

# PERSPECTIVES

## Teaching Legal Research and Writing

### “HOOKING” THEM ON BOOKS: INTRODUCING PRINT-BASED LEGAL RESEARCH IN A STIMULATING, MEMORABLE WAY

BY JENNIFER MURPHY ROMIG

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Sound teaching theory dictates that students will learn more about a subject or skill if they first appreciate its relevance to their own lives. Empirical data and anecdotal evidence both suggest that students are not as familiar with libraries and basic print research techniques as their instructors and librarians would like.<sup>1</sup> Thus, a teacher of fall semester first-year law students has the double challenge of introducing the myriad of law-specific sources and remediating students' more fundamental research skills.

Although one approach is to “start with some foundational research skills rather than jumping into digests, statutes and treatises,”<sup>2</sup> I take the latter approach. To address both the introductory and remedial goals identified above, I start the research component of my fall semester with a 75-minute “hook”<sup>3</sup> designed to catch students' interest: a real-world research project using a variety of real sources, in the controlled

<sup>1</sup> Kathryn Hensiak et al., “Information Literacy and Law Students,” American Association of Law Librarians/Aspen Publishers Grant Program Final Product Report, <[www.bu.edu/lawlibrary/working/stephanie/surveyresults.htm](http://www.bu.edu/lawlibrary/working/stephanie/surveyresults.htm)> (August 9, 2004).

<sup>2</sup> *Id.*

<sup>3</sup> The concept of a “hook” is summarized in Harvey J. Brightman's Master Teacher Program materials (May 17–18, 2004), “Creating Interest and Showing Subject Relevance,” on file with Emory University's University Advisory Council on Teaching.

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environment of the classroom during a single class session. Students use digests, statutes, and treatises as well as other sources during this session, even though they have read only an introductory chapter on legal research and their earlier closed-universe memo assignment provided little background on legal research. Students enjoy the challenge of experimenting with new sources, and the class provides a solid and interesting foundation both for the law-specific sources taught in more detail later in the course and for the basic tenets of good research inside or outside a law library.

Given the students' lack of familiarity with legal research sources, the physical setup of the classroom is the first important aspect of this exercise; it provides visual context for the project they are about to attempt. I load up a library cart with eight types of sources<sup>4</sup>: (1) *American Jurisprudence* (Am Jur<sup>®</sup> 2d); (2) *Corpus Juris Secundum*<sup>®</sup> (CJS<sup>®</sup>); (3) a state-specific legal encyclopedia; (4) *American Law Reports* (ALR<sup>®</sup>); (5) relevant treatises; (6) online access to LegalTrac and relevant periodicals; (7) selected volumes from the relevant state digest series, including the *Descriptive-Word Index* and *Words and Phrases*; and (8) the index and relevant volume of the state code.

The sources are distributed around the classroom and labeled in a large, bold font. When students enter the classroom, they immediately comprehend the major shift from the closed-universe memorandum into the world of research.

I begin the class by giving a 10-minute overview of the research process, elaborating on the introductory reading and emphasizing the need for strategy in an almost infinite universe of legal authorities. I then tell students they are going to dive in immediately and explore these sources, so they should get out their pens or computers and prepare to take notes as though they are in a supervising lawyer's office.

<sup>4</sup> The specific volumes and authorities within these volumes are listed in a table at the conclusion of this article.

I then explain<sup>5</sup> the client's problem. The client, a second-year law student in Miami, Florida, works part time as a "downtown ambassador" for the city. As an ambassador, she wears a uniform and makes herself conspicuously available in a given area of the city to help tourists and discourage mischief. She has a five-block area to cover, and she uses a Segway Human Transporter supplied by her employer to do so.

A Segway is a scooter-like device that enables "self-balancing human transportation."<sup>6</sup> At this point in the monologue, I use the classroom's Internet access, projector, and screen to play a promotional video showing the Segway in action.<sup>7</sup> The video is set to upbeat music and contains various shots of people using Segways to traverse city streets, train stations, office lobbies and hallways, parks, and college campuses. This video could be shown after the hypothetical instead of before, but I present it first so as to pique students' curiosity and to reinforce the importance of careful listening even when one is not sure why a client is conveying certain information.

After the five-minute video, the client's story continues. A month earlier, the client had finished her shift and visited the House of Margaritas with some co-workers. She had two or three drinks and then departed, on the Segway, to return it to the ambassadors' headquarters. On the way there, she ran the Segway into a pole, fell off, and sprained her wrist. Police officers helped her recover, called an ambulance, and gave her a Breathalyzer test. They then charged her with driving under the influence (DUI) under Florida state law. Now the client needs the class's help to evaluate her defenses, including specifically the defense that the DUI statute should not cover Segways because a

<sup>5</sup> If time permits, and this is a significant "if," this monologue could be replaced with a live client interview or videotape. See Ben Bratman, "Reality Legal Writing": *Using a Client Interview for Establishing the Facts in a Memo Assignment*, 12 *Perspectives: Teaching Legal Res. & Writing* 87 (2004). Using a live interview would, however, allow the class to be expanded to fill two 50-minute sessions instead of a single 75-minute session. The first session would include the introduction, client hypothetical, and search-term brainstorming; the second session would include the hands-on research in the classroom.

<sup>6</sup> <[www.segway.com/segway/](http://www.segway.com/segway/)> (August 9, 2004).

<sup>7</sup> The video can be viewed or downloaded in various formats at <[www.segway.com/connect/multimedia.html](http://www.segway.com/connect/multimedia.html)> (August 9, 2004).

Segway is not a “vehicle.”<sup>8</sup> Once students understand this research cue, we work on group brainstorming to come up with search terms. I hand out a worksheet<sup>9</sup> that asks the following questions and directions:

- What issue are you researching?
- What are your best search terms (sub-categories to jump-start their brainstorming include “people, places, and things”; “claims and defenses”; and “relief sought”)?
- Choose a search term and broaden it with synonyms.
- Choose a term and stretch it from the most abstract to the most concrete.

The search-term discussion usually takes about 15 minutes. Working with the class as a whole on this segment takes less time than breaking into groups, and the worksheet provides a helpful structure for soliciting relevant comments. I write the various student-generated terms on the chalkboard so students can refer to them when conducting their research. This time is well spent because it reminds students about good research techniques in general. Students generate a strong list of search terms and realize that diving in with the first term that came to mind would have been a poor idea. They also come up with new and creative ways to help the client beyond just researching the defense that was part of the research question. These ideas present good opportunities to talk to students about focusing on the actual question asked but also communicating with supervisors about other possible questions to research.

Once the list of search terms is complete, I ask students to form groups of four or five and go to one of the research stations around the classroom.

<sup>8</sup> This problem is fictional but was inspired by Sophie Sparrow’s session at the 2002 Legal Writing Institute Biennial Conference, “Using Active Learning Techniques in the Legal Writing Classroom.” That session focused on another aspect of DUI law and suggested the possibilities of this area as a way of reaching first-year law students.

<sup>9</sup> The structure of the search-term worksheet is based entirely on Amy Sloan, *Basic Legal Research: Tools and Strategies* 19–23 (2d ed. 2003).

They are to examine the source and figure out how to use it, most likely by starting with whatever index accompanies the source. After 20 minutes, they should be ready to report back on (1) the source their group used, (2) their findings so far, and (3) what the group would do next in the research process if they were going to take more time to conclude the project.

During this segment of the class, their work takes off. The classroom becomes loud as students exchange search terms and begin working together to go through the indexes. I walk around and talk to any slow-starting groups. (The group with the *Descriptive-Word Index* and digest usually needs the most prompting. Those using the legal encyclopedias also tend to need some help.) The biggest challenge for the instructor is to bring their work to an end and to bring the class back to order as a group without being abrupt.

The final component of the class requires students to report to one another what they found. This portion of the class reveals to students the rich network of cross-references in legal research. Students using the treatises or state encyclopedia have used their presentation time to ask questions of the students with the state code. Students with the periodicals have asked about the relevance of other states’ laws. I reserve the right to select the group’s spokesperson during this segment of class, and typically I call on the least outspoken student in the group. Even the shyest students and international students not confident of their English skills have done excellent work explaining their source and what their group would like to do next in the research process. Again, the most challenging part of the class is ensuring that one person speaks at a time and that every group gets a turn before the class ends.

I have conducted this class twice now, with one group of 32 students and another group of 36. Both during and after the class session, students have commented on enjoying the class. One student said that her parents became tired of hearing about the Segway when she went home for a weekend visit in October. Several students

“The classroom becomes loud as students exchange search terms and begin working together to go through the indexes.”

“[This introduction] allows them to collaborate and engage in mutual discovery at a moment of potential confusion.”

forwarded articles about Segways last year after an accident that led to a product recall.<sup>10</sup>

This introduction to research serves goals other than capturing students' interest, which is important but not sufficient by itself as a pedagogical outcome. It gives students a hands-on introduction to the basic sources of legal research. It allows them to collaborate and engage in mutual discovery at a moment of potential confusion. It requires them to explain what they learned immediately after learning it.

This approach does have a few drawbacks, however. The most notable risk is that students may mistakenly believe research can be done quickly in only a single source. Groups using the Florida statutes and the treatise with a table of the Florida statutes are particularly susceptible to such beliefs. Therefore, the instructor must emphasize both before and after the exercise that it represents only the very first steps of a more thorough approach to the project. In the final portion of the class when students report to one another what they found, the instructor should listen carefully to students' descriptions of what they would do next in the research process. Any groups that say they have found “the answer” should be questioned for holes in their research.

Another drawback is that a group may not feel its research time was productive. Those students may be tempted to abandon the source they were trying to use. In this exercise, for example, the periodical research on LegalTrac tends to produce the least useful results. To help students reach the stage of assessing sources (rather than just searching for them), I provide two articles, one on drunk bicycling in Los Angeles and another on Florida's drunk driving laws. Simply “handing over” sources in this fashion may magnify students' belief in a single right answer. In future classes I will combat this belief by writing my search technique on each source to show students that a variety of searches are necessary to find the proper subject matter (the California article) or the

proper jurisdiction (the Florida article) and that researchers may not necessarily be able to locate an article meeting both criteria.

The opposite problem may also occur: Students may be overwhelmed by the breadth of what they find. The general encyclopedias tend to fall into this category. The instructor can counteract these problems by walking around the classroom and monitoring each group during the small-group discussions. When students report their findings to the group as a whole, the instructor may need to supplement their descriptions with an explanation of techniques for obtaining more relevant sources or for narrowing a search.

Other drawbacks are more logistical in nature. Some libraries may not allow the entire index to a set of encyclopedias to be removed and taken into a classroom even for 75 minutes. Using appropriate signs to direct researchers to a second set of indexes is the ideal solution to this problem, if a second set is available. Fitting all of the indexes and sources onto a single library cart can be challenging. Using classroom technology can sometimes be a problem as well; last year, for example, the sound system in my classroom malfunctioned, and students could not hear the upbeat music that accompanied the Segway promotional video.

All in all, however, I have found this class to be a very positive addition to my fall semester. The articles that students brought to my attention in late fall 2003 also revealed another useful angle on this hypothetical. During later classes held inside the law library, I asked students to suppose that the client wanted to bring a civil suit against the manufacturer resulting from her injury. I advised them that the client's consumption of several drinks before the accident would seem to rule out a successful negligence case because of comparative or contributory negligence, so strict liability would probably be the best product-based claim. Based on these facts, I asked them research the Florida standard for strict liability in a products liability case.

<sup>10</sup> *E.g.*, *Segway Recalls 6,000 Scooters*, Chicago Tribune, Sept. 29, 2003, at 10.

.....

This second research exercise could be done in all of the same types of authorities used in the initial class, and it continued to reinforce the message I was trying to convey in my “hook”: Print-based research is a valuable place to start and is not a monolithic activity; instead, law books provide many ways of starting a research project.

Researchers should be familiar with all the major sources and should select where to start based on the nature of the legal question and how much the researcher already knows. The broadest message I want to leave them with is that research in the law library is necessary, useful, and enjoyable.

“The broadest message I want to leave them with is that research in the law library is necessary, useful, and enjoyable.”

#### Table of sources used in Segway introduction to research under Florida law:

Source	Indexes and volumes
A.L.R.	Two copies of <i>Quick Index</i> and volumes with relevant entries: Thomas R. Malia, “Snowmobile Operation as DWI or DUI,” 56 A.L.R.4th 1092 (1987). David P. Chapus, “Horseback Riding or Operation of Horse-Drawn Vehicle as Within Drunk Driving Statute,” 71 A.L.R.4th 1129 (1989). “Operation of Bicycle as Within Drunk Driving Statute,” 73 A.L.R.4th 1139 (1989). “What Is a ‘Motor Vehicle’ Within Statutes Making It an Offense to Drive While Intoxicated,” 66 A.L.R.2d 1146 (1959) and A.L.R.2d Later Case Service for volumes 64–66 at pages 497–500. Gregory J. Swain, “Operation of Mopeds and Motorized Recreational Two-, Three-, and Four-Wheeled Vehicles as Within Scope of Driving While Intoxicated Statutes,” 32 A.L.R.5th 659 (1995). These annotations are also collected along with many others in the book <i>Critical Issues: Drunk Driving Prosecutions [Annotations from the ALR System]</i> (1990).
Am. Jur. 2d	Index and volumes 7A and 8 (topic “Automobiles and Highway Traffic”).
C.J.S.	Index and volumes 60, 60A, 61, and 61A (topic “Motor Vehicles”).
Florida Statutes	Index and volume 12B (topic “Motor Vehicles”), containing Florida Stat. Ann. § 316.193.
West’s® <i>Florida Digest</i>	<i>Descriptive-Word Index</i> volumes 34 (A–CI), 36 (DR–G), 36A (H–LH), and 36D (SI–Z); <i>Words and Phrases</i> volume 44 (J–end), and digest volume 3A (Automobiles key numbers 1 and 332).
<i>Florida Jurisprudence</i>	Index and volume 4A (topic “Automobiles and Other Vehicles”).
Treatises	Chart showing the legal subdivisions within the Library of Congress KF classification; Internet access to law library’s catalog; Lawrence Taylor, <i>Drunk Driving Defense</i> (5th ed. 2000); Wilson C. Howe, <i>Adkins Florida Criminal Law and Procedure Annotated</i> (11th ed. 2002).
LegalTrac	A computer terminal, Internet access, and LegalTrac password are needed. I also provide printouts of LegalTrac’s help screens, which provide instructions on using its various searching functions. It is difficult to provide all of the periodicals students might reasonably find, but the two that seem most appropriate are Valerie Lezin, <i>Drunk Bicycling Held No Violation of Vehicle Code</i> , Los Angeles Daily Journal, July 23, 1980, at 1, and Mark Dodson, <i>Florida’s New “Drunk Driving” Laws: An Overview of Constitutional and Statutory Problems</i> , 7 Nova L.J. 179 (1983).

