PERSPECTIVES
Teaching Legal Research and Writing

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What's the Matter with Kids Today?

"Why can't they be like we were, perfect in every way? What's the matter with kids today?"[1]

BY DIANE MURLEY

Diane Murley is the Reference/Web Services Librarian for the Southern Illinois University School of Law Library in Carbondale.

Students beginning law school today have different research backgrounds than we had when we began law school, but that does not mean that they are any less prepared to become legal researchers. This year's incoming class will have to learn more about legal research in more formats than we did, and we can use their familiarity with Internet searching to teach them what they need to know. This article offers some ideas for using our students' experiences with Internet research to help them learn the research skills that will be expected of them when they are lawyers.

Incoming Law Students Have Valuable Research Skills

With the arrival of every new first-year class, legal research instructors lament the students' lack of basic research skills. Like the refrain about the younger generation from *Bye Bye Birdie*, we compare the research experiences of incoming law students unfavorably to our own. If there was ever a time when the research skills of an entering law school class met the expectations of their legal research instructors, it was a long time ago.

The current theory explaining the students' asserted lack of skills is that they made it through college doing all their research on the Internet without ever setting foot in the library. Therefore,

[1] "Kids" from *Bye Bye Birdie: A Musical Comedy*, book by Michael Stewart; music by Charles Strouse; lyrics by Lee Adams. Vocal score. New York, NY: Edwin H. Morris & Co. (1962).

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the theory goes, incoming students believe that everything they need is on the Internet and everything on the Internet is reliable, so they never even consider using print or specialized electronic resources to which the library subscribes. (Westlaw® and LexisNexis® are the obvious exceptions to this theory.)

It is certainly true that students use the Internet for research more often than they did even a few years ago, and the ready availability of information on the Internet can explain in part why students today have little or no experience using research tools we consider to be basics. However, complaints about the research skills of incoming law students date back to long before Internet searching was generally available to students. The Internet is only the latest accused offender.

Students who have used the Internet to find materials for undergraduate papers have done research, and that gives legal research instructors something on which to build. We need to stop treating Internet searching as a bad habit that must be discouraged so the students can learn to use print resources. A better approach would be to start using our students' experiences with searching the Internet as a foundation for teaching them what they need to know about legal research in all formats.

A New Approach: Incorporate Internet Legal Research into First-Year Legal Research Courses

Law students today have to learn more about legal research than we had to learn when we attended law school. Not only do they have to find their way through an increasing number of both primary and secondary sources, but they are also expected to learn how to use legal resources in all formats. It is up to us to provide them with the tools they will need to face the legal research challenges they are likely to encounter.

By incorporating Internet research into the first-year legal research course, we can take advantage of the actual research experiences of our incoming first-year students, teach them general research principles that they can apply to the broad range of legal resources available today, and improve their Internet research skills. The ideas that follow are suggested ways to use Internet research examples and concepts for these two purposes.

First, we take advantage of the fact that the students are comfortable doing research on the Internet to teach them legal research skills they can use in all formats. A simple way to build on the students' basic familiarity with the Internet is to explain new materials using Internet terms and concepts. For example, using a headnote number to skip to the part of the case that the headnote summarizes is very much like clicking a link in a Web page to jump to another point on the same page. Using the topic and key numbers of a known case to find other cases on the same subject, or using references in a secondary source to find related secondary and primary sources, is comparable to using links to browse from page to page, a concept with which our students are already familiar.

Second, we recognize that the students will use the Internet for legal research, with or without our instruction, and we teach them some basics of Internet legal research as early as possible. Of course, how much time you can spend on Internet legal research practices will depend on how much total time you have to teach the first-year students legal research. You may be able to fit an entire class session on Internet legal research into the schedule, or you may be limited to mentioning research tips and warnings in passing within classes devoted to other legal research topics. At a minimum, our students need to be taught that not everything is available on the Internet, not everything on the Internet is reliable, and there is more to Internet research than keying a word or phrase into a search engine.

If you are as fortunate as I am and participate in a first-year program that includes legal research instruction throughout the first year, you can incorporate more information on Internet legal research into each class. Besides disabusing the students of the notions that everything is on the Internet and everything on the Internet is reliable, we can start to teach them how to evaluate information they find in all formats and compare the various sources that will be available to them

throughout their careers. Here are some ideas I have for including a little knowledge about legal research on the Internet into some of our first-year lawyering skills classes.

Statutory Research Classes

Statutory research classes offer opportunities to use the Internet to help teach legal research skills that students can use in all formats and to introduce Internet legal research practices that will enable them to be informed online legal researchers.

Use Statutory Web Sites to Help Teach Updating

Use a state statutory code Web site to introduce the steps necessary to find the most current version of a statute. Most state codes on the Internet are only updated as frequently as the official code; changes are not made every time another session law passes. We can start a lesson on updating statutes by displaying a state code Web site and the information about when it was last updated. Then show the students how they would have to find the most current version of a statute by searching the state legislature's site for session laws passed since the code was updated.

Projections of these Web sites on a screen and on the students' laptops will be easier for a classroom of students to see than books and their updates displayed by the professor. And the addition of another example of the steps necessary to update statutes will help the students to understand how the statutory code and session laws work together and how to find the current version of a statute.

Use Statutory Web Sites to Demonstrate that Internet Information Is Not Necessarily Current

We already teach the students about the need to update. The discussion of updating presents a good opportunity for demonstrating the need to check when a legal Web site was last updated. Students assume that Internet information is by its nature more current than print. By showing them that primary legal information on the Internet, especially statutes and regulations, is frequently out of date, we can demonstrate that Internet information may not be the most current and reinforce the message that they need to update their research in any format.

Case Law Research Classes

Use Case Web Sites to Demonstrate that Everything Is Not on the Internet

Case law research classes lend themselves better to teaching good Internet legal research practices than to teaching general case law research skills.

Students may assume that everything they need will be available on the Internet. Case collections on the Internet rarely go back beyond the early 1990s, and some courts remove them after a certain period of time. We can use case Web sites to show that not everything they will need is available on the Internet. This may also be an opportunity to demonstrate that search engines would not retrieve individual cases, and that students would have to know which Web site has the cases of a particular court, thus introducing the concept of the deep or invisible Web.

Research Strategy Classes

Use Internet Examples to Demonstrate the Need to Evaluate Information

Government Web pages of statutes, regulations, or cases frequently have warnings that the information is made available as a public service, but that it should not be relied upon unless it is confirmed by checking the official publication. We can point out these warnings and explain that most of the government agencies placing information on the Internet cannot afford the quality control necessary to guarantee accuracy and completeness.

We should also start the students thinking about whether information they find on the Internet is reliable. There are plenty of examples of information found on the Internet that proves to be unreliable. We can use these examples to illustrate the need to know who is the author and who is making the information available, what are their credentials, and whether they have any biases that might affect the accuracy and credibility of the information provided.

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"By taking an integrated approach and focusing on general principles rather than formats, we can help our students become better legal researchers."

Use Examples of Unreliable Internet Information to Help Teach the Concept of Authority

For example, we can use the discussion of ways to evaluate Internet information for reliability to introduce concepts necessary to evaluating legal information in general. An evaluation of a source of legal information must include questions about who is the source of the information, as well as whether it is complete and current, regardless of the format.

The discussion of the different authority and weight accorded different sources of legal information might also be more memorable if it includes nonlegal examples with which the students are more likely to be familiar. If the students are asked which source should be given greater authority or weight on the question of whether a sports star has been traded—a statement by the team and player, a report on ESPN, or a rumor on a fan Web site—they can begin to see the issues. Then they will be more likely to begin to understand the finer points of primary and secondary authority, and mandatory and persuasive authority.

Have the Students Compare Internet and Print Resources

If your first-year legal research class includes legislative history and administrative research, you have a couple of excellent opportunities to begin to teach the students how to evaluate legal resources for cost and efficiency. Have them do legislative history exercises in print and on the Thomas Web site[2] and compare. It doesn't matter which format they prefer, as long as they can say why they prefer it. Include other electronic resources in the comparison if you teach them.

After teaching the students how to update regulations, break them into teams and have them race to update the regulations in print and on GPO Access,[3] preferably allowing each student to use each format. Again, include other electronic resources in the race if you teach them. It won't matter which format wins the race. You will have laid the foundation for an informed discussion of the two formats.

Conclusion

Law students today have to learn more about legal research than we did, and we have to find ways to continue to teach them what they need to know. By taking an integrated approach and focusing on general principles rather than formats, we can help our students become better legal researchers. If we treat law students' experiences with Internet research as a tool rather than as a bad habit that should be discouraged, we can help them learn the research skills that will be expected of them when they are lawyers.

[2] <thomas.loc.gov>.

[3] <www.gpoaccess.gov>.

Teaching Nonlegal Research to Law Students: A Discipline-Neutral Approach

BY DOUGLAS W. LIND

Douglas W. Lind is a Collection Development Librarian at the Edward Bennett Williams Library at Georgetown University Law Center in Washington, D.C.

The need for research instruction in nonlegal or interdisciplinary areas becomes increasingly obvious as the study and practice of law diversifies. Advanced legal research classes are adding to their syllabuses topical discussions in areas such as company and business research, health, medicine, and social policy, in order to provide students with basic bibliographic foundations in these areas. Generally though, law schools do not offer classes devoted entirely to the process of nonlegal or interdisciplinary research. In 1999, the Georgetown Law Center began an experiment to address the needs of those students in seminar classes who needed research assistance when writing papers requiring the use of traditionally nonlegal resources. Rather than address this from a discipline-specific approach as was already being done in advanced legal research classes, this course was designed to instruct students in the methodology of interdisciplinary research generally. Spanning only six weeks, this one-credit course was based on classes in library research offered at many undergraduate schools, but modified to assist law students writing seminar papers. The course has evolved into a two-credit, semester-long, seminar-style class addressing not only scholarly research, but also potential nonlegal and interdisciplinary research needs in the practice of law.

Philosophy of the Class

A general methods—rather than a discipline-by-discipline—approach avoids a heavy reliance on bibliographic instruction. Although knowing what the standard sources are in each discipline is beneficial, my experience is that this knowledge can be gained through one-on-one instruction with a librarian or attorney, or through self-instruction using the plethora of general research guides on the Web. Rather than devote a majority of class time to this, I instruct from a general methodological approach to give students a foundation of how information is arranged, what types of materials are available regardless of the topic, and how to determine the appropriate methodology for any given research topic. Although standard sources may be discussed in lecture, students, through their assignments, are left on their own to discover and explore the sources relevant to their situation, thus learning about the sources in context. With this foundation, they learn how to logically approach a variety of research situations and how to find sources they need.

Applying Classroom Instruction to Individual Topics

Although the course does not focus on particular disciplines, this is not to say that students are without exposure to them. In fact, the class is run much like a seminar. Enrollment is limited to 15 students and each selects a topic, related to law but not specifically legal, at the beginning of the semester to follow throughout the course. Their topics serve as a tether during the semester, providing context as it is applied, via assignments, to each general syllabus section. Each two-hour class consists of an interactive lecture and student discussion of their results applying the previous class topic to their individual topics and disciplines. To maximize exposure to unfamiliar materials, traditional legal sources are not to be consulted.

Intended Outcomes

The combination of lecture and application of principles to individual topics, followed by group discussion of findings, gives students hands-on, contextual experience of researching an issue in an unfamiliar area. Furthermore, the seminar style of classroom discussion exposes them both to the broad array of disciplines and types of topics that may be encountered and how they might be dealt

"A general methods—rather than a discipline-by-discipline—approach avoids a heavy reliance on bibliographic instruction."

"The course does not use sources covered in first-year legal research classes and advanced legal research."

with. For example, students discover that current topics require a different strategy than those that are more established and topics often touch upon several disciplines. The general lectures also give them the foundation for methodologies that can be applied to the varying research situations they will eventually face in the future. These include how to narrow a paper topic using online and print sources; the benefits of a controlled vocabulary in an increasingly full-text searchable world; how to discover the best sources for research in a given discipline; and how to evaluate the reliability of electronic sources.

Mechanics of the Class

Choosing a Topic

The choice of a topic is based on a real or imagined situation of writing a paper that is law-related but not specifically legal. The course does not use sources covered in first-year legal research classes and advanced legal research. Rather than start with the question "How do I find things on this topic?" I tell my students to take a step back and ask, "What *is* my topic? What discipline(s) does it touch upon? Is it broad or narrow? Does it have subcategories that I should be interested in? Is it well established or relatively current?" These topics are used as a springboard for the early lectures on how information is arranged, what sources are available for learning more about a topic, and if a chosen topic is viable for the intended purpose (in this instance, writing a seminar paper).

Why Not Just Google It?

I use the first couple of classes to discuss the arrangement of libraries and information generally, including how call numbers and subject headings can be used to gather monographic information and how similar controlled vocabularies can be used for researching journal literature. I also discuss how library catalogs can be used to not only gather citation information but also to get a sense of how much is available on a given topic, seeing the larger discipline in which it resides and what other disciplines may be related to it. To their disdain, I forbid the use of electronic resources in these early stages of topic selection (with the exception of library catalogs). I assure them that in the real world Google has many professional and scholarly applications, but by forcing them to work with the print materials and analyze the viability of their topics individually, and later in group discussion, a foundation is created that will be the basis for practice in an electronic environment. I also point out that although online services are arguably making the tasks of learning legal bibliography and methodology more intuitive and seamless, reliance on this form of research without proper foundation and knowledge of organization increases the greater danger that valuable information will be overlooked.

Not All Electronic Material Is Created Equal

In class and at the reference desk, I am always impressed by how students readily give equal credence to information available on the Web regardless of who is presenting or publishing it. To battle this, I move them slowly into searching those materials that are akin to print materials and often are merely the electronic versions of the print product. Most of what I focus on are databases to which the library subscribes. I demonstrate how the full-text searching that they are so enamored with is indeed useful when gathering information about very recent or specific topics, but often leaves the researcher who needs more general information wallowing in results. If the biggest pedagogical challenge in the early classes is keeping students engaged during discussions of the organization of print materials, here promises are realized as students apply their topics to aggregate databases where use of keyboard searching and controlled vocabularies (when available) prove to be more effective and efficient than their beloved full-text searches. It is hoped at this point that they are learning the valuable skill of anticipating results.

