaining, because he placed great trust in Hilda, his lover, and that it would have been unseemly of him to pry for further information at the delicate moment of her announcing her pregnancy. The facts, however, show only that Hilda and Louis were sexually intimate on two consecutive days; they do not address whether Louis placed great trust in Hilda at the time of negotiations or was otherwise prevented by the nature of their relationship from protecting his interests as he would in a less personal bargain. Indeed, the fact that Hilda was also intimate with another man and that Louis was unaware of that suggests that their relationship could just as likely have been casual or short-lived.²³ In my view, without more facts regarding their relationship, half-truth is a better theory for misrepresentation than an independent duty to disclose all facts.²⁴

Materiality: any form of misrepresentation on this topic would almost certainly be material, because, had he been aware of all the facts, Louis presumably would not have signed the agreement without further investigation of his paternity or without trying to persuade Alex to share the expenses.²⁵

Justifiable reliance: Even if Hilda engaged in a form of misrepresentation of material fact, however, Louis might be denied relief if he was unjustified in his reliance on Hilda's suggestion that he was the only one who could have fathered her child. Hilda may argue that Louis' disappointment in his bargain stems from his

²³ More than half of this paragraph is devoted to arguing both sides of the question whether the facts give rise to a duty to disclose all material facts.

²⁴ This conclusion about half-truth is hedged a bit, but it clearly deserves a point because it takes a strategic stance that one theory of misrepresentation is stronger than the other. By comparing the level 3 theories, it also resolves the level 2 analysis of whether Hilda stated a misrepresentation.

²⁵ We are now back to level 2 analysis, looking into a box labeled "Material Fact?" that sits alongside the "Misrepresentation?" box. Its contents are tidy and generate no debate. The answer therefore simply identifies material fact as a premise that the parties would not dispute.

failure to make any independent inquiries about paternity, such as by demanding a prenatal test of paternity before signing or simply by asking Hilda questions about the possibility that someone else was the father. Courts sometimes excuse such a lack of diligence, however, in appropriate circumstances. For example, in light of the highly personal nature of Hilda's announcement and her intimate relations with Louis in the previous month, Louis might reasonably have viewed it as crass for him to demand that Hilda arrange for a prenatal test or wait until a blood test could be administered after birth. It's more difficult to defend his failure to simply ask Hilda whether anyone else could possibly be the father, but he might reasonably have believed that he wouldn't necessarily get a truthful answer to such a compromising question. On balance, I believe that Louis' reliance was justified.²⁶

I conclude that Louis could rescind for Hilda's misrepresentation through half-truth.²⁷

Q2. Rescission for Misrepresentation: B may rescind the contract if, during bargaining, S misrepresented a material fact on which B justifiably relied.²⁸ B will argue that S's silence about the death of her son in the house justifies rescission.²⁹

Duty to Disclose: Deception justifying rescission normally must be in the form of active misconduct, such as a false statement, statement of

²⁶ Within this paragraph are all the elements of a full level 2 analysis: a quick statement of the issue and general rule, followed by arguments on the facts for both sides before reaching a conclusion. Notice that one facet of the rule, relating to excusing lack of diligence, appears in the middle of the fact analysis; the writer reasonably held that point back so that it could serve as a transition from one argument to another.

²⁷ At last we have returned to the level 1 IRAC. Having analyzed sub-issues at levels 2 and 3, the writer is now prepared to state an overall conclusion to the general issue stated at the beginning of the answer.

²⁸ If problem 1 and problem 2 appeared on the same exam, the exam writer probably could simply incorporate by reference legal standards that were stated earlier in the exam. I assume here, however, that students are treating each of the problems as independent practice exams, administered at different times.

²⁹ Although the first complete sentence of the paragraph summarizes the rule at a very general level, the entire paragraph works as a unit to help define the issue. The heading identifies a general category of grounds for rescission, and the final sentence identifies a factual context within which we will apply the rule.

half-truth, or active concealment. Bare nondisclosure of facts known to a party generally does not suffice absent a special relationship between the parties, and the facts provide no basis from which to infer such a relationship here. If the general rule applies, then B has no basis for relief.

On the other hand, a growing number of states have recognized a special duty to disclose material facts during bargaining for the sale of a home. The traditional rule of “buyer beware” is still embraced by courts and legislatures in some states, perhaps because it places healthy incentives on buyers to protect their own interests by making reasonable inquiries. Even without a duty to disclose, for example, B could have protected his interests by asking S whether the house had any hidden characteristics that might affect its value, forcing S to reveal the problem, to state an actionable falsehood, or to give an evasive response that might have put B on notice that further inquiry was warranted. Still, I believe that the trend requiring full disclosure of material facts is supported by sound policy considerations and will eventually be recognized universally within the United States. Although it does increase the number of cases in which courts will upset contracts, it does so justifiably in light of the huge economic undertaking assumed by a home buyer, and in light of the emotional and aesthetic ties between a home owner and the place where the buyer eats, sleeps, and carries on family life. I conclude, therefore, that S likely had a duty to disclose all material facts.³⁰

Materiality: Even if S has a duty to disclose, S’s failure to disclose will not justify rescission unless the omitted fact is material and therefore would

³⁰ The second paragraph recognizes that the facts will support a finding of misrepresentation only if they justify departing from the general rule against imposing a duty to disclose; the third paragraph follows with a policy-rich debate on the relative merits of carving out an exception from the general rule for sales of homes. Because the problem is not set in any particular state, the students are free to couch their conclusions in terms of their preferred view or their prediction of which rule a court would choose if the question were one of first impression.

have affected whether B was interested in buying the house at a particular price. B will undoubtedly advance a market analysis that shows that buyers are generally reluctant to purchase a house in which someone died of a frightening disease, a reluctance that drives down the market value of the house to a significant degree. Using a purely economic analysis, such an effect on the home’s market value and potential resale price establishes materiality almost by definition. B may add that some of the considerations that give rise to a duty to disclose (such as the personal ties between a person and his home) suggest that even purely personal misgivings about a death in the home should be viewed as material. S may argue, however, that the circumstances of her son’s death are private and should not be subject to disclosure unless they affect the essential quality of the house, such as its habitability and durability. Of course, the son’s death has no physical effect on the house, and it arguably affects the house’s market value only as the result of a kind of ignorance and prejudice that a court should not condone. Although this is an extremely close and difficult question, I conclude for policy reasons that the circumstances of the death of S’s son in the house should not be viewed as a material fact that must be disclosed.³¹

I conclude that S would have a duty to disclose all material facts, but that the problem does not reveal any such failure justifying rescission.³²

© 2004 Charles R. Calleros

³¹ This paragraph sets forth a complete IRAC on the sub-issue of materiality.

³² In this final sentence, the exam writer sums up the conclusions on the sub-issues, leading to an overall conclusion (no rescission for misrepresentation) on the general issue.

“It was the kind of paper I dread: a draft submitted by a student from China in idiomatic, scholarly English.”

FAILING MY ESL STUDENTS: MY PLAGIARISM EPIPHANY

BY ALISON CRAIG

Alison Craig is the Legal Writing Specialist at Brigham Young University's J. Reuben Clark Law School in Provo, Utah.

Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own “teachable moments for teachers” to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: sirico@law.vill.edu.

It was the kind of paper I dread: a draft submitted by a student from China in idiomatic, scholarly English. It was footnoted throughout, but there were no quotation marks in the entire paper. I wouldn't have expected such sophisticated language from a native English-speaking law student; from a non-native speaker, such fluent language was an impossibility. Clearly, the student had plagiarized.

As I prepared to meet with her, I was aware of the huge task before her: to make the paper acceptable by U.S. academic standards. I certainly didn't expect I had anything to learn. After all, I had been teaching writing for 18 years (five of them at the law school), and I had always insisted that my students learn how to document their sources accurately. However, because my parents had taught English in China for three years, I was aware of the Chinese cultural standard that to use someone else's words honors that person. I was even aware of a Western parallel to the Chinese system in our use of literary allusion.

Of course, such an awareness doesn't change our rules about plagiarism, and all our legal writing students receive class instruction on plagiarism, are given a copy of the Legal Writing Institute handout on plagiarism, and are informed of the law school's written policy on plagiarism, with special emphasis on the consequences that accompany plagiarism.

After I read the student's paper—at least enough of it to see that it was not her own work—the student and I met. I explained the law school plagiarism policy to her and told her that the paper would not be acceptable within those guidelines. Then I launched into my standard speech: quotation marks for language from the source, citations only for borrowed information in her own words. Clearly puzzled, she pointed out all of her footnotes.

“Yes,” I replied, “but you also need to use quotation marks.”

“But I used footnotes,” she explained. They were less cumbersome than listing the source in the body of the paper, she told me.

Even though she was misunderstanding my point and focusing on footnotes as opposed to in-text citation, I could tell she was trying to understand, so I persisted. However, all my attempts to explain to her that she had used the exact words of her source without acknowledgment were met with the same response: “I footnoted it.” Our fruitless discussion continued for about 20 minutes.

Finally the light went on—not for her—but for me. It was as if for a moment I stood outside my culture's norms and saw them as a foreigner might see them—and they were more complex than I had realized. What I finally came to understand was that to her there was no difference between using the ideas of another person (which we would footnote) and using the exact words of another person (which we would put in quotation marks and footnote). For the first time I realized that we actually have a two-tiered system of attribution: one system—citations—for summaries and paraphrases; a second system—quotation marks and citations—for direct quotes. No wonder English as a Second Language (ESL) students have

such a hard time understanding how to avoid plagiarism—it's more complicated than we understand!

This student had learned the one tier: to cite everything she borrowed, and she had done it as carefully as she could. What she hadn't understood was the second tier—if she used the exact words of the author, she was obligated to use quotation marks as well. (Nor had she understood the corollary that must seem so strange to a speaker of English as a second language. She needed to translate much of the elegant prose of her source into her own halting English and then expand on it with her own thoughts and insights.)

I remember my “aha” moment when I understood her problem. I don't remember the words I used to explain it to her, but once I grasped our two-tiered system of attribution, I was able to explain that second tier to her simply and easily.

This experience did three things for me: first, it made me look back with new eyes on every ESL student I've ever worked with, especially the exasperating student I encountered several years ago. He'd submitted a draft of his appellate brief with much of his policy section written in fluent academic prose. His legal writing professor told me that she'd already seen that section and had written in the margin, “Are these your own words?” So I chose to be more direct, telling him about the law school policy on plagiarism and warning him that his paper might receive a failing grade.

When we met about his paper, he kept assuring me that his teacher had recommended that the students use certain law review articles in their briefs. Yes, but with attributions and quotation marks, I explained. He was so adamant in his refusal to accept my explanation that I finally invoked my many years of teaching experience as proof that I knew whereof I spoke. After he met with me, he went back to his teacher, trying to get her to contradict my insistence on quotation marks. Both his legal writing professor and I became frustrated by his continued questioning

and speculated that he was trying to play one of us off against the other. Did he have a problem with female authority, we wondered?

This student eventually put in enough citations and quotation marks that his paper didn't fail, but now I wonder how much of his failure to understand was because of our failure. We assumed willful ignorance and willful resistance. What if instead he simply did not understand the complexities of our system? What if we failed him?