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## A MONTESSORI JOURNEY: LESSONS FOR THE LEGAL WRITING CLASSROOM

BY SONIA BYCHKOV GREEN

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### Introduction

My sons attend a Montessori school.<sup>1</sup> Like many parents, we chose the school in large part because it was small, clean, and peaceful—and accepted two-year-olds without requiring that they be toilet trained. We had heard bits and pieces from friends and colleagues about the Montessori philosophy, and the ideas of independent learning and respect for the child appealed to us. Since then, we have learned much more about the philosophy, and the school has given me some insights into education and a prism through which to view my own teaching. This article sets out some of the lessons I have learned, and suggests some ideas for application to the legal writing classroom.

### The Journey, and Lessons Learned Along the Way

In mid-January, the school holds a biennial “Montessori Journey”: a chance for parents to come to the school over an evening and weekend day, look closely at the classrooms and the materials, and then, the next day, actually experience the classes by pretending to be the students. The start of the “journey” was a silent walk from classroom to classroom. We were asked not to speak, not to ask questions, and not to touch anything. We were given paper on which we

could record our impressions, nicely sharpened pencils, and nothing else. Like any good teacher (or lawyer, for that matter), I have a hard time being silent for two hours. And yet, this part of the journey was one of the most peaceful and insightful parts of the weekend.

The second day allowed us to travel through the different classrooms, starting in the toddler class, and progressing through the middle school. In each room, we were asked to pretend to be students, and use the materials the way the children would.

For the school, it was an attempt to teach us their nontraditional methods, actually using nontraditional means; this in and of itself is a terrific idea.<sup>2</sup> Usually, we meet for discussions or question-and-answer sessions that were just like those that would arise in any other setting. In this special case, however, we were forced to detach from the experience and just observe. As I traveled through the journey, and reflected on it afterward, I thought that some of the philosophy and specific techniques could be useful in a legal writing classroom as well. Here are some ideas:

#### 1. Teach students to be independent thinkers and doers.

A large part of the Montessori philosophy is to give students choices in the “works” they do. The classrooms at all the grade levels are designed so that students can select from a number of age-appropriate works. The role of the teacher is to make sure that students do the works properly, to give lessons in how to do some of the more advanced works, and to make sure that each

<sup>1</sup> The school is Keystone Montessori School, in River Forest, Ill. I want to thank the faculty and staff of the school for their commitment and dedication, and for educating me, as well as my sons.

<sup>2</sup> I had a similar experience at a Legal Writing Institute conference session this summer, at the presentation “Teaching Law Students Through Their Individual Learning Styles,” by Robin Boyle, Dr. Joanne Ingham, and Elaine Mills. The presenters asked the audience to assess their own learning styles by taking a short questionnaire. They made the questionnaire available in a traditional paper format (respondents marked off best answers on a sheet of paper) and, anticipating that some would be more tactile learners, they also made the questionnaire available as strips of paper that would be laid out on a grid to correspond with the best answer). This instantly reinforced the ideas that people learn differently and that different methods can and should be used.

student eventually does works in a variety of areas.<sup>3</sup> The amazing freedom this affords seemed overwhelming to most of the parents who had been schooled in more traditional means.

In a legal writing classroom it is obviously harder to give students those kinds of choices. The topics are limited from the beginning, and it is crucial to ensure that all of the topics are covered. Presumptively, students have chosen to be in a law classroom because they want to learn the law, but we know that this is often not the case. Even if they want to be lawyers, they may not want to learn the law. And even if they want to learn the law, they may not be at all excited about learning legal writing. Thus, we cannot let them choose everything, and have to make sure that they still learn everything they need. However, if we can allow them some more choices either in what they write about, or how they present at least some of their work, we may encourage them to be more proactive about their own legal education and, in the end, learn better.

A corollary to this may be that we can try to give students choices in how they learn legal writing: some schools are experimenting with legal writing sections by topic area; at John Marshall, we have divided our fourth-semester drafting courses into specialty topics, and the students seem to be more engaged. Perhaps even in a traditional first-semester legal writing classroom students can be given some choices on memo topics or in-class writing assignments. Even small choices may be beneficial.

## 2. Use materials that truly engage and appeal to every different learning style.

### A. Different age and ability classrooms

In Montessori classrooms children are divided by age. The breakdown of classrooms at Keystone is: Parent/Infant (three-to-24-month-old children

with parents); Toddler (two-year-olds); Primary (three-to-five-year-olds); Junior Elementary (six-to-nine-year-olds); Senior Elementary (nine-to-12-year-olds); and Middle School (12-to-14-year-olds). The general assumption is that children of different ages have different approaches to learning, and that these age-related classifications are most useful for dividing up the classroom.<sup>4</sup> To some extent, age is a proxy for ability, but even more than that, the age classifications are thought to represent unique developmental stages.<sup>5</sup> These are obviously large categories, and they are not rigid: students can advance at a younger age or may stay in a classroom even if they are a bit older. The categories are useful for defining skills, and the combined age rooms allow students to learn from and teach each other. Within each classroom there are tools for the different age-and-skill-level children to use.

As I reflected on this, I wondered whether we could do anything at all like this in our legal writing classrooms. Can we make any generalizations about our students? Can we put the weaker students in a different classroom? Can we put different kinds of learners in different sections? In the end, this breakdown is probably impossible to ascertain and impose, and moreover, there is likelier to be much more benefit to having different kinds of students in a single section to teach each other and enrich the classroom. The better lesson here may just be that we have to be ever mindful that our classrooms contain individuals of different abilities, interests, and styles, and we need to be cognizant of that when we teach.

B. Know what the students like to do, and allow them to do that

A corollary to the different age classrooms is a strong Montessori emphasis on understanding how students learn and what they can do. For example, most of the works in the Primary classroom are meant to be done individually; few works for the older kids are meant to be done in

“Perhaps even in a traditional first-semester legal writing classroom students can be given some choices on memo topics or in-class writing assignments.”

<sup>3</sup> Here is an excellent description of the teacher's role in the Montessori philosophy: “As the child is introduced into the learning environment, the teacher explains and enforces the rules which govern [that] world. . . . But, and this is most basic to the system, she must never force the child to begin learning. *The first movement of exploration must come from the child.*” George L. Stevens, *Montessori Perspectives, Past and Present*, in *A Montessori Handbook* 29, 33 (R.C. Orem ed. 1965) (emphasis in original).

<sup>4</sup> Paula Polk Lillard, *Montessori Today: A Comprehensive Approach to Education from Birth to Adulthood* 6–7 (1996).

<sup>5</sup> *Id.*

“[T]here is something terrifically liberating about physically cutting up a piece of writing.”

groups.<sup>6</sup> The philosophy behind this is that children of that age work better independently.<sup>7</sup> This approach changes dramatically as students move into the Junior Elementary classroom. There, most of the works are meant to be done in groups, since children of that age are generally more social.<sup>8</sup> Amazingly, they learn and get works done even in groups.

These sorts of classifications are obviously easier to make for younger children, where age and developmental level control so much. For our legal writing students, it is very difficult to find such broad, useful categories that fit. There has been a wonderful body of scholarship about learning styles and personality styles,<sup>9</sup> and we should all be more aware of our students' varied skills and personalities. Some will be loners, and some will be social, and we have to take that into account. My Montessori Journey reminded me and illuminated a different aspect of learning theory: we should consider not just each student's learning style, but simply his or her style—how they function generally, and what that means for how we can best teach them,

C. For the hands-on learners: cutting up parts of the discussion

One of the works I did in the Junior Elementary classroom was to dissect a sentence by actually cutting it up. There were strips of paper with sentences. The work was to cut up a sentence and lay out the different pieces. There was a small basket with laminated sheets of paper that could be laid out next to the sentence parts to identify the main clause and the modifying clause. Students could move the pieces around and construct their own sentences. They could also use

arrows to point to parts of a sentence and attach labels to the sections to identify that part of the sentence. This kind of exercise was repeated in the older-age classrooms as sentence diagramming became more complex.

It occurred to me that we could do the same exact exercises. I still have students who write sentence fragments, or don't understand how one part of a sentence can modify another. This kind of exercise could help some students finally understand how a sentence is structured.

Moreover, there is something terrifically liberating about physically cutting up a piece of writing. It made me feel empowered, and made me realize that the product is not sacrosanct. I plan to have students cut up their own sentences, some judicial opinions, and memoranda. Then I will ask them to put them together and show me how the pieces fit.

D. For the hands-on learners: sorting

Parents of Montessori students know that the interest in sorting is cultivated and nurtured.<sup>10</sup> As students get older, the sorting becomes more sophisticated. One fascinating project designed for the Senior Elementary students was a large grid that consisted of several blocks. The general topic of the grid was “ancient Roman culture,” and there were general headings: social, economic, political, etc. Next to it, there was the quintessential Montessori basket, which contained information about different aspects of the culture: paragraphs describing politics, photos of roads and buildings, etc. Students were supposed to sort the paragraphs and/or drawings into the correct categories and place those on the grid. Since this project was for older children, it was a group project, and it encouraged them to discuss what fell under which category. This way, they learned not just the substance of the culture itself, but what the different categories meant, and how to organize topics into different categories.

This can have a variety of applications in the legal writing classroom. Students can be asked to

<sup>6</sup> See *id.* at 34, and generally, on this age range, see *id.* at 34–43.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* at 47, and generally, on this age range, see *id.* at 44–53.

<sup>9</sup> See, e.g., M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 Seattle U. L. Rev. 139 (2001); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347, 394 (2001); Clifford S. Zimmerman, “Thinking Beyond My Own Interpretation”: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum, 31 Ariz. St. L.J. 957, 960 (1999).

<sup>10</sup> For a humorous take on Montessori sorting, read *Something Weird Going On in That Montessori School*, *Neighbor Reports*, The Onion, November 1, 2000.

sort out cases based on different criteria: for example, students can be given different case examples of conduct that satisfies the element of “outrageousness” in an intentional infliction of emotional distress setting, and asked to place the examples on a continuum, ranging from least to most offensive. Preparing a grid like that could help students understand that there can be a range of examples, and, when they have to make a prediction about whether a particular fact pattern rises to the standard of outrageousness, they could try to see where that would fit in the range. It could also appeal to the tactile learners, and teach them a learning method they might even apply in other classes.

Students in a legal writing classroom can also be asked to sort research materials (perhaps either the actual books, or strips of paper on which different names of research tools are written) and physically group them into, for example, primary and secondary authority, or, within primary authority, into mandatory and persuasive authority. This type of exercise may seem basic to some students, but for others, it may be just what is needed to make the different classifications stick in their minds.

### 3. Teach in steps.

#### A. Basic works

Another aspect of the Montessori philosophy starting in the Primary classroom (three-to-five-year-olds) is not to allow a student to do a work until that student has had a lesson by the teacher on how to do the work properly. The teacher will usually demonstrate the work silently, sometimes to a single student and sometimes to a group. After that, the student is free to choose to do that work.

This struck me as an especially interesting idea since we often do the opposite. We make students brief cases right away and often forget that we need to teach them how to do it. In Montessori schools the lessons are often done one on one, or in small groups; we don't have the luxury of that. But, we can make an effort to see what each student has mastered, and try to avoid pushing students to do things that they simply have not learned how to do.

#### B. Advanced works

Students also cannot move on to a more advanced work until they have mastered a basic work. The teachers keep close track of this, and the works are laid out on the shelves in a specific progression. Students learn very early on that they must do the works in order. For example, in the Primary classroom, the math progression goes from simple organization of objects from smallest to largest, to basic counting, to using bead strings to count to higher and higher numbers, to more sophisticated counting games and four-digit addition and subtraction.<sup>11</sup>

To some extent, we already do this kind of sequential teaching in the legal writing classroom. Many of us start with smaller assignments that progress to more complex assignments, or ask our students to outline or submit drafts before they submit a final product. One problem—perhaps unavoidable—is that we usually cannot, as a practical matter, prevent a student from moving on. Confronted with deadlines and a justifiable amount of student anxiety, we usually cannot prevent a student from starting work on a new assignment until that student has completed a previous assignment to our satisfaction. If nothing else, I find myself grading memo 1 while my students embark on memo 2. But perhaps we can accomplish this to some extent with prewriting, and with rewriting. Better yet, perhaps we can encourage our students to be more critical readers of their own assignments so that they would share part of the burden of ensuring that they were truly doing and learning things in a logical progression. It may be that just the thought of progressions and repetition could guide some of how we present information to our students.

### 4. Detach from the classroom.

During the silent walk part of the journey itself I found it incredibly helpful to step back and just observe. I think this might be applicable in several different areas:

A. Stepping back from the texts and looking at them more generally, rather than for a specific purpose.

“During the silent walk part of the journey itself I found it incredibly helpful to step back and just observe.”

<sup>11</sup> Lilliard, *supra* note 4, and generally, on this age range, at 34–43.

“In any law school classroom, we cannot expect students to have respect for each other’s ideas if we do not treat those ideas with utmost respect.”

B. Stepping back from student writing product and waiting to grade or even mark up papers until I have read several papers.

C. Observing our students at work: studying, writing, or working in small groups.

D. Encouraging our students to detach, pause, and reflect before starting to write, or before taking notes on cases, assignments, or what they are told in the classroom.

E. Trying a silent classroom. One day, and I have not tried this yet, I would like to try setting out a range of materials—perhaps different legal research tools or different types of writing—and telling my students very generally what the overall topic is, and then asking them to walk around, silently, and just study the materials. Some students will rebel against this, but for others, this may be just the atmosphere they need to reflect on what is presented.