The Free Web and Evaluating What You Find

After looking at authoritative electronic information, we move to searching the free Web, where discussions focus on how it is organized and what the researcher can expect to find. Again, the

practice of determining what the researcher intends to find aids in the research. And although the free Web offers an increasing amount of primary and secondary information, the students discover that it is not always authoritative and needs more evaluation than print resources found in libraries. Students also learn how the free Web is a valuable tool for learning discipline-specific sources and methodology from credible research guides published by most university libraries.

Other Topics Covered

We also discuss specific types of materials that require special methodologies or knowledge of sources. These materials may include statistics, transcripts, biographical information, personal information, and public records. The Law Center's archivist also gives a lecture on the intricacies of performing archival research at the governmental, academic, or corporate level to find those unique and often overlooked materials.

Putting It All Together: Self-Analysis by the Students and Evaluating Their Performance and Understanding

At the end of the semester, I need to have some basis on which to grade the students, but because this is a skills class and not a content-based class, it is somewhat difficult. Although I have a sense of individuals' performance, I need a more objective measure. The vehicle for this is a final paper that puts it all together. Within a set page limit, students must demonstrate these two things: (1) that they have applied proper methodology to their specific topics and analyzed their results; and (2) that they grasp the underlying principles of each syllabus section, and regardless of the topic or the discipline, once they leave this class they will be able to quickly formulate a research strategy be it for scholarly writing or interdisciplinary researching in a practice setting. My grading is 25 percent class attendance and participation, 25 percent methodology and analytical ability demonstrated through six assignments, and 50 percent final paper putting it all together.

Evaluation and Evolution

In the beginning, the class was thought to be too basic because it was essentially a library research skills class. What I quickly discovered, though, was a definite need and appreciation for this type of instruction in an environment where legal bibliography and methodology are stressed, often to the exclusion of other disciplines, and in a reality where what is available electronically often does not make topical distinctions. In the future, the course syllabus will be driven by growth in electronic resources and the evolving organization of the Web. These changes will also shape future students' expectations and the skills they bring with them. Finally, although the class has evolved pedagogically to address the rapid increase in the availability of information in electronic format and resultant change in student expectations, from a philosophical level it remains as it began: intensive instruction in the methodology of interdisciplinary research.

"We also discuss specific types of materials that require special methodologies or knowledge of sources."

"Students need to learn to correct or compensate for their weaknesses as well as to capitalize on their strengths. Thus, it is important that students be uncomfortable some of the time, just as it is important for them to be comfortable some of the time. Students need to learn to deal with more challenging methods of instruction and assessment, as well as with ones that challenge them less. Teachers who vary methods of instruction and assessment for all students automatically provide an environment in which, at a given time, some students will be more and others less comfortable."

—Robert J. Sternberg & Elena L. Grigorenko, *The Theory of Successful Intelligence as a Basis for Instruction and Assessment in Higher Education, in* Applying the Science of Learning to University Teaching and Beyond 45, 48–49 (Diane F. Halpern & Milton D. Hakel, eds. 2002).

Evaluating the Financial Impact of Legal Research Materials: A Legal Research Classroom Exercise[1]

BY KATHRYN HENSIAK

Kathryn Hensiak is Research and Instructional Services Librarian, Pritzker Legal Research Center, Northwestern University School of Law, in Chicago, Ill.

> "The financial realities of practicing law and, in particular, the escalating cost of legal research materials, are part of the day-to-day experiences of today's lawyers."

More than ever, law students must be able to critically evaluate legal information and legal resources. When law students enter the "real world" as practicing attorneys, they will regularly make choices about how they conduct legal research. Not only do practicing attorneys have to pick the right resource, but they must also select the best format, taking into consideration cost considerations, ease of use, and whether or not the resource is readily available. As young lawyers mature into leadership roles in the profession, they will be called upon to make choices about the libraries and legal resources in their work environments. Whether the setting is a large law firm or a solo practice, making informed purchase decisions and calculating the financial impact of legal resources on the bottom line is expected in today's competitive legal market. It is no surprise that library budgets are often a target when attorneys are looking for ways to cut costs. Attorneys are forced to make difficult choices about the types of legal resources they will be able to maintain to support their practice. Given this backdrop, I developed an instructional exercise for my advanced legal research students that not only focused on evaluating legal information in general but also stressed the financial impact of legal resources and how the two ideas were related.

In most advanced legal research courses, we spend a great deal of class time talking about evaluating information. Typically, we emphasize evaluating information in the context of using freely available Web sites for legal research. Many of us use acronyms or other instructional methods to demonstrate that students must consider accuracy, timeliness, and authority when searching for legal information on the Web. In my view, talking about evaluating information solely in the context of using the Internet for legal research is not enough in today's world. Evaluation skills should carry over into all parts of legal research instruction and these skills should be discussed throughout the course of a semester. Whether using print sources, costly electronic sources, or freely available Web sites, evaluation skills should be part of the research process.

In particular, a part of the evaluation process that tends to get overlooked is taking into account the financial impact of legal resources. As librarians, we evaluate resources all the time based on financial considerations. This same evaluation goes on in law firms and legal departments as well. Librarians play a significant role in this process but, often, it is the managing partners or leaders of a corporate legal department who evaluate the usefulness and value of a particular legal resource and ultimately decide whether to purchase or retain the resource. The financial realities of practicing law and, in particular, the escalating cost of legal research materials, are part of the day-to-day experiences of today's lawyers. However, these issues are not addressed in the standard law school or legal research curriculum. For this reason, I developed a classroom exercise designed to sensitize future attorneys about the financial realities of paying for legal resources.

Designing the Exercise

To create the exercise, I developed a list of possible legal resources in various formats. I picked resources that students would encounter in practice but I also included resources that would make some of the choices difficult. In addition, I decided to make this a law firm with a strong emphasis on employment law. I chose employment law but clearly any other specialty would

[1] A shorter version of this article appeared in the 12th National Legal Research Teach-In Training Resource Kit (2004).

work just as well. Next, I created the handout for the exercise. I divided the handout into three columns. The first column described the type of resource and the format. The second column contained comments from me that were intended to challenge the students. For example, for LexisNexis® and Westlaw®, I mentioned that 64 percent of attorneys preferred Westlaw. This added a challenge for the students because Westlaw was more expensive than LexisNexis. The third column detailed the cost for each resource. I assigned random prices to the various resources. To be honest, I don't have a clue about what resources cost in the real world. But, I didn't see this "unreal" part of the exercise to be a significant limitation to achieving the ultimate goal of the exercise. Since the point of the exercise was to get students thinking about evaluating materials and the costs associated with those materials, the actual dollar amounts were not critical. For instance, the cost associated with unlimited access to LexisNexis and Westlaw for one year by far made up the majority of the budget. In the same manner, I assigned high dollar amounts to print resources that I knew the students preferred such as state annotated codes. Another challenge I added to the exercise was listing access to the BNA *Labor Relations Reporter* in both print and electronic format. The comments column mentioned how associates clearly favored the electronic version but senior partners (and the primary rainmakers) preferred the print format. The total for all of the resources on the list was $1,753,000.

Implementing the Exercise

After creating the exercise, it was time to put it into action in the classroom. This exercise works best if it is done in the middle of the semester. By this time, students have been exposed to a wide variety of print and electronic legal resources. They have learned that print resources are still valuable and in some cases easier to use than the electronic counterpart. If the exercise is done too early in the semester, students may automatically favor the electronic resources and pay little attention to the print versions. I did this exercise during the class period immediately following a lecture I gave on evaluating legal information found on the Web. I wanted to tie the two classes together and illustrate to students that evaluation skills apply to other types of decisions associated with legal research.

To administer the exercise in class, I divided the students into groups of three or four. The instructions I gave them were these:

> "You are a managing partner in a newly formed law firm of about 150 lawyers. The law firm is known for its labor and employment law practice. This section of the firm has the most attorneys and generates the most profits. As members of the Management Committee, you need to select and purchase items for the firm library. After soliciting input from the members of the firm, you compiled this list of resources. The combined cost of these resources is $1,753,000. The firm has only $1,000,000 to spend on the library. Look at these items and the comments and trim $753,000 from the library budget. Please be ready to present (and defend) your final budget to the entire committee in 20 minutes."

Students responded very well to the exercise. While working in their groups, they appeared animated and actively engaged in the process. I overheard spirited discussions about the value of certain print resources versus the electronic version. After 20 minutes, I asked each group to present their recommendations to the Management Committee (me and the other students). The presentations went well. It was clear that the students were conflicted about some of their decisions but they defended their recommendations well when I asked them to clarify some of the more controversial decisions.

I would definitely include this exercise again in future advanced legal research courses. It is a nice opportunity to change the pace of the class and have students work together. To improve the exercise, I would solicit more input from law firm librarians so that I could provide more realistic examples of costs and competing interests that often surface in the private law firm setting. Having realistic figures would also provide students with some insight into what they will be

"I overheard spirited discussions about the value of certain print resources versus the electronic version."

facing in the "real world." Also, to promote more meaningful discussion and critical thinking, I would ask each group to share what they considered to be the most difficult choices.

Evaluating the Financial Impact of Legal Research Materials

Resource	Comments	Cost
Unlimited LexisNexis (one year)	36% of the attorneys prefer LexisNexis.	$400,000
Unlimited Westlaw (one year)	64% of the attorneys prefer Westlaw.	$500,000
Collection of major treatises in substantive areas of the law practiced by the firm	Most other major law firms in the area have these treatises.	$120,000
American Jurisprudence 2d (Am Jur®) —print	Used mostly by new associates and summer clerks.	$10,000
Corpus Juris Secundum® (CJS®) —print	Used mostly by new associates and summer clerks.	$10,000
West's® *Legal Forms*		$10,000
American Jurisprudence Legal Forms 2d		$10,000
Federal reporters (*Federal Supplement*®, *Federal Reporter*®, *Supreme Court Reporter*®)—print		$120,000
United States Code Annotated® or *United States Code Service*—print		$40,000
Code of Federal Regulations—print		$25,000
West's Federal Practice Digest®		$30,000
Illinois reporters—print		$40,000
Illinois statutes—print		$10,000
Illinois Administrative Code		$8,000
West's Illinois Digest		$10,000
Major Illinois treatises and practice materials (other than Illinois Institute of Continuing Legal Education (IICLE))		$15,000
General Digest®—all cases reported/ digested		$75,000
Annotated codes for all 50 states	You receive a deep discount from the publisher if you purchase all 50 states (normally $10,000 per state).	$100,000
Harvard Law Review, Yale Law Journal, Stanford Law Review		$15,000

Resource	Comments	Cost
BNA *Labor Relations Reporter*—print	10 of the 20 partners in the Labor and Employment section (and the biggest rainmakers) insist the library have a print copy of this reporter. They will not use the electronic version.	$75,000
BNA *Labor Relations Reporter*—electronic	All 20 associates in the Labor and Employment section prefer the electronic version—it's much easier to use.	$50,000
IICLE publications covering major practice areas of the firm—print	Most senior partners really like these publications and prefer the print versions—very practical. Not available on LexisNexis or Westlaw.	$25,000
IICLE publications covering major practice areas of the firm—electronic	Most associates prefer electronic access. Not available on LexisNexis or Westlaw.	$25,000
PACER Software—to search dockets in federal court, file documents electronically	Most associates want this. Most partners have no idea what it is.	$30,000
Total		$1,753,000

"Computers are good at swift, accurate computation and at storing great masses of information. The brain, on the other hand, is not as efficient a number cruncher and its memory is often highly fallible; a basic inexactness is built into its design. The brain's strong point is its flexibility. It is unsurpassed at making shrewd guesses and at grasping the total meaning of information presented to it."

—Jeremy Campbell, *Grammatical Man: Information, Entropy, Language, and Life*, ch. 16 (1982).

Legal Briefs: Helpful but Also Hazardous

BY BRIAN CRAIG

Brian Craig is a reference staff attorney with Thomson-West in Eagan, Minn.[1]

"Obtaining copies of legal briefs used to be burdensome and time-consuming. With technological advances, briefs are now just a few clicks away …"

With more courts requiring electronic filing of court documents, legal briefs are now more accessible than ever. On the one hand, this increased availability of legal briefs saves time and money for attorneys in researching and drafting their own briefs. On the other hand, as attorneys and law students increasingly rely on legal briefs written by others, issues arise with respect to professional responsibility, academic honesty, and infringement of intellectual property rights.

Prior to electronic or digital filing, many law libraries maintained bound volumes of U.S. Supreme Court briefs with the earliest collections beginning with coverage from 1854.[2] Courts and other law libraries also maintained collections of briefs but few contained large collections for multiple jurisdictions. More recently, law firms have started to maintain document management systems to store and later access their own briefs. Obtaining copies of legal briefs used to be burdensome and time-consuming. With technological advances, briefs are now just a few clicks away for anyone with access to the Internet.

Courts, government agencies, law firms, public interest groups, trade associations, and business entities often make legal briefs publicly available on their organizations' Web sites. Briefs can be found on the federal government Web sites for the Federal Trade Commission, U.S. Equal Employment Opportunity Commission, Securities and Exchange Commission, and the U.S. Department of Justice. For example, the Office of the Solicitor General of the U.S. Department of Justice makes publicly available all briefs filed by the office since July 1998 and selected coverage of briefs filed from 1982–1996.[3] Florida, Kentucky, North Dakota, Texas, and Wisconsin have also provided public access to state supreme courts briefs.[4] Briefs are also available from the U.S. courts of appeals for the Seventh and Eighth Circuits.[5] Likewise, many organizations that routinely submit merit and amicus curiae briefs with courts, such as the American Civil Liberties Union, make their briefs available to the public on their Web sites. Legal practitioners can also access briefs from fee-based Internet legal research services such as Westlaw®, LexisNexis®, and BriefServe and free Internet portals such as FindLaw®. Obtaining briefs used to be a cumbersome and time-consuming task. Now, legal briefs are much more accessible and will continue to become even more accessible in the future.

With this increased access to legal briefs, legal practitioners can use legal briefs in a number of beneficial ways. The importance of writing effective legal briefs has increased in recent years. To promote judicial economy, state and federal appellate courts have increased the frequency of deciding cases on the basis of briefs without oral argument. Since 1979, Rule 34(a) of the Federal Rules of Appellate Procedure authorizes federal courts of appeals to decide cases on the basis of the briefs alone without oral arguments. The Federal Rules of Civil Procedure also allow district courts to provide by local rule that, in absence of a

[1] The views expressed in this article do not necessarily represent the views of Thomson-West or any of its employees. As a matter of disclosure, Westlaw and FindLaw are Thomson-West registered trademarks.

[2] R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States,* 38 Am. J. Legal Hist. 482, 485 (1994).