The second result of my new understanding is similar to what happens when I learn some new word—suddenly I begin hearing it all around me. I now have a heightened awareness of the complexities of plagiarism, so I have been encountering the topic all around me this summer. For example, I've been reading Mike Rose's *Lives on the Boundary*. In it he describes a Hispanic student who has excelled in her southeast Los Angeles high school but is accused of plagiarism in college. Similar to my student from China, she has listed her sources in her paper and doesn't realize she can't simply copy what they have said.¹ A July 2003 *Time* magazine article describes Thomas Jefferson writing The Declaration of Independence and notes that Jefferson “borrowed freely from the phrasings of others . . . in a manner that today might subject him to questions of plagiarism but back then was considered not only proper but learned.”² More recently, my colleague Lovisa Lyman, who teaches the legal writing course for students in the Master of Laws (LLM) program, told me about a study that found that ESL students don't understand and therefore ignore indirect comments about plagiarism such as “Where did you get this information?”³—just as our ESL student ignored his professor's similar question.

¹ Mike Rose, *Lives on the Boundary: A Moving Account of the Struggles and Achievements of America's Educationally Underprepared*, 179–180 (1989). I have also encountered many undergraduate students who were native English speakers and not underprivileged who have never been required to adhere to a rigorous system of attribution.

² Walter Isaacson, *How They Chose These Words*, *Time* 76, 77 (July 7, 2003).

³ Fiona Hyland & Ken Hyland, *Sugaring the Pill: Praise and Criticism in Written Feedback*, 10 *J. of Second Lang. Writing* 185, 201 (2001).

“I now have a heightened awareness of the complexities of plagiarism.”

“To my student
this spring,
thank you for
teaching me
to see
plagiarism
with new
eyes.”

.....

The third result of my epiphany is that I plan to make a preemptive strike against plagiarism with our ESL students. Early in fall semester, I will offer a workshop on plagiarism specifically for ESL students. We will discuss the two-tiered system of attribution that our culture demands. We will practice in class—especially that second tier of quotation and attribution and also that corollary requirement that students restate what they find in their own words and add to it with their own ideas. Finally, the students will complete a short exercise in which they demonstrate their ability to quote accurately, paraphrase, and summarize. (I used such an exercise when I taught writing to undergraduates, and I found it more effective than all my talking about the subject. In the exercise, the students learn firsthand how much care they have to take to be accurate, and they receive feedback that shows them where they are avoiding plagiarism and—more importantly—all the places where they are not.)

To my student this spring, thank you for teaching me to see plagiarism with new eyes. To my other ESL students who struggled to understand our complex system, my apologies. I will try not to fail you again.

© 2004 Alison Craig

THE SEMICOLON'S UNDESERVED MYSTIQUE

BY ANNE ENQUIST

Anne Enquist is the Writing Advisor at Seattle University School of Law in Seattle, Wash. She is a member of the national Board of Directors for the Legal Writing Institute and has served on the editorial board for the journal Legal Writing: The Journal of the Legal Writing Institute. Professor Enquist is co-author of The Legal Writing Handbook, 3d edition, and three books: Just Writing, Just Briefs, and Just Memos.

Writers' Toolbox ... is a regular feature of Perspectives. In each issue, Anne Enquist will offer suggestions on how to teach specific writing skills, either in writing conferences or in class. Her articles will share tools and techniques used by writing specialists working with diverse audiences, such as J.D. students, ESL students, and practitioners. Readers are invited to contact Professor Enquist at ame@seattleu.edu.

It happened again last week. A student came in for a writing conference and wanted to discuss how she could improve her choppy, rather unsophisticated writing style. As we looked at several of her paragraphs, I pointed out a pair of sentences that might be joined by a semicolon.

"Oh, I never use semicolons," she flatly declared, much in the same way someone might say I don't smoke, eat red meat, or watch reality TV. When I asked why, her answer was equally vague: "I just don't use them."

Having gotten similar responses about semicolons from students over the years, I commented to her that I had noticed other law students avoiding semicolons, and usually it was because they thought they were really difficult to use. I mentioned that semicolons seem to have some kind of undeserved mystique and that they are not only simple to use but also handy to have in one's legal writing repertoire. In fact, if she

wanted, I could explain almost everything she needed to know about semicolons in about three minutes.

The promise that it would be quick and painless won her over, and we set out to conquer the semicolon in three minutes, give or take a few seconds.

I started by assuring her that two main rules about semicolons covered 98 percent of the situations in which they would be used. To understand the first rule, I recommended that she think of a semicolon as a "soft period." Using the two sentences from her writing that had looked like natural candidates for a semicolon, I explained how a semicolon can hold together two main clauses (sometimes called independent clauses), or for the grammatically challenged, two wannabe sentences (has a subject and verb and can stand alone as a sentence).

Example:

The plaintiff is a Nevada resident. The defendant is a California resident.

The plaintiff is a Nevada resident;
main clause (could be a separate sentence)

the defendant is a California resident.
main clause (could be a separate sentence)

Although these two clauses could be separate sentences, they are closely related and, given the diversity jurisdiction context, it was stylistically effective to balance one against the other. When read as a "soft period," the semicolon signaled a pause that is longer than a comma but shorter than a period. Thus, it signaled a relationship between the two clauses that is closer than the relationship between two typical sentences that follow one another.

I then explained a variation on this first rule, which is when the second main clause begins with a transitional word or phrase.

"I started by assuring her that two main rules about semicolons covered 98 percent of the situations in which they would be used."

“Once the items become long or have internal commas, it helps the reader if the items are separated by semicolons.”

Example:

The plaintiff is a Nevada resident. Nevertheless, his car is registered in California.

The plaintiff is a Nevada resident; nevertheless, his car is registered in California.

It helps at this point to draw a chart for students so that they can see that the semicolon is the soft period holding the two clauses (or wannabe sentences) together and that a comma sets off the transition from the rest of the second clause.

_____ ; transition ,
main clause (could be a separate sentence)
 _____ .
main clause (could be a separate sentence)

It also helps to give students a short list of words that commonly fit into the transition slot: *nevertheless, therefore, however, consequently, on the other hand, for example, furthermore, moreover, etc.*

Example:

The summons was not delivered to his usual place of abode; therefore, service was not effected in the manner prescribed by law.

The key to this first rule, then, is to emphasize that most of the time semicolons are like soft periods holding two main clauses together because the clauses are closely related in meaning. It doesn't change anything if the second clause begins with a transition.

The second rule is just as easy as the first. I start by explaining that in a typical series (three or more items grouped together), the items are separated by commas. If there is a simple series in the draft the student is working on, I use that as my example. Otherwise, I pick something simple like the colors of the American flag.

Example:

red, white, and blue
item 1, item 2, and item 3

Building on this example, I show the student how a series can contain increasingly longer and more complex items.

Example:

The defendant ran out of the house,
item 1
through the backyard, and into the alley.
item 2 and item 3

As long as the items are fairly short and do not contain internal punctuation, the commas are enough for the reader to see where one item ends and another begins. Once the items become long or have internal commas, it helps the reader if the items are separated by semicolons, as in the example below.

Example:

The defendant claims to reside in Nevada, even though his car is registered in California; he is registered to vote in California; and all of his financial assets, including stocks, bonds, and a savings and checking account, are in a California bank.

In the example above, the third item in the series (all of his financial assets, including stocks, bonds, and a savings and checking account, are in a California bank) has internal commas, so now the writer is required to use semicolons to separate the items.

_____ ; _____ ;
item 1 item 2
 _____ , _____ , _____ , _____
item 3

Long items in a list, particularly those introduced by numbers, are also separated by semicolons.

“Because of the place the Supreme Court holds in American law, there are a number of reliable Web sites that post opinions, briefs, and other materials for Supreme Court research.”

FINDING LOW-COST SUPREME COURT MATERIALS ON THE WEB

BY BETH YOUNGDALE

Beth Youngdale is the Head of Student Services at the Tarlton Law Library, Jamail Center for Legal Research, at the University of Texas School of Law in Austin.

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.

One of the challenges in teaching law students is encouraging them to think cost-effectively when they are working on legal research projects. No matter how many times we talk about the costliness of certain commercial database providers, the fact remains that, for now, for students, Westlaw® and LexisNexis™ are “free” as well as familiar. Therefore, of course, the commercial vendors will be the default resource for most students. The teachable moment comes

in pointing students toward sources—in this article, Web sites—that will provide the same information, and often additional information, for no cost at all.

A first-year law student approaches the reference desk of the library and hesitantly asks for the phone number or e-mail address of the clerk of the court for the United States Supreme Court. After a little gentle digging, the librarian discovers that the reason the student is interested in contact information is that he wants to call the clerk about the briefs for a case pending before the Court. The research assignment for the first-year class involves the use of federal money to support scholarships for religious studies on campus. Each student is allowed a limited amount of research time on Lexis and Westlaw. This student has just realized, near the end of his project, that legal briefs to the Supreme Court for the case *Locke v. Davey* may provide some helpful information. Unfortunately, he has used all of his allotted Westlaw and Lexis time. He thought that if he contacted the Supreme Court, he might be able to sweet-talk someone into faxing him the briefs he needs. The librarian wisely uses this question as a “teachable moment.”

Because of the place the Supreme Court holds in American law, there are a number of reliable Web sites that post opinions, briefs, and other materials for Supreme Court research. We will look at several of these “obvious” sites and the information they provide. For the sophisticated researcher, though, there are also different ways to expand Supreme Court research beyond the more traditional (if we use the word *traditional* with the Web) Web sites. We’ll explore some other ways to track down Supreme Court information, as well.

There are a number of useful Web sites that provide excellent Supreme Court information. The Court’s own Web site, <www.supremecourtus.gov>, has slip opinions in PDF format, a calendar of oral arguments, orders lists, and a link to the merits briefs through the American Bar Association Preview of United States Supreme Court Cases Web site at <www.abanet.org/publiced/preview

/briefs/home.html>. The ABA site does not have the briefs that were submitted for the jurisdictional phase of the trial, and the merits briefs do not include amicus curiae briefs submitted by third parties. The Supreme Court's Web site has slip opinions back to the 2001 Term, plus complete volumes of the *United States Reports* back to volume 502 (1991). The Supreme Court site does not have opinions online further back than 1991.

The docket list for *Locke v. Davey* is available at <www.supremecourtus.gov/docket/02-1315.htm>, which lists the dates of procedural matters and the different briefs that have been submitted. From the U.S. Supreme Court's main Docket page, you can also find the link to the merits briefs on the ABA Preview site. Our case is not scheduled to be heard for a couple of months, and the briefs are not yet available. So, we'll keep looking.

FindLaw® is an excellent resource for Supreme Court materials. Current opinions are available at <supreme.lp.findlaw.com/supreme_court/decisions/index.html>. Briefs, a feature that is not available on many Web sites with Supreme Court resources, are available at <supreme.lp.findlaw.com/supreme_court/briefs/index.html>. FindLaw has briefs from the jurisdictional phase of the process as well as the merit phase. Amicus briefs, which are not a part of the ABA's collection, can also be found through FindLaw. In our search for information on *Locke v. Davey*, the FindLaw site at <supreme.lp.findlaw.com/supreme_court/docket/2003/december.html#02-1315> proves to be the most helpful so far. Here we find the opinion of the U.S. Court of Appeals for the Ninth Circuit, the Supreme Court's grant of certiorari, and the respondent's brief in opposition to the petition for certiorari (although the link is broken).

The Legal Information Institute (LII) Web site at Cornell Law School, <supct.law.cornell.edu/supct>, is another solid resource for Supreme Court materials, particularly when looking for historical information. In addition to current opinions, LII has historic decisions going back to

the 1700s. While this historical collection does not include every Supreme Court case, it does include "the court's most important decisions through the whole period of its existence." These cases can be browsed by topic, by author, and by party. They can also be searched by key word. For the current Term, the site provides links to an oral arguments calendar that includes questions presented. There are additional links with case status information and the Medill School of Journalism's link for the case, where audio files of oral arguments are available. While the LII Web site does not have briefs, it does provide a link to the FindLaw site where briefs are available, <supreme.lp.findlaw.com/supreme_court/briefs/index.html>.