##### **5. Respect each other, the classroom, and the materials.**

A final and quite striking aspect of both the journey and the Montessori curriculum is a “practice what you preach” concept that manages to teach ethics and good behavior through kind leadership. Even the youngest students are taught courtesy and respect through example: each tot is greeted with a handshake and a “good morning” and when they offer snacks to each other, they say “yes, please” and “no, thank you.”

In any law school classroom, we cannot expect students to have respect for each other’s ideas if we do not treat those ideas with utmost respect. Here is where the Socratic method gone awry—as it can—can do more harm than good. In the legal writing classroom we have more flexibility in how we approach various topics, and we have a great opportunity to teach courtesy and respect by example. Of course, not every idea will be right, and we will all have students who need to be taught how to be respectful in the classroom, but we can lead the classes in a way that allows for respect for different ideas. At the same time, as legal writing teachers we face the tough task of often being the first ones to comment on and grade student papers. We should think about how we do that, and how we can educate and correct

while still maintaining—and demonstrating—respect for our students.

Students should also be reminded that others use the same sources they use, and work in the library should be put back so that others may use it. It’s a basic principle, and it should be something students have heard all their lives, but it may be worth repeating in the legal writing classroom. Most of us spend time worrying about plagiarism, and our students need to be taught how they can spot potential problems and avoid them. Even more than that, the legal writing classroom can teach students the underlying ethical guidelines and the basic premise of respect: respect for other people’s ideas.

### **Conclusion**

Obviously, practical constraints limit what we do. I can spend more time understanding each student’s style and abilities, evaluating the student, and meeting outside of class if I have 20 students rather than 40. I am lucky to be part of a four-semester legal writing program<sup>12</sup> but many of us are not. We need time also to think about how to adopt new and interesting approaches in the classroom and to do that, we need to have summer educational grants and institutional support. To extend the idea of respect beyond teacher and student, we need to be in positions where our colleagues respect us. All of these things can make a positive impact on our students.

As I finished my Montessori Journey at the school, like most of the parents, I was bubbling with energy and enthusiasm, curious to learn more, and anxious to try some of these methods on my own. As my students go through their law school journeys, I want to find ways to help them feel that way about the law.

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<sup>12</sup> We have moved back to a four-semester required program at JMLS after our experiment in a three-semester required program proved to be less successful than we had planned. For a description of our three-semester program, see Sonia Bychkov Green & Maureen Straub Kordesh, *And Now for Something Completely Different: Lessons Learned in Revising the Legal Writing Curriculum*, The Second Draft, May 2002, at 6.

## DESIGNING AN LL.M. CURRICULUM FOR NON-WESTERN-TRAINED LAWYERS

BY MARIAN DENT

*Marian Dent is the Dean of Pericles, the American Business and Legal Education Project in Moscow, Russia.*<sup>1 2</sup>

*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.*

American law firms in Moscow look to American LL.M. programs to train lawyers they will hire. They find that legal training in Russia and the former Eastern Bloc nations does not prepare law students for the type of practice that they will encounter in their new legal environment. Instead, they often require an American LL.M. of their associates. Yet, they have been disappointed in many of those programs, especially their lack of training in writing.

<sup>1</sup> Pericles is a Moscow-based LL.M. program designed to educate Russian lawyers in Western legal thinking and Western standards of private law practice. Marian Dent canvassed expatriate lawyers in Moscow to determine what a graduate law program should include.

<sup>2</sup> This article is the first of a projected series on designing curriculum for non-Western-trained lawyers and for international law students studying in the United States.

The Eastern Bloc legal education system trained its lawyers well for Soviet-style practice. By Soviet-style practice, I mean a system in which very few complex cases arose and in which lawyers did not involve themselves in business planning. Without an extensive system of private property, most questions posed to lawyers were routine matters of applying a detailed law to a personal dispute that easily fit within that law. In fact, the lawyer's trade was not to research and write, but to listen to a client's problem and provide a correct solution, orally, and from memory. One Russian attorney, an academic who in the early days of perestroika had interned for a year in a Washington, D.C., law firm, related a tale of distress when, upon returning home and joining a Russian law office, the managing partner made her remove all her law books from her shelf. He told her that if a client thinks she has to look up the law, the client wouldn't trust her. Plus, if there was no law that squarely covered the client's problem, she was to tell the client that he or she didn't have a case. Another lawyer related an interview experience where, as a job applicant, she was given a test where she was expected to recite certain sections of the civil code verbatim.

Designed for this Soviet system of legal practice, the Eastern Bloc legal education system stressed oral abilities and memorization over written analysis. For the most part, this continues today. Exams are oral. Students are given a list of questions in advance—most of which ask for definitions or recitations of laws and regulations. Then exam questions are chosen at random from this list, and students show off their memorization skills by reciting their prepared answers back to their professors. The professor might ask some questions related to the student's prepared answer, but then again he or she might not.

Very little writing is required in Russian and former Eastern Bloc law schools. Most law schools, to this day, require only one written assignment: a thesis prepared in the final year of their five-year, undergraduate law program. This thesis most often merely summarizes the published opinions of law professors and other scholars on an area of law assigned by the thesis adviser. Advice given the

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“Managing partners of the Moscow branches of several American law offices responded by demanding American LL.M. degrees from their entry-level Russian associates.”

thesis writers centers around recommendations of other experts to read, rather than help with analytical skills and writing.

Managing partners of the Moscow branches of several American law offices responded by demanding American LL.M. degrees from their entry-level Russian associates. The partners perceived that the LL.M. training would instill logical thinking and legal writing abilities. They have been disappointed in the results, however. “These days, an LL.M. just means that the associates expect a higher salary,” one partner told me. “I don’t see it as the guarantee of analytical skills that it should be.” Another expressed disappointment that an associate the firm had sponsored for an American LL.M. appeared to have completed the program without having taken any writing class, and having avoided all first-year U.S. law school courses. “What good is it,” I was told, “if the LL.M. only teaches some American law. The students won’t practice it when they come back here. I need to see skills taught.”

Clearly, LL.M. programs were not fulfilling law firm expectations for international students. The law firms were hoping for some kind of a shortened version of the J.D., particularly an exposure to American-style legal reasoning and writing. But that isn’t always what they got. The LL.M. degree faces the dilemma of the dual purpose. On the one hand, it’s a graduate law degree, providing in-depth knowledge in a particular aspect of American law. But on the other hand, the LL.M. is a first exposure degree or bar exam qualifier for international students. It’s this latter type of LL.M. that the foreign offices of Western law firms are seeking, and that non-Western-trained lawyers need.

Thus, I set out to determine, in detail, what foreign offices of Western law firms wanted to see in returning LL.M. students.

Over the course of two years, my Pericles staff members and I surveyed more than 50 partners and senior associates from 18 Western law firms operating in Moscow, as well as about a dozen lawyers working on rule-of-law development for international and foreign nonprofit organizations. This was not designed as a scientific survey for an article, but merely to learn what it would take to convince law firms and organizations to support

our program and hire our graduates (thus keeping us in business). Although the survey covered only Moscow lawyers, many of the lawyers I interviewed had practiced in several international offices, and expressed the same feelings about LL.M.s in former Soviet and other non-Western countries where they had worked.<sup>3</sup>

We found three needs with which there was almost universal agreement:

- (1) the need for writing courses that stress analysis;
- (2) the need for first-year Socratic method courses; and,
- (3) the need for a grading system on a par with that of J.D. students.

“Writing, writing, and more writing” was the comment I heard from a former managing partner of one large firm’s Moscow office in response to a question about what LL.M. programs should include. This was the most frequently expressed idea among all the attorneys interviewed. They mean, particularly, analytical writing and the ability to put together memoranda and client letters explaining complex nuances of law.

<sup>3</sup> We interviewed some lawyers orally, and requested a written survey only of those who seemed like they had the time or would be amenable to completing it. We skewed our interviews and surveys toward managing partners and those making hiring decisions over other lawyers in their firms or organizations. Because most of the Western firms here have an American or English lawyer in charge, the purpose of our survey meant that we spoke more to expats than to Russian lawyers. We also talked to more people at bigger law offices (those more likely to have openings for our graduates) than at those with smaller Moscow operations (which in turn skewed the results more to commercial than nonprofit practices). And because we were proposing an American LL.M., we dealt more with American firms and firms from England than with firms and organizations from civil law countries. In interviewing people, we either proceeded from the simple question of what courses the lawyers thought would be important for an LL.M. program (especially for one in business law) or we presented a list of suggested courses and asked the lawyers to mark which were most and least important, and to add in anything we had missed. Then we asked for open-ended advice about what knowledge they sought in LL.M. graduates/employment candidates, and how they would structure an LL.M. program for such candidates. As we progressed, we began to vet suggestions from earlier interviewed attorneys through our interviews with other attorneys, discarding suggestions with which most people disagreed. Occasionally we went back to the same lawyers to vet the comments of the later interviewees.

Writing is a skill often ignored in LL.M. programs. The partners and associates I interviewed said that they would structure an LL.M. program with a greater emphasis on analytical writing skills. Those who had taken the trouble to look at applicant transcripts were chagrined that many LL.M. graduates had no writing courses on their transcripts, or had only an “Intro to American Law” course, in which the students had touched on writing and analysis in the context of writing for law school exams, rather than in the context of professional work. The interviewees commented favorably on the few LL.M. programs that contained strong writing components.

English language was not considered a major problem in LL.M. graduates’ writing styles. The lawyers I spoke with emphasized logical analysis in writing more than grammar or syntax. This was more so in bigger firms than in smaller ones, as the bigger law firms have professional translators and English language editors who review associates’ work before it appears on the partners’ desks. But even in the smaller firms and public organizations I spoke with, the perception was that language usage works itself out over time. Moreover, associates with weaker language skills were simply given more writing tasks in their native language, whereas the analytical skills taught in good legal writing classes benefited even students who were writing in Russian.

Opinion was somewhat divided, however, on the value of a thesis, required for many LL.M. programs. While all agreed that legal writing classes were needed whether or not the LL.M. program had a thesis requirement, some felt that the thesis benefited students by requiring them to apply their newly learned writing skills in depth, under the guidance of a professor accustomed to Western standards of legal analysis and attribution.

Opinion was also divided on the value of “paper courses” over “exam courses” in developing writing skills. Because course papers often require students to analyze the law in the abstract, several lawyers felt that the exercise of writing law school exams on hypothetical legal situations was more beneficial for LL.M. students. Some commented that doctrinal course papers were not subject to the same type of evaluation that legal writing

course papers received, and so were not nearly as valuable. Others, however, felt that the time pressure of exams was not helpful for LL.M. students, as it created artificial conditions that foreign students would not meet again in practice unless they decided to take a bar exam. Most felt that the optimal requirement would be courses with take-home exams or papers based on hypothetical legal problems. But again, the response was uniform in holding these to be no substitute for legal writing courses.

Finally, I noted a distinct lack of enthusiasm for having LL.M. students learn American legal research skills. One interviewee went so far as to suggest that LL.M. students only be required to write closed universe memoranda in their legal writing courses. This opinion was an extreme. Others would de-emphasize research in comparison to analysis, but would stress computer-based research over book research. One former managing partner explained it in practical terms: the firms expect associates with American LL.M.s to know the basics of American legal research and to be able to do it in a pinch, but not much more. Foreign associates are employed to write about their home country’s law in terms that Western clients will understand. If a U.S. research problem arises, the most efficient solution is to use an American J.D. (if one is available in the country) or to farm the work out to a U.S. branch office. Sometimes the exigencies of a particular case, the needs of a particular client, or a firm’s billing practices require that LL.M.s are assigned to do U.S. legal research, but it isn’t a very frequent occurrence. Even if a foreign lawyer has passed a U.S. bar, everyone understands that his U.S. research skills won’t be as honed or up-to-date as those of a U.S.-based associate or those of a J.D. earned in the United States.

On those occasions when a Russian associate does research U.S. law, he or she will use the Internet. Foreign offices have neither the space nor the need for an extensive library of U.S. legal materials. Keeping an extensive U.S. law library in foreign offices is a costly and inefficient proposition.

In sum, the firms want to see LL.M. students take writing courses that emphasize analysis over language and over research. To the extent that

“Foreign associates are employed to write about their home country’s law in terms that Western clients will understand.”

“The lawyers completing the survey generally agreed that LL.M. students should be graded on a par with J.D. students.”

research is taught, they want computerized research emphasized. A master's thesis is not considered an adequate substitute for good legal writing courses.

The second mandate of the attorneys we interviewed was that LL.M.s should be required to take at least one first-year, Socratic-style course. Again, this harks back to the emphasis on analytical skills. The lawyers with whom I spoke unanimously agreed that the Socratic teaching method of American law schools was what made them value an American LL.M. degree over a European or even a British equivalent.

Just behind the lack of writing courses in the expat lawyers' complaints about American LL.M.s was the phenomenon of LL.M. students who take only advanced courses. An LL.M. student thus can conceivably avoid any courses that develop analytical skills.

Frankly, writing courses can teach foreign LL.M. students only a small portion of the analytics they need. While legal writing teaches how to express analysis to a client, the first-year curriculum's game of daily being forced to pick apart three or four cases and to respond to a professor's hypothetical variants of those cases etches the brain with the skills that the writing courses study more formally. When no first-year doctrinal courses are required, LL.M.s don't necessarily develop the first-year skills that the mythical Professor Kingsfield called "thinking like a lawyer."

The lawyers completing the survey generally agreed that LL.M. students should be graded on a par with J.D. students. They want to see a criterion by which they can evaluate an applicant's credentials against a standard that they know. When an LL.M. program puts its non-Western students on a separate curve it does those students a disservice.

Employers need this criterion because Russian law schools don't provide it. Russian law schools have no strict curve that professors follow: most students get 5's and 4's (the equivalent of A's and B's). In addition, exam retakes are possible. If a student gets a 3 or 2 (C or D) chances are he or she will ask the professor to retake the exam. Some law schools even have a set fee that they charge a

student for a retake. Moreover, in a Russian oral exam, the result is often based more on whether the professor likes you (or whether you gave him a bottle of vodka on Veterans' Day) than on whether you know the material. So, in short, it's rare to see a Russian law student with low grades. (That's something to think about when admitting students to your LL.M. program.)