[3] *Available at* <www.usdoj.gov/osg/briefs/search.html> (last visited November 17, 2004).

[4] Florida: <www.floridasupremecourt.org/pub_info/index.shtml#summaries> (last visited November 17, 2004). Kentucky: <www.nku.edu/~chase/library/kysctbriefs.htm> (last visited November 17, 2004). North Dakota: <www.court.state.nd.us> (last visited November 17, 2004). Texas: <www.supreme.courts.state.tx.us/ebriefs> (last visited November 17, 2004). Wisconsin: <library.law.wisc.edu/elecresources/databases/wb> (last visited November 17, 2004).

[5] Seventh Circuit: <www.ca7.uscourts.gov/briefs.htm> (last visited November 17, 2004). Eighth Circuit: <www.ca8.uscourts.gov/brfs/brFrame.html> (last visited November 17, 2004).

request for oral argument, motions for summary judgment may be decided on briefs alone.[6] To achieve success in today's legal climate, attorneys must learn how to write persuasive and effective legal briefs.

Benefits of Using Legal Briefs

Using briefs written by other attorneys can help brief writers in a number of ways. Attorneys and law students can improve their own writing skills by seeing how more experienced and seasoned attorneys construct and frame legal arguments. Unlike case law, where judges tend to use more objective language, attorneys use persuasive legal arguments and language in their legal briefs.

Reading briefs written by others can also help less experienced practitioners learn the proper brief contents and citation formats for particular courts. By downloading previously filed briefs, attorneys can save considerable time and money in creating the skeletal format of a brief pursuant to local court rules. As a caveat, practitioners should always remember to check their local court rules since the brief relied upon may be outdated or may be filled with errors.

Many courts, especially the U.S. courts of appeals, have stringent and varied local rules for brief contents. For example, briefs filed in the Eleventh Circuit must include a cover page, certificate of interested persons and corporate disclosure statement, statement regarding oral argument, table of contents, table of citations, statement regarding adoption of briefs of other parties, statement of jurisdiction, statement of the issues, statement of the case, summary of the argument, argument and citations of authority, conclusion, certificate of compliance, and certificate of service.[7] By downloading a previously filed brief from the Eleventh Circuit, a less experienced attorney can save considerable time instead of starting from scratch in drafting his or her original brief.

When attorneys and law students need to find legal precedent to support their arguments, legal briefs can be another legal research source in addition to traditional resources such as case law, statutes, regulations, treatises, bar journals, and law reviews. One commentator has observed that legal briefs "provide an excellent starting point for legal research because they enable a practitioner to get up to speed on an issue or topic without starting from scratch."[8] Indeed, there are many advantages to using legal briefs in legal research and writing.

Although legal briefs are an excellent resource for attorneys, there are potential hazards when legal professionals rely too extensively on previously filed briefs.

Professional Responsibility and Ethical Issues

When an attorney borrows extensively from another attorney's legal brief and presents those original ideas as his or her own, questions of professional responsibility and ethics arise. *Black's Law Dictionary*® defines plagiarism as the "deliberate and knowing presentation of another person's original ideas or creative expressions as one's own. Generally, plagiarism is immoral but not illegal."[9]

Attorneys and law students should exercise caution when borrowing from the text of another attorney's brief. The Supreme Court of Iowa held that an attorney's plagiarism of 18 pages from a treatise, and request for attorney fees for 80 hours of work preparing the brief, warranted suspension of his license for six months.[10] The Supreme Court of Illinois held that an attorney who plagiarized published works in his LL.M. thesis warranted censure.[11] The Indiana Supreme Court similarly held that it was improper for an attorney to paste

"Attorneys and law students should exercise caution when borrowing from the text of another attorney's brief."

[6] Yamaha Corp. of America v. Stonecipher's Baldwin Pianos & Organs, Inc., 975 F.2d 300 (6th Cir. 1992). *See also* Beth Bates, Annotation, *Necessity of Oral Argument on Motion for Summary Judgment or Judgment on Pleadings in Federal Court*, 105 A.L.R. Fed. 755, 761 (1991).

[7] 11th Cir. R. 28-1.

[8] Thomas Keefe, *Finding Briefs Online*, 92 Ill. B.J. 373 (July 2004).

[9] *Black's Law Dictionary* 1187 (8th ed. 2004).

[10] Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Lane, 642 N.W.2d 296, 302 (Iowa 2002).

[11] In re Lamberis, 443 N.E.2d 549, 553 (Ill. 1982).

"Law students should also be apprised of the possible ramifications of academic dishonesty when seeking admission to practice law after graduation from law school."

more than 10 pages from an *American Law Reports* annotation directly into his brief.[12] Although there is no bright-line test for what constitutes plagiarism and what will merit attorney discipline, extensively borrowing from another attorney's brief and submitting the brief to the court as one's own work certainly raise ethical concerns that attorneys should consider when relying on briefs written by others.

Academic Honesty Issues

With legal briefs so accessible, law students may have a greater tendency to borrow extensively from briefs written by other attorneys and submit the work as their own. The Internet has increased concerns by academic officials for many academic programs. According to one commentator, "With Internet and cellular phone technology, and some amazing ingenuity, it's easier than it once was to cheat on tests or plagiarize term papers on the collegiate level."[13]

All educational institutions have an honor code or some policy with respect to academic honesty. For example, the University of Minnesota Law School Honor Code states, "It is a violation of this Honor Code … to submit as one's own any written assignment partially or totally written by another unless specifically permitted to do so by the written instructions governing the assignment."[14] Other law schools have similar policies. Legal research and writing instructors should remind students about their institution's academic honesty policies when giving out assignments for legal briefs and moot court competitions. Law schools and moot court competition coordinators may consider reviewing and possibly revising their honor codes and policies to specifically address the extent to which law students can use and rely on legal briefs written by other attorneys. Law students should also be apprised of the possible ramifications of academic dishonesty when seeking admission to practice law after graduation from law school.

Copyright Issues

Besides ethical and academic honesty concerns, many law students and attorneys may not be aware that borrowing from another attorney's legal brief may constitute copyright infringement. Whether or not intellectual property rights exist with respect to legal briefs filed with courts remains a somewhat unsettled question. There appears to be little case law directly addressing the issue of whether legal briefs and other court documents receive copyright protection although some commentators have expressed opinions on the topic. According to one author, "Filed legal documents become public records, and traditionally have not been considered privately owned intellectual property."[15] Another commentator has suggested that "court documents such as legal briefs cannot be copyrighted."[16] Conversely, another author suggests that "[l]ike other litigation materials, legal briefs are copyrightable."[17]

In *WPOW, Inc. v. MRLJ Enterprises*,[18] the U.S. District Court for the District of Columbia held that the defendant infringed the plaintiff's copyright when the defendant copied the portion of an exhibit to the plaintiff's earlier license application with the Federal Communications Commission. "By analogy, a law firm or client could be found liable for unauthorized copying of portions of another firm's legal brief even though the brief was filed and subject to public review."[19] Works of the federal government and federal government employees receive no copyright

[12] Frith v. State, 325 N.E.2d 186, 188–189 (Ind. 1975).

[13] Steve Koehler, *College Cheaters Getting Craftier*, Springfield News-Leader, Oct. 31, 2003, at 1.

[14] University of Minnesota Law Honor Code 3.02.

[15] K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32-MAY Colo. Law. 53 (2003).

[16] Steven J. Melamut, *Pursuing Fair Use, Law Libraries, and Electronic Reserves*, 92 Law Libr. J. 157, 173 (2000).

[17] Jonathan S. Jennings, *Copyright Pitfalls for Law Firms*, 44-MAY Fed. Law. 52, 53 (1997).

[18] 584 F. Supp. 132 (D.D.C. 1984).

[19] Jennings, *supra* note 17, at 53.

protection[20] but legal briefs written by state and local governments as well as private parties may receive some copyright protection.[21]

Law firms should establish policies to safeguard and protect their firm's intellectual property in legal briefs and to set polices when attorneys rely on briefs written by other attorneys. Additionally, law school research and writing instructors should carefully advise law students about the potential liability of relying extensively on legal briefs written by other attorneys.

Conclusion

When relying on legal briefs, attorneys and law students should exercise reasonable discretion. Obviously citing to the same cases as another brief would not pose any problems but pasting several pages of text verbatim from another brief would certainly raise some red flags. By following reasonable judgment in relying on briefs written by others, brief writers can write more persuasive and effective legal briefs themselves.

"Law firms should establish policies to safeguard and protect their firm's intellectual property in legal briefs …"

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[20] 17 U.S.C.A. § 105.

[21] *See generally* Carolyn Elefant, *Are Legal Briefs Copyrightable: Yes or No and Why It Matters*, *available at* <www.his.com/~israel/loce/press.html>.

The Case Against Collaborative Learning in the First-Year Legal Research, Writing, and Analysis Course

BY JOHN S. ELSON

John S. Elson is Professor of Law at Northwestern University School of Law in Chicago, Ill.

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.

The burgeoning literature advocating innovative approaches to first-year legal research, writing, and analysis (LRWA) programs is obviously a welcome development; but, also welcome would be more serious discussion of the weaknesses and costs of some of the proposed innovations. Such a counter-perspective would be especially useful in light of the apparent trend toward adding instructional components to the LRWA course on broader lawyering subjects such as problem-solving, negotiation, case planning, and professionalism. These additions cannot help but dilute the focus on traditional LRWA skills. As important as these subjects are to the training of lawyers, it is by no means self-evident that they should be taught either at the expense of, or before, a student has developed a solid foundation in the understanding and application of the traditional LRWA skills.

I fear that the introduction of collaborative learning (CL) exercises into the LRWA course, which a number of LRWA teachers have recently advocated, will only exacerbate this dilution in the focus on LRWA skills. While those advocates do emphasize CL's benefits beyond simply the acquisition of LRWA skills, they rest their case on the proposition that CL exercises will enhance students' learning of those skills. There is little, however, in the CL literature that supports this proposition and even less that weighs, or even acknowledges, the costs of using CL to teach the first-year LRWA course.[1]

I raise this challenge to the calls for such use, not as a teacher of the first-year LRWA course, but rather, as a demanding, and occasionally dissatisfied, consumer of its work product. During my 33 years as an in-house, live-client clinical teacher, I have more often than not found that many of my students would have been far better prepared for the challenges they were likely to meet in practice had they spent more time and effort learning and reinforcing the fundamental LRWA skills. I would also emphasize that my concerns about adding CL exercises to the LRWA course do not arise from doubts about either the need for collaborative lawyering skills in law practice or the benefits of teaching such skills in law school. I use a variety of CL techniques in both my clinic classes and my case supervision, where I often structure, as well as assess the effectiveness of, students' collaborative work on cases. Rather, my concerns about CL exercises in legal education arise only with respect to their use in first-year LRWA. That concern arises primarily for two reasons: first, they are being used before

[1] Among those claimed benefits are: easing worries and fears, reducing competitiveness and its resulting counterproductive anxieties, enhancing self-esteem, building judgment, reducing class barriers, promoting democratic values, generating friendships, developing and enhancing team-working abilities, and promoting alternative dispute resolution methods and more conciliatory negotiation methods. Elizabeth L. Inglehart, Kathleen Dillon Narko & Clifford S. Zimmerman, *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 J. Legal Writing Inst. 185, 188, 192, 194, 210 (2003). Zimmerman, *"Think Beyond My Own Interpretation:" Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 Ariz. St. L.J. 957, 1000 (1999).

most students are likely to gain the working knowledge of the basic LRWA concepts that is essential to make CL exercises productive, or at least not counterproductive and, second, by design or credit limitations, they reduce the amount of student-teacher interaction that is at the heart of good LRWA teaching.[2]

I. The Major Problems with Collaborative Learning Theory as Applied to the First-Year Legal Research, Writing, and Analysis Course

Although the CL literature I have found does not directly address the learning process by which its methods are supposed to facilitate law students' acquisition of the essential LRWA skills, the following seem to be the basic ways it is supposed to accomplish such learning:

1. It enables students to begin to become accustomed to the sort of lawyering discourse that is a good model for practice.[3]

2. It exposes students to peer criticism of their work, which both provides them with a wide variety of alternative views to consider and allows for more creativity since it is not being dictated by the teacher on whose favor the students depend.[4]

3. It enhances students' critical abilities by allowing them to consider and articulate strengths and weaknesses in other students' work.[5]

These are all valuable ways in which student collaboration contributes to novices' acquisition of any professional skill. Missing from the literature on CL, however, is a discussion of the preconditions needed if these various ways of learning are to be effective in enabling students to develop the essential LRWA skills. As in any profession or skilled trade, law practice has a body of core concepts and practices that must be understood, tried, and, as much as possible, internalized as a precondition for attaining competence as a practitioner. As an obvious, but important, example, a lawyer cannot meaningfully use case law in legal argument without knowledge of the basic conventions for relying on precedent, such as how to discern the relative significance of factual distinctions between cases.[6] What CL advocates have yet to explain is how students can be expected to critique meaningfully other students' use of case law, assess other students' critique of their own use of case law, or cooperate in drafting legal analyses or arguments without first learning on their own both what the underlying conventions for the use of precedent are and how to begin to go about applying those conventions. CL proponents are likely to answer this question in one of two ways: first, that students can adequately engage in CL exercises while they are learning didactically the LRWA rules and practices or, alternatively, that students can sufficiently learn the LRWA rules and practices before engaging in CL exercises.

Given the breadth of the LRWA subject matter, the time needed to learn how to begin to apply its rules and practices, and the typical paucity of

[2] As a caveat to this critique, I would note that it does not apply to schools where CL exercises supplement, rather than supplant, this one-on-one student-teacher interaction that should be at the heart of effective LRWA instruction. Any bad learning that might result initially from premature CL exercises can not only be rectified, but can also be utilized as occasions for greater learning where teachers are able to take the time to discover the bad learning, explain and correct it, and, finally, supervise exercises to assure the corrections are understood and take hold. Given the time restraints under which most LRWA courses operate, however, it is questionable whether this corrective model of effective CL teaching is practicable at most schools, or is even desired by most CL advocates. Further, since teaching through CL takes longer to cover the same material than through traditional individual assignments, there is even less likelihood that LRWA courses will be able to add CL exercises purely as a supplement to the existing level of teacher-centered individualized instruction. Inglehart et al., *supra* note 1, at 199.

[3] *See* Zimmerman, *supra* note 1, at 995–96; Inglehart et al., *supra* note 1, at 190–91.

[4] Inglehart et al., *supra* note 1, at 190.