Using *Locke v. Davey* as a test case, it was interesting to note that some of the links on the LII site, even those that say "this term," do not all reference materials from the current Term (2003–2004). For instance, as of November 2003 the link *Cases argued this term* takes you to "Calendar of Oral Arguments from 1 November 2002 to 3 June 2003." On the other hand, the link *Supreme Court orders this month* does in fact link you to orders from the current month. Briefs and other information for *Locke* were not available through the Cornell site.

The Oyez Web site (U.S. Supreme Court Multimedia) at <www.oyez.org/oyez/frontpage> is unique in its dedication to providing transcripts and audio files of oral arguments before the Supreme Court. Audio files are available back to 2001 and the site is in the process of releasing historical oral arguments as MP3 files at <www.oyez.org/oyez/resource/nitf/273/>. As might be expected in early November 2003, given that *Locke v. Davey* has not yet been heard by the Court, the Oyez site does not have much information. It does list December 2, 2003, as the date for oral arguments.

The Medill School of Journalism at Northwestern University has a Web site called On the Docket at <journalism.medill.northwestern.edu/docket/>. In conjunction with the Oyez site,

“FindLaw has briefs from the jurisdictional phase of the process as well as the merit phase.”

“With the help of the Internet, however, sometimes researchers can find treasure troves of documents and other information.”

.....

this site includes a current listing of the cases pending before the Court, a story on each case, additional feature stories on selected cases, links to Web sites relevant to the cases, information provided by attorneys and parties in the cases, the dates for scheduled oral arguments, the questions presented to the Court, referrals to the attorneys in the cases, and citations (and links) for the lower court opinions. Coverage dates back to the 1998–99 Term. The Docket page for *Locke v. Davey* includes a summary of the case, including relevant facts and the procedural history, the question being presented to the Court, a link to the Ninth Circuit’s opinion, and an article titled “The Faith-Based Legal Landscape.”

In addition to these generally well-known Web sites, sophisticated researchers can find Supreme Court information in less obvious places by thinking strategically about the parties that are involved in the case, and doing a little digging. While many of the Web sites listed above have great materials, often such collections are not comprehensive—there may be gaps in coverage, older briefs may not be available, or amicus briefs may be missing. With the help of the Internet, however, sometimes researchers can find treasure troves of documents and other information.

Here are some suggestions for additional research:

- If the parties to a suit are entities of some kind—companies, government agencies, nonprofit organizations—find their Web sites and see what information they have posted. You may find briefs or other court documents readily available. Enron, for example, has its bankruptcy court documents, special-master reports, etc., posted on its Web site <www.enron.com/corp/por/supporting.html>. While the Enron case is not a Supreme Court case, this does give you an idea of the type of information some entities will post.

For example, in *Locke v. Davey*, the attorney general for the state of Washington asked the Supreme Court to review the Ninth Circuit’s opinion. The Washington attorney general’s Web

site has a page devoted to the case, <atg.wa.gov/davey/>, which includes a link to court documents with a copy of the petition for certiorari. Additionally, while the respondent, Joshua Davey, is an individual, the nonprofit group American Center for Law and Justice is representing him. Its Web site also has a page devoted to the case, <www.aclj.org/news/pressreleases/030908_davey.asp>, which includes the respondent’s brief in opposition to the petition for certiorari.

- By reading newspaper articles or other press coverage of a Supreme Court case you can discover what third parties may be interested in a particular case. If you find the Web site of a third party to the case or a party that is interested in the case, you will find that some groups not directly associated with a case will often post information about it. Some of these parties will submit amicus briefs; some may simply post coverage of the case—articles, court documents, and lower court opinions.

If you will remember, the Web site On the Docket had a feature article on *Locke v. Davey* titled “The Faith-Based Legal Landscape.” That feature referenced several different organizations that have an interest in the litigation—the Cato Institute, <www.cato.org/index.html>; Americans United for Separation of Church and State, <www.au.org/>; and the Heritage Foundation, <www.heritage.org>. By reviewing these organizations’ Web sites, you will find that the Cato Institute has posted the amicus brief it has filed with the Supreme Court at <www.cato.org/pubs/legalbriefs/locke.pdf>. Neither the Americans United for Separation of Church and State nor the Heritage Foundation has posted briefs.

Also think about the types of organizations that might be interested in a case with religious freedom or separation of church and state issues. The American Civil Liberties Union (ACLU) at <www.aclu.org/court/courtmain.cfm> and the Christian Legal Society’s Center for Law and

Religious Freedom (CLRF) at www.clsnet.org/clrfPages/index.php3 often write amicus briefs for or serve as counsel on cases that revolve around these issues. Being aware of organizations and people who litigate or write on particular issues may provide you with additional points of contact for Supreme Court information. In this instance, both the ACLU and the CLRF have amicus briefs available online at www.aclu.org/Files/OpenFile.cfm?id=13416 and www.clsnet.org/clrfPages/amicus/locke_davey.pdf, respectively.

- If a case is small enough not to have generated much news coverage or notable special interest, you may want to try a general Internet search to see what you find. Lesser-known groups or people may have Web sites dedicated even to those cases that are not of interest to a larger audience. Such sites may provide the same type of information in terms of briefs, articles, and transcripts that would be found on more official Web sites.

Doing a general search for *Locke v. Davey* on the Internet pulls up many sites that have additional briefs from some well-known organizations as well as articles and analysis of the case. Some of these sites may provide valuable information for a research project.

Remember to remind students when they use organizations' Web sites or personal Web sites that they need to be aware of bias. While documents that are posted because they were submitted to the Supreme Court should be identical to what was actually submitted, students should be sensitive to citing nonofficial or nonauthoritative Web sites, and should probably note the possible bias of a Web site if referring others to it.

Conclusion

In my mind, this is the type of teachable moment that can show students the creativity and challenge (in a good way) of legal research. It demonstrates that there are good, reliable Web sites with free information available for Supreme

Court cases. It demonstrates that these sources are not always comprehensive, but that there are other ways to find more information, still for free. And while we're not focusing on it for purposes of this article, it might also be used to point out some of the weaknesses of using just the Internet for legal research, and one of the reasons we pay what we do for Lexis and Westlaw—Westlaw has 29 briefs, including the petitioner and respondent briefs.

© 2004 Beth Youngdale

“Remember to remind students when they use organizations' Web sites or personal Web sites that they need to be aware of bias.”

“I frequently tell my students to think about the ‘audience, purpose, and content’ of their documents before they start writing.”

TOTO, I DON'T THINK WE'RE IN PRACTICE ANYMORE:¹ MAKING THE TRANSITION FROM EDITING AS A PRACTITIONER TO GIVING FEEDBACK AS A LEGAL WRITING PROFESSOR

BY EMILY ZIMMERMAN

Emily Zimmerman is an Assistant Professor of Legal Writing at Villanova University School of Law in Villanova, Penn.²

One of the most challenging aspects of teaching legal writing is providing written feedback to students on their writing assignments. After practicing law for several years, I was used to going over my colleagues' written work with a fine-tooth comb in order to produce the most effective documents for our client. When I left practice to start teaching legal writing, the practitioner in me continued to focus on the perfection of the document and had the urge to show my students how to improve their writing by “fixing” their writing assignments myself. I could show my students how to improve their documents by example—my example. Although I certainly did not rewrite my students' papers for them, there is no question that I erred on the side of noting any aspect of a student's paper that warranted revision and I probably line-edited my students' work more than I should have. As a result, my students received papers that were not only heavily commented on in the margins but also intensively marked throughout the text.

Thinking about the substance of my comments on my students' papers, the extent of my handwriting on my students' papers, and the time

spent marking my students' papers has led me to a very conscious appreciation of the differences between the type of editing that I did as a practitioner and the type of feedback that I should be providing as a teacher. It is neither practicable nor constructive to edit our students' papers as we would drafts of documents in practice. First, it takes a long time to edit one brief, much less 40 briefs. More significantly, editing a paper for a student usurps the student's role in assessing and improving his or her skills. Inputting edits into a computer does not learning make. Additionally, to the extent that our students use their legal writing assignments as writing samples, these samples should reflect our students' work, not our editing ability.

While we may readily acknowledge that we should not edit our students' papers as we would drafts of documents in practice, it can be harder to avoid this temptation in reality. I frequently tell my students to think about the “audience, purpose, and content” of their documents before they start writing. Following my own advice has helped me more fully understand the difference between my former role as a practitioner and my current role as a teacher in providing written feedback and has helped my comments better reflect this transition.

Purpose

In practice, the primary purpose of editing was to create a document that was as perfect as possible in order to accomplish the goals of the document. Whether I was editing an appellate brief, a contract, or a letter, my foremost concern was with the document itself because I was responsible for representing my client as well as I possibly could. Of course, I was also concerned with training and providing feedback to my colleagues regarding their writing, but that was not the primary purpose of my edits.

In teaching, on the other hand, the document itself is not of utmost importance. My students do not represent actual clients, and my students'

¹ With apologies to *The Wizard of Oz* (Metro-Goldwyn-Meyer 1939) (motion picture).

² The author thanks Diane Edelman for her helpful feedback on this article.

briefs are not going to be filed on anyone's behalf. The purpose of my students' briefs is not to achieve the result sought in the briefs themselves, but to be the means by which my students can learn, develop, and refine their analytical and communicative skills to become effective lawyers. It is highly unlikely that my students will ever file a brief on the exact issue that they have written about in their legal writing class. In fact, many, if not most, of my students may never draft an appellate brief in practice, and, frankly, I don't care whether they do. I do care, however, whether my students learn to think critically and communicate their ideas clearly and logically. Developing the ability to think critically and communicate effectively is the purpose of my students' writing assignments, and my feedback on their assignments must reflect this goal.

Audience

When providing feedback on a draft, there are really two audiences to consider: the drafter of the document to whom the *feedback* is directed, and the person to whom the *document itself* is being directed. In practice, the ultimate target of the document—judge, opposing counsel, vendor—was the dominant audience. Although I considered how my colleagues would receive the *feedback* that I was providing, the goal of the *document itself* and, thus, the ultimate audience of the document, were foremost in my mind. As a professor, however, my students are the dominant audience. My feedback is important because of what it can teach my students, not because of the revised document per se that could result from my feedback. Although I might craft my feedback to give my students insight into the mind of the ultimate audience of the document (e.g., by noting where and explaining why an analysis is incomplete, by indicating where a point is unclear), the students themselves are my real audience—the audience whose actions I am seeking to affect with my feedback.

Content

I tell my students that the purpose and audience of a document play a large role in controlling its content. This applies equally to feedback, and I try to keep my purpose and audience foremost in my mind as I give feedback to my students. This heightened awareness of purpose and audience has helped me refocus my comments away from those that characterize a practitioner to those that reflect a teacher. Specifically, I am better able to restrain my impulse to comment on every aspect of my students' work and to concentrate instead on providing feedback to help my students develop the transferable skills that they will need as they continue their legal careers.

To be sure, my comments still respond to what my students have written; my comments are not completely abstracted from my students' work. However, I am careful that the way in which I communicate my feedback to a student does not usurp the student's role as writer *and* rewriter. I provide my students with guidance as to how they can improve their writing; I do not rewrite their documents for them.