This leaves the employers trying to choose between five or six candidates, all from top law schools, and all with top grades. The human resources coordinator of one top firm was asked to compile a list of which top 20 LL.M.s had separate grading and which did not. She was told to ignore the LL.M. transcripts from schools with separate grading in evaluating the applicants' credentials. Naturally, the expat lawyers look to LL.M. grades as their salvation, recalling the strict curve and class ranking that they worried about so much when they were students.

A related factor is that international law firms want to see LL.M. graduates who have studied together with J.D. students, rather than in separate courses or separate sections. We heard, time and time again, that half the value of hiring an LL.M. graduate is the firm's ability to compare that graduate with American or European law school graduates. In sum, employers want to see competitive grades from regular law school courses. Such programs will give non-Western students studying in the United States the most value for their degree when they return home.

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## REINING IN FOOTNOTES

BY LOUIS J. SIRICO JR.

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One of my students has informed me that according to an unwritten rule, a student comment with fewer than 80 pages of footnotes will never see publication in our school's law review. This rule compels me to recall the words of Professor Fred Rodell: "[T]he footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes. Any article that has to be explained or proved by being cluttered up with little numbers until it looks like the Acrosses and Downs of a crossword puzzle has no business being written."<sup>1</sup> Throughout the law school world, footnote mania seems to be pandemic.

In almost any student-run law review, a glance at student pieces reveals footnotes occupying at least one-third to one-half of the typical page. Moreover, law professors seeking offers of publication have long realized that their chances of success depend upon giving student editors what they want: among other things, an excess of footnotes.

This article addresses two questions. Why has the revolution in teaching first-year legal writing failed to help solve the problem? What can legal writing faculty tell law review students about the proper role of footnotes?

In first-year legal writing courses, students typically hone their writing skills by drafting memoranda of law, appellate briefs, and other documents that practitioners craft. At most law

schools, the students include citations within the text of their documents and rarely insert a footnote. They do not include discussions about side issues; instead, they stay focused on their issues. Moreover, they do not write academic articles. In drafting lawyering documents, they learn to cite authority for legal propositions according to a functional theory about citation:

- (1) Cite authority to identify a source of a quotation; a source of law, usually a case, statute, or regulation; or a secondary authority that supports an argument.
- (2) In identifying sources, cite only to direct authority, when available, as opposed to secondary sources that discuss the authority.
- (3) Cite only as much authority as is necessary to justify your statements. If you need to cite more than one source for a proposition, you rarely need to cite more than three sources.

### A Preoccupation with Footnotes

When students move on to writing for law reviews, they seem to believe that their new enterprise is such a unique endeavor that the lessons of the first-year legal writing course do not apply. At an orientation meeting for the law review, an editor tells them that they must write long footnotes offering extensive discussions of every collateral topic imaginable. (Perhaps I exaggerate, but only slightly.)

The editor also tells the students to write concise sentences, because finances permit the law review to publish only a certain number of pages, and long sentences waste pages. The result is articles brimming with nominalizations and other unfortunate devices that make the prose hard to digest. Yet, ironically, a competing law review policy results in space wasted on excessive footnotes.

Thus, the philosophy of writing that students learned in the first year is relegated to the first year and perhaps to some upper-level skills courses.

Student editors may protest that these footnotes are necessary for a complete discussion of the topic at hand. However, the editors might discover a different viewpoint if they were to leave

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<sup>1</sup> Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 41 (1936).

“Editors are rookies in the academic world. They attempt to compensate for their inexperience by demanding an inordinate number of elaborate footnotes.”

the law library and pass through the doors of the campus library. There, they might peruse scholarly journals in a variety of challenging fields and find that the ones permitting footnotes allow them only to identify the source of a quotation, a finding, or an idea.

Why have law reviews moved to this bizarre direction? My theory is that the problem stems from a lack of self-confidence on the part of the law review editors. Editors are rookies in the academic world. They attempt to compensate for their inexperience by demanding an inordinate number of elaborate footnotes. Unfortunately, this preoccupation may lead them to fiddle with footnotes instead of grappling with the text.

### A Primer

It is past time to rein in footnotes. Instead of adhering to the wooden rule that more is better, legal writers should adopt a functional approach: use footnotes when you need them. Here is a primer.

**The Principle:** The reader should be able to understand the text without having to read any footnotes. Thus, footnotes give additional information, but not information necessary to understand the meaning of the text.

**Rule I:** Use footnotes to provide supporting authority for statements in the text. Use a footnote to:

- provide the citation to a case, statute, regulation, secondary authority, or similar authority that you mention in the text.
- cite to the source of a quotation or a paraphrase of a quotation.
- cite to the source of an idea or conclusion that did not originate with you. (Deciding when an idea or conclusion is significant enough to require citation is often a judgment call.)

**Rule II:** Use footnotes to carry on a discussion collateral to the text, that is, a discussion that elaborates on the text, but is not essential to understanding the text. A collateral discussion may:

- provide a brief bibliography of relevant sources.
- explain more fully information or statements in the text.

**Rule III:** Include collateral discussions only when they will truly help the reader. Avoid discussions that are unnecessarily extensive or very peripheral to the discussion in the text.

### An Example

To explain sound practice in footnoting, I offer this example. I repeat the first three paragraphs of this article; However, I insert footnotes at the end of almost every sentence. In each footnote, I explain whether I would include a footnote, and, if so, what information I would include in the footnote.

One of my students has informed me that according to an unwritten rule, a student comment with fewer than 80 pages of footnotes will never see publication in our school's law review.<sup>1</sup> This rule compels me to recall the words of Professor Fred Rodell: “[T]he footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes. Any article that has to be explained or proved by being cluttered up with little numbers until it looks like the Acrosses and Downs of a crossword puzzle has no business being written.”<sup>2</sup> Throughout the law school world, footnote mania seems to be pandemic.<sup>3</sup>

<sup>1</sup> I could cite to my “interview” with the student. However, the name of the student would be of no interest to the reader; therefore, the citation would not be worth the ink. If identifying the student would be meaningful to the reader, I would include the footnote.

<sup>2</sup> Because I quoted a source of interest to the reader, I must cite to the source: Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 41 (1936).

<sup>3</sup> Here, I could include citations to numerous articles criticizing law review practices and insert pinpoint citations to discussions of footnoting practices. Three citations should be enough. However, if I believed that I should use the footnote to provide a full bibliography on the subject, I would use the footnote for this purpose. This sort of bibliographic footnote is an unfortunate peculiarity of law reviews.

In almost any student-run law review, a glance at student pieces reveals footnotes occupying at least one-third to one-half of the typical page.<sup>4</sup> Moreover, law professors seeking offers of publication have long realized that their chances of success depend upon giving student editors what they want: among other things, an excess of footnotes.<sup>5</sup>

This article addresses two questions. Why has the revolution in teaching first-year legal writing failed to help solve the problem?<sup>6</sup> What can legal writing faculty tell law review students about the proper role of footnotes?<sup>7</sup>

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**“When reading a footnoted opinion one’s eyes are constantly moving from text to footnotes and back again. ... If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane.”**

—Abner J. Mikva, *Goodbye to Footnotes*,  
56 U. Colo. L. Rev. 647, 648 (1985).

<sup>4</sup> A typical footnote might include examples of articles with extensive footnotes or even a full-scale empirical study of footnotes in law reviews. I believe that the statement in the text is self-evident and would not include this footnote.

<sup>5</sup> I might include a footnote if I could easily find a source that supported the statement. If not, I would not bother to engage in a lengthy research foray, because the statement in the text would surprise no academic reader and thus is self-evident.

<sup>6</sup> This footnote could be either of two types. The first type would direct the reader to a later section of the article discussing the topic (“*See infra* note 68.”). This sort of footnote is padding. The second type would be an extensive footnote on the history of legal writing pedagogy with reference to textbooks in the field, pinpointing their respective discussions of footnotes and including parenthetical descriptions of those discussions in each book. I view this footnote as unnecessary.

<sup>7</sup> Like the preceding footnote, this footnote could be one of two types. The first type would unnecessarily direct the reader to a later section of the article discussing the topic. The second type would cite to articles and books in the legal writing field that discuss guidelines for including and drafting footnotes. Although this discussion might be relevant, I would reserve judgment this early in the article. I would wait until later in the article to find a location offering a developed discussion of the topic. I would include parentheticals after citations only when necessary.

“Those using the relay approach benefit from the division of labor. They attain expertise because of specialization and save time because of efficiency.”

## THE “RELAY” TEAM-TEACH APPROACH: COMBINING COLLABORATION AND THE DIVISION OF LABOR TO TEACH A THIRD SEMESTER OF LEGAL WRITING

BY WILLIAM Y. CHIN

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### I. Introduction

Busy legal writing professors can add a third semester of legal writing (i.e., an advanced legal writing course) to their teaching load by using the “relay”<sup>2</sup> team-teach approach. Not all law schools provide a third semester of legal writing, and “[m]ost LRW programs are only two semesters by default, not design.”<sup>3</sup> But by using the relay team-teach approach, a third semester can be designed with collaboration and the division of labor as key components.

The relay approach uses the division of labor concept by dividing a class into units with each legal writing professor individually teaching one unit and then handing the class to the next professor, much like a relay race with a runner running one section of the track and then handing the baton to the next runner.

<sup>1</sup> I thank Legal Writing Professor Sandy Patrick for initially developing a workshop on team teaching that led me to write this article. I also thank Legal Writing Professor Anne Vilella for her insightful views on team teaching.

<sup>2</sup> Gail Riddell, *Team Teaching vs Relay Teaching*, Tag Newsletter, Sept. 1992, at <www.tag.ubc.ca/resources/tapestry/archive/92/s921.html>. “Relay” is interchangeable with other terms. One is “serial.” James R. Davis, *Interdisciplinary Courses and Team Teaching* 7 (1995). A second is “tag.” U. Western Ont., Teaching Large Classes, at <www.uwo.ca/tsc/tlc/lc\_part3d.html#01> (last visited July 15, 2004). A third is “take-turn.” Barbara Leigh Smith, *Team-Teaching Methods*, in *Handbook of College Teaching: Theory and Applications* 127, 133 (Keith W. Prichard & R. McLaran Sawyer eds. 1994).

<sup>3</sup> Randall S. Abate, *The Third Time Is the Charm*, The Second Draft, May 2002, at 7.

Although the division of labor, by dividing the work among individuals, seems to emphasize the individual, the individual actually is part of a team. Collaboration exists because “[c]ollaboration means working together for a common end,”<sup>4</sup> and legal writing professors do work together in planning, teaching, and evaluating a third-semester course with the common end of providing critical legal skills to students.

In our program, we use the relay approach to teach an elective advanced legal writing class in the fall and spring semesters. It is a three-credit seminar class with up to 16 students. The course begins with an “Introduction” class and ends with a “Reflection” class, and in between consists of a “menu”<sup>5</sup> of four units: (1) statutes, (2) contracts, (3) judicial opinions, and (4) legal correspondence (along with an “oral presentations” component at the end). Our choice of this menu of units “recognizes that professional writing spans a variety of documents . . . and gives all students the value of a writing survey.”<sup>6</sup> An equivalent number of class days are allotted to each unit. Each unit includes an in-class peer review session and one major writing assignment (consisting of a draft and then the final paper). At the end, students fill out class evaluations for each professor.

### II. The Advantages of the Relay Team-Teach Approach

Those using the relay approach benefit from the division of labor. They attain expertise because of specialization and save time because of efficiency. Terms such as “specialization” and “efficiency” create an image of professors as mere classroom automatons. But concern that the division of labor will dehumanize professors is unfounded because “[f]aculty are not, clearly, replaceable parts of a machine” but are instead “autonomous individuals.”<sup>7</sup> They are not

<sup>4</sup> Mary Susan E. Fishbaugh, *Models of Collaboration* 4 (1997).

<sup>5</sup> See Abate, *supra* note 3, at 7.

<sup>6</sup> Nancy Soonpa, *A Retrospective on Three Teaching Experiences*, The Second Draft, May 2002, at 4.

<sup>7</sup> James L. Bess, *Tasks, Talents, and Temperaments in Teaching*, in *Teaching Alone, Teaching Together* 24 (James L. Bess ed. 2000).

“confined to a very few simple operations”<sup>8</sup> but can, instead, in a relay team-taught course, freely shift from unit to unit. The opportunity to move from unit to unit avoids the problem of demoralization and dehumanization.<sup>9</sup> Thus, the potential problems associated with the division of labor are avoidable while its advantages are significant and benefit professors and students.

#### A. The Expertise Advantage

The division of labor creates “many advantages” and one advantage, according to Adam Smith, is that “[e]ach individual becomes more expert in his own peculiar branch.”<sup>10</sup> This is true for legal writing professors team teaching a course that is divided into several units. A team member teaching the “statutes” unit, for example, focuses on statutes to the exclusion of other subjects and this specialization leads to expertise in that subject. Further, the shortened teaching period (e.g., one quarter of the class if there are four units) allows a team member to expend extra effort during the short teaching period without fear of “burning out.” For the team member teaching the statutes unit, the extra effort could, for example, be helping a legislator draft a bill. Such extra efforts, made possible by the division of labor, further develop a team member’s expertise.

The expertise generated by the relay approach benefits not only professors, but also students. After all, “people with specialized knowledge and skills are the best source of ‘opinion’ about a particular domain, and lay people (for example, students) can learn by questioning them to test their wisdom.”<sup>11</sup> This “question and answer” process occurs in law school. Thus, students benefit from professors with expertise who can confidently answer their questions, and the relay team-teach approach provides such expertise. As one third-semester student noted, “The team approach provided an opportunity for the students to have a professor with more expertise or experience in an area than would have probably been possible had there been only one professor.”

<sup>8</sup> Adam Smith, *The Wealth of Nations* 987 (Edwin Cannan ed. 2003) (1776).

<sup>9</sup> Bess, *supra* note 7, at 24.

<sup>10</sup> Smith, *supra* note 8, at 18, 22.

<sup>11</sup> Bess, *supra* note 7, at 241.