[5] *Id.* at 193; Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 J. Legal Writing Inst. 1 (2003).

[6] *See* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 Temple L. Rev. 393, 404–05 (1997) (listing 34 core concepts that students should be taught in order "to function with sophistication in a world of courts, legislatures and agencies, and of precedents, statutes and regulations.").

LRWA course credit hours, it seems highly unlikely that first-year students can gain a sufficient working knowledge of the essential LRWA skills before they are the subject of CL exercises. Although it would seem obvious that the later in the course such exercises are introduced, the more the students would be prepared to provide and utilize meaningful collaboration in research, writing, and analysis, such back-loading does not appear in the literature as an essential element of the curricular design of CL programs.[7] The reason for this seems to be the prevalence of the first of the foregoing two CL rationales, that CL exercises can be an effective means for introducing and reinforcing students' ongoing learning of LRWA skills. There are several problems with this rationale that I have not found addressed in the CL literature.

First and most important, it fails to appreciate the role of habituation to the development of effective professional skills. Educators now widely accept John Dewey's recursive, experiential learning model of education, according to which students should not be treated as mere receptacles of information, but rather, as active participants in the learning process in which they learn best by continually evaluating and re-evaluating their learning in light of its effect in moving toward some deliberate goal.[8] Professor Donald Schon has amplified Dewey's learning model in the context of effective professional education by describing the steps of a process by which novice students first use discrete professional skills to try to accomplish certain practical tasks, then the students' mentors critique their performance of those skills with respect to what they did well or poorly, and what they need to improve for future success and, finally, the students, through repeated practice, seek to improve their skills in light of their mentors' critique.[9]

The CL literature does not address the role CL exercises play in this recursive, experiential learning model, but it is easy to see how it can strike at its heart when the advice or feedback students receive comes from fellow students who share their own inevitable knowledge and experiential deficits and who, therefore, are as likely as not to contribute to the development or reinforcement of bad learning and performance habits. Of course, as noted above, such miseducation can be remedied and can even be an occasion for deeper understanding, where students' collaborative communications are monitored and deconstructed in order to illuminate how the students arrived at their mistaken conclusions. Such careful and continual faculty monitoring of the ongoing collaborative process, however, is not called for by most CL advocates for two reasons. First, such intensive faculty monitoring and feedback on the student critique or feedback process are probably impractical because of their cost and relative inefficiency. Rather than spend their time critiquing the adequacy of students' mutual critiques, teachers can promote their students' development of fundamental skills and learning habits more effectively and efficiently by assessing directly students' initial attempts to perform skills, suggesting ways to improve their performances, and then assessing their ability to use that feedback to improve their performances. If a teacher's goal is to improve students' critiquing abilities, then critiquing their critiquing of other students' work would make sense. Such a curricular goal, although undoubtedly valuable, is, nevertheless, secondary to the goal of developing students' affirmative ability to exercise fundamental LRWA

[7] *See*, *e.g.,* "Students should become comfortable with group work as early in the school year as possible." Inglehart et al., *supra* note 1, at 200.

[8] John Dewey, *Experience and Education*, 38–39, 68–69, 88 (1938).

[9] *See* Donald Schon, *Educating the Reflective Legal Practitioner*, 2 Clinical L. Rev. 231 (1995); Richard K. Neumann Jr., *Donald Schon, the Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 Clinical L. Rev. 401, 415–18 (2000).

skills and can best be pursued after a certain competence in those skills has already been attained.

Second, such intensive monitoring of the ongoing collaborative process appears to be contrary to the philosophy of many CL advocates, who argue that CL is effective precisely because it decenters the role of the classroom teacher and adopts a more democratic model of mutual instruction.[10] Rather than its prime virtue, however, I suggest that even this partial displacement of the LRWA teacher's instructional control by CL exercises is CL's primary harm. Although some CL advocates' claim a Deweyian mantle for what they believe is its more democratic, student-centered approach, it is in fact the antithesis of the developmental mentoring role that Dewey believed was the unique province of the effective teacher:

> It thus becomes the office of the educator to select those things within the range of existing experience that have the promise and potentiality of presenting new problems which by stimulating new ways of observation and judgment will expand the area of further experience. He must constantly regard what is already won not as a fixed possession but as an agency and instrumentality for opening new fields which make new demands upon existing powers of observation and of intelligent use of memory. Connectedness in growth must be his constant watchword.[11]

Dewey's call on teachers to develop from their diagnosis of students' existing learning needs new challenges that will extend their learning capacities sounds like a daunting call for LRWA teachers, especially in light of their customarily high student-teacher ratios. In fact, however, it reflects how dedicated LRWA teachers ordinarily go about their work of providing students with individualized critique and advice as to what they need to do in order to improve their skills. This is a role obviously beyond the powers of neophytes and, I believe, beyond that of even the great majority of law teachers, who have not studied and developed methods for teaching legal writing as a process for developing students' thinking and learning abilities. As Linda Berger has summarized, effective legal writing teachers will use a spectrum of different teaching approaches depending upon their students' individual learning needs and the teacher's particular learning goals:

> A teacher may want to let the student know what strong points and shortcomings she sees in his arguments or explanations (feedback based on analysis of the student's subject, content, or meaning); she may want to let the writer know what she has determined are his major strengths and weaknesses (feedback based on diagnosis of the student writer and communicated to the student reader); she may want to let the student know how his paper affected her (feedback based on the reactions of the teacher reader and communicated by the teacher writer); or she may want to let the student know how his paper measured up to a set of textual criteria (feedback based on the features of the student text).[12]

From this repertoire of teaching techniques, reader-response type of feedback is the only one student collaborators can be expected to be prepared to use. However, given that the target audiences of most LRWA writing are themselves legally trained, such neophyte reader response will

[10] "The initial requirement for using collaborative learning is to recognize the value of student input—primarily to each other and absent a high degree of teacher intervention. Thus, the focus of the classroom shifts from one which is teacher-centered to one which is student-centered." Zimmerman, *supra* note 1, at 998.

[11] Dewey, *Experience and Education*, at 75 (1938).

[12] Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher As Reader and Writer*, 6 J. Legal Writing Inst. 57, 76 (2000).

not be very useful, and quite possibly misleading. In sum, the argument that CL exercises should displace even some of the teaching that teachers of first-year LRWA do underestimates the importance and complexity of the job LRWA teachers do.

A counterargument to this critique is that by the time they reach law school, students have sufficient facility in logic and rhetoric, and, especially as a result of the increasing numbers with substantial work experience, sufficient pragmatic or common-sense judgment to offer each other constructive insights into what they did wrong and how they can do it better. While this rationale may work quite well for graduate business schools, where most students have significant prior work experience in the general areas that are the subject of their business school studies, the opposite is true for law schools where college and most types of pre-law work do not prepare for and, indeed, are often inconsistent with, properly performed LRWA practices. For example, it has been my experience that students who prided themselves on their writing in college were likely to make such common legal writing mistakes as including tangential matters in briefs because they seem interesting, withholding the conclusion to the end of a memo in order to heighten the suspense, using waffle words to avoid being found wrong, or simply avoiding altogether the weaknesses in their side of the cases to make their argument appear stronger than it actually is.

Another potential problem with use of CL exercises in first-year LRWA that is not addressed in the literature arises from student collaboration in doing initial drafts of writing assignments. Although some experienced lawyers may find collaborative writing of analytical legal documents helpful, for neophytes such collaboration is likely to interfere with the progressive stages of the writing process that make the act of writing itself an instrument of active thinking, or, in other words, a process that, if done with due deliberation, is generative of concept formation, logical analysis, clarity of thought, and critical inquiry. Thus, the very act of choosing and not choosing particular words in sentences is intrinsic to the discovery and formulation of ideas. The act of writing words, sentences, paragraphs, and topics in a particular sequence generates understanding of logical relationships between ideas and provokes insights into new such relationships. Rewriting one's own drafts requires a rethinking of both the logic of one's arguments and whether their expression is effective for their particular audience. Perhaps most important, as an overarching process, during each stage of analytical writing, good writers naturally engage in a form of self-interrogation by which they challenge their own tentative propositions in order both to generate alternative reasonings and to advance their arguments to their conclusions.[13]

Student collaborative discourse during the writing process necessarily disrupts the type of sustained self-interrogative and sequential reasoning that generates creativity, logical analysis, and critical insight. Suzanne Ehrenberg has pointed out several ways in which writing is superior to oral discourse in promoting creative and critical thinking:

> [S]poken discourse is not as useful as writing at enhancing our creative thinking because oral brainstorming and debate depend on having an engaged and responsive audience for our ideas. Writing, on the other hand, is always available as a tool for igniting creativity and generating ideas. Even if we have an audience to employ as a sounding board, the very presence of that audience may inhibit the creative process because it "puts pressure on us to make sense and avoid inferences we cannot explain." Thus, "solitary writing for no audience is often more productive than speaking" in the early stages of a project, when the generation of ideas is of paramount importance.
>
> Spoken discourse is also not as effective as writing at fostering critical thinking. Only writing offers us the opportunity to

[13] V.A. Howard and J.H. Barton, *Thinking on Paper*, 68–70 (1986).

> examine a text for internal logic and consistency. "[T]he difference between ... the contemplation of the text and the pondering of the utterance, between the capacity to review a statement visually as well as internally, by eye as well as by ear ... is of fundamental importance for the development of ... reasoning."[14]

Students who collaborate in the drafting process can independently go through all of the stages of this generative, self-critical writing process and then mutually critique each other's final drafts to develop a stronger joint work product. The CL literature I have seen, however, does not relegate the collaborative element of writing to this final stage of mutual critiques of revised drafts and, therefore, risks allowing students to avoid the creative and critical thinking that is generated by students' full and independent engagement in the progressive phases of the writing process.[15]

A related problem, again not discussed in the CL literature, concerns how to assure that collaborating students do not divide their independent research and writing so that one or more of the collaborators miss important learning experiences. Such deficient learning may result if assignments do not require each student to engage in the learning experiences deemed critical by the teacher, or, where, even if they do, freeloaders can avoid such experiences or more eager students can take on a disproportionate share of the work.[16]

Teachers can, of course, closely monitor all phases of students' ongoing collaborative work in order to assure that all collaborating students actively engage in all of the prescribed learning experiences. But, such monitoring would seem to undercut CL exercises' underlying premise that students will develop CL skills through independent give and take. Of course, giving students the freedom not to do the work may be defended as a learning experience itself since such students are likely to learn through their ultimate shortcomings the adverse consequences of their nonlearning. The problem with this rationale is that students are unlikely to appreciate the critical, long-term importance of the mastery of LRWA skills, especially in view of the relatively low status the LRWA course and its faculty enjoy in most law schools. The ultimate cost of such nonlearning is, of course, ultimately borne by clients.

Finally, an inevitable issue of fairness as well as assessment accuracy arises in LRWA programs where students are graded on the basis of the results of their collaborative efforts. Arguments that the potential for under-rewarding high-achieving partners and over-rewarding low-achieving ones is outweighed by the unique learning that arises from the necessity of cooperating to produce the best result make far more sense in the context of upper-level courses where (i.) grades are not as critical as they are in

[14] Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 Iowa L. Rev. 1159, 1189 (2004) (footnotes omitted).

[15] "[S]tudents may work collaboratively at any and every stage of the process of writing. ..." Inglehart et al., *supra* note 1, at 197. *But see* Davis, *supra* note 5, at 4–5 (peer review editing of primary writing assignment for which students instructed not to collaborate in the writing process held in second semester "because, at that point in the year, students had completed five substantial writing assignments and would be more likely, by virtue of instruction and practice, to possess the knowledge and experience to provide a useful critique of the memorandum's organization and analysis."

[16] In applying an economic analysis to collaborative learning in his undergraduate introduction to law course, Nim Razook observes that the students "shar[ed] responsibilities according to their individual strengths. ... [T]he better writers would assume additional writing and editing responsibilities while others would take on more quantitative responsibilities." Nim Razook, *Some Order and Some Law: Cooperative Norms, Free Riders, and Bridge Burners in Student Teams*, 47 J. Legal Educ. 260, 262–63 (1997). Such an economically efficient division of assignments is rational, but exactly contrary to the learning needs of the students as well as to the interests of the public and the profession since the weaker students should obviously spend more, not less, time on improving their competencies.

the first year when they determine law review eligibility, first summer jobs and, for many students, prospects for transfer to a more desirable law school; (ii.) students usually have a choice as to whether to take courses in which grades are based on collaborative work; and (iii.) there is more opportunity to prepare students in effective techniques of collaboration.

II. The Implications of the Move Toward Collaborative Learning in First-Year Legal Research, Writing, and Analysis for Legal Education and the Practice of Law

There are no more important skills for the effective practice of law than those taught in the first-year LRWA course. Why then is there a growing movement for adding components and methods to the LRWA course that would dilute its focus on developing each student's LRWA capabilities?[17] Perhaps the correct answer to this question might suggest strategies for reinforcing the traditional focus of the LRWA course on LRWA skills.

One explanation could be that LRWA teachers are bored, or otherwise dissatisfied, with teaching year after year the same conventional LRWA skills. Occupying relatively low-paid, insecure, and unprestigious teaching positions, LRWA teachers may find that developing new teaching approaches and subject matter could not only be intellectually more stimulating, but also generative of publications and a path toward higher pay, greater job security, and higher prestige. Any such discontent, however, should, be remedied in ways other than changing the traditional LRWA course, such as making LRWA teachers' pay, faculty status, and perquisites commensurate with these teachers' crucial role in preparing students for practice. Creating opportunities for teaching courses besides LRWA would also seem a constructive use of resources not only for teachers, but also for students in light of the oft-noted growing disconnection between the world of legal academia and the practice of law.[18]

Teaching for mastery of LRWA skills may also assume diminished significance in those schools that promote their LRWA course for teaching "people skills" that will help in business as well as legal careers.[19] Law schools that dilute their focus on LRWA skills for such reasons, I suggest, are misguided and disserving their students and the public. What most importantly distinguishes lawyers from, for example, nonlegally trained managers, businesspeople, or social workers, for example, is the ability to analyze how the law is likely to be applied and how it is likely to be changed or how it can be influenced to be applied or changed. Aiming for less than mastery of these abilities would undermine the primary value added by a legal education. Some law graduates,

[17] As my foregoing analysis indicates, the movement rests in part on its advocates' overestimation of the benefits and underestimation of the costs of substituting CL exercises for direct teacher instruction. In addition, however, the non-LRWA educational benefits that CL advocates claim for their exercises, listed at note 1 above, also appear as a factor in generating enthusiasm for including CL in LRWA.