I still mark grammatical, punctuation, and spelling errors on my students' work. I even continue to edit what my students have written. However, when I line-edit now, I do so more selectively and deliberately to illustrate a particular point (e.g., writing persuasively, communicating clearly, avoiding run-on sentences). My goal is not to correct my students' writing, but to guide them to improve their own writing.

Consciously identifying and focusing on the purpose and audience for my feedback has affected not only the substance but also the quantity of my comments. I still provide a lot of feedback on my students' papers, but my comments are generally less copious than when I began teaching. Although I never received any complaints about the number of my comments, I had been concerned that the sheer quantity of my comments—particularly of the editing variety—would make it physically

“My feedback is important because of what it can teach my students, not because of the revised document per se that could result from my feedback.”

“Comments can both help a student improve the particular document reviewed and apply to documents drafted in the future.”

difficult for my students to decipher my feedback. Also, the quantity of marking might dilute the impact of my comments, by (1) overwhelming my students and discouraging them from reading any of my comments, and (2) making it difficult for students to determine which feedback was most significant. Always remembering the purpose and audience for my comments helps me to focus my comments on those pertaining to the skills that my students need to develop and limit the extent of my correcting comments.

In the heat of marking, one can lose sight of the forest (the teaching purpose of our comments) for the trees (all of the individual aspects of our students' papers on which we might want to comment). As I mark, I continually regroup to make sure that I have not lost sight of my purpose and audience. I have developed the following questions to help ensure that, like me, my comments have made the transition from practice to teaching:

1. *Do my comments reflect their teaching purpose and are they addressed to my student audience?* This is, obviously, the overarching question. The following questions are designed to lead me to an affirmative answer to this bottom-line inquiry.

2. *Do my comments reflect what I have taught my students?* The material taught in class should introduce students to and help students develop the skills that they are required to use for their writing assignments. Our students should understand what we expect from them, and our comments should reflect these priorities.

The priorities that determine what we teach in class and the expectations that we identify for our students should correspond to the characteristics of a successful paper. Any strategy for effective commenting requires that we understand just what it is we expect a paper to accomplish (e.g., argumentative thesis sentences, persuasive analysis, accurate descriptions of cases). Before we start reviewing an assignment, we must resolve the question: Do I know what I am looking for in this paper? Answering this question can help ensure

that our comments are focused on the most significant aspects of our students' writing, which should be elements that we have covered in class.

3. *Have I made clear how my comments extend beyond this particular document and relate to legal writing generally?* Another way to ask this question is: Will my comments help my students improve their writing generally or are my comments solely geared toward improving the particular document that I have reviewed? Specific comments regarding what a student has written and comments geared to helping a student improve his or her writing generally are not mutually exclusive. Comments can both help a student improve the particular document reviewed and apply to documents drafted in the future. We should be sure that our students understand that our comments apply beyond the particular document that has given rise to them. For example, while I might tell a student that he or she has not provided any support for a specific conclusion, I will also explain why it is important to provide such support (e.g., to tell the judge not only the result you want but also why that result is correct). Similarly, I will not only note that a student has made repeated punctuation or spelling errors, but also explain the possible consequences of these types of errors to the student's goal of being an effective advocate and counselor (e.g., by undermining the student's appearance of professionalism, by impeding the reader's ability to understand the student's point). We may think that the applicability of our comments to our students' future legal writing is crystal clear, either by virtue of our classroom teaching or common sense. However, our students might not realize the transferability of our comments as they review their marked assignments. Therefore, we should make this relationship explicit to our students.

4. *Have I highlighted key weaknesses and strengths in my students' writing?* On a paper that is filled with comments, a student might not be able to distinguish more significant from less significant feedback. One way to address this problem is to

limit feedback to particular aspects of a student's writing: commenting on a limited number of identified aspects of a particular assignment (e.g., thesis sentences, CRAC (conclusion, rule, application, conclusion) format) or commenting on only the most pervasive weaknesses in a student's paper.

Providing wrap-up comments at the end of a paper is another way to draw students' attention to particular aspects of their writing. A single failure to provide support for a proposition or include a thesis sentence may warrant a comment, but a pervasive failure to cite authority or use thesis sentences requires a more focused response. Writing comments at the end of a student's paper can identify themes in the student's writing (e.g., effective thesis sentences, insufficient explanations for conclusions) and provide a framework for the individual comments throughout the student's paper. The end comments can also provide some additional explanation for the most significant or recurrent comments written throughout the student's paper.

I like using end comments on major assignments to connect the feedback on the current assignment to future writing efforts. Rather than introduce the end comments as a retrospective of the most significant features of a student's current assignment, I introduce my end comments by saying, among other things, "As you continue your legal writing, be sure to ..." By presenting my final comments prospectively, I am explicitly reinforcing that my comments on a particular assignment do not only relate to that assignment but also apply to future writing projects. Prospective end comments can provide continuity from one legal writing assignment to the next and from our legal writing course to the student's future legal writing projects, whether in school or in practice.

As I read and comment on assignments, knowing that I am going to provide my students with this brief, forward-looking overview may also help to keep me focused on my overarching

purpose of providing meaningful feedback, not editing or correcting each student's particular paper.

5. *Have I left work for the student to do?* In other words, if the student were going to rewrite the paper, would the student only have to input my editorial changes or would the student actually have to do independent work, guided by my comments, to rewrite the paper? Because the goal is to provide feedback, not rewrite the student's paper, my comments should leave plenty of work to do for the student who wants to revise his or her paper. Presenting feedback by asking questions is one way to avoid rewriting a student's paper for him or her. For example, rather than editing a student's paper to state a point more clearly, we can write a comment asking whether the reader would understand the student's point. We might also explain why the reader would be likely to misunderstand the student's point. Although it can be helpful to assume occasionally the role of the writer or editor and show the student how we might rewrite a phrase or sentence, it is generally more useful to assume the role of the reader and give the student insight into the reader's response to what the student has written.³

6. *What would be my immediate reaction if I were the student receiving the paper back with these comments on it?* This question relates less to the substantive comments themselves and more to the sheer quantity of comments on each page of the paper. Are there so many comments on the paper that the student will be immediately overwhelmed and discouraged from reading any of the comments? Are there so many comments on the paper that the student cannot decipher the comments? On the other hand, are there so few comments that the student will feel that he or she received insufficient guidance or will wonder whether the professor, in fact, read the paper at all? If the paper is graded, are there enough comments and explanations so that the student will understand the basis for the grade received?

³ The insight into the reader's mind can be given by the legal writing professor from the perspective of the student's teacher or the document's intended audience (e.g., judge, law firm colleague, client).

“Presenting feedback by asking questions is one way to avoid rewriting a student's paper for him or her.”

“ Our practical experiences before we came to teaching play an invaluable role in our effectiveness as teachers.”

.....

When we start teaching legal writing, we all know that our purpose is to teach. Our practical experiences before we came to teaching play an invaluable role in our effectiveness as teachers.⁴ However, at the same time, it is useful to recognize and remind ourselves of the ways in which the role of teacher differs from that of practitioner. Being mindful of our teaching purpose and student audience is particularly appropriate when we give written feedback to our students on their writing assignments. This mindfulness can help us provide focused feedback that guides our students in improving their own writing and thereby facilitates our students' development as critical thinkers and effective communicators.

© 2004 Emily Zimmerman

⁴ See, e.g., Mitchell Nathanson, *Celebrating the Value of Practical Knowledge and Experience*, 11 Perspectives: Teaching Legal Res. & Writing 104 (2003).

ADDING METHOD AND ALLEVIATING MADNESS: A PROCESS FOR TEACHING CITATION

BY JOAN MALMUD

Joan Malmud is a Legal Writing Instructor at the University of Oregon School of Law in Eugene.

The lonely law student sits staring at her citation manual. She knows the answer is in there, but where? She flips through the 500 pages of rules. The index, her professor told her, would lead her to any answer she needed. “But, I don’t even know what I’m supposed to be looking for,” she moans to herself. “How can I look it up if I don’t know what I’m looking for?”

Citation manuals, like so many aspects of the first year of law school, are overwhelming to law students. Thus, each fall, I offer first-year law students a class to make using the *ALWD Citation Manual*¹ a little less overwhelming. The class takes an hour and 15 minutes to teach. When it’s over, the students feel that citing, while perhaps not easy, is at least manageable.

The ALWD manual becomes more manageable by my doing three things. First, I focus the students on the information that they will actually need in the fall semester of their first year, and I eliminate from their concern everything else. Second, I make the information they do need easy to retrieve. And, finally, I give them a process for constructing any citation.

The class begins by reading through the table of contents. This seemingly boring task becomes unexpectedly fun. As we read through the table of contents, I distinguish between information the students will need repeatedly as they cite, information the students should read and be aware

of, and information the students will never need during the fall semester.

So for example, I tell them to be sure to read rule 11, “Introduction to Full and Short Citation Formats,” because it provides a helpful foundation for citing. But I explain that as they cite, they probably won’t be referring to those pages as frequently as they will to rule 12, “Cases,” and rule 14, “Statutory Codes,” repeatedly.

Then the fun begins. As we move through, I identify for the students all the information they won’t need during their first semester. Citing footnotes, supplements, graphical materials, and internal cross-references? “That’s 10 pages you can ignore.” Federal legislative materials and court rules? They won’t need those rules until second semester. “That’s 30 pages, eliminated!” Constitutions, local ordinances, and treaties? They will not need those materials at all during their first year. “Fifteen more pages, gone!” And so on.

By marching through the table of contents (even the parts that they won’t use during the first semester), the students begin to learn what is inside the book they were once so scared to open. And, because I get to tell them about all the information they no longer need to worry about, the students begin to feel like the ALWD manual might just be manageable. As we march through the table of contents, I also make the information that they do need to worry about easier to retrieve.

Tabs are the key to easy retrieval. Ordinarily, frustration mounts as students cite because they must re-find information they found just moments ago. It seems they should remember the page on which the rule for citing consecutive pages begins, but they can’t. And so, off they go, to the index, look up “pages,” find the page number, flip back, flip forward, turn a few pages back, a few pages forward, until they get to exactly where they were just a few moments ago when they were citing another case. Thus, students spend proportionately more time tracking down information than they do applying the information. It seems powerfully wasteful. And it

“Tabs are the key to easy retrieval.”

¹ Students at the University of Oregon School of Law learn legal citation from the *ALWD Citation Manual*. The teaching method explained in this essay could be used generally for *The Bluebook* as well, but an additional step would need to be added: Students would have to ask whether an example needs to be adjusted to account for differences between citation styles in law review articles and court documents.

“The first step to building a citation is to ask, ‘What resource am I citing?’”

is. By sticking a tab on rule 5 and marking it “page numbers,” the students no longer need to spend time flipping forward and backward trying to find the particular page they are looking for. They can go directly to the information they need and apply it.

As we go through the table of contents, we tab those rules that they will use repeatedly.² In my class, we tab 14 rules and appendixes:

- Rule 3.3, “Capitalizing Specific Words.”
- Rule 5.3, “Citing Consecutive Pages.”
- Rule 6.0, “Citing Sections and Paragraph Numbers.”
- Rule 12.0, “Cases.”
- Rule 12.21, “Short Citation Format [for Cases].”
- Rule 14.0, “Statutes.”
- Rule 14.6, “Short Citation Format for Federal and State Statutes.”
- Rule 44, “Signals.”
- Rule 47, “Quotations.”
- Rule 48, “Altering Quoted Materials.”
- Rule 49, “Omissions within Quoted Materials.”
- Appendix 1, “Primary Sources by Jurisdiction.”
- Appendix 3, “General Abbreviations.”
- Appendix 4, “[Federal] Court Abbreviations.”