#### B. The Timesaving Advantage

The division of labor saves time. The “subdivision of employment in philosophy ... [and] every other business ... saves time,” stated Adam Smith.<sup>12</sup> Likewise, in education, “[t]eam teaching saves time,”<sup>13</sup> especially if a relay team-teach approach is used. Saving time is important because educators often complain about their lack of time,<sup>14</sup> and this complaint is echoed by legal writing professors.<sup>15</sup> The lack of time might be a reason why a third semester is not offered. If so, the relay approach provides a possible solution. In a four-unit course, the relay approach requires a time commitment of merely one-quarter of the semester from each team member because the teaching is divided among four team members. Of course, “one quarter” is an approximation because educators are not assembly line workers producing a fixed product in precise amounts within precise time frames. Also, collaborative activities such as team meetings do take time. But a team member responsible for teaching a part of the course saves time by preparing curriculum, teaching classes, meeting with students, and grading assignments for only that part of the course. Thus, “[a] three-semester program can be structured so that workloads are manageable for ... instructors,”<sup>16</sup> permitting them to provide a third semester that might not otherwise exist.

### III. Planning and Teaching a Relay Team-Taught Course

Careful planning is vital to the success of a relay team-taught course. Careful planning ensures that classes proceed smoothly despite the potential for confusion due to multiple professors teaching the course. Careful planning also ensures that the separate units form a unified, coherent whole. The

<sup>12</sup> Smith, *supra* note 8, at 18.

<sup>13</sup> Nicholas C. Polos, *The Dynamics of Team Teaching* 12 (1965). But some argue that “[t]eam teaching is not a timesaver.” Judith A. Winn & Trinka Messenheimer-Young, *Team Teaching at the University Level: What We Have Learned*, 18 *Tchr. Educ. & Special Educ.* 223, 228 (1995).

<sup>14</sup> Winn & Messenheimer-Young, *supra* note 13, at 226; Fishbaugh, *supra* note 4, at 12.

<sup>15</sup> See Linda Edwards, *A Chance to Teach Analytical Skills Intentionally and Systematically*, The Second Draft, May 2002, at 1.

<sup>16</sup> Abate, *supra* note 3, at 7.

“Careful planning ensures that classes proceed smoothly despite the potential for confusion due to multiple professors teaching the course.”

“The objective is not to produce identical units devoid of creative variety, but to create enough similarities among the units to develop a reassuring rhythm for students ...”

importance of careful planning is shown by the negative experience of one university where a team of five to nine faculty members team-taught an introductory course in architecture using the relay approach. Students complained about faculty members failing to coordinate and communicate with each other. The students encountered “a poorly organized curriculum, lack of clear expectations, and . . . gaps and redundancies in the reading, the presentations, and the assignments.”<sup>17</sup> Thus, careful planning is necessary to ensure a satisfactory experience for students and professors, and satisfaction is more likely if the planning recognizes what is required in the pre-class, during-class, and post-class periods.

#### A. The Pre-Class Period

Before the course begins, all team members should meet to, first, agree on a common text to be used in all four units. A common text helps bind the separate units together by serving as a common focal point throughout the course. A common text also provides consistency because it is used in all the units. The chosen text could focus on style such as *Expert Legal Writing*<sup>18</sup> or on substance such as *Writing for Law Practice*.<sup>19</sup> The particular text chosen is less important than having a common text. As one third-semester student stated, “Something that helped the consistency was having the LeClerq [sic] book that all professors made assignments from and references to. Each assignment we turned in had to reference LeClerq [sic], so we had a consistent style guide.”

Second, the team members should create a comprehensive syllabus to ensure curriculum cohesiveness. The syllabus, like the common text, benefits students by serving as a fixed point for them throughout the course. Creating a syllabus forces team members to address the following questions:

1. What subjects will be covered? A variety of subjects are possible including statutes, contracts, judicial opinions, legal correspondence, wills, advanced research, and mediation. Some factors to consider include the needs of the students and the

institution, and the expertise and interests of the professors.

2. How many subjects will be included?

The answer could be three, four, or five. It seems three is the minimum number that still provides sufficient variety, and five is the maximum number that provides variety without overwhelming students with too many subjects and transitions.

3. What is the order of the subjects? The order is flexible. One factor could be the mere scheduling requirements of the professors. Another could be the subjects chosen—that is, perhaps some subjects should be placed first because they serve as an introduction to the other subjects.

4. Who teaches a particular subject? Consider the expertise of the professors. Consider also their preferences. The “preferences of faculty” are important because “individuals whose temperaments are matched to their assigned tasks will perform more effectively (on the assumption that higher motivation and commitment are generated).”<sup>20</sup> But because preferences can change, flexibility is required.

5. What are the reading and writing assignments and the due dates for each unit? One major writing assignment for each unit (in a three-, four-, or five-unit course) should provide students with a manageable workload. Any more and the workload could be overwhelming. Also, provide the same amount of time for assignments to be turned in. These identical aspects ensure fairness and promote course uniformity. The objective is not to produce identical units devoid of creative variety, but to create enough similarities among the units to develop a reassuring rhythm for students that counters disruptions caused by the transitions between units.

#### B. The During-Class Period

If possible, all team members should attend the first class to emphasize the “team” aspect of the course. Students will welcome this additional opportunity to meet with professors because the time they have to become acquainted with professors in each unit is much shorter than in their other classes.

<sup>17</sup> Smith, *supra* note 2, at 133.

<sup>18</sup> Terri LeClercq, *Expert Legal Writing* (1995).

<sup>19</sup> Elizabeth Fajans et al., *Writing for Law Practice* (2004).

<sup>20</sup> Bess, *supra* note 7, at 17.

In the first class, students should be introduced to the relay team-teach approach. This introduction is needed because most students probably have not experienced a relay team-taught course. First, explain that the relay team-teach approach will differ from their other classes, but that certain benefits gained from this approach (e.g., expertise) will benefit them. Second, explain the goal of the course, and that this goal will remain the same throughout the course. The students' realization that the course goal remains the same throughout the course helps them view the course as an integrated package. Third, inform students of the "open-door" office policy allowing students to see any professor at any time and not only during the time when the professor is teaching a unit. "I like being able to ask one professor a question, even if it is not about that professor's [sic] unit, and get an answer from that professor (either the professor knows the answer already or is willing to talk to the other professor[s] to get the answer)," commented a third-semester student. Finally, explain the purpose of having students write their names on a sheet of folded paper placed in front of their desk. It eases the transition between units. As one student stated, "One thing I think helped me was the name placards, so that professor's [sic] did not have to keep asking names, but could still address us personally."

Another simple technique that eases the transition between units is for the professor teaching the last class of the unit to remind students of the upcoming transition to a new unit. The professor can identify the next professor and provide a brief overview of the next subject. "I appreciated on a professor's last day when the professor would remind us it was his or her last day and tell us a little bit about the professor doing the next unit," commented a third-semester student.

For the last class of the course, the professor conducting the class should be the same professor who conducted the first class. The familiar face at the last class will help students achieve a sense of "completeness" for the course. During the last class, the professor should find time to summarize and synthesize. This reminds students of the "big picture" for the course. Time should also be available for students to reflect on their classroom experience. Their reflections, in addition to

providing helpful feedback to the professors, makes them participants in the team-teach process.

### C. The Post-Class Period

After the last class, team members should meet for three reasons. One is to discuss grades. A possible (and simple) grading scheme for a student's *final course grade* is to average the student's grades from the major assignment in each unit. For a student's grade *within each unit*, a uniform grading scheme should be applied by all the team members. Grade factors such as extra points for class participation should be agreed on by the entire team. This uniformity ensures fairness in the grading process.

A second reason to meet is to evaluate the course. Team members can review the text, the syllabus, the assignments, and other parts of the course. They can exchange views on what did and did not work, what should continue, what should be modified, and what should end. The lessons learned can generate ideas on how to improve the next class, and as research shows, more ideas are generated from people working in groups.<sup>21</sup>

A third reason to meet is to foster a "collaborative climate."<sup>22</sup> Such a climate is characterized by trust, and trust produces beneficial results including helping team members "stay focused on the goal," "communicate more effectively," and "be more open to criticism and risk."<sup>23</sup> These characteristics make it more likely that a team-teach effort succeeds.

### IV. Conclusion

A third semester of legal writing is possible through the relay team-teach approach. By gathering a team and then dividing the work among team members, the relay approach combines collaboration with the division of labor. The combination produces a team of interested, expert professors teaching a course that provides necessary legal skills to students.

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<sup>21</sup> Davis, *supra* note 2, at 81.

<sup>22</sup> *Id.* at 94.

<sup>23</sup> *Id.*

“For the last class of the course, the professor conducting the class should be the same professor who conducted the first class.”

## ADVICE ON STATE COURT ADVISORY OPINIONS

BY JOHN P. MCIVER

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*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.*

"Your Most Obedient and Most Humble Servants." So ends the letter of reply from the United States Supreme Court to President George Washington's request for its opinion on the legality of certain actions of the federal government while the United States remained neutral in the ongoing wars in Europe.<sup>1</sup> Yet "obedient" hardly characterizes the justices' response. They refused to answer any of the questions Washington posed to them. Indeed, with their letter, the justices began to formalize the interpretation of the "case or controversy" clause of Article III of the U.S. Constitution, taking a stance that would be repeated many times over the succeeding 200 years. In this view, situations requiring an advisory

<sup>1</sup> Letter from the Justices of the Supreme Court to President George Washington, Aug. 8, 1793, reproduced in Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (1997).

opinion do not present either a case or a controversy susceptible to judicial involvement.

The refusal of the U.S. Supreme Court to proffer constitutional opinions outside a case or controversy does not mean that state supreme courts are unwilling to do so. At present, 10 state courts<sup>2</sup> are required or allowed by their state's constitution to respond to requests for advisory opinions from the state's chief executive and, in most instances, its legislature. The most recent—and noteworthy—example of an advisory opinion was issued by the Massachusetts Supreme Judicial Court in February 2004 in response to the Massachusetts Senate's request for an opinion on the constitutionality of a bill that prohibited same-sex couples from entering into marriage.<sup>3</sup> At least another nine states have allowed their courts to render advisory opinions at various points in their history.<sup>4</sup>

### What Is an Advisory Opinion?

An advisory opinion is not an opinion in the traditional sense, in which the rights of two or more adversarial parties are adjudicated. It is, in essence, an opinion advising what the law would be, based on a hypothetical set of facts. For example, the Colorado Constitution states the circumstances in which an advisory opinion may be issued as follows: "The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives."<sup>5</sup> Opposing parties are not required.

According to *Black's Law Dictionary*<sup>®</sup>, an advisory opinion is "a nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose."<sup>6</sup> As a rule, advisory

<sup>2</sup> Supreme Courts in Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota issue advisory opinions.

<sup>3</sup> In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565 (2004).

<sup>4</sup> At one time or another, the courts of Connecticut, Kentucky, Minnesota, Missouri, New York, North Carolina, Oklahoma, Pennsylvania, and Vermont have issued advisory opinions.

<sup>5</sup> Colo. Const. Art. VI, § 3.

<sup>6</sup> *Black's Law Dictionary*, 8th ed. 2004.

“An advisory opinion is not an opinion in the traditional sense, in which the rights of two or more adversarial parties are adjudicated.”

opinions are nonbinding and nonprecedential.<sup>7</sup> This interpretation is based generally on the theory that advisory opinions are opinions of the individual justices and not of the court itself.

### Use of Advisory Opinions

Why, then, would someone other than the governmental official asking for the ruling consult an advisory opinion? The reasons are several. Examining these intragovernmental communications provides significant insights into the thinking of the members of an individual court on specific points of constitutional law. They may allow for some predictability of the outcome of a pending or future case. The advisory opinion may cause the executive branch to refrain from implementation of a law the justices think is unconstitutional, and save the expense of litigating the point later. The text of advisory opinions can explain state policy and governmental direction. It can offer assistance in the legislative drafting process and the development of additional policies with its “expert advice.” A series of advisory opinions may provide guidance on the historical development of a specific doctrine. The text of an advisory opinion may be equally illuminating to those in other states considering similar actions.

### Reporting of Advisory Opinions

Reporting of advisory opinions varies from state to state. For example, some advisory opinions are published in the same chronological arrangements as other court decisions, and treated in all respects like other decisions. Some are published in supplements or appendixes to the official court reports. Some states maintain a file of advisory opinions, but the text is not included in a more formal print or electronic source. Some advisory opinions do not seem to have been published at all, or were withdrawn after publication, while others came in the form of letters or other transmittals and not as court decisions. In the earliest days of the nation,

<sup>7</sup> The exceptions to this rule are Colorado and, to a lesser extent, South Dakota.

advisory opinions were sometimes delivered orally, in person, by a justice. Further, there may be a combination of the publication styles in any one state, as reporting methods varied from year to year.

Because there is no single reporting style, there is no one method that can be used to locate either one or all advisory opinions from the various states. Earlier researchers have compiled lists of some states’ advisory opinions,<sup>8</sup> but even starting with their results does not guarantee a comprehensive retrieval of all advisory opinions for a specific jurisdiction. Given this situation, it’s easy to see why locating the advisory opinions of a particular court can be a challenge.

### Researching Advisory Opinions

The most important thing to know when searching for advisory opinions from a specific state is where (or how) the opinions were reported. Sometimes this is evident from the citation, if one is in hand. If not, the quickest way to find this out is by contacting the state’s clerk of the supreme court, reporter of decisions, or supreme court or state law librarian. One (or all) of these officials should be able to provide details on advisory opinion reporting and may be able to provide information about already existing compilations of advisory opinions, indexes, or other finding aids.

If the advisory opinions are reported with the other opinions of the court, and if a known

<sup>8</sup> See Albert R. Ellingwood, *Departmental Cooperation in State Government*, App. IV, 269 (1918) for a listing of advisory opinions from 22 states. This remains the definitive work on advisory opinions, despite its date of publication. And see Oliver P. Field, *The Advisory Opinion—An Analysis*, 24 Ind. L.J. 203 (1949), which includes a listing of advisory opinions for Colorado, Maine, Massachusetts, New Hampshire, and South Dakota; John F. Hagemann, *The Advisory Opinion in South Dakota*, 16 S.D. L. Rev. 291 (1971), with a listing of South Dakota’s advisory opinions in Appendix A, p. 306; Terrance A. Smiljanich, *Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 U. Fla. L. Rev. 328 (1972), which lists Florida’s advisory opinions in an appendix, p. 341; Appendix at 227 N.C. 705–726 (1947), which includes a subject matter listing of North Carolina advisory opinions. See also Preston W. Edsall, *The Advisory Opinion in North Carolina*, 27 N.C. L. Rev. 297 (1949), which includes an extensive listing of advisory opinions in its footnotes.