[18] *See, e.g.,* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 Mich. L. Rev. 34 (1992); John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?* 39 J. Legal Educ. 343, 370–71 (1989).

[19] My law school specifically promotes its LRWA course as teaching those skills in addition to LRWA that are needed in today's legal and business worlds:

> In today's increasingly complex and competitive legal and business worlds, lawyers must possess excellent communication, presentation, and teamwork skills that go beyond the typical legal analysis and reasoning skills taught at every good law school. At Northwestern, first-year students are required to take two semesters of Communication and Legal Reasoning. In addition to offering traditional instruction in legal reasoning, research, writing, and oral argument, the course encourages teamwork and collaboration on brief writing exercises and role-playing situations. <www.law.northwestern.edu/academics/clr.html>.

This theme is echoed for its academic program in general:

> "In addition to providing a first-class legal education, Northwestern Law offers a uniquely inviting and collaborative environment in which our students develop supportive, not competitive, relationships with each other and faculty." <www.law.northwestern.edu/mainpages/community>.

of course, do end up working in fields that do not call upon any legal analytical skills, but adapting the curriculum for their career needs would defeat the very point of having law schools that derive their monopoly power from state supreme courts' certification that they are in fact preparing students adequately for the practice of law.[20]

A final, and perhaps more troubling, and certainly more provocative, reason for the putative decreasing focus on the teaching of traditional LRWA skills may lie in the rise in the legal academy of schools of jurisprudence that posit common law legal reasoning as a subjective, inaccurate, unjust, inefficient, or inconsequential method of legal decision-making. In part, these attacks have come from scholars who, having adopted analytical methods from the fields of sociology, economics, or political science, see traditional legal outcomes more as the function of underlying social forces than the deliberate analysis of individual judges following common law reasoning methods. The decreasing focus on LRWA skills may also be in part a legacy of the perspective shared by legal realists and critical legal scholars who see court decisions as the product of almost infinitely manipulable rhetorical games, dependent far more on personal or policy preferences than objectively ascertainable legal rules. From either perspective, there is little of social value that rides on whether or not students master common law analytical methods since outcomes will not vary with the skill with which these methods are performed.

Because I am not aware of any empirical studies that measure the extent to which LRWA teachers have doubts about the practical or normative efficacy of common law reasoning or the extent to which any such doubts negatively affect their effectiveness in teaching LRWA skills, this explanation for LRWA teachers' putative move away from their traditional focus on teaching only LRWA skills is admittedly hypothetical. Assuming, however, it has some value either as explanation or forewarning, I suggest that LRWA teachers who, as a result of the foregoing quasi-scientific or critical perspectives, are not requiring rigorous mastery of LRWA skills are breaching a trust they owe their students.

Whatever the jurisprudential standing of common law decision-making methodology, no lawyer can competently ascertain or argue the law without mastery of LRWA skills since common law legal reasoning is the form of argument required by courts at every level and supplies the decisional principles that are in fact outcome determinative for at least the bulk of legal controversies, which, some critical legal studies adherents notwithstanding, are decided by objectively ascertainable legal rules or principles.[21] My argument in this regard is not based on the premise that our common law system of legal decision-making is better than other existing or potential systems or even that critical and sociological schools of jurisprudence do not in

[20] *See* John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 St. John's J. Legal Comment 269 (2001).

[21] Owen M. Fiss succinctly summarizes these jurisprudential schools, their implications for approaches toward judicial decision-making, and, in the following passage, shows why it is still critical for lawyers and judges to be well prepared to apply the rules that govern common law judicial decision-making:

> In sum, the justices are disciplined in the exercise of their power. They are caught in a network of so-called 'disciplining rules' which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which the justices are part. These disciplining rules provide the standards for determining whether some decision is right (or wrong) and for justifying it (or for contesting it). They constrain, not determine, judgment. Of course, disagreement can still take place, as it has throughout history. But disagreement-at least within modest proportions-is not destructive of law. Rather, it is generative of it: Disagreement is in fact an essential part of any collaborative moral enterprise within a changing society.
>
> In this account of adjudication I recognize that I am making an empirical assumption about the richness of the legal system in a country such as the United States. I am assuming that our legal culture is sufficiently developed and textured so as to yield a body of disciplining rules that constrains judges and provides the standards for evaluating their work.

Owen M. Fiss, *The Death of the Law*, 72 Cornell L. Rev. 1, 11 (1986).

fact reveal important ways in which that system is permeated by unfairness, hypocrisy, economic and racial privilege, or inefficiency. Rather, because it is in fact the operative system by which legal decisions are made, law teachers have a duty to prepare their students both to master it and to be capable of improving it. The failure to prepare students to do this not only shortchanges them, but also undermines our legal system's premise that lawyers will be adequately trained to apply its methodology.

It could also be argued that more is at stake here than the adequacy of law students' preparation for practice. If students are becoming progressively less rigorously educated in the methods of common law decision-making and that method is what primarily constrains judges from engaging in wholly subjective decision-making, it follows that any trend away from rigorous preparation of students in LRWA skills could degrade the future quality of decision-making in our legal system generally.[22] Although such extrapolation is not necessary to my argument for re-examination of the case for CL in first-year LRWA, its logic should, at least, be a cause for heightened concern among law faculty generally for what is going on in their schools' LRWA courses.

III. Conclusion

None of my foregoing points breaks any new jurisprudential or pedagogical ground and, I suggest, they are useful to consider only because of what I see as a growing trend in legal education away from its traditional and critically important focus on teaching the fundamental skills of legal writing, research, and analysis. I see the introduction of collaborative learning techniques into the first-year LRWA course as only one manifestation of this trend. If this article can provoke a discussion of, or even better, empirical research on, the proper place and method of those techniques in legal education, it will have achieved its purpose.

[22] An additional argument against any move away from law schools' rigorous focus on teaching LRWA skills that is outside the scope of this article is that there is a critically important ethical dimension to the professional exercise of legal research, writing, and analysis skills that emphasizes such duties as thoroughness, accuracy, and honesty. Although my argument has been framed in terms of the damage to lawyering skills that flows from diluting LRWA teaching, the same, if not a more powerful, argument can be made as to the harm to the profession's ethical standards from such dilution. No matter how technically proficient law students become in their ability to exercise LRWA skills, unless they are taught to understand and appreciate the legal profession's ethical standards for the exercise of those skills, whether in the role of advocate or counselor, they will not be able to practice with true professional competence. I cannot help but speculate whether the Justice Department attorneys who avoided analyzing, or even citing, germane authorities, including Supreme Court precedent, in their memorandum of law legitimating the military's use of torture or torture-like practices in Iraq and Afghanistan might have provided their clients with a more thorough, accurate, and less one-sided opinion if they had had an LRWA course that had succeeded in instilling in them both the methodological and professional-ethical requirements of good LRWA. *See* Kathleen Clark and Julie Mertus, *Torturing the Law; The Justice Department's Legal Contortions on Interrogation*, Washington Post, June 20, 2004, at B3.

DEFEATING THE WRITER'S ARCHENEMY

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, Professor Enquist offers suggestions on how to teach specific writing skills, either in writing conferences or in class. Her articles 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**.

Every writer has a few bad habits. Some may be no more harmful than chewing on a pencil or drinking too many cups of coffee. Others can undermine a writer's ability to complete a successful document. That second kind of bad habit, especially when it plagues a significant number of students, warrants the attention of legal writing professors.

The bad habit I'm referring to is procrastination. While almost everyone gives in to the temptation to procrastinate occasionally, some students are world-class procrastinators when it comes to writing. They will laughingly tell you that they cleaned their whole apartment, helped a friend move, and watched *American Idol*—all to avoid starting to draft the latest legal writing assignment.

While I have not been able to uncover credible numbers about procrastination among law students, several experts have suggested that between 65 percent and 90 percent of undergraduates procrastinate to the extent that it affects their academic performance. (Solomon and Rothblum,1984; Knaus, 1977).[1] Anecdotal evidence suggests that the percentages among law students, particularly when it comes to legal writing, are also high.

Even though procrastination is pervasive and its bad effects are well known, our understanding of procrastination may be overly simplistic, which leaves us ill-equipped for working with (dare I say, reforming?) the procrastinating legal writing student. Fortunately, psychologists who have studied procrastination extensively have a few insights that we can apply to teaching legal writing.

First of all, some experts have described two fundamentally different types of procrastinators: the relaxed type and the tense-afraid type. (Solomon and Rothblum, 1984). The *relaxed procrastinator* often feels negatively toward his or her work and blows it off by having fun, socializing, or engaging in some distracting activity. Ellis and Knaus (1977) call these individuals the "easily-frustrated, self-indulgent procrastinators." They tend to describe the work as boring or stupid, procrastinate by finding something fun to do, and then rationalize that behavior.

The *tense-afraid procrastinator* (Fiore, 1989) is often overwhelmed, unrealistic about how much time things take, indecisive about how to proceed, and angry or resentful about the demands being made on him or her. The tense-afraid procrastinator often lacks confidence in his or her ability and fears falling short or failing.

While most experts agree that there are distinctly different types of procrastinators, they don't all agree on how to categorize them. L. J. S. Walker (1988), for example, divides procrastinators into four types: the Perfectionist, the Postponer, the Politician, and the Punisher. Sapadin and Maguire (1997) categorize them into six types: the Perfectionist; the Dreamer, who has big ideas but can't work out the details; the Worrier; the Defier, who resists what others expect

"While almost everyone gives in to the temptation to procrastinate occasionally, some students are world-class procrastinators when it comes to writing."

[1] Interestingly, some experts who track academic trait procrastination (ATP) say that procrastination increases as students move through their undergraduate years.

"These descriptive labels vividly capture one important truth about procrastination: there are often dramatically different reasons why students procrastinate."

or want; the Crisis-Maker; and the Over-Doer, who is chronically overextended.

These descriptive labels vividly capture one important truth about procrastination: there are often dramatically different reasons why students procrastinate. For example, some procrastinators' delaying behavior comes from an overdeveloped sense of optimism ("Why start? I have plenty of time"), while other procrastinators' habit stems from an overdeveloped sense of pessimism ("Why start? Whatever I do won't be good enough").

What does all of this mean for the legal writing professor working with a procrastinating student or the legal writing student who wants to lick his or her procrastination habit? Simply put, the advice or strategy that might be helpful for one type of procrastinator may be counterproductive for another. The key is to match the advice and strategy to the type of procrastinator and his or her reasons for procrastination.

Step one in working with any procrastinator, then, is to identify why the student procrastinates when faced with a legal writing task. As legal writing faculty, most of us are not trained counselors, but we can make our students aware of the types of procrastinators and encourage them to identify for themselves the root causes of their procrastination about writing.

Step two involves developing an effective strategy for defeating the type of procrastination the student has identified.

Relaxed procrastinators may respond well to writing schedules with multiple minideadlines for each step along the way. Because they seem to need to feel deadline pressure in order to get started, having a self-imposed deadline for completing the research, for developing an outline or organizational plan, or even for small steps such as getting the rules section drafted, may help. Reporting in to someone about whether each of these minideadlines was met may also be necessary for the relaxed procrastinator.

For the tense-afraid procrastinator, what may be most important is to recognize what not to do. Exhorting this procrastinator to "try harder" or "get organized" may be counterproductive (Fiore, 1989). For this kind of procrastinator, better strategies are those that reduce the unpleasantness (or the perception of unpleasantness) of the task.

One simple approach may be to have tense-afraid procrastinators recall the last time they had a successful writing experience. What did they write? How did they go about completing this writing task? If they still have that successful piece of writing, have them reread it before starting the new writing task. The key to this approach is to have students build on their successes.

If the student does not have or remember any successful writing experiences, an alternative might be for the legal writing professor to select the best paragraph in the student's latest draft and use it as a building block toward success. If the student wrote one successful paragraph about an analogous case, for example, walking through how and why it works gives the student specifics that he or she can apply to other, less successful parts of the draft.

The fear of failure in some tense-afraid procrastinators tends to be a deep-seated psychological phenomenon far beyond the expertise of most legal writing professors' ability to address, but the literature about procrastination provides some strategies that tense-afraid procrastinators may find helpful (Roberts, 1989). Chief among them are some simple changes in the student's self-talk[2] from procrastinating ways of thinking to productive ways of thinking:

Procrastinating	**Productive**
I must/have to ____ or (something awful will happen).	I'd like to/choose to …
I've got to finish …	When can I get started on …
Oh God, this assignment is enormous.	Where is the best place to start?
I can't succeed.	I have a better chance of succeeding if I …

Perfectionist procrastinators may need help setting realistic goals. On some level they know

[2] <mentalhelp.net/psyhelp/chap4/chap4r.htm>.

that most law students were at the top of their class as undergraduates and that not all of them can be at the top at law school. A gentle reminder of this fact helps some temper their obsession to do everything perfectly so that they will be the best.

The perfectionist legal writer can also bog down when any given paragraph, sentence, or even word choice is not going well. Encouraging them to skip over the problem area, at least for the moment, and continue working on another section while their subconscious works on a solution for the problem is a simple but powerful strategy.

Perfectionists may need help developing judgment about how much time to spend on any given part of the writing task. While it might not be advisable to tell most students something like "don't spend more than an hour proofreading this document," perfectionists may respond well to ballpark time frames.

Perfectionists may also benefit from a discussion about the law of diminishing returns and how it relates to efficiency vs. perfectionism. Explaining that it is doubtful that anyone in practice will be willing to pay for something to be written perfectly may jolt them into realizing that the goal of the course is something larger than getting the highest grade possible. It is really about becoming an effective writer for practice, and "effective" often means knowing when something is good enough to get the job done.

Because the "postponer" procrastinators tend to have short attention spans and difficulty staying on task for long periods, they need to adjust their writing schedules so that their writing sessions are shorter and have more variety. Postponers respond well to having others structure and direct their activities. This type of student, like the relaxed procrastinator, may need to sit down with the professor to create a writing schedule and then send in mandatory progress reports via e-mail.

Politicians are the high profile members of any law school class. They involve themselves in numerous extracurricular activities and often have difficulty saying "no" when asked to organize an event or participate in a project. Social butterflies by nature, they want to please others and thus may have a hard time making their legal writing assignments a priority. As a rule, politicians may have two root causes to their procrastination: (1) they are overextended, and (2) they resist focusing on any task like writing that is more solitary than social.