Clearly, within any one of these rules, the students will be using multiple sub-rules. But the tab on each of these rules will get them to the section they need quickly and easily.

When I know that my students will rely on a particular sub-rule, I tell them to tab that page. For example, I know the real trouble with page numbers is citing consecutive and scattered page numbers. So, they tab the page with information about consecutive and scattered page numbers. From there, they can get to other information about pages. Likewise, within Appendix 1, they’ll be using the information about Oregon the most. We tab that page. If they need information about other jurisdictions, they can find it easily within that section.

² I bring to class stacks of small tabs in multiple colors. As I distribute the tabs to my students, I get to remind them: “See what fun citing can be! We all get party favors.”

Tabbing also helps make a boring citation class a little more fun. First, it’s an arts and crafts project, and the students don’t get many of those in law school. Second, by the time we’re done tabbing, I get to announce, “Look! Five hundred pages reduced to 14 tabs!” Again, the ALWD manual seems just a little bit more manageable.

After we’ve reduced the ALWD manual to the pages the students will be using the most, we discuss the process for building a citation. I explain five steps.

The first step to building a citation is to ask, “What resource am I citing?” I point out that by determining the resource they are relying on, the students have eliminated from the ALWD manual hundreds of pages they do not need to worry about. Turn right to the section about cases; ignore the sections on constitutions, statutes, other legislative materials, court rules, local ordinances, etc.

Second, they should ask, “Do I need a full cite or a short cite?” I give a little background about when they need a full cite as opposed to a short cite and explain that all their citations will be one or the other. I note that determining whether they need a full or short cite again reduces the number of pages that they need to consult.

Third, I tell them to look for an example of either the full cite or short cite. I point out that if they are looking for an example of a full citation, every rule about a particular source begins with an example. The parts of the example are labeled. Helpfully, the sub-rules within each chapter of the ALWD manual follow the order of the example at the beginning. By understanding that sub-rules about a source follow the order of the initial example, the students begin to see organization within the mass of details and, again, it’s easier for them to find the information they need.

In addition, the front and back inside covers of the ALWD manual can help students find a citation example quickly. The front inside cover, the “Fast-Format Locator,” lists each resource alphabetically and a page number where students can find an example of a full citation to that resource. The back

cover, the “Short-Citation Locator,” does the same for short citations.

The fourth step is to begin constructing their citation based on the example. If the example has a case name, their citation needs a case name. If the case name is in italics, their case name should be in italics. If there is a comma after the case name, they should have a comma after the case name. And so on.

The final step to building a citation is to add jurisdiction-specific information to their citation. To do so, the students will have to flip back and forth between the appendixes and their example. Flipping back and forth between pages is often awkward, but it’s a necessary part of the process and the tabs make it easier.

Now that they’re feeling more comfortable with the ALWD manual, I break out cold, hard truths number one and two. The first cold, hard truth is that they must read the ALWD manual. Building a citation based on an example will probably not give them a perfect cite. Students may not realize that they need information in the sub-rules. To know the details, they must read the relevant section of the ALWD manual. I recommend that when they begin citing, they should read each relevant section, or at least as much as they can before their eyes glaze over. At first, this will slow them down considerably. But, gradually, they will learn what is in the ALWD manual, and they will no longer have to read each section to put together a citation.

The second cold, hard truth is that they will never find everything they need to know about a citation in one place. But, by following the steps I’ve laid out, they have a framework within which to work, and the tabs will make it easier to find the various pieces of information they need.

We end the class with a few practice examples. I provide copies of a state case from a regional reporter whose name must be abbreviated, a state statute, and a federal statute. We practice citing to each in turn, carefully following the steps I laid out and using the tabs they have put into their

manuals. When citing the state case, I tell them that the information they want to cite spans two pages. When citing the state statute, I tell them they want to cite two consecutive sections. Before moving on to the federal statute, I tell them that they need to cite the state case again so that they can practice a short cite. The practice reinforces that they really can create a citation by themselves.

This class differs from other citation classes in that it does not teach the students how to cite any one source. Rather, by narrowing the scope of the information they need to know, using tabs to make that information easy to find, and providing the students with a process with which to build cites, it provides them with the tools and builds their confidence in their ability to cite any source.

© 2004 Joan Malmud

“I recommend that when [students] begin citing, they should read each relevant section, or at least as much as they can before their eyes glaze over.”

“The challenge we face is how to convince students that they must be able to write well in order to be good lawyers.”

DON'T JUDGE A COURSE BY ITS CREDITS: CONVINCING STUDENTS THAT LEGAL WRITING IS CRITICAL TO THEIR SUCCESS

BY CHRISTINE G. MOONEY

Christine G. Mooney is an Assistant Professor of Legal writing at Villanova University School of Law in Villanova, Penn.

How many times have legal writing professors been faced with students who believe that legal writing is a less important, if not dispensable, part of their law school curriculum? “I already know how to write or I wouldn’t have been accepted into law school” goes the familiar refrain. Some students are even insulted by the legal writing requirement, believing that a writing class of any kind at this stage of their education is remedial and beneath them.

At Villanova, in addition to student skepticism, we have the added hurdle of a mere two-credit allocation for the entire year-long Legal Writing course. A recurring comment on student evaluations expresses the sentiment that students find the course to be far too much work for only two credits.¹ Students’ preexisting bias, coupled with the tremendous amount of work that Legal Writing requires in an already overburdened law student’s schedule, can tempt some students to give short shrift to their Legal Writing course. This frustration often leads to the (accurate) estimation by our students that, relative to their other courses, their Legal Writing grade will not have a significant impact on their overall grade point average. Therefore, the logic goes, if something has to slip, Legal Writing assignments should be the first casualty.

If left unchallenged, these views can lead students to the erroneous and self-defeating

conclusion that legal writing is not all that important compared to their other courses. Students must understand that the principles they learn in Legal Writing are unique to the legal field, and no matter how skilled students may be at writing, they cannot simply transfer their prior approach to the legal setting and expect to succeed. As we know, most students enter law school with an unrealistic view of what the life of a lawyer is like. It is incumbent upon us to correct those misperceptions and provide students with an understanding of the kind of skills they will need to be successful lawyers.

The challenge we face is how to convince students that they must be able to write well in order to be good lawyers. From the beginning of their law school careers, we need to shape student perceptions about the important role that legal writing skills will play in their legal careers. Specifically, they must know that writing will transcend nearly everything they do as lawyers. Students need to understand that a lawyer’s job is to be an effective advocate and that one cannot be an effective advocate without being an effective communicator. Regardless of the specific area of practice, effective lawyering requires effective oral and written communication skills. Everything from client letters to contract drafting to transactional work to litigation requires clear, concise writing.

More than any other first-year course, Legal Writing requires full student engagement. Although we can teach rules and approaches to writing and analysis, students cannot learn how to analyze and write about legal problems simply by absorbing what we have taught them. If they are to learn how to write well, they must be active participants in the learning process, and they must engage right at the beginning.

I begin this process of persuasion right from the first class. In order to avoid sounding self-serving, it is important to approach this from the students’ perspective. Otherwise, the students may mistake my entreaty as predictable professorial bias toward

¹ In Villanova’s program, in the fall semester alone, students are required to write an ungraded closed memorandum of law, two drafts of another ungraded open memorandum of law (one is a rewrite of the original), and a graded open memorandum of law, as well as numerous other homework assignments and group collaboration exercises.

one's own subject and dismiss me out of hand. Therefore, I focus on the impact that legal writing will have on them, both in the long term and in the short term.

From a long-term perspective, I tell my students that a lawyer's ability to effectively advocate rests primarily on their ability to express themselves clearly, logically, and professionally. I tell them that there is no legal job I can think of where you do not need to be proficient in legal writing and oral communications, and that these skills pervade every other skill and ability a lawyer needs. I point out that the most thorough researcher and brilliant thinker will not be helpful without the ability to clearly communicate the results. Overall, success as a lawyer depends on communication. I give the students a fairly detailed recitation of what lawyers in several different practice areas might do with their day. For example, I describe a practice that involves heavy contract drafting. I explain the importance of precision of language and clarity of sentence structure, providing examples of the havoc that a vague, incomplete, or ambiguous contract provision can wreak upon the contracting parties, whether they be business associates trying to dissolve a partnership, a family member disputing a will provision, or a divorced couple arguing over a custody agreement. I also talk about attorneys who do corporate work, such as mergers and acquisitions, and the 11th-hour breakdown of deals that occurs because the parties have different views of an agreement, which was painstakingly hammered out over a period of months.

I discuss what occurs in litigation and how the client's case is managed largely through written documents. From discovery requests, to demand letters, to memorandums to the court seeking various types of relief, to settlement documents, I stress how important it is for the lawyer to write with precision.

I also point out to the students that the view other professionals will have of them will be largely shaped by their oral and written skills. Oral and

written skills are those that are most visible to colleagues, clients, and just about everyone with whom a lawyer comes into contact. The way lawyers present themselves and their ideas in writing and orally will inevitably have a profound influence on the ways that others perceive them and their abilities.

In an effort to appeal to the students' short-term concerns, I explain that their ability to obtain and retain legal employment depends largely on their legal writing skills. Because most of what a new lawyer does is research and write, employers place a high value on legal writing ability and often make it a litmus test for job applicants. Many employers will forgive a less than stellar grade in one area of substantive law. Conversely, many employers will not consider a student who has performed poorly in his or her legal writing course, even if that student has otherwise good grades. Moreover, many employers require a writing sample as part of the application. This means that, in many cases, a student must demonstrate proficiency in writing before he or she can even obtain an interview.

Once students obtain summer employment, they are on trial. The single biggest factor upon which students will be judged is their legal writing ability. Most employers expect to have to train young lawyers in the specific areas of law, but they do not expect to have to train them to write.²

How can we, as legal writing professors, convince our students of these facts at the outset of their legal education so that they can make the most of their opportunities to maximize their legal writing skills? One way to convey the importance of effective legal writing is to describe personal experiences from law practice. For example, I worked for a law firm that, like most others, placed enormous importance on writing ability. I naively entered practice feeling nervous about my command of substantive law but relatively confident about my writing ability since I had performed well in law school. I share stories with my students about unsettling experiences I had as

“I point out that the most thorough researcher and brilliant thinker will not be helpful without the ability to clearly communicate the results.”

² Bryant Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Legal Educ. 469, 490–91 (1993).

“Another way to persuade students that their legal writing skills are important is to have former students come into class to speak about their experiences in the real world.”

.....

a summer and first-year associate when partners extensively critiqued my writing. Fairly early in my employment as a summer associate, I realized that while the firm viewed my writing skills as good for a law student, they were far from meeting the standard that the firm expected from its lawyers. In other words, I had a long way to go. It was only after many arduous (and sometimes torturous) assignments, where I was closely mentored on my writing, that I began to understand the enormous importance of thinking about every word I wrote.

Another way to persuade students that their legal writing skills are important is to have former students come into class to speak about their experiences in the real world. Having these live testimonials is a great way to drive home the point that legal writing skills have a profound effect on success. This type of testimonial from an independent source can be an invaluable way to reach students who may be skeptical. Career counselors can also attest to the importance that employers place on legal writing skills.