“Examining these [opinions] provides significant insights into the thinking of the members of an individual court on specific points of constitutional law.”

“There is little consistency among the states in their record keeping; however, the more recent the opinion, the more likely it is to be located.”

opinion is needed, then a search as for any other case should return the sought-after advisory opinion. Advisory opinions reported with the court's other decisions should be digested in the West digests. These opinions may be found through the digests' *Descriptive-Word Index*<sup>9</sup> or via a word search on Westlaw® or LexisNexis®, using the subject of the opinion as the search terms. For example, a researcher seeking an advisory opinion regarding some aspect of the election process might use search terms like “elections,” “balloting,” or “voting.” Similarly, if the state's advisory opinions are treated like other court opinions, and if the subject of the advisory opinion is an existing statute, the state statutes should refer to the advisory opinion in the annotations to the statutory section it construes.<sup>10</sup>

If, however, the advisory opinions are published in an appendix or supplement to the state court opinions in an official reporter, they can be much more difficult to locate, even with a citation. These opinions will probably not be included in the West digests or reporters (or not included consistently) and, therefore, most likely they will not be on Westlaw or LexisNexis. To further complicate the quest, it's not uncommon for reprints of the official reports to omit appendix and supplementary materials, making it necessary to have an original or a complete copy of the official reporter (i.e., one that does not omit appendix or supplementary information) to locate advisory opinions.

If the state's advisory opinions are not published with the other opinions of the court or are not included in an appendix or supplement to the official reports, the researcher may have no choice but to contact the state's clerk of the supreme court, reporter of decisions, or supreme

court or state law librarian. One of these officials should be able to assist in locating a locally maintained compilation of the opinions. There is little consistency among the states in their record keeping; however, the more recent the opinion, the more likely it is to be located.

Researching advisory opinions is an adventure in almost every case. Most states that allow for the issuance of advisory opinions do not provide for the uniform or comprehensive publication of the opinions. The information in advisory opinions, however, can be of considerable assistance in a range of situations, making the challenge of finding the documents worth the effort.

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<sup>9</sup> Individual state digests may have a *Descriptive-Word Index* entry for “advisory opinion,” but this is for cases dealing with some aspect of the law of advisory opinions and not for the text of the opinions themselves. There is no topic in the West Digest System that collects the text of these opinions.

<sup>10</sup> The annotations to the state's statutes or constitutional provisions that allow for state supreme courts to issue advisory opinions generally do not cite to the advisory opinions themselves. Rather, they cite to cases construing the statutory or constitutional provisions.

## FROM THE COURTROOM TO THE CLASSROOM: REFLECTIONS OF A NEW TEACHER

BY STEPHANIE HARTUNG

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*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](mailto:sirico@law.vill.edu).*

Seven years as a public defender in Oakland, California, made me nothing if not tough. So last year, when my family moved to the East Coast and the opportunity arose to teach legal research and writing at Suffolk University Law School, I welcomed what I anticipated would be a break from the intensity of my former job. Although I was happy as a public defender and, in many ways, felt that I had found my calling, the work had taken its toll on me. At the same time, I worried that teaching might not invigorate me the same way that litigation had. I wondered if teaching the mechanics of legal writing and analysis to first-year law students could nourish my public defender soul.

As the first day of class approached, friends and colleagues warned me about the difficulties of standing up in front of first-year law students. "Are you sure you want to do this?" I was asked more than once. I shrugged off the questions. Given my litigation background, I felt relatively confident. As a public defender, I had become accustomed to hostility from all directions: the middle-aged client who could not accept that he faced 25 years in

prison under California's draconian sentencing laws, the hostile jurors who regarded me with as much disdain as they obviously felt for my client, the former prosecutor-judge who gave little more than lip service to defense attorneys.

If nothing else, the gritty and often thankless work had given me nerves of steel. As a regular visitor to the county jail, I had grown accustomed to the stench of bologna and cleaning products wafting through the concrete hallways, as the impossibly heavy metal doors clanked behind me. On one occasion, I had represented a man accused of robbing a young woman at gunpoint, where the primary evidence against him was the eyewitness identification by the victim. After several weeks of trial, convinced that my client was innocent, I had stood next to him as the jury read the verdict, nearly immobilized by the fear that I might not be able to prevent an unimaginable injustice. When I heard the words "not guilty," I felt an overwhelming rush of relief and accomplishment. By comparison, talking to a class of first-year law students seemed like a walk in the park. At least no one's life or freedom would depend on me.

My first lecture was a two-hour course overview and law school orientation. Aside from discussing the various components of the course and what would be expected of the students, I planned to introduce them to the American court system and stare decisis—not exactly simple concepts. Knowing the students would be expecting a brief first class, I hoped to keep things light. I planned to share some of my law school and legal practice experiences, and I hoped to open things up to a conversation with the students about their understanding and expectations of law school. While I didn't have a clear idea at the time exactly what kind of teacher I wanted to be, it wasn't my style to be intimidating. I wanted my students to feel comfortable around me so that they would open up in class.

As I walked into the lecture hall to teach my first class, I was far more nervous than I had anticipated. Suffolk has a beautiful, new high-tech facility across from the State House in Boston. The building's façade, with its regal pillars spanning the entranceway, suggests that important things are

“I wondered if teaching the mechanics of legal writing and analysis to first-year law students could nourish my public defender soul.”

“Once I remembered the evolution I had undergone as a law student, I began to see my own students in a new light.”

taking place inside. I walked into a cavernous lecture hall with high ceilings and windows overlooking Boston Common. I hoped that what I had to offer these students would measure up to the weighty expectations of the law school. When I entered the classroom, I was shocked at how quiet the students were. They all looked so serious and stern. I began my lecture, but was surprised by how hesitant most of the students were to engage in any kind of dialogue. One woman toward the front of the room bore her eyes into the desk in front of her, as if fearing that any incidental eye contact with me might result in my grilling her *Paper Chase* style. Many other students peered furiously at the materials I had just handed out, similarly avoiding eye contact at all costs.

As I made my way through the material, I felt increasingly like a bad comic in front of a tough crowd. I was lucky to get a chuckle or a muffled laugh here and there, and only a handful of eager hand-raisers (the type who would draw eye rolls from their classmates before the end of the semester) participated in what I had hoped would be an open discussion. By the time the two-hour class was over, my throat was dry and I was bathed in sweat. Feeling depleted, I started to doubt my ability to be an effective teacher.

In the days that followed I began to think more about my first year of law school. Although it wasn't so long ago, it was strange that I had such difficulty remembering the details of those first few weeks of class. Was it so brutal that I had blocked the whole thing out like an unbearably bad memory? As I spent more time thinking about it, I realized that, in many ways, I had been that woman toward the front of the class, staring down at my desk, paralyzed by the fear that I might be called on and revealed as somehow less capable than my classmates. Although I entered law school as a confident young woman who had done well in college and spent time traveling around the world, the first few weeks of class somehow deflated my confidence. The feeling gradually changed, although I couldn't point to exactly when or how, and by my third year I was much more relaxed and confident and regularly participated in class.

Once I remembered the evolution I had undergone as a law student, I began to see my own students in a new light. Maybe I was a bit easier on them—and on myself—realizing that their reticence was not necessarily the result of an ineffective teacher so much as a product of their own fears and insecurities. Perhaps I had expected too much too soon. I decided the best thing to do was to give all of us a little bit of time to get used to each other. Gradually I started to relax and let my guard down as well. Instinctively, I had been hesitant to reveal personal details about myself to my students, perhaps fearing that if they knew I was the mother of two young children (the youngest born only three months before classes began), they would not take me seriously.

But eventually, without consciously deciding to do so, I did reveal more about myself to my students. I was surprised at the effect it had. Two students confided in me that they were nursing mothers, juggling the pressures of law school with the hormonal roller coaster of new motherhood. Other students began to stop by my office frequently, talking to me about everything from sentence structure to frustration with law school cliques, or just to let me know that something we had discussed in class was coming in handy somehow. I began to feel a real affinity for and connection with my students.

While the triumphs and frustrations I felt my first year of teaching legal research and writing were perhaps less dramatic than those I experienced as a public defender, they were no less meaningful. Probably my most satisfying moment as a teacher came just after winter break. I had rescheduled my night class after a snow cancellation. It was not our usual time or place to meet and I was unsure how many students would show up. It was a minute or two before class was scheduled to begin and only a few students were in the classroom. As I stepped out into the hallway to look for stragglers, I could hear raised voices from the lounge area on the floor below. I looked down over the balcony and there in a cluster was the rest of my class, heatedly debating their spring memo issue—whether an Arab man was properly detained based on an unverified tip alleging

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terrorist activity. In many ways the sense of accomplishment I felt was no less compelling than a not guilty verdict at the end of a jury trial. I knew that I had not only taught my students the fundamentals of legal research and analysis but also somehow managed to get them excited about it.

In the end I found my first year of teaching to be both more challenging and more fulfilling than I had anticipated. And along the way I surprised myself with how much I embraced the role of writing instructor. I never would have guessed that before the year was over I would receive—and actually read—e-mail messages entitled “the power of the semicolon!” Or that I would voluntarily add *Eats, Shoots and Leaves* to my summer reading list. Just the other day, as I read *Babar* to my three-year-old daughter, I was surprised to find myself getting irritated at the author’s repeated improper change of tense. I guess I’ve inadvertently developed the critical eye of a writing instructor as well. While there are days when I miss the rush of my old public defender life, I’m continually surprised at how much satisfaction I get from the student connections I’ve made and the knowledge that my course has made a difference—however small—in their lives.

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“In many ways the sense of accomplishment I felt was no less compelling than a not guilty verdict at the end of a jury trial.”

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“Who dares to teach must never cease to learn.” — John Cotton Dana. In 1912, Dana, a Newark, N.J., librarian, was asked to supply a Latin quotation suitable for inscription on a new building at Newark State College (now Kean College of New Jersey), Union, N.J. Unable to find an appropriate quotation, Dana composed what became the college motto.

—*New York Times Book Review*, Mar. 5, 1967, p. 55.

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## TALKING TO STUDENTS ABOUT THE DIFFERENCES BETWEEN UNDERGRADUATE WRITING AND LEGAL WRITING

BY ANNE ENQUIST

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*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](mailto:ame@seattleu.edu).*

Dear new law students,

When a person embarks on a new challenge such as law school, it is often a good idea to ask those who have gone before you what it is that they know now that they wish someone had told them then. At the risk of depriving you of discovering this for yourself the hard way, I thought I'd share a few observations about the similarities and differences between undergraduate writing and the writing you'll do for your legal writing classes.

If you are a typical law student, you probably wrote numerous papers as an undergraduate. Consequently, you will be inclined—consciously and subconsciously—to draw on the experiences you had with these undergrad papers when you are writing “papers” in law school. After all, you must have been a successful undergraduate student if you are now a law student, so it makes perfect sense to apply what worked before to the writing assignments you have now, right?

Yes and no. Yes, there are things that you learned about undergraduate writing assignments that will carry over into law school writing assignments, things like planning, time management, outlining, revising, editing, and proofreading. But there are also things that are quite different, and I don't just mean citation form. First and most important is the difference in the writer-reader relationship. Undergraduate writing has an unusual, even artificial, writer-reader relationship: The writer is usually the novice in the subject matter, and the reader is the expert. The student learning the subject is writing for the professor who has advanced degrees in the subject. This relationship is, of course, backwards. The normal writer-reader relationship is just the opposite: The writer is the expert writing for a less informed reader. In fact, the reason why the writer is writing is that he or she knows more about the topic than the reader, and the reason why the reader is reading is that he or she wants the information the writer has to share.

Now think for a minute about how the artificial undergraduate writer-reader relationship changes a number of things. The undergrad writer is writing not to really inform or explain; instead, he or she is writing to fulfill a requirement, to impress the professor reader, and to get a good grade. And how do you get the good grade? Not by making the typical points that the professor has already read in hundreds of other student papers. You got the “A” by making the “creative” point, by offering up the unusual insight, maybe even something that professor had not already thought about or read about. The unwritten rule that most successful undergrad writers have absorbed is that the secret to getting good grades on papers is to dress up your ideas; make them seem more sophisticated than they really are. In short, make simple things seem complex.

Second, how about your research? Undergrad writers are rewarded for doing extensive research, so naturally they want to make sure that their professor knows just how much work they did. The natural tendency then is to cite to every conceivable thing they found, no matter how tenuous the relationship is to the topic. Real-world

“Undergraduate writing has an unusual, even artificial, writer-reader relationship ...”

writing also rewards comprehensive research,<sup>1</sup> but in the real world readers don't want to know everything the writer learned while researching. Real-world readers expect writers to be more selective, to synthesize the relevant material, and to avoid taking them down every blind alley they stumbled upon on the way to determining what matters and what doesn't.

And don't forget that because the undergrad writer is a novice in the field being written about, he or she is also very likely to quote extensively in order to be sure to get the information right. The tendency toward over-quoting seems directly related to the extent of the writer's lack of confidence about the subject matter. Over-quoting during one's undergrad days had the double benefit of bringing lots of expertise that the writer doesn't have into the writing all while adding length!

Which brings us to my third point: how about length? It is no secret that many undergrad writers pad their writing to meet the length requirements of assignments. Some undergrad professors have been known to reward students who write very long papers. At times it may even seem like undergrad writers are getting "paid" by the word. The longer the paper, the more likely it is to garner a high grade. In real-world writing, things don't usually work that way. If the writer becomes wordy or fails to get to the point, the reader is likely to become impatient and annoyed; he or she may even stop reading. Legal writing adopts the real-world writing point of view about length, which is "I'm busy. Tell me what I need to know and then stop writing."