To defeat their procrastination tendencies, politicians often have to cut one or more extracurricular activities. Once they have carved out enough time to do their writing, they may respond well to strategies that make it a more social activity. Working to develop a clear sense of who their reader is may help them see writing more as lively dialogue than lonely monologue. They may find sharing drafts or working in writing groups helpful if the rules governing collaboration in your course or school allow it.

While the scope of this column won't allow for an extended discussion of every strategy that might be matched to a type of procrastinator, one expert claims that for approximately one-third of all procrastinators the tried-and-true time management techniques (the "to do" list, a daily schedule, rewards along the way) will work wonders. Simple things like finding the right place to work, breaking a big project into small tasks, and tricking oneself into getting started right away can also help break the negative reinforcement cycle of procrastination.

Another simple but important insight is that procrastination is always attached to what people perceive as unpleasant tasks; few of us procrastinate about doing things we like. Convincing students that legal writing is a satisfying, rewarding, and worthy challenge may be a hard sell in some quarters, but it is worth a try. It certainly beats feeding the perception that it is boring, uncreative, or tedious. It helps, of course, if the legal writing professor himself or herself is excited and passionate about legal writing, and it doesn't hurt to remind law students that they really do want their chosen profession to be intellectually challenging. If it really were easy, would they want to spend a career doing it?

Finally, no discussion of procrastination would be complete without mentioning the importance of controlling distractions. In the course of writing this column, I had the opportunity to chat with a

"Another simple but important insight is that procrastination is always attached to what people perceive as unpleasant tasks …"

colleague who confessed she is a chronic procrastinator. She wondered whether procrastination rates were on the rise given the new temptations of e-mail and surfing the Web. She pointed out that the very machine she uses for writing is also the machine that contains all those distractions!

In the old days when we talked to students about removing distractions and creating an environment that was conducive to effective writing, we might have suggested turning off the TV, cleaning the clutter from one's desk, or unplugging the telephone. Now we should probably add turning off e-mail and cell phones and using laptops in locations that keep us focused.

"As any smoker or couch potato knows, kicking a bad habit is hard. Backsliding is common, even expected."

As any smoker or couch potato knows, kicking a bad habit is hard. Backsliding is common, even expected. And when it comes to procrastinating about writing, some students have had the bad habit reinforced over their educational careers. They keep repeating the same scenario. They delay working on a writing project, turn in what was essentially a rough draft, are unsatisfied with the result, and become convinced again that they are not good at writing and that writing is a distasteful task, so that the next time they are faced with a writing assignment, they are even more inclined to procrastinate.

Reversing this cycle won't be easy. It will take more than just saying "Stop procrastinating." Working with students to identify their own type of procrastination and matching that to some potentially useful strategies is just a start. But as we know from the procrastination literature itself, starting is half the battle.

For more on procrastination, see *Counseling the Procrastinator in Academic Settings* (Henri C. Schouwenburg et al. eds, 2004). Numerous university learning centers also have information about procrastination on their Web sites.

Principium est potissima pars cujusque rei. **The beginning is the most powerful part of each thing.**

Coming Face-to-Face with a Legal Research and Writing Client

BY NANCY OLIVER

Nancy Oliver is Professor of Legal Research and Writing at the University of Cincinnati College of Law in Ohio.

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**.

My first year of full-time teaching of legal research and writing courses was an intense and exciting learning experience for me. Every day yielded some new insight into how my students perceived the materials I presented and ideas about how to improve the sequence, timing, and substance of my classes. New careers are exciting in this way—you can hardly keep up with how much you are learning and you are never bored. Noteworthy among my early days filled with learning opportunities was the day my colleague and I reviewed the results of our experiment regarding simulated client counseling sessions. On that day, I knew I had learned a valuable and unexpected lesson that would influence my approach to teaching for many years to come.

As we discussed our simulated counseling sessions, my colleague reported that one of her students told her after the simulation: "This is the first time I thought of them as people!" Although my students had not chosen these particular words, I realized that this was the sentiment at the heart of many of the comments my students had made in a class in which we discussed the counseling simulations they had recently conducted. Prior to the simulations, my students had not thought of the hypothetical clients we presented them as people.

The students, at the beginning of the second semester of their first year of law school, had participated in simulated client counseling sessions in their lawyering II–advocacy classes. Through these simulations, the students had come face-to-face with their first clients. While their clients had been purely hypothetical up to this point, thinking of the clients as real people seemed to add a new dimension to the studies the students engaged in the rest of the semester.

This article will address how first-year students come to see their clients as purely hypothetical beings, how the counseling simulations were conducted in our lawyering II classes, and how the students benefited from meeting one of their legal research and writing clients.

Clients as Purely Hypothetical

Until my colleague and I sat down and discussed our impressions of the client counseling simulations we had added to the beginning of our courses that semester, I hadn't thought about the perception my first-year students had of clients. In many of their classes, their experience up to that point had involved the analysis of appellate decisions. While such analysis is a wonderful teaching tool for learning the nuances of torts, contracts, criminal law, and other first-year courses, most such experiences did little to focus the students on their relationship with their future clients. By the time most cases make it to the appellate process, the nature of the relationship between a party to the case and his or her attorney will rarely merit discussion.

Further, the research and writing projects my colleague and I had assigned our students the first semester involved purely hypothetical people. The assignments began with a standard tasking memo in which we described a client's legal problem. In our memos, we directed the students to research and analyze the problem and prepare objective office memos in which the students were to present their analysis of the situation.

Because we used purely hypothetical people in our writing assignments, our first-year students

> "Prior to the simulations, my students had not thought of the hypothetical clients we presented them as people."

"We discussed the importance of setting a friendly, collaborative tone in greeting the client and providing a comfortable and private location for the meeting."

never had the opportunity to carefully consider the experience of being a client. The two or three clients involved in their writing projects were presented in rapid progression to the students. I now imagine that the typical first-year student begins to see each of these clients as merely another of the many hypothetical people involved in hypothetical legal situations that must be dealt with before moving on to the next ones in an attempt to avoid drowning in the pile of work that typifies the first year of law school. Somewhat like my students' experience, I remember a time in my past when I was a busy, practicing attorney. At times, I certainly could have viewed all of my open files as just a big pile of undifferentiated work if I hadn't had clients' names and faces to attach to each file. My teaching epiphany came when I realized that attaching names and faces to at least some of their work the first year would be a valuable experience for my students.

Client Counseling Simulations

In an ongoing response to the McCrate Report,[1] the faculty of my law school continues to identify additional opportunities for our students to study the professional skills and values discussed in the report. One result of these efforts is an innovative approach to the second-year professional responsibility class in which our students receive training focused on client relationships and interpersonal lawyering skills. Although these professional responsibility classes provide a more detailed study of these skills, our legal research and writing professors recently decided to introduce client interviewing and client counseling in our first-year lawyering classes. We felt that the study of these interpersonal skills would nicely complement the rest of our curriculum focused on the study of the skills of research, writing, problem solving, legal analysis, reasoning, and oral advocacy.

Our first attempt at incorporating these interpersonal skills into our classes occurred in the spring semester of 2004 in our lawyering II–advocacy classes. In this class, the students learn persuasive communication skills, write a brief in the setting of a pretrial motion, and present an oral argument in front of a faculty judge. Two of our three legal research and writing professors participated in the maiden voyage of our counseling classes. Although each of us took a slightly different approach to how we presented the material, we both concluded that the students benefited from an introduction to client counseling.[2]

To kick off the semester, I added a class in which I lead a student discussion about the relationship between a lawyer and a client and the various models of decision-making in this relationship. We also discussed the fundamental lawyering skills and values from the McCrate Report and the many upper-level classes, journals, clinics, institutes, and extracurricular activities offered by our law school in which the students could further develop these skills and values.

During this class, we also discussed the basic goals and steps of an effective client counseling session.[3] We discussed the importance of setting a friendly, collaborative tone in greeting the client and providing a comfortable and private location for the meeting. We explored effective methods of conveying an assessment of the client's legal

[1] American Bar Association Section of Legal Education and Admission to the Bar, Report of the Task Force on Law Schools and the Profession; Narrowing the Gap, Legal Education and Professional Development–an Educational Continuum (1992) (known as the McCrate Report).

[2] Our counseling classes followed a common sequence used in teaching skills: we taught, demonstrated, practiced, and discussed the skill. Specific ideas about how to conduct the simulations came from discussions with Professor Marjorie Aaron, executive director of the Center for Practice in Negotiation and Problem Solving at the University of Cincinnati, and from my experience teaching as an adjunct in the Lawyering program at Southern Methodist University Dedman School of Law in Dallas, Texas.

[3] *See generally, e.g.,* Robert F. Cochran Jr., John M.A. DiPippa & Martha M. Peters, *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling* 131–164 (1999) (discussing client counseling); Stefan H. Krieger & Richard K. Neumann Jr., *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis* 215–265 (2d ed. 2003) (discussing client counseling); Nancy L. Schultz & Louis J. Sirico Jr., *Legal Writing and Other Lawyering Skills* 195–203 (3d ed. 1998) (discussing effective client consultations).

problems using easily understandable language and collaborative methods to convey and evaluate options available to the client to resolve the problems. Finally, we discussed helping the client choose an appropriate option to implement and the importance of identifying the actions that will follow, the parties responsible for these actions, and the next contact with the client. I then conducted a brief demonstration of a client counseling session in which I acted as the lawyer and an administrative assistant acted as the client. At the end of class, the students were instructed to review the last objective memorandum they wrote in the fall semester for our next class.

During the next class, we discussed the client's legal situation from their last objective memo of the fall.[4] For this memo, the students were instructed to represent Dr. Cheryl Kowalski, an ophthalmologist practicing in Kenosha, Wisconsin. Dr. Kowalski came to our firm seeking advice about a covenant-not-to-compete (hereinafter CNC) contained in an employment contract she had signed when she joined the Kenosha ophthalmologic practice owned by Dr. David Friedman. The covenant provided that for two years after leaving the practice, Dr. Kowalski would not practice ophthalmology in Kenosha and certain specified surrounding counties. However, she wished to join a new practice with Dr. Linda Garrison in a suburb of Racine where she could perform laser eye surgery, an activity Dr. Friedman had decided not to pursue. Our client wanted to know if Dr. Friedman could enforce the terms of the CNC against her and prevent her from taking this new job. The students were provided with many other facts regarding such things as the area from which Dr. Friedman's practice drew patients, Dr. Kowalski's training, and market conditions.

In their fall memos, a slight majority of the students concluded that the CNC was most likely not enforceable because the geographic restriction was unreasonably broad. However, this conclusion was far from airtight. I led a discussion of how the client's situation could unfold if Dr. Kowalski chose to leave her current employment and start the new job.

The students concluded that even though the CNC was unlikely to be enforced, the risk of being sued by Dr. Friedman if she left his practice to compete in the area was too great to be ignored. Further, having to face such an expensive distraction while starting a new professional job seemed like a heavy burden to the students. Although they hadn't researched the topic, I told the students that in some jurisdictions, Dr. Garrison could also be sued for tortious interference with Dr. Friedman's contract with Dr. Kowalski. To the students, this didn't seem like an ideal way to start a new relationship with an employer.

The students and I brainstormed various possible solutions to Dr. Kowalski's problem including staying in her current employment, leaving without talking to Dr. Friedman and hoping for the best, and attempting to discuss the issue with Dr. Friedman before leaving her employment with him and negotiating a settlement to any dispute that might arise with Dr. Friedman. Eventually, most of the students advocated the last option.

The students then looked at the interests of both Dr. Friedman and Dr. Kowalski in the dispute that would likely arise when the issue of the CNC was broached with Dr. Friedman. On the blackboard, we listed the interests and concerns of each party. With respect to Dr. Friedman, the students noted that if Dr. Kowalski left his practice and joined Dr. Garrison's practice, he would have to train a new ophthalmologist in the ways of his practice, he would possibly lose income because of the direct competition with Dr. Kowalski, he would be worried that she would steal his patients, and he would fear a reduction in the need for his services if she used laser surgery to correct the vision problems of the residents in the area where he practiced.

The students also brainstormed ways to convince Dr. Friedman to release Dr. Kowalski from the CNC. They came up with offering to

"On the blackboard, we listed the interests and concerns of each party."

[4] I thank my colleague, Professor Christine Zimmer, who created the research and writing problem discussed in this article. The problem is purely fictitious.

"The class in which we discussed the relationship between the attorney and the client yielded many student insights and an enthusiastic discussion."

have Dr. Kowalski practice only laser surgery during the restricted time period of the CNC (a type of opthalmological care Dr. Friedman didn't provide), offering that Dr. Kowalski would not directly solicit Dr. Friedman's patients to whom Dr. Kowalski provided treatment, offering that Dr. Kowalski would stay with Dr. Friedman's practice for six months to train her replacement, and offering a monetary settlement. The students left the class armed with many handouts—instructions for a simulated client counseling session, a written description of a suggested format for an effective client counseling session, a summary of the fundamental lawyering skills and values from the McCrate Report, and a list of upper-level classes and activities that offered opportunities to develop these skills and values.

Each student had been assigned a role to play in the simulated client counseling session with Dr. Kowalski that was to take place at a time of the students' choosing during a week in which the students did not meet with me because they were attending training in computer-assisted legal research. Students were assigned to groups of three—two lawyers to counsel one client. If the client turned out to be a male student, we referred to him as Dr. Karl Kowalski. I distributed confidential instructions for both the clients and the lawyers that were to be kept secret until after the simulations were concluded. The client instructions directed the student-client to become angry at least once while discussing the situation, to act confused at some point during the counseling session, and to tell the attorney that he or she would be willing to pay a settlement of up to $15,000, but to disclose this only if specifically asked. The lawyers' instructions included directions regarding the law firm's hourly rates and included an estimate that negotiating a settlement on behalf of Dr. Kowalski would likely take about seven hours including the preparation of a settlement agreement. Both sets of instructions told the students that after conducting the simulations, they were to prepare a written, two-page memo in which they were to discuss the parts of the sessions that went well, the parts that didn't go as well, the decisions made during the sessions, and what the students learned from the sessions.

During the next meeting of the class, we held a discussion about the counseling simulations and the students turned in their memos discussing the simulations. I was happy to hear that most students found the simulations enjoyable and useful. I was also happy and surprised to find that the classes and simulations about client counseling met various pedagogical goals, not all of which I had anticipated.

Advantages of Meeting the Legal Research and Writing Client

We believe that we fulfilled our main goal of successfully introducing the interpersonal lawyering skill of client counseling to our first-year students. The classes and simulations related to counseling were aimed at discussing the skill, demonstrating the skill, having the students practice the skill, and then discussing the simulation experience. In addition to fulfilling our main goal, the counseling classes gave us the opportunity to discuss the relationship between the attorney and the client, enriched our discussion of professional values, and helped our students understand the importance of their work in their objective memos on the lives of their client.