Regardless of which method or methods we use, we owe it to our students to impress upon them the uniquely important role their legal writing ability will play in their professional success in both the short term and long term. Once they understand this, rather than engaging in short-sighted calculations about the impact the course may have on their GPA, students can focus on developing their legal writing skills to their best potential before they are in a position where their writing capabilities may well define their available opportunities.

© 2004 Christine G. Mooney

TOOLS FOR TEACHING THE REWRITING PROCESS

BY JENNIFER BRENDEL

Jennifer Brendel is a Clinical Professor and Director of Academic Support Programs at Loyola University Chicago School of Law in Ill.

One of the most effective (and, believe it or not, popular) teaching techniques in our legal writing curriculum is mandatory rewrites. However, merely requiring students to redo their assignments would be an exercise in futility and frustration for the students without the other methods—including a cut-and-paste discussion exercise and instructor conferences—we use to teach the process of rewriting. Following are some of the ideas that have helped in making the mandatory rewrites work within our first-year curriculum.

Background: Our First-Year Legal Writing Program

Our entire first-year curriculum centers around the rewriting process. The progression is deliberately slow, with numerous mandatory and optional opportunities for instructor feedback. In the fall semester, the primary assignment is a closed memo. Students write the memo in a series of ungraded building-block assignments. It is not until the ninth week that students turn in the full memo, which is worth 30 percent of the final grade. Students then rewrite that assignment for 70 percent of the final grade. Students also write and rewrite a research memo and trial level brief in the first year.

Teaching Techniques for Maximizing the Effectiveness of the Rewrite

Cut-and-Paste Discussion Exercise

Individual written comments are essential to teaching the rewriting process. However, perhaps

because of the time and effort already devoted to the assignment, some students may feel defensive about their work and have difficulty letting go of the approach they followed in the first draft. These students are so invested in their first draft that they have difficulty re-envisioning the assignment. As a result, they are not able to fully understand and incorporate their instructor's written comments for the rewrite. Alternatively, students may unquestioningly make the changes indicated, without really analyzing or understanding why those changes were suggested.

Recognizing that critiques of individual work may create a barrier to learning, we incorporate portions of all the students' work into a cut-and-paste exercise as a supplement to the individual critique. To create this supplement, instructors use excerpts from all their students' papers to illustrate specific teaching points. Increasingly, the instructors have required students to submit their papers both in hard copy and by e-mail. The electronic version facilitates the drafting of the cut-and-paste exercise. The instructors do not identify the authors in any way, so there is no embarrassment or sensitivity inhibiting the discussion. Instructors try to find examples of strengths and areas for improvement from each paper so no one feels singled out. If an instructor is still concerned about student reaction, the instructor may change the language slightly so that the teaching point is still conveyed without the student recognizing his or her own language verbatim.

We have used multiple formats for these cut-and-paste supplements. One format synthesizes the students' work into one complete memo.¹ Another format uses select portions of each section of the memo, and places two examples side by side, one meant to illustrate a strength and one an area for improvement. For example, this format might include two Questions Presented, two Brief Answers, two excerpts from a Statement of Facts, two umbrella paragraphs, two (or more) sample thesis sentences, two sample case illustrations, two

“Instructors try to find examples of strengths and areas for improvement from each paper so no one feels singled out.”

¹ Although we use the cut-and-paste exercise for the brief assignment as well, for this purpose, I'm using the memo as an example.

“The evaluation of the cut-and-paste document uses a group discussion format rather than a lecture format.”

sample application paragraphs, and two conclusions. Under either structure, the exercise is not labeled or annotated for the students. The “good” examples should be randomly placed in contrast to the weaker examples.

The instructors distribute the exercise and then guide the class in evaluating the different selections. During this discussion, students use the same evaluation criteria that applied to the original assignment. The class works together to identify effective elements, sections that need improvement, and potential revisions that would strengthen the document.

The evaluation of the cut-and-paste document uses a group discussion format rather than a lecture format. The students actively contribute ideas and feedback. This active participation allows students to see the assignment from the perspective of the reader.

However, instructors do need to guide the discussion. Students may identify as “strengths” examples the instructor intended to illustrate areas for improvement (or vice versa). For example, an instructor may include a Question Presented with no key facts as an example needing improvement. The students may identify this as a good example because it is concise. Rather than telling students that they are right or wrong, the instructor can use their comments as a springboard for more guided questions. For example, the instructor might ask specific questions designed to help students think about the purpose of a Question Presented and then to evaluate whether the example met those purposes.

We collect the exercise at the end of the class session. Students are notified of this in advance so that they can take notes on separate paper. Our primary reason is that the exercise has less value when taken out of context. Instead, we encourage instructors to write a separate handout of general comments to summarize the major teaching points. This is helpful in focusing the more free-form discussion that took place during the exercise. Also, we do not want students to feel

tethered to the “good” examples. When students keep the samples, they often try to model so closely that they lose their own voice.

This exercise is a good transition step for students to begin revising their own work. It also helps students think more independently and work collaboratively.²

Mandatory Instructor Conferences/ Pre-Conference Assignment

There is that word again: mandatory. It is not as draconian as it sounds—students consistently evaluate this as one of the most effective teaching techniques. After the cut-and-paste class for each major assignment, students typically have two weeks to rewrite the assignment. During that time, each student must attend an instructor conference to discuss the rewrite.³

In addition to commenting on the full paper, the instructor identifies for each student one specific, discrete portion of the assignment to rewrite and submit prior to the conference. The pre-conference assignment is specifically tailored to each student. Instructors look for a section to rewrite that is manageable, and that will provide a good test of how well the student understood the written comments. Pre-conference assignments might range from rewriting one specific section or paragraph block (e.g., one case illustration, one application paragraph, the Question Presented or Brief Answer, the umbrella section) to looking at the assignment more globally (e.g., underlining and rethinking all thesis sentences, outlining the entire Discussion section).

The assignment gives the conference a working agenda and increases the student’s investment in the meeting. Because the students have actively worked with the written comments before the conference, they are more engaged in the session, more likely to realize where they have questions and more motivated to ask them, and more focused (rather than lapsing into generalized

² This cut-and-paste exercise can be useful in teaching citation as well. Before the rewrite of each major assignment, our tutors create a cut-and-paste citation exercise illustrating common citation errors from their students’ papers. The class works together to correct those errors.

³ The conference would not be nearly as effective if conducted after an assignment was completed; students would not have the same motivation or investment.

anxieties, passivity, or frustration). Before meeting face-to-face with the student, the instructor has the chance to assess whether the student “gets” the written comments and is able to incorporate them. The instructor can then better prepare for what still needs to be addressed in the conference, and what needs to be explained further or perhaps from a different angle. The session becomes collaborative—a working meeting rather than a one-sided critique.

The one-on-one conversation during a conference can yield significant insights on both sides. Rather than relying on the “best guess”⁴ as to why the student made certain choices, the instructor can go right to the source and ask. The conversation may begin with such open-ended questions as “What did you want to convey to the reader here?” or “Why did you choose to ... ?”

Often the students’ explanations reveal a better understanding of the problem than the instructor would have guessed from the written product. Discussing the student’s verbal assessment of the problem (as if the student were reporting verbally to the assigning partner) can provide a good springboard for approaching the rewrite. The instructor can identify what was effectively conveyed in the oral report and discuss how that can be translated into the written document.

Other times, an instructor may realize that what might have seemed like a careless error or omission was actually the result of a reasoned choice, based on a misapprehension. Without the conference, the instructor might never know the reasons for the student’s choice. For example, a student who failed to include the relevant rule may not have “missed” it, but may have consciously made that choice. The student may explain that “the partner would probably know this and I wouldn’t want to insult her by including rules that would be obvious to her.” (First-year students can credit practicing attorneys with a truly encyclopedic knowledge of the law; flattering but not necessarily accurate.) Another student may

believe that it is unethical to write about a case without disclosing every single fact and issue in the case, even those not relevant to the issue at hand. These are only the tip of the iceberg in terms of the myths and misunderstandings that can be firmly implanted in the students’ mind and entirely unknown to the instructor.

Without the conference, the instructor might attribute these weaker points in the students’ work to carelessness or lack of effort; the student might incorporate the instructor’s comments but never understand the reasons behind the change. An important teachable moment would be lost.

The conference is also the best way we have found to teach the reader-centered approach to writing. Written comments often are interpreted by students in terms of “right” and “wrong” and “what do I need to do to get the A?” In the artificial world of the classroom, it can be hard for students to remember that memos and briefs serve a purpose other than earning a grade. The “real world” audience is the reader who will actually use the document to make important decisions. By physically sitting with and talking to their reader, the students remember that purpose. The instructor can take on the role of the assigning partner (or judge) and identify (a) what the reader needed from the document and (b) what the reader got from the document. The gap between the two helps focus what needs to be done for the rewrite.

Taking notes after meeting with a student can be helpful in commenting on the rewrite. We require students to submit with their rewrite a copy of the written comments they received on the first draft. This policy helps avoid the perception of mixed signals. In addition, reading a rewritten draft side by side with prior comments can be very enlightening regarding the student’s choices. Something that seemed to come from left field in a student’s rewrite might make more sense in light of the original comments on the paper. Knowing why the student made certain choices helps the

“The conversation may begin with such open-ended questions as ‘What did you want to convey to the reader here?’ or ‘Why did you choose to ... ?’”

⁴ Anne Enquist, *Beyond Labeling Student Writing Problems: Why Would a Bright Person Make this Mistake?* Second Draft (1986).

.....

instructor to comment more effectively on the rewrite. Keeping notes regarding the conference meetings can serve a similar purpose.

Conclusion

Mandatory rewrites have worked well for us in conjunction with our other teaching methods. The cut-and-paste exercises are not particularly labor-intensive to prepare, and make for very interactive class meetings. The conference and pre-conference assignment, although more time-consuming, offer a unique chance to identify and take advantage of teachable moments that might otherwise have been missed.

© 2004 Jennifer Brendel

CLIENT COMMUNICATIONS: DELIVERING A CLEAR MESSAGE

BY JOSEPH M. WILLIAMS AND
GREGORY G. COLOMB

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

In our last three columns, we explained how to construct legal memoranda for in-house clients and documents for the court, so that those readers can read, understand, and act on them as easily as their substance allows.¹ Writing to clients is no less demanding, and in some ways is more so.

When you write an internal memo to a colleague or a pleading to a court or commission, you don't have to invent a new form for each document. Pleadings and memoranda have conventional forms, often set by a firm's practice or by the rules of a court. When you write for clients, however, you can't always know what they expect. They are unlikely to know the conventional forms of the law, so you usually have to adapt a standard form or invent a new one to fit your particular communication to your particular reader.

Also, when you write to other lawyers or the courts, you can assume your readers know the law and understand your role in it. You usually don't have to define terms of art, cover basic background, or explain the rudimentary bases of your legal reasoning. And in certain ways, you can play your legal role more directly. With colleagues, you can usually be as objective as possible in order to get the law right, and let the chips fall where they may. In court documents, both you and the

court understand how you can—and cannot—argue the law and facts to suit your client's cause. Everyone understands the conventions and their constraints. With most clients, however, you have to explain basic concepts, and you must make them believe that you are committed to their success, even when the law is against them.

Above all, you and your client are likely to have different ideas about what makes the best legal writing. When you write for a court, for a supervising attorney, or to opposing colleagues, you have a deep interest in getting the law right in their eyes, both now and in the future, when something you write today could return to haunt you. And so you value writing that respects the full complexity of the law, its nuances and ambiguities, hedging when necessary, anticipating unobvious contingencies, detailing prior holdings or the development of the law, and laying out every step of your best legal reasoning. But that kind of writing makes most clients roll their eyes. Their interest is not the complexities or history of the law, but the practicalities of their situation. They care less about your seeming to be right on the nuances of the law than they do about accomplishing their goals.