In short, while undergrad writing strategies made perfect sense given the writer-reader relationship and the overall undergrad writing situation, writing in law school is likely to be different. Although the writing still occurs in a school situation, the professor will probably be role-playing the real-world reader—either a

supervising attorney, a judge, a client, or opposing counsel. Consequently, your legal writing assignments will require you to write for this simulated reader and not for the legal writing professor. Admittedly, the assignments will still be academic exercises and you as the writer will be the novice and the legal writing professor will be the expert. The difference, of course, is that the legal writing professor will be reading and evaluating your writing from the perspective of the real-world reader. Put another way, while the unspoken goal of undergrad writing may have been to make simple things seem complex, the goal in most legal writing is to make complex things seem simple.

Does this mean that your undergraduate education did you a serious disservice and ill-prepared you for law school and the practice of law? Not at all. It just was a different writing situation, and the quicker you grasp the salient differences, the less frustration you'll have about one of the most important and most challenging things you learn in law school: to be an effective legal writer.

Good luck and have a great year.

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“[W]hile the unspoken goal of undergrad writing may have been to make simple things seem complex, the goal in most legal writing is to make complex things seem simple.”

<sup>1</sup> Although sometimes the time constraints and limited resources mean that you have to curb your impulse to research a topic to death.

## CLIENT COMMUNICATIONS: DESIGNING READABLE DOCUMENTS

BY GREGORY G. COLOMB AND  
JOSEPH M. WILLIAMS

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

Under the best of circumstances, communicating complex legal matters is difficult, even when your reader understands the law and can think them through clearly and objectively. But that difficulty is multiplied when the reader does not grasp the legal issues or, worse, has no real interest in them—indeed, may even recoil from an objective discussion that threatens personal or professional loss. These are some of the obstacles that make writing for clients a demanding skill that too few lawyers ever master. But perhaps the greatest obstacle is not in clients but in the lawyers themselves.

To communicate well with clients, you have to write in ways that accommodate your client's needs and limitations. To do that, you have first to address your own, in at least two ways. First, you must learn to be more explicit than will feel natural or even tolerable, in both your language and your explanations of the underlying bases of your reasoning. Few clients will fully understand all of your terms and concepts, and even those who do rarely think like lawyers. It is challenging to explain the distinctive logic of the law, a logic that, though you learned it through hard struggle, now seems so natural. Lawyers sometimes think: *My task will be so much easier if I can just teach my clients a little law.* But that is a vain hope. So you have to adapt your documents—and your thinking—to fit them.

Second, you must learn to see each issue from the client's view. Clients ultimately will rarely share your perspective on any legal issue. Their final commitment is not to the law, but to their own

advantage. They usually want immediate solutions and rarely care about your respect for the full nuance and complexity of the law. What lawyers judge to be the most admirable legal writing makes most clients roll their eyes and think of lawyer jokes—and then to demand: *Just tell me what to do*, or worse: *Find a way that I can do what I want*, or worst of all: *Don't let me lose what I've got.*

In our last column, we explained how you can accommodate clients' needs with a style that is true to the law but accessible to them.<sup>1</sup> In this one, we show you how to organize documents in ways that help clients understand your legal reasoning and advice from their distinct perspective.

### The General Principles

There are six basic principles for creating a coherent organization in documents for any professional setting:

#### Offer Readers a Framework for Understanding

1. Create a relatively short opening segment that prepares readers for the story and argument to come.
2. State (or at least forecast) the point of each document at the end of its opening segment.
3. If the document is long, offer a road map and briefly summarize the parts.

#### Offer Readers Lots of Visual Road Signs

4. Divide the body into distinct sections. Arrange them in an order that helps readers see their connections, and be sure that readers recognize the principle behind that order before they read on and then are reminded of it as they go.
5. Design each document so that readers can immediately identify (i) where the introduction to the document ends, (ii) where its conclusion begins, and (iii) where each major section begins and ends. You do that most effectively by using headings and white space, but those key junctures should also be clear from your language.

<sup>1</sup>Client Communications: *Delivering a Clear Message*, 12 Perspectives: Teaching Legal Res. & Writing 127 (2004).

### Repeat for Larger Segments

6. Repeat the first four principles for every section and then again for every subsection longer than two pages: Create for each section and subsection (i) a short opening that frames the segment that follows, (ii) a sentence at the end of every opening that states the point of its segment, and (iii) distinct subsegments arranged in a useful and evident order. You may not want to use headings for segments shorter than a page, but make all key junctures clear from your language. (For short sections, you can also omit the road map.)

These principles reflect what readers need: They want to know where your document will take them, where they are as they read, and what are the main ideas or recommendations they should remember.

When a whole document follows those principles, readers should be able to absorb it in a series of increasingly detailed passes by reading only what immediately follows headings at each level of structure.

- At the most general level, a reader can get a sense of all the most important information by reading just the title or subject line, the introduction, and the conclusion.
- For a more detailed overview, a reader can then read the headings and openings to major sections, or for still more detail, the headings and openings of subsections.
- If you organize paragraphs by those principles, then a reader can even skim them in the same way.

Never force your readers to study every word of a document unless they need a finely detailed understanding of its argument or advice. That is not to say you should hope for mere skimming; certainly not that you should only write beginnings and endings with care. But when your documents ask readers unfamiliar with the law to consider difficult material, you dare not trust that readers will in fact *read and understand it all*. The top-level structures that make documents easier to skim successfully are also what help us read most easily and understand most accurately.

### Applying the Principles in Client Communications

Clients need extra help in recognizing the organization of your documents for the same reason that they need a particularly clear style: they don't know enough to understand legal discussions as easily as lawyers do, and they are so invested in the outcome that they will almost unavoidably interpret what you write through the lens of their hopes and fears. Readers who do know the law can anticipate much of the structure and substance of your document; even so, they will be grateful for any help you give them to read more quickly and easily. Explicit structure is a courtesy to your legal readers; for the rest, it's a necessity.

### Give Special Attention to Openings

Because clients have fewer resources for recognizing the kind of story and argument you are developing, you can help them most by making clear what to expect in what follows. And if there is any chance that your detailed legal discussion will confuse or mislead them, you owe it to them to be sure that they start with a clear grasp of the least they have to know and act on.

### Set Expectations Before Your Clients Begin Reading

Your introduction is the most important tool for setting a reader's expectations, but don't neglect the small but often decisive things you can do before readers get there. Use an informative subject line, even on documents formatted as letters. Don't just state the general topic; be specific enough that your reader can anticipate the issue and your main points.

**Not:** ERISA Considerations

**But:** Five Steps for Ensuring ERISA Compliance in Restructuring the Adams Pension Fund

Even before clients get to that initial subject line, you can help them prepare for what is to come. Call or e-mail the client ostensibly to tell him or her that a letter or memo is coming, but primarily to give him or her a quick précis of the issues and, if you know it, your advice. For an important document, include a brief cover letter as

an executive summary—not an abstract of the full contents but what business writers call a “takeaway,” what you want the client to remember after he or she has forgotten the details.

**Introduce the Context, the Problem/Question, and the Solution/Answer**

Keep your introduction short, but make sure that it accomplishes these four tasks, usually in this order:

1. *Remind readers of how this document relates to what they have seen or heard before.* Even if your client is fully aware of the context for the document, he or she may not recognize what parts of that context are most relevant to the issue at hand.
2. *State the specific problem or question your document addresses.* Clients tend to focus on the big problem they need you to solve, but individual documents normally address only a piece of the larger issue. So be sure that your introduction focuses on the precise issue the document addresses, including (if they are not obvious) the specific consequences of not resolving the immediate problem—such as not resolving the larger one.
3. *State your main point, including what the reader must do in response to the document.* Although it is technically possible to save all or part of your main point for the end, it is always less helpful and, for client communications, risky. They are too likely to get lost or confused before they get to it—or not get to it at all.
4. *Summarize, if possible, your reasons in support of your point or advice.* You don't need to turn your introduction into an extended abstract of the whole, but readers will know better what to look for if they know the general outlines of your argument.

For letters, you can lay out these four elements in a paragraph or two:

As you recall, in a conference call on June 2, 2004, we discussed the exclusivity and first-refusal proposals with representatives of Clearlines.com. *context* Clearlines now

claims that in this call we made promises that we do not recall, that we did not intend to make, and that are not reflected in our contemporaneous notes. *problem* This letter summarizes that conversation and lists talking points for any further conversations with Clearlines. Please review it carefully now and again before any contact with Clearlines so that there can be no possibility of further confusion on these issues. *resolution/recommended action*

In memos, these four elements correspond to the standard opening parts: brief introduction [context] + question presented + brief answer. For complex issues, it may take several pages to lay out all four elements. Here is an abbreviated example:

Client routinely imports goods that qualify for duty-free treatment under the Generalized System of Preferences (“GSP”) of the Trade Act of 2002 (“the Act”). Goods qualify under GSP if they meet the Act's requirements for local content percentage at the time of importation. However, when exchange rates change rapidly, goods can rise above or fall below the required local content percentage between the time of shipping and the time of entry. Accordingly, Client intends to adopt practices to identify GSP discrepancies and file appropriate claims to obtain refunds of duty paid on late-qualifying goods or to pay duty on goods that lose qualification in transit.

Question Presented

What procedures are available for Client to amend claims for GSP qualification of imported goods?

Brief Answer

U.S. Customs offers four procedures to amend claims for GSP benefits.

- Before liquidation, importers can file a Supplemental Information Letter (“SIL”) for each occurrence or a quarterly Post-Entry Amendment (“PEA”) listing multiple occurrences.

- Within 90 days of liquidation, importers can file an Administrative Protest or Petition.
- More than 90 days after liquidation but before Customs initiates an action for unpaid duties, importers can file a Prior Disclosure to limit its penalties.

We recommend that Client make every effort to identify GSP discrepancies as soon as possible and to file quarterly PEA reports. Regular PEA reports reduce the risk that Client will fail to report a discrepancy and thereby pay unnecessary duties or be subject to penalties on unpaid duties. Any discrepancies discovered after liquidation should be reported as soon as possible, using the appropriate procedure.

#### **Never Save Crucial Information for the Conclusion**

It's almost never a good idea to follow the IRAC organization that many learn in law school—Issue-Rule-Analysis-Conclusion. The mistake is even greater when writing for clients: they are almost sure to get lost in the law long before they reach the conclusion. But the biggest mistake is to give readers something that *feels* like a conclusion at the end of the introduction, and then to save for later important uncertainties, qualifications, limitations, or applications for your answer: a client is likely to act on the apparent conclusion up front, possibly to his or her (and your) detriment. Do not for example, offer this apparent good news at the beginning of a letter or memo,

Client faces no impediments in either U.S. or Faraway Country law to its proposed scheme for importing widgets into the Philippines.

only to take it back at the end:

Although Client's importation scheme faces no legal impediments, Faraway Customs has wide-ranging discretion and often acts to protect influential domestic companies from foreign competition. Client can expect to face numerous procedural impediments that will generate significant delays and cost increases.

Also avoid saving necessary practical advice for the end:

Although Client's importation scheme faces no legal impediments, Faraway Customs has wide-ranging discretion and often acts to protect influential domestic companies from foreign competition. Client can reduce the risk of interference from Faraway Customs if it enlists a major domestic company to play a role in the distribution of the imported goods.

Some writers wonder whether there might be an exception to this rule for bad news. Surely it's better to save bad news for the end, after you've had a chance to prepare readers for it? This question has a simple answer, if we consider it from the reader's point of view: Get bad news out early. You won't "soften" bad news by withholding it. Few writers are good enough to hide bad news very long, and the news will seem even worse once readers begin to anticipate it. Even if you think you are good enough to work up to bad news, most readers feel manipulated when you do. So don't try to "reason" your way to a bad-news conclusion, thinking you can convince your readers of its inevitability, or at least its correctness. If they pay you to be right, they want to know your right conclusion; then they'll ask you to justify it.

#### **Put Your Client in the Question and Answer**

In most cases, you'll decide what to tell a client through the framework of a general legal standard: once you understand the standard, you can apply it to the client's specific situation. But clients almost always understand legal advice more quickly and accurately through the framework of their immediate situation: once they understand how the law applies to them, they may sometimes be ready to consider the general legal principles that explain that application. So whenever possible, state your question and answer in the opening, not in terms of a general legal principle but in terms of the client's specific situation.

You can best prepare clients to understand your legal analysis if you state issues in three parts:

1. A circumstance

2. Its legal consequence
3. Its practical effect

For example:

If Client copies the listings in Big Bell's phone book for its own phone book but those listings were compiled through mechanical means without original thought or expression, *circumstance* then Client's use falls within the standard for fair use *legal consequence* and client cannot be prohibited from using the listings. *practical effect*

If you later want to explain your conclusion in terms of the underlying legal standard, make two simple changes: replace the client and its specific circumstances with the general legal terms that define the standard, and replace *if* with *whenever* (which helps you remember to add necessary provisos).

Whenever published materials are compiled through mechanical means without original thought or expression, no matter how much effort was involved, *circumstance* then those materials qualify for the fair use exception to copyright protection *legal consequence* and others cannot be prohibited from using them. *practical effect*

That *if-then* or *whenever-then* construction is probably the clearest way to state a legal standard not just for clients but for any readers who need to apply the standard to specific facts. The characterization structure of each clause helps readers match the story in the standard to the story in the facts.<sup>2</sup> The *if-then* logical structure helps readers sort facts by their relevance. It explicitly articulates the condition and consequence in a cause-and-effect order, so that readers can determine which facts are dispositive for a particular decision, which are mere background, and which are consequences.

<sup>2</sup> See *Telling Clear Stories: A Principle of Revision That Demands a Good Character*, 5 Perspectives: Teaching Legal Res. & Writing 14 (1996).

## Give Special Attention to Headings and White Space

Even when you aid clients in all the ways we've described, they can easily lose their way in a document organized around patterns of reasoning they do not know and so cannot anticipate. And they are even more likely to get lost—or not even try to find their way—if what they face are dense pages where one long gray paragraph follows another.

So the more you break up a document with headings and white space, the less intimidating it will appear. More importantly, you help clients navigate even a complex document, in two ways. Clients can use the headings as an outline, both as an overview before they delve into the details and as regular signposts reminding them where have been, are now, and will go. And if they do get lost in a particularly dense section, you minimize that loss: they can skip to the next one, use its heading to reorient themselves, and start reading again.