The class in which we discussed the relationship between the attorney and the client yielded many student insights and an enthusiastic discussion. I began the discussion by summarizing the three models of legal counseling presented in the textbook the students would use the next semester in their professional responsibility class. These models are the authoritarian, client-centered, and collaborative models.[5] Under the authoritarian model, an attorney takes control over the representation and shares knowledge with a rather passive client about how the client should handle the legal problems.[6] Under a client-

[5] Cochran Jr. et al., *supra* note 3, at 2–9.

[6] *Id.* at 2–4.

centered model, on the other hand, an attorney actively involves a client in the process of evaluating potential solutions to the client's legal problems by analyzing the consequences to the client of the options using the prism of the client's values.[7] The collaborative model of decision-making requires an attorney and client to work together to advance the interests of the client with each bringing his or her skills and knowledge to bear on the client's problem. While the client maintains control over the decisions, the attorney operating under the collaborative model structures the decision-making process including consideration of how the decisions affect other people.[8]

The students identified the advantages and disadvantages of each model and concluded that they preferred the collaborative model. While the students could easily see why a lawyer should not impose his or her values on a client by making all decisions regarding the representation, discussion was livelier as we probed the possible problems with a purely client-centered approach. As the discussion proceeded, students observed that a lawyer might be able to help a client by objectively analyzing the client's situation even when the client could not be objective because the situation was replete with emotion and possible negative consequences for the client. In such a situation, the students observed that the lawyer could help the client identify interests and goals the client may not have considered while mired in the legal problem. Further, the students realized that their personal integrity and professional responsibilities would prevent them from becoming a hired gun willing to do anything to further the client's interests.

Our discussion of professional values was also more robust than it would have been if not tethered to a client's situation. For example, the students who acted as lawyers were better able to appreciate the value of competent representation when looking into the eyes of Dr. Kowalski, a client depending on them. Many student-lawyers remarked in their reflections memos that they would be more thoroughly prepared in the future to counsel a client because of the awful feeling they had when they weren't prepared to answer a client's reasonable questions. Further, many of the student-clients remarked how helpful and reassuring it was for them when their lawyer was knowledgeable and prepared to help them. I hope that they will remember this experience and try to re-create that feeling for their own clients.

Finally, when the students recognized the clients as real people, they realized that the job of a lawyer doesn't end when the lawyer makes a prediction about the client's legal situation in his or her objective memo. It wasn't enough for Dr. Kowalski to hear from her lawyer that her CNC was likely overbroad, and, therefore, unenforceable. She needed to know how to proceed with this knowledge. Should she merely ignore the offending CNC? The students decided this would not be the best course and brainstormed various options of how to otherwise help this client. They identified various options to offer their client in a collaborative decision-making counseling session.

In a memo discussing a client counseling simulation, one student noted surprise at how much the attorney needed the input of the client to proceed with representing the client. Another expressed concern that the decisions he would make for a client are not necessarily the ones the client would make for herself. As my colleague's student noted so precisely: "This is the first time I thought of them as people!" This experience taught me that my students had not thought of our hypothetical clients as people. Having learned this valuable lesson, I will try to take advantage of my unique position in my student's first-year experience to help them meet at least one of their legal research and writing clients face-to-face.

"Our discussion of professional values was also more robust than it would have been if not tethered to a client's situation."

[7] *Id.* at 4–6.

[8] *Id.* at 6–9.

USING "WALKING TOURS" TO TEACH RESEARCH

BY DEBORA PERSON

Debora Person is the Administrative Librarian at the George W. Hopper Law Library at the University of Wyoming College of Law in Laramie.

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

"The tours are modeled after self-guided tours in a museum. Each class has a research scenario that is used throughout its walking tour packet."

As part of our tenure process, all faculty members, when voting to retain or reject nontenured faculty, must list valid reasons for their vote. These comments are typed separately and appear in our review packets. One year I was amused to see the comment, "She does very well in the classroom, especially considering she teaches the most-hated class in law school." I chose to believe that faculty member was remembering his or her own law school experiences as my student evaluations didn't necessarily reflect the same opinions. But as other faculty comments also hinted at the difficulties presented by teaching legal research, I decided it was a good time to review my instruction techniques.

Librarians teach 12 50-minute sessions of legal research as part of the legal research and writing course for 1Ls. The first-year class is divided into sections, with each section having approximately 20 students. We continue to emphasize paper resources in the first year, despite the allure of electronic resources. Our reasons are twofold: many of the attorneys in our state still use print resources and students who are familiar with the content and organization of print resources will transition easily to electronic resources. Class time includes some online searching but the vast majority of our classroom teaching and library labs use print resources.

For the first few years I taught, I used a standard legal research textbook and scripted lectures. Classes, for the most part, consisted of lectures introducing specific concepts and resources. Students were assigned readings and research questions within the text. Most students felt a disconnect between the class lectures and the research questions they were answering. Several constructively criticized the course, saying they were tactile learners and needed more hands-on learning. I began to consider ways to address these needs.

Over the past four years I have developed and used research "Walking Tours." Students buy the package of tours at the beginning of the semester. This is the only required text for the course. I strongly recommend that students refer to hornbooks and other materials that we maintain on reserve at the library circulation desk as supplemental reading. The tours are modeled after self-guided tours in a museum. Each class has a research scenario that is used throughout its walking tour packet. This allows me to discuss the use of weekly resources in relation to a specific fact pattern.

The instructions direct students to the resources in the library, followed by a brief discussion of the material that has already been introduced in class, followed by specific elements of the set, and instructions on use. The instructions are laced with commands. In order to complete the exercise the students must use the materials in front of them. For example, the walking tour for digests for our state tells them to:

- Go to M-N-1 in the library (*M-N-1 is a shelving location*). These are the state digests. (*Here follows a description of digests in general and jurisdictions in specific.*)
- Notice the set has 16 volumes that are organized by subject, an index volume, and a Table of Cases and *Words and Phrases*® volume.

- Using the index volume, look up "wiretapping." (*The research scenario for Section 1 deals with the validity of wiretapping a second phone conversation without an authorization order based on information received in an initial tap with a proper authorization order.*) Under the subheading "Evidence in criminal prosecutions," it refers to **Crim Law 394.3** (*here follows further discussion of topic and key numbers and instructions on retrieving case citations under Crim Law 394.3 by looking in the digest*).

The tour continues. Students run brief searches in other volumes to demonstrate the various uses of the digests. Throughout the tour package there are short-answer questions that allow me to see whether students are using the resource correctly.

This year I added two or three simple hypothetical research questions at the end of each set of walking tours. Instructions tell students to develop a research strategy for finding the answer based on the resources they used in the current week's walking tour. For example:

> Your client has been threatened with loss of his dog because of its "vicious propensities." After some discussion of the dog's behavior with the client, you recognize that it will be important to determine how courts are defining the term "vicious propensities." Using the resources from the walking tour this week, where would you begin your research?

At this point I instruct them *not* to research the question, only develop a strategy to find the answer. I expect them to be specific about jurisdiction and the updating process. This is an effort to get them to (a) plan their research, and (b) review what they know about the content of the resources. I want to get them thinking about what questions they should be asking and what resources they should be using. During the next class we use these hypotheticals to review the prior lesson and to enhance our discussion of research strategies. We consider choices that face researchers such as when state digests are preferable to federal digests, for either jurisdictional or content reasons, and the general strengths and weaknesses of digests. Once students understand the purpose of a resource in the research process, it is a simple matter to reintroduce the resource when discussing electronic research.

The following week students receive a new client scenario. Using the same resources, they are asked to research their issues and write a research journal in which they record the steps of their research, including the issues they are pursuing and the rules they found.

At this point students have had 20 to 30 minutes of introductory lecture in class; an in-library, self-directed introduction to the resources; hands-on experience using these resources to address a small set of hypothetical questions; in-class discussion on their chosen research plan; and a fresh scenario to research in these same resources. Recently I added flow charts for researching primary resources that incorporate suggested strategies beginning with secondary sources or with primary sources.

Feedback on these walking tours has been surprisingly favorable. It can be tedious reading while standing in front of library shelves, but the hands-on experience seems to enhance the learning process. I have had students tell me they were initially less than enthusiastic about doing the walking tours because they require in-library time. When I suggested that I might discontinue their use, they strongly encouraged me to continue using them. Students have told me that they take their tours with them to their summer jobs and many students have returned to ask me for updated copies.

My colleagues are probably right that legal research classes may be intensely disliked. Research assignments are generally labor-intensive and time-consuming. First-year law students are initially reluctant to spend the time needed to develop good research skills during an incredibly busy and stressful first semester. On the other hand, at the end of the first year, many students tell me that of all the work assigned during their first semester, the legal research exercises are especially valuable. These exercises connected them with the practice of law, and the ideals they had as they entered law school.

"Students have told me that they take their tours with them to their summer jobs and many students have returned to ask me for updated copies."

BOOK REVIEW ...

Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation

BY LYNNE TRUSS
GOTHAM BOOKS, 2004

REVIEWED BY JAMES SPETA

James Speta is Associate Professor of Law at Northwestern University School of Law in Chicago, Ill.

It seems appropriate to begin with a confession: Lynne Truss had me on page 4. After declaring that routine, public misuse had made it "tough being a stickler for punctuation," (p. 2) she allowed that she was also "well aware there is little profit in asking for sympathy for sticklers. We are not the easiest people to feel sorry for. We refuse to patronise any shop with checkouts for 'eight items or less' (because it should be 'fewer'). … " (p. 4) Although my own grocery-buying habits have never (consciously) changed, I have apparently referred to the matter of "less or fewer" frequently enough that it has worn thin with my own children, ages 7 and 9.

Eats, Shoots & Leaves is an entertaining read because Lynne Truss corrals a large number of common punctuation errors and allows her British-intoned invective wide range. After providing several examples, she says, dearly: "The confusion of the possessive 'its' (no apostrophe) with the contractive 'it's' (with apostrophe) is an unequivocal sign of illiteracy and sets off a simple Pavlovian 'kill' response in the average stickler." (p. 43) Or the following, on commas: "As with other paired bracketing devices (such as parentheses, dashes and quotation marks), there is actual mental cruelty involved, incidentally, in opening up a pair of commas and then neglecting to deliver the closing one. … In dramatic terms, it's like putting a gun on the mantelpiece in Act I and then having the heroine drown herself quietly offstage in the bath during the interval. It's just not cricket." (p. 91) Readers who have on their shelves *Fowler's Modern English Usage* (second edition) and who enjoy that edition's simultaneous displays of opinion and of rigor are Truss' most natural audience.

What is the place of *Eats, Shoots & Leaves* in the law school world? There is hardly need of another writing manual, and Truss is not writing for lawyers. I have nevertheless recommended *Eats, Shoots & Leaves* to students in my third-year seminar, for I think the book fills an important niche alongside some combination of Bryan Garner; Helene Shapo, et al.; Laurel Currie Oates, et al.; William Strunk and E.B. White; and other favorites. *Eats, Shoots & Leaves* is a good refresher for students (and, boy, do they need it). And the tone is exactly that which I think appropriate (sometimes) to take with students. Do they not realize that writing effectively is the lawyer's principal tool of persuasion? Do they not know that judges, not to mention professors, react to grammar, punctuation, and related errors harshly? Apparently not.

More than that, however, I think that *Eats, Shoots & Leaves* usefully bridges a gap in the available manuals, each of which is principally directed either to technical usage matters or to matters of style. The *Chicago Manual of Style* covers all of the punctuation rules that Truss addresses and more, though decidedly with less style. On the other side, Garner or Shapo provides all of the writing style advice that a law student or lawyer needs to discipline a memorandum or brief.

The important connection *Eats, Shoots & Leaves* makes between these works is between punctuation as a technical exercise and punctuation as a stylistic device. As Truss explains, sticklers often battle amongst themselves over proper punctuation (especially over the appropriate number of commas). Truss relates some of the disputes between humorist James Thurber and his New Yorker editor Harold Ross over comma placement. "Thurber was once asked by a correspondent: 'Why did you have a comma in the sentence, "After dinner, the men went into the living room"?' And his answer was probably one of the loveliest things ever said about punctuation. 'This particular comma,' Thurber explained, 'was Ross's way of giving the men time to push back their chairs and stand up.'" (p. 70)

This anecdote reveals "the mixed origins of modern punctuation, and its consequent mingling of two quite distinct functions: 1. To illuminate the grammar of a sentence; 2. To point up—rather in the manner of musical notation—such literary qualities as rhythm, direction, pitch, tone and flow." (p. 70)

Consider the following possible starts to a brief.

- "Plaintiff's reliance on the consumer expectations test is misplaced. Here, the good was complex and intended for sophisticated users, and only the risk/utility test applies."
- "Plaintiff relies on the consumer expectations test, but this case concerns a complex good, intended for sophisticated users, and only the risk/utility test applies."
- "Plaintiff relies on the consumer expectations test. This case, however, concerns a complex good, intended for sophisticated users, and only the risk/utility test applies."
- "Plaintiff relies on the consumer expectations test; this case, however, concerns a complex good, intended for sophisticated users, and only the risk/utility test applies."

All of the standard legal writing manuals would wave the reader off of the first construction in favor of the other three. The manuals also suggest that the third construction is better than the second. In my experience, the last construction is the best. In the third, the full stop after the statement of the plaintiff's position accords the plaintiff too much dignity; it allows the reader, while stopping, to agree. The second solves this problem through a compound sentence, which moves the reader to the conclusion. But I believe that the last option is more forceful and therefore better than the second. The semicolon immediately signals that the plaintiff's premise is wrong. As Truss says, "Expectation is what these stops are about; expectation and elastic energy. Like internal springs, they propel you forward in a sentence towards more information. …" (p. 114) The compound sentence (example two) does not hammer in the same way the semicolon allows: the semicolon lifts the reader up, and what immediately follows lands with more force (emphasizing that the plaintiff does not understand *this* case). This is but an illustration of what we (in my former appellate practice) called "writing downhill": attempting to inexorably draw the reader down into agreement. Using punctuation to create pacing, it also avoids tired and ultimately ineffective adjectives (nonsensical!), adverbs (clearly!), and vague generalizations (misplaced!). All manuals warn against these, but maintaining the forcefulness of advocacy without them is trickier. Truss provides tools, and instructions, that help enhance writing's force.