For example, consider these next two excerpts from a letter advising a client about the tax consequences of choosing Florida as a place of residence:

1a. You have asked about tax consequences of a residency change to Florida. Florida law prohibits individual state income tax. Instead, the Code taxes intangible personal property, wherever that property is. It defines intangible personal property as property which is not itself intrinsically valuable, but which derives value from that which it represents. This definition includes stocks, mutual fund shares, notes, bonds, and other obligations for the payment of money and certain leases of property. The Code establishes two classes of intangible personal property. Examples of the first are notes, bonds, and other obligations for payment of money secured by a mortgage or other lien on Florida real estate. A one-time tax of

“With most clients, however, you have to explain basic concepts, and you must make them believe that you are committed to their success.”

¹ *Delivering a Persuasive Case: Organizing the Body of a Pleading*, 11 Perspectives: Teaching Legal Res. & Writing 84 (2003); *Framing Pleadings to Advance Your Case*, 10 Perspectives: Teaching Legal Res. & Writing 92 (2002); and *So What? Why Should I Care? And Other Questions Writers Must Answer*, 9 Perspectives: Teaching Legal Res. & Writing 136 (2001).

“Readers want to grasp the subject of a sentence quickly and easily, then quickly connect that subject to a verb expressing a strong action.”

2 percent on the value of intangible property applies, payable within 30 days following the creation of obligation. Other intangible personal property constitutes the second class. An annual tax of up to 1.5 percent of property value applies to this class. The first \$20,000 of property is exempt, and a tax of 1 percent of value of the property applies to the next \$80,000. The Code makes it possible to double the exemption for a husband and wife filing a joint return. Your particular circumstances make this move financially plausible. On balance, the Florida Revenue Code offers you many advantages, given the nature of your property.

1b. You have asked about the tax consequences if you move to Florida. Given the nature of your properties, you would find certain tax advantages there.

You would not pay state income tax in Florida. Instead, you would pay a tax only on your intangible property. You would treat as intangible property anything that you own that has no intrinsic value, but represents a value, no matter where that property is located. You would thus pay a tax on your stocks, mutual fund shares, notes, bonds, certain leases of property, and anything else that obligates another party to pay you money.

You would divide this intangible property into two kinds and pay taxes on it at different rates:

- You would include in the first kind of property all your notes, bonds, and mortgages on property you own in Florida. On this property, you pay a one-time tax of 2 percent. You must pay that within 30 days after you acquire the property.

- In the second kind you would include all your other personal property. On this property you exempt the first \$20,000, then pay an annual tax of up to 1 percent on the next \$80,000. Then you would pay 1.5 percent on everything over that.

If you and your wife file a joint return, you can double these exemptions.

Plainly enough, few if any clients would choose to receive a letter written like 1a. rather than the more reader friendly 1b. It feels dense, abstract, and legalistic. Some of the causes of the differences are obvious, but others are not.

In this column and the next, we discuss issues to focus on when you write to clients. In this column, we focus on style and sentence structure. In the next, we focus on organization and the visual appearance of a client communication.

The General Principles of Clear Sentences

In briefest form, these are the basic principles for a clear and direct style:

1. Avoid beginning a sentence with a long, complicated phrase or subordinate clause.
2. Make the subject of each sentence short, concrete, and familiar, preferably its main character.
3. Make the verb of each sentence express the main action associated with the character in the subject.
4. Avoid interrupting the subject and verb.

Those four principles reflect a single desire of your readers:

Readers want to grasp the subject of a sentence quickly and easily, then quickly connect that subject to a verb expressing a strong action.

In the next examples, the 1a. version departs from these principles; the 1b. version follows them closely.

1a. Although the inclusion of two variance provisions in the Act was intended to encourage pollution reduction (e.g., section 301(c)'s variance for economic hardship; section 301(l)'s variance allowing up to two additional years for compliance with effluent limitations for innovative technology that will result in greater effluent reduction than is required), relief from other requirements of the Act is insufficient to actually encourage pollution reduction.

1b. Under the Act, manufacturers can use two variance provisions that encourage them to reduce pollution:

- A manufacturer faces economic hardship (section 301(c)).
 - A manufacturer has two additional years to comply with effluent limitations for innovative technology, if the technology will reduce an effluent more than is required (section 301(l)).
- Neither variance, however, offers manufacturers enough relief to actually encourage them to reduce pollution.

Those general principles apply to writing intended for all audiences, but they require fine-tuning when you write to clients.

Applying the Principles in Client Communications

Focus on Characters and Actions

All readers understand sentences more easily and accurately when they begin with a concrete subject that names a familiar character closely followed by a verb expressing the main action associated with that character, but clients need this structure more than most.

When readers are already familiar with the predictable elements of a story and argument, they rely less on the words and more on their prior knowledge. So your colleagues familiar with the law are less likely to complain or even notice when your prose gets a bit dense. In fact, some may even prefer it if they think that bespeaks deep professional thinking.

But most clients have a different experience. Dense prose usually annoys or intimidates them (or both). Worse, it makes them read less accurately. So a difficult style is especially risky when your clients have a legal problem, especially when they want to do something advantageous but legally uncertain. We are all averse to bad news so clients tend to resolve all doubts about what you mean to support what they want to do. The less clear and more ambiguous your prose, the

more they will misinterpret. Most difficult is for clients to see obligations and limits that block their goals. So the harder it is for clients to accept what you say, the more explicit you have to be.

When you write to clients, you want the message to be clear. It is particularly important to emphasize—even overemphasize—your primary points. Use simple, direct sentences with a prototype character-action structure. That style may feel too simple to you, but after 25 years of working with legal writers, we have yet to hear a client complain about a lawyer who writes too clearly.

Give Special Attention to Point of View

There is an aspect of style where the instincts of lawyers—especially of newly minted ones—might agree with the needs of their clients: the principle that subjects should name short, concrete, and familiar main characters in your story or argument. The problem is that what seems short, concrete, and familiar to you may not be to them.

For example, the next passage explains a legal basis on which a client might recover damages on a property he rents. Most of the lawyers who have read it report that the passage is relatively easy to understand.

In contrast to the statutory method, there are several advantages in the equitable right of recovery. First, recovery in equity does not require strict compliance with statutory limits. Because recovery can be tailored to the particular facts of the controversy, the amount recovered may be greater. In a statutory action, recovery of rents is limited to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the plaintiff recovered rents based upon the value of the property with the defendant's improvements thereupon. Second, proceedings in equity relax the evidentiary standard. In another equitable action (*Tyson*), the court allowed evidence of the original cost of the improvements instead of

“We are all averse to bad news so clients tend to resolve all doubts about what you mean to support what they want to do.”

“But for the most part, focus on your client, not on the law and its manifestations.”

limiting it to the amount the improvements had enhanced the value of the land. Most importantly, recovery in equity does not require one year of possession prior to suit.

They find this a simple story that flows naturally from sentence to sentence, idea to idea, because the concept *recovery in equity* is familiar enough that it seems to them a concrete legal character in a familiar legal story. In fact, some lawyers have told us that this version of the story is not only easy to understand, but the only one that respects the law.

But unless they have been through this before, clients disagree. For them, recovery in equity may be short, but it is neither concrete nor familiar, and it certainly does not feel like a character they can even *imagine* telling a story about. Think how such a reader would react if you tried to start a story, *Once upon a time there was recovery in equity*. ...

Fortunately, when you tell stories about the law to clients, you almost always have appropriate alternatives for characters/subjects. Rather than focus on legal concepts familiar to you (*recovery in equity*, *good faith*, etc.), you can focus on the legal role of the people involved (*the court*, *plaintiff*, *lessor*, *landlord*).

You can use legal actors for threats and cases when you want to focus clients on the consequences of their actions. Compare:

Under this regulation, you may not modify the emissions controls ...

This regulation prohibits you from modifying the emissions controls ...

But for the most part, focus on your client, not on the law and its manifestations.

For example, if your client were both a plaintiff and a lessor, you could focus the story on either of those characters:

In contrast to the statutory method, plaintiffs find several advantages in the equitable right of recovery. First, a plaintiff does not have to comply strictly with statutory limits. Because a plaintiff can recover an amount tailored to the particular facts of the controversy, he may recover more. In

a statutory action, plaintiffs can only recover rents up to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the plaintiff recovered rents ...

In contrast to the statutory method, lessors find several advantages in the equitable right of recovery. First, a lessor does not have to comply strictly with statutory limits. Because a lessor can recover an amount tailored to the particular facts of the controversy, he may recover more. In a statutory action, lessors can only recover rents up to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the lessor recovered rents ...

But of the two, clients have an easier time seeing themselves in the more familiar role of plaintiff than of lessor, but an even easier time yet as a landlord. (Try making the subjects of that passage *landlords*.)

But the most familiar character that all clients are centrally interested in, of course, themselves:

In contrast to the statutory method, you may find several advantages in the equitable right of recovery. First, you do not have to comply strictly with statutory limits. Because you can recover an amount tailored to the particular facts of the controversy, you may recover more. In a statutory action, you could only recover rents up to the value of use and occupation exclusive of improvements to the property. However, in an equitable action (*Wilson*), the plaintiff recovered rents based upon the value of the property. ...

There is one situation that might appear to be an exception to these principles, but is not. Sometimes, you send clients a document (or part of one) that doesn't directly address the client but a secondary legal audience. For example, when you write an opinion letter so a client can meet due diligence requirements, your real audience is not the client but some future court. To cover all the legal bases, you may need to write from the point of view of the law. But if you do, simply add an executive summary or cover letter that gives the

client the gist of the story in terms that make sense to him or her.

In most client communications, you give advice, explain a law or regulation, show the client how to comply, describe legal implications of a decision, and so on. If so, unbutton your vest, loosen your tie, and talk to your client as a friend would. Not like this:

The Board's decisions in *General Foods, Sparks Nugget*, and *Mercy-Memorial*, and the Sixth Circuit's opinion in *Streamway* suggest that compliance with section 8(a)(2) is more likely if the council's representative aspect is minimized. Much more frequent rotation of membership on the council would be helpful in this regard. An emphasis on employees' voicing their own individual concerns rather than purporting to speak on behalf of others also would help, as would opening council meetings to any employee with a concern to raise.

But like this:

As suggested in several Board decisions, you are likely to minimize the council's representative aspect if you comply with section 8(a)(2) (see *General Foods, Sparks Nugget*, and *Mercy-Memorial*, and the Sixth Circuit's opinion in *Streamway*). In particular, try to rotate the membership on the council more frequently and emphasize that employees are voicing their own individual concerns rather than purporting to speak on behalf of others. To this end, you could open council meetings to any employee with a concern to raise.

Avoid the Trappings of Law

Nobody likes reading citations, but they disrupt clients a lot more than lawyers who have learned to bear with them. No matter who your readers, avoid beginning a sentence with a long citation, especially as a subject:

The Supreme Court in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099 (1962), a case in which employees left their workplace because the factory was too cold, for it lacked heat in the winter months, held that section

seven of the Act protects the rights of workers to act together to better working conditions.

Your best option is to move the entire citation to the end of the sentence.²

The Supreme Court has held that section 7 of the Act protects the rights of workers to act together to better working conditions. (*NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099 (1962)).