Truss also usefully differentiates two of the most overused punctuation devices in brief writing: parentheses and dashes. Legal writers are too fond, as many have noted, of the asides and qualifications that these bracketing devices allow. But, occasionally, such is necessary, and then one must distinguish between the two. I found Truss' cut enlightening (following supporting examples, which I will omit). She says that parentheses "half-remove the intruding aside, half-suppress it; while the dashes warmly welcome it in, with open arms." (p. 160) Again, the punctuation conveys the quality of emphasis, with parentheses indicating an aside or a confidence, or perhaps a snide remark, while dashes increase the offset matter to a level equal to or greater than the main sentence.

At bottom, *Eats, Shoots & Leaves* will entertain those who care about writing. If you can get away with assigning it, it has the potential not only to instruct but to develop writers as well.

WRITING TIPS ...

To Get to the "Point," You Must First Understand It

BY STEPHEN V. ARMSTRONG AND TIMOTHY P. TERRELL

Timothy Terrell is Professor of Law at Emory University School of Law in Atlanta, Ga. Stephen Armstrong is Director of Career Development for the law firm of Wilmer Cutler Pickering Hale & Dorr LLP in Washington, D.C. They are the authors of Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing *(2003), and have taught writing programs for lawyers and judges for the past 20 years. They are regular contributors to the* **Writing Tips** *column in* Perspectives.

"Over the past 10 or 15 years, practicing lawyers have come to rely more and more on oral reports or e-mail summaries because … formal memos are regarded as too slow and too expensive."

When new associates (or summer associates) write their first research memos for a law firm or department, they often make two related mistakes. It would be unfair, however, to blame them. The rules of the game have changed, and usually without anyone having warned them. Their memos are now being judged by a new standard, one that law school seldom emphasizes.

In law practice, it's no longer enough that their research is thorough, their analysis thoughtful and precise, their conclusion sound. Their memo also has to "add value," to use the common jargon, in a very pragmatic way. It has to help the reader avoid a risk, respond to an opportunity, accomplish a goal, or otherwise provide practical help that justifies the cost of writing the memo. And these days, the cost often requires a good deal of justification. Over the past 10 or 15 years, practicing lawyers have come to rely more and more on oral reports or e-mail summaries because, in many situations, formal memos are regarded as too slow and too expensive. Consequently, if a memo fails to show quickly that it can "add value" to justify its cost, its writer is likely to be convicted of bad judgment, no matter how expert the memo's lawyering.

First Mistake: Missing the Pragmatic Point

In this situation, new lawyers often misunderstand the memo's "point." They certainly understand intuitively, as well as through explicit instruction in their writing classes, that the point should be captured in the memo's "short answer" or "conclusion" section, which should, of course, tell the reader the destination to which the writer's hard work has led. But they fail to ask the critical question: Whose "destination" should be the focus here?

In law school, most writing is intended to demonstrate to the instructor that the student can analyze a legal issue competently. The focus of the memo is therefore, quite appropriately, "the law," and the student's ability to master it. From this exercise, then, students take away the impression that the point to a memo is this "legal" bottom line—the destination to which the law leads.

In law practice, however, the law is seldom its own point. Instead, even when one lawyer is communicating to another about the law, the true point is practical: not what the law *says*, but what the reader can or should *do* as a result of what the law says.

An example is the best way to demonstrate the practical defects that law firm partners often identify in a new associate's work, defects that are usually quite inadvertent. Here is the opening of a memo written by a first-year associate for a partner, but with the understanding that a version of the memo will eventually be sent to the client:

> To: Partner
> From: Associate
> Re: Jury trial issue in *Jones v. Smith*
>
> Facts
>
> [For this limited purpose, we don't need the facts, and we are also not implicitly contending that the fact section of a memo must necessarily appear first. Whether it does should depend upon whether the facts help to illuminate the "Question" and "Conclusion" sections that will follow.]

Question

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

Conclusion

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

Sadly, new associates too often fail to realize that one way for them to end their careers at a firm early is by writing conclusions that say "both"—even if both is the correct legal conclusion, as it was in this case. In fact, according to the partner for whom the memo was written, the "lawyering" in it was first class. It nailed the legal point of the assignment. But it missed the *practical* point. This is not an easy concept for new lawyers to grasp: After having been so thoroughly trained to think like lawyers, they must now learn to think simultaneously like a lawyer and like something more than a lawyer (or, at least, more than a "book" lawyer).

The comfortable world of law school is now past. The law is no longer a mental exercise; it must be used to do something. And that means that the associate must think differently about the memo's conclusion or "point." Now, it must focus not just on the law, but on how the memo will actually be used—by both its ultimate audience, the client, and its immediate audience, another lawyer higher in the firm's food chain.

New lawyers usually catch on to this real-world standard fairly quickly, but they seldom push the pragmatic analysis far enough. In this instance, for example, the memo will be used to decide whether it's worth trying to avoid a jury trial, as the client hopes. That's obvious enough. But the memo will also have a more mundane, less obvious use. Assuming the client is a company, the in-house lawyer who first reads the memo will probably have to explain to someone else, perhaps a superior, why the company faces the risk of a jury trial. And, certainly, the partner who receives the memo will have to explain to the in-house lawyer why that unhappy outcome seems unavoidable. In both cases, those explanations will take place first, as a conversation, before the other person reads the memo.

To prepare for the conversation with the in-house lawyer, the partner must take two steps: become comfortable that the memo's analysis is sound, and think through the "script" for the conversation. In its original form, the memo's summary conclusion offers no help with any of this. To push the pragmatic analysis of the memo's point far enough, and then to redraft the conclusion so it works, here's what the associate should imagine: The partner picks up the phone and calls the client to report the result of the research:

Partner: Hey Joe, you know you asked us whether your case was going to be tried by a jury or by the court? Well, turns out it could go either way, but it will probably go to a jury. Talk to you later.

Any partner knows that the actual conversation with the client will have to go much further. This, then, from the partner's perspective, is the *practical* point of the memo: What should I say to the person who must make a decision based on your work? Faced with the memo in its original form, to prepare for that conversation, the partner first has to do all the work of extracting the more complete picture that the client seeks, and then summarizing that picture into a script for the phone call. For this very practical goal, the memo is quite useless.

Here is the summary conclusion, rewritten to focus on the pragmatic as well as the legal point:

Conclusion

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

"This, then, from the partner's perspective, is the *practical* point of the memo: What should I say to the person who must make a decision based on your work?"

"But, in the face of that bad news, the conclusion offers the partner some help: a way to show the client that every legal rock was turned over …"

To persuade a court otherwise, we would have to argue (1) that the case is too complex for a jury's understanding; or (2) that the underlying issue is a breach of fiduciary duty of a kind (such as breach of constructive trust) that is a matter of equity rather than law; or (3) that the court should follow a minority line of cases that hold any action for "disgorgement" of excess profits to be a matter of equity rather than law. None of these arguments is likely to succeed.

This conclusion still says "both." And it still delivers bad news: We're probably faced with a jury trial. But, in the face of that bad news, the conclusion offers the partner some help: a way to show the client that every legal rock was turned over in the search for a better answer, but none could be found. That extra step is reflected in the (1), (2), (3) in the second paragraph. Now the partner can pick up the telephone and have a complete conversation with the client just on the basis of the memo's conclusion. From the partner's perspective, that is one truly "practical" point of the document.

Here is another example of the difference between a "book" lawyer's summary conclusion and a fully pragmatic one.

Original

Success Worldwide: Project X

Facts

[A page and a half, which we spare you.]

Question presented

Will a liquidated damages provision contained in the Building Lease between Excel and Owner which provides for Excel to pay off the entire Project Loan upon the occurrence of an Event of Default be valid and enforceable under New York law?

Conclusion

New York courts will likely deem the liquidated damages provision contained in the Building Lease valid and enforceable, especially if it is modified as will be indicated below.

Revision

Success Worldwide: Project X
Enforceability of liquidated damages provision under New York law

You have asked us whether New York courts will deem valid and enforceable the liquidated damages provision of a draft building lease between Excel Enterprises and Success Corporation of America, a wholly owned subsidiary of Success Worldwide, Inc. The property to be leased will be constructed by Success Corporation, and the construction will be funded by a construction loan provided by Success Worldwide. The liquidated damages provision provides that, under certain circumstances, Excel would be required to pay off the entire loan.

We believe that New York courts are likely to deem the provision valid and enforceable if it is modified in the following two ways:

1. It should state that only Events of Default that are considered material shall trigger Excel's liability for liquidated damages. If this modification is not made, the provision could be voided in its entirety.
2. It should recite the factors considered by Excel and Success Corporation in arriving at the settled amount of damages.

The following pages describe the facts and analysis upon which our conclusion is based.

Second Mistake: Concluding with a Conclusion

The second common defect in the law firm memos of new associates is also primarily a carryover from law school. Because the function of the law school memo is to force students to present their reasoning and demonstrate the thoroughness of their research and analysis, it is not surprising that they often put *two* conclusions

in the document: a "short answer" in the beginning and a "conclusion" at the end. As reasonable as this second conclusion seems—doesn't it make sense to wait until the end of the analysis to state the full-fledged result?—it is in fact a mistake.

Memos in law firms almost never *end* with a conclusion of any sort. If the memo's short answer or conclusion has been well drafted, it is so full and so practical that the analysis section does not *develop* to a conclusion—it instead *defends* the initial conclusion, continually referring back to it. As a result, there should be no work for a conclusion to do at the document's end. In fact, any conclusion there ought to be a waste of the reader's time. If it is actually doing any work, then the initial conclusion was probably defective. For example, in the revised jury-trial memo, what more would you expect from an additional conclusion at the memo's end?

A practical conclusion at the memo's start—as opposed to a merely legal one, whether it comes at the start or the finish—is not only more efficient from a reader's perspective, it is also more forceful and confident. The powerful opening changes the character of the document profoundly. Rather than building to a close like a detective story, the memo demonstrates total mastery over its analysis from the start, and therefore commands more respect. It announces, as an associate's work must, that the writer has dominated the law rather than been a victim of it, and has thought beyond the law to the world of action in which the memo's readers must live.

"A practical conclusion at the memo's start … is not only more efficient from a reader's perspective, it is also more forceful and confident."

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.

William Brescia et al., *Designing and Developing Web-Based Continuing Legal Education*, Legal Reference Services Q., Nos. 2/3, 2004, at 171.

> "[P]rovides an account of the process of developing a course interface, through collaboration of a legal librarian and an educational technology class, integrating the needs of attorneys into the content area, and a description of the finished product [a Web-based CLE course entitled 'Legal Research on the Web']." *Id.*

Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 Notre Dame L. Rev. 1761 (2004).

> Discusses the Style Project for the Federal Rules of Civil Procedure, the purpose of which is "to translate present text into clear language that does not change the meaning." *Id.* Concludes that the project, while ambitious, can be accomplished and that ambiguities can be removed, structure improved, and punctuation upgraded, all leading to improved clarity of the rules.

John Doyle, *Ranking Legal Periodicals and Some Other Numeric Uses of the Westlaw and Lexis Periodical Databases*, Legal Reference Services Q., Nos. 2/3, 2004, at 1.

> "[A]n exploration of the opportunities and difficulties in extracting numeric information from the full-text legal periodical databases on Westlaw and Lexis." *Id.* Reviews various ranking methods used previously. Produces rankings of the most cited general law reviews and specialized law journals.

Elizabeth Fajans & Mary R. Falk, Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers, 3d ed. (2005) [St. Paul, MN: Thomson-West, 213 p.]

> Describes how each type of writing can be accomplished, noting that the only "real differences among the three formats are in manuscript preparation (e.g., footnotes vs. endnotes) and, more importantly, in scale." *Id.* at 5.

Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroider, the Minimalist Wizard, and Other Stories*, 9 Scribes J. Leg. Writing 77 (2003–2004).

> Discusses what can happen when a lawyer's writing does not comport with professional standards. Groups cases in which lawyers have been criticized or sanctioned under: "failing to state the law accurately, failing to state the facts accurately, poor writing, plagiarism, and lack of civility." *Id.* at 79.

Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?* 32 Hofstra L. Rev. 1215 (2004).

> Takes on the arguments that attempt to justify not using unpublished opinions and is especially critical of the position taken by Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.

Kristin A. Henderson, *Lessons from Bankruptcy Court Public Records: A Conflict of Values for Law Librarians*, Legal Reference Services Q., Nos. 2/3, 2004, at 55.

> Discusses how the need for access to information and the right of privacy creates special dilemmas in the bankruptcy context.

Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 Scribes J. Leg. Writing 1 (2003–2004).

> Using two cases, one an original and another a rewrite, the author demonstrates from survey results received from 251 Michigan attorneys and judges that they strongly prefer opinions that are "straightforward and lean." *Id.* Also summarizes the results from three similar surveys.

Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later)*, 9 Scribes J. Leg. Writing 113 (2003–2004).

> Updates a survey from the 1999–2000 academic year. Shows in updated data current through January 2003 that legal writing programs continue to improve. Includes new data on the ability of legal writing faculty to vote in faculty meetings.

Mohamed Y. Mattar, *Trafficking in Persons: An Annotated Legal Bibliography*, 96 Law Libr. J. 669 (2004).

> Identifies, organizes, and describes articles that examine trafficking of persons and how it has become a significant international human rights issue.

Matthew Parry, *Dieu li Volt? Employment Discrimination Against Muslims*, Legal Reference Services Q., Nos. 2/3, 2004, at 85.

> A pathfinder designed "to make the Byzantine world of employment discrimination more accessible to Muslim employees." *Id.* Focuses on issues that have arisen in a post-9/11 world.

Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235 (2004).

> Proposes that if a decision "adds nothing new to the law, its opinion need only state and cite the controlling law." *Id.* at 1240. Such opinions would be precedential. "[C]oncludes that limited publication and, especially, no-citation rules are fundamentally incompatible with a system based on the rule of precedent." *Id.*

Wayne Schiess, *What Plain English Really Is*, 9 Scribes J. Leg. Writing 43 (2003–2004).

> Responds to David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 Rutgers L.J. 713 (2002). Points out where the author agrees and disagrees with Crump. Also provides examples of what legal writing is all about. *Id.* at 71–75.

Eugene Volokh, Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review, 2d ed. (2004) [New York, NY: Foundation Press, 262 p.]

> Instructs students how to find a topic and how to develop it into a useful and publishable piece. Includes new chapters on getting on law review (especially about doing the write-on competition) and about submitting finished Notes to outside competitions.

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