Otherwise, put the shortest possible reference in a prepositional phrase and move all the identifying clutter to the end:

In *NLRB v. Washington Aluminum Co.*, the Supreme Court held that section 7 of the Act protects the rights of workers to act together to better working conditions. (370 U.S. 9, 82 S. Ct. 1099 (1962)).

Finally, lose the Latin phrases, the antique terms, and every instance of *aforementioned*, *hereunder*, *heretofore*, *therein*, and so on. Your clients want today's English, not a mishmash of Latin, Early Modern English, and words no one but a lawyer could utter.

There are some other issues in constructing sentences specifically for clients, but we'll deal with those in our next column, when we discuss matters of organization and the visual appearance of client communications.

© 2004 Joseph M. Williams and Gregory G. Colomb

² You can also move the citation to a footnote, but many readers object to this practice because it forces them to leave the flow of the argument in order to find the information they want. (As this footnote does.) Footnotes work better for clients than for other lawyers, because for the most part clients just ignore citations, which is easier when they are at the bottom of the page.

“Nobody likes reading citations, but they disrupt clients a lot more than lawyers who have learned to bear with them.”

LEGAL RESEARCH AND WRITING RESOURCES:
RECENT PUBLICATIONS

COMPILED BY DONALD J. DUNN

Donald J. Dunn is Dean and Professor of Law at the University of La Verne College of Law in Ontario, Calif. 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.

Introduction to the Bibliography Issue, 18 Ohio St. J. on Disp. Resol. 971 (2003).

The annual issue of this journal, which is devoted exclusively to identifying and describing the recent literature on the various aspects of dispute resolution.

Georgia Briscoe, *The Catalog vs. the Home Page? Best Practices in Connecting to Online Resources*, 95 Law Libr. J. 151 (2003).

Examines how best to bring Web sites, electronic journals, and subscriptions “to the attention of users, concentrating on the pros and cons of using the catalog or the home page.” *Id.*

Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching in the First Year*, 38 Gonz. L. Rev. 57 (2002–2003).

“This Article suggests the traditional skills that serve as the focus of most first-year legal writing courses (legal analysis, predictive memo writing, persuasive writing, and legal research) can be taught in an engaging way by tying all or most of the assignments into a single problem, which the students then work on all year as if they were lawyers.” *Id.* at 59.

Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 New Mex. L. Rev. 49 (2003).

“This article focuses on the attorney’s vital court communication, the trial and appellate brief, and the transition of these briefs from paper medium to electronic media.” *Id.*

Mae M. Clark & Mauri K. Hawkins, *Additional Readings for Defending Childhood*, 14 U. Fla. J.L. & Pub. Pol’y 201 (2003).

A listing of books, journal articles, cases, and Web sites relating to child advocacy and children’s rights.

Bradley G. Clary & Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals*, 2003 [St. Paul, MN: Thompson-West, 206 p.]

Designed for first-year law students. Presents the basic components of legal analysis and writing through a problem-solving approach. Discusses roadmapping (identifying and analyzing the problem, key facts, and legal rules and identifying a solution) and then discusses the office memoranda, client letters, and trial and appellate briefs as means for reaching a solution. Includes a *Teacher’s Manual*.

Linda H. Edwards, *Legal Writing and Analysis*, 2003 [New York, NY: Aspen Law & Business, 350 p.]

Uses the legal method approach to teaching legal writing and analysis. Explains prewriting, writing, and revising. Opens with an overview of a civil case and the lawyer’s role, followed by discussions of the legal system, case briefing, synthesizing cases, and statutory construction.

Joel Fishman et al., *Bibliography of Legal History Articles Appearing in Law Library Journal*, Volumes 1–94 (1908–2002), 95 Law Libr. J. 217 (2003).

An extensive, topical, and annotated listing. Compiled by seven members of the Legal History and Rare Book Special Interest Section of the American Association of Law Libraries.

Brian A. Glassman, I Didn't Take the Road Less Traveled, and What a Long, Strange Trip It's Been, 53 J. Legal Educ. 295 (2003).

Describes how, through persistence, the author was able to stretch his teaching experiences by adding substantive law teaching to his résumé in addition to legal writing.

Tom Goldstein & Jethro K. Lieberman, 2d ed., 2003, *The Lawyer's Guide to Writing Well* [Berkeley, CA: University of California Press, 287 p.]

Outlines the causes and consequences of bad writing, and presents straightforward, easy-to-apply remedies to make writing readable. Includes usage notes that address lawyers' most common errors. Contains a set of editing exercises to test one's skills.

Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 Vt. L. Rev. 371 (2003).

Provides a brief history of legal education (emphasizing the origins of legal research and writing programs), describes problems with these programs, speculates about the causes of the problems, and proposes solutions and explains why they are important. *Id.* at 373.

Catherine F. Halvorsen & Diana C. Jaque comps. *Keeping Up with New Legal Titles*, 95 Law Libr. J. 435 (2003).

Succinct reviews of 13 law-related books published in 2002. Moves away from covering legal reference books as was done in previous issues of *Law Library Journal*.

Kathryn Hensiak, *Too Much of a Good Thing: Information Overload and Law Librarians*, Legal Reference Services Q., 2003, No. 2/3, at 85.

Discusses information overload (too much data to properly process) and how law librarians can address the problem by having an "informational focus" and an active management plan.

Robert H. Hu, *A Resource Guide to Tax Law Careers*, Legal Reference Services Q., 2003, No. 2/3, at 113.

An annotated bibliography of both print and electronic sources that can be used by librarians and career counselors in assisting their clientele in pursuing careers in tax law.

Diana C. Jaque et al., *Gerontology and the Law: A Selected Annotated Bibliography: 1999–2001 Update*, 76 S. Cal. L. Rev. 699 (2003).

The seventh update to an extensive bibliography first published in *Law Library Journal* in 1980. Includes new categories of Web sites and congressional documents.

Diana C. Jaque & Lee Neugebauer comps. *Legal Reference Books Review*, 95 Law Libr. J. 279 (2003).

Succinct reviews of 10 legal reference books published in 2002. Continues the reviews from earlier issues of *Law Library Journal*.

Lyonette Louis-Jacques, *Publications of Adolf Sprudzs, 1953–2002*, 95 Law Libr. J. 339 (2003).

A listing of the publications of this internationally known legal scholar and law librarian.

Eugene Kontorovich & David Lisitza, *A to Zzz, Legal Affairs*, July/August 2003, at 18.

A less-than-flattering review of the seventh edition of *Black's Law Dictionary*, suggesting it is shifting toward providing "bland and lifeless definitions." *Id.*

Margaret A. Leary, *Library Support for Faculty Research*, 53 J. Leg. Educ. 192 (2003).

Describes how the University of Michigan Law Library provides services to the faculty. The article is directed to faculty, not law librarians, and briefly discusses the 10 steps to establish a faculty research support program.

Susan P. Liemer, *Many Birds, One Stone: Teaching the Law You Love, in Legal Writing Class*, 53 J. Leg. Educ. 267 (2003).

Argues that legal writing instructors should fashion assignments around the law they love. By doing so, substantive law from doctrinal courses can be integrated into legal writing courses in ways that are beneficial to instructors and students alike.

Judith L. Maute, *Writings Concerning Women in the Legal Profession, 1982–2002*, 38 Tulsa L. Rev. 167 (2002).

Covers 20 years of writings regarding women in the legal profession. An unannotated, topical arrangement.

Robert A. Mead, *'Suggestions of Substantial Value': A Selected, Annotated Bibliography of American Trial Practice Guides*, 51 U. Kan. L. Rev. 543 (2003).

"[F]ocuses on books [from throughout the history of American legal publication] about the art of being a courtroom advocate" ... [that are] "intended to direct the reader to interesting examples of works from different periods." *Id.*

Beverly Moran, *Bibliography of Tax Articles in High Prestige Non-Specialized Law Journals: A Comparison of Australia, Britain, Canada and the United States 1954–2001*, 29 Ohio N.U. L. Rev. 111 (2002).

Identifies 23 leading law journals from four countries and provides a topical bibliography of articles that would be most widely read by non-tax specialists.

Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 Int'l Law. 221 (2003).

Begins by identifying "the various interpretations attributed to the term 'globalisation' in the social science." It "then examine[s] the contributions of legal research to the understanding of 'globalisation'." Attempts to take stock "of the principal areas of existing legal theory and practice in which the regulation of cross-border activities is an issue" and examines "attempts to distil more normative, general theories of law and regulation from these initial building blocks and from the wider understanding of 'globalisation' in other social sciences." *Id.*

E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993–2002*.

Describes 88 articles published in the last 10 years that discuss gender-based persecution as a basis for asylum.

Penelope Nicholson, *Vietnamese Law: A Bibliography*, Legal Reference Services Q., 2003, No. 2/3, at 139.

A seven-part annotated bibliography on Vietnamese law designed to assist students and researchers. Among the parts are listings of main laws and decrees, English language primary sources, and sources arranged by topic.

Kumar Percy, *Admiralty and Maritime Law Articles Published in Non-Maritime Law Journals* (2002), 34 J. Mar. L. & Com. 511 (2003).

A subject-matter, annotated bibliography of admiralty and maritime law articles published in U.S.-based legal journals, exclusive of the four journals devoted specifically to these topics.

.....

Loretta Price, *An Explosive Quarter-Century: A Guide to Monographic Works on Women's Legal and Political Rights*, 2003 [Buffalo, NY: William S. Hein & Co., Inc., 967 p.]

Explores the disparity between how the law treats women and men by examining the roles women play in the social, cultural, religious, and political aspects of life. Covers social history and policy, feminist theory and history, biography, racism, crime and the criminal justice system, domestic violence, health, reproductive rights, immigrant women, language and literature, legal education, and sexual harassment.

Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483 (2003).

Discusses deductive reasoning (including syllogisms) and analogical reasoning, “provides a basic definition and overview of analogical reasoning and its use within a larger syllogistic framework of legal writing” [and] “identifies and creates a vocabulary for describing recurring problems in students’ analogical reasoning.” *Id.* at 491.

Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing*, 2d ed., 2003 [New York, NY: Aspen Law & Business, approx. 600 p.]

Designed to teach students to read the law, reason about a client’s situation, and write about it in different forms. Uses a single case file, the HomeElderCare case, for all examples to demonstrate how to analyze a case from initial client interview through appellate argument.

Websites on Juvenile Issues, 7 UC Davis J. Juv. L. & Pol’y 409 (2003).

Compiled by the staff of this journal. The Web sites listed provide significant information on juvenile law and policy issues.

Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 Temp. L. Rev. 69 (2003).

Discusses how the author transitioned from teaching traditional legal writing to teaching a substantive course. Examines how teaching students how to write good law school exams is a crucial legal writing skill.

© 2004 Donald J. Dunn

136

PERSPECTIVES





ATTN: A. LAUGHLIN, D5-S238



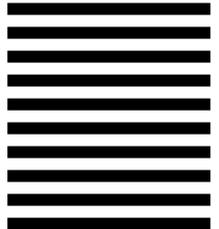
NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL

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

POSTAGE WILL BE PAID BY ADDRESSEE

WEST
PO BOX 64833
ST PAUL MN 55164-9777



PERSPECTIVES

Teaching Legal Research and Writing

All articles copyright 2004 by West, a Thomson business, 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 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 west.thomson.com/customerservice/newsletters/perspectives.

The trademarks used herein are the trademarks of their respective owners. West trademarks are owned by West Publishing Corporation.



© 2004 West, a Thomson business

L300000/1-04
Material #40261395



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



Account number _____ (optional)

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:



Printed by West as a service to the Legal Community.