### Headings

A heading is most informative when it shows readers how its section fits into the structure of the document in three ways:

1. It relates its section to the flow of the document by (a) recalling key concepts that tie together the entire argument and (b) introducing any new key concepts that uniquely characterize the section that follows.<sup>3</sup>
2. It relates its section to the sequence of the document by using numbers or at least formatting to indicate the order and "level" of its section (first main section, third subsection, second sub-subsection, etc.).
3. It relates its section to the logical organization of the document by stating or forecasting the main point of its section.

Not every heading can do all three at once, but each one should do at least the first two.

<sup>3</sup> See *So What? Why Should I Care? And Other Questions Writers Must Answer*, 9 Perspectives: Teaching Legal Res. & Writing 136 (2001).

For example, these headings are vague:

**Copyright Protection**

**Fair Use**

They announce only the general topic of a section. They would be more informative with more specific key concepts:

**Client’s Exemption from Copyright Protection**

**Fair Use: Four Key Criteria**

Those headings would be still more informative with numbers to indicate their order and level:

**3.0 Client’s Exemption from Copyright Protection**

**3.2 Fair Use: Four Key Criteria**

In a very short document, you can omit numbers and format headings to indicate their level (as in this column). But use numbers if your document has more than three main sections or if the sections are longer than two pages. Lawyers often prefer traditional outline numbering: roman capitals for main sections, capital letters for subsections, etc. But that requires readers to remember where they are in the sequence. For client communications, we recommend multilevel Arabic numerals, as in our example.

The most informative headings are those that most fully reflect the gist or main point of their section:

**3.0 Client Can Use Big Bell Material Without Copyright Violation Because Mechanically Generated Information Qualifies for Fair Use**

**3.2 Four Criteria of Fair Use: Nature of the Work, Intended Use, Amount of Borrowing, Market Effect**

To create an informative heading, do this:

1. Start by identifying the main point of its section, which should be at or near the end of the opening to the section.
2. If you do not find one there, look at the end of the section (in which case, you should consider moving it up front).

3. If you can find no point at all, revise so that the section does make a point.
4. Once you have identified the main point, circle its key concepts.
5. If it has few or only general ones, revise the point so that it anticipates those specific concepts you develop in the section.

For example, compare these sentences for “pointedness”:

Client’s freedom to use Big Bell material is determined by the principles of fair use.

Client’s freedom to use Big Bell material is determined by the four key criteria for fair use.

Client’s freedom to use Big Bell material is determined by the four criteria for fair use: nature of the work, intended use, amount of borrowing, and market effect. In this case, the first criterion is the key factor.

That last point provides a model for the most informative and therefore more helpful heading.

**White Space**

We all know how dismaying, even intimidating a solid gray page can be, much less one after another. Readers get little help from a page with no more visual structure than margins and an occasional paragraph indentation. Such pages give no visual signals to the structure of their content and so further burden already burdened readers struggling to understand just the bare meaning of that content. Headings add important visual structure to your pages, giving readers both visual and verbal clues to the organization of your document. But you have other resources for adding white space that breaks up the look of the page and visually reinforces the verbal structure of its content.

Here are some ways to use white space to help readers see the structure of your information.

- Use bullets to state parallel items (as here).
- Use numbered lists when you want your client to follow directions in a particular order (as in the two lists in the previous section).

- Break out complex paragraphs into outline form.
- Use underlines sparingly, but do use them to emphasize something that your client cannot afford to overlook.
- Alternatively, use one-sentence paragraphs (sparingly) to set off crucial information.
- Double-space long quotations (though the better course is to avoid long quotations whenever possible).
- Organize complex correlations into tables and complex quantitative information into charts.

You learn the law in law school, summer internships, a judge's chambers, and the first year or two in a law office or legal division. You learn how to write exams for test readers, memos for colleagues and judges, and briefs for courts. When you are learning legal writing, almost all of your readers know more about the law than you do, and so they read a lot into your writing that you didn't have to say. Moreover, they are usually willing readers.

Clients don't have that advantage: they usually know a lot *less* about the law than you do, and they *don't* want to read what you write. So you can't take anything for granted, least of all their willingness to work through complex issues. The

problem is, you can't misrepresent complex issues by dumbing them down. You have an obligation to present your clients with your best understanding of their situation, given the law and their needs, no matter how complex that understanding might be. But you have an equally important responsibility to present your complex understanding in ways that accommodate their limitations as fully as you possibly can.

And here's a bonus for learning how to communicate clearly with clients: once you do, you know how to communicate clearly with a court or a colleague. In fact, it's not a bad idea to think of a court or a colleague as your client, one that happens to know a great deal about the law, but is also overworked, juggling many matters at once, burdened with thousands of pages to read, and so desperately grateful for whatever help you can give in the way of making your documents as crisply clear and easy to read as you can make them.

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Please note that beginning with volume 1, all issues of *Perspectives* are available in the Perspectives database (PERSPEC) on Westlaw and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. *Perspectives* is also available in PDF at [west.thomson.com/newsletters/perspectives](http://west.thomson.com/newsletters/perspectives).

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## OUR QUESTION—YOUR ANSWERS

BY JUDY MEADOWS AND KAY TODD

*This is a column of reader-prepared answers offered in response to a specific question posed by Perspectives. Readers are invited not only to submit “answers” but also to submit “questions” they would like to see addressed in future issues.*

### OUR QUESTION: IS THE USE OF DIGESTS CHANGING?

As budget realities lead us to question legal titles that were formerly sacred cows, we wondered whether digest subscriptions were turning up on the cancellation lists, and then we wondered if the use of digests was changing. We asked: “Do you see a need to continue teaching how to use digests? Is there a need to retain print copies now? If so, are there specific sets that your customers still use? If your library has cancelled any of its print digests, what has been the reaction of your customers? Has anyone missed it?” Our question was posted on lists for state court and county law librarians and private law librarians. Similar surveys were posted for academic law library directors on their list by Mike Beaird, director of the University of Arkansas Law Library at Little Rock, and on the list for acquisitions librarians by Cynthia Aninao of the University of Cincinnati Law Library in Ohio. We benefited from Mike’s research and his tabulation of nearly 70 responses on law school practices with respect to ownership of digests and from Cynthia’s summary of 36 libraries’ practices.

### YOUR ANSWERS

Your answers provided strong support for the key role that digests play in effective legal research. Kreig Kitts of Troutman Sanders in Atlanta perhaps expressed it most compellingly: “I can’t express how strongly I feel that digests are an essential part of the big picture thinking necessary to produce research that is better than mediocre and to think critically concerning the law. Without this picture, which the digests force a lawyer to take, legal research becomes a matter of fact patterns and key words instead of legal principles. The quality of the research, and consequently of the lawyering, decreases. Unlike hopping onto a database with some thrown-

together search terms . . . a print digest requires a researcher to stop and think about things for a minute. A lawyer that stops and thinks about things is a much better lawyer for it.” This sentiment was echoed by Pamela Melton of the University of South Carolina, Coleman Karesh Law Library, in Columbia: “The West digest system is one of the monumental developments in the history of American law.” Pamela Gregory of the Circuit Court for Prince George’s County Law Library in Maryland agreed: “Digests provide hierarchical indexes to approach case law by subject. They are a valuable and highly popular resource here, as they provide still yet another access point to case law.” Barbara Zaruba of the San Joaquin County Law Library in Stockton, Calif., believes the digest enables researchers “to see the *big* picture of legal research” and added, “Most attorneys are still hooked into the Key Number System.” Kay Newman, state law librarian of Washington in Olympia noted, “Seasoned attorneys are aware that information can easily be missed by using only electronic resources.” Maria Sosnowski, Clark County Law Library, also in Washington state, likes the digests “because it’s easier to see how things fit together.” She remarks that researchers using the digests “often stumble across something by looking for something else.” And Joseph Novak, librarian at the Mound Correctional Facility in Detroit, although speaking about inmates using a law library, summarized the general view: “The digests will always be needed; whether in print or electronic format.” The importance of the *Descriptive-Word Index* was also mentioned; Elisabeth McKechnie of the University of California, Davis, noted, “Without an index, a student can only find material if he knows the correct search terms to use.”

### Digests in Print

Novak’s comment leads us to the subsidiary question of digests in print as compared to digests online. Mark Estes of Holme Roberts & Owen in Boston commented, “The print digests have value as a tool to give literally a different perspective into the research problem. It is that fresh perspective that is so crucial to stimulating the creativity of the researcher—and aligning or redirecting his/her

“Digests provide hierarchical indexes to approach case law by subject.”

“After the researcher has gotten some idea of the scope of the topics, then online measures are more cost-effective.”

thought into a different line of analysis.” Some librarians commented that use of the print digests first was a cost-effective technique before using Westlaw® or LexisNexis®. Frank Drake of Arnstein & Lehr in Chicago noted, “After the researcher has gotten some idea of the scope of the topics, then online measures are more cost-effective.” The value of the print resource when facing an unfamiliar topic was noted by Mindy Maddrey of Collier Shannon & Scott in Washington, D.C., who said, “Many of our newer attorneys have never had a chance to focus on print research. Most are pleased (and relieved!) when we point out how they can use the outlines of the digest topics as ‘cheat sheets’ when they are working with a lesser-known topic. Also, many of them find it easier to use the digest in print when they are less familiar with a subject and do not know the terms of art that would guide them into successful ... research.” Kitts finds it “easier and faster to move through the contents of a print digest without missing something.” Pam Dempsey of Rodey, Dickason, Sloan, Akin & Robb in Albuquerque, N.M., noted, “Whether any particular digest set is maintained in print is another matter, which may depend upon whether any given library’s users have access to online services.” For example, Novak noted, “In the prisons all our resources are in print.” Gregory emphasized the importance of print in a public library. “In a busy urban public law library environment you can’t always get to the public terminals, and often just one or two cases are needed to get a perspective. ... Recently, when the network went down for a week the return to the digests was something to see.” Kerry Prindiville of the Fresno County Public Law Library in California also finds digests key in the public law library setting: “I know that they are not very popular with attorneys due to all the electronic resources now available to them, but what about the self-represented litigant, who is uncomfortable using an electronic database? I just showed a self-represented litigant how to use the *United States Supreme Court Digest* because he was only interested in cases from the U.S. Supreme Court. He was thrilled that something like that existed.” Other responders focused on the cost of the electronic research. Endorsing the need

for print digests, Karla Castetter at Thomas Jefferson School of Law in San Diego explained “that some graduates practice in a court, agency or other environment where access to electronic resources is constrained or non-existent.” She reinforced this with an example of a judicial clerkship position in Vermont where the court has no access to electronic resources. Rebekah Maxwell, at the University of South Carolina School of Law in Columbia, noted, “There is no way to tell what kind of firm a graduate will end up in nor is there a way to predict what sort of technology online budget they will enjoy, so we teach the basic paper sources as well as their online counterparts.” A few of our correspondents cited times of power outages and network problems as justifying print as a fallback option. Several in academic libraries described the print versions as useful for training law students in digest research.

#### **Print Digests—Public Law Libraries and Private Law Firm**

State digests for the home state or adjacent states were cited most frequently as those retained and heavily used in law firms. Many who responded to the survey noted the heavy use these print volumes receive. Kay McClain of the Indiana Attorney General’s Office said, “I am continually searching for volumes that are missing from the shelves, as attorneys (we have over 120 on staff) do use them.” In her library, print resources are required of summer clerks, engendering in some of them “a state of shock.” McClain added, “I cannot imagine canceling the digests!” McClain has also retained the *Bankruptcy Digest*®, *United States Supreme Court Digest*®, and *Federal Practice Digest*®. Our survey suggests the home state digest and the federal digests are most often retained in print. The *Bankruptcy Digest* and *United States Supreme Court Digest* were a secondary citation by many. The *General Digest*® and *Decennial Digest*® were noted by many as having been cancelled, and in some cases not without regret. As might be expected, those who have owned the *General Digest* and *Decennial Digest* were predominantly in academic or court settings. A number of academic law librarians noted that retaining those digests has provided backup for them when they

have discontinued regional digests or digests for other states. David Lang of Dechert LLP in Washington, D.C., cited the benefit of the state digests for including both state and federal coverage—"a nice combo; and not the cost and size of the regional or federal." Lang also noted the increasing costs of upkeep for digests, in particular the financial burden of the expanded topic coverage made in certain areas of the federal digests recently. "That ended our subscription in this office," he indicated, although he has retained them and marked them "not current." Zaruba, of the San Joaquin County Law Library, summarized her cancellations as follows: "The main reasons that we cancelled the digests were: the cost (staff time/space/subscriptions), the growing size/space, the infrequent use, the redundancy, and the difficulty of use."

#### Print—Academic Law Libraries

Academic law libraries are canceling print digests, but their holdings are still major. Of 70 academic libraries responding to Beard's survey, 27 subscribe to all the regional digests. Beard concluded that all the schools that responded owned the *Bankruptcy Digest*, *Federal Practice Digest*, and *United States Supreme Court Digest*. State digest holdings are substantial as well: while only 11 schools reported having all state digests, only nine schools own only their home state's digest. Several schools that get the *Decennial Digest* do not maintain the interim *General Digest*. In Aninao's survey, 10 of 36 responding schools have cancelled the *General Digest*. Some schools own print digests for adjacent states, others maintain digests for important or large states, and still others own state digests for those states not covered by a regional digest.

#### Did Anyone Object?

There was general agreement that cancellations did not meet with resistance. "To my knowledge, not one of our users complained," reported Brenda Larison of the Supreme Court of Illinois Library in Springfield. Some public law libraries compensate by offering to run a free headnote search online. Many libraries that cancelled upkeep for the digests reported keeping the sets on the shelf marked as not current.

#### Our Conclusions

Enough librarians responded positively about the continuing value of some print digests that we feel their organization and utility should still be taught to law students and others studying legal research. The electronic searching of the digest topic paragraphs is a technique that saves a lot of time and money. It certainly leads to more substantive results than the mere searching of words or facts. Print products allow researchers to identify vital key numbers. A print digest search followed by the application of relevant key numbers in Westlaw is a powerful and efficient combination.

When the law library's resources are stretched to the maximum, or space issues become paramount, some print digests can be eliminated without sacrificing the quality of materials available to the researcher. State, and regional digests that include the home state, are the most preferred by both librarians and their libraries' users. When space and cost issues come to a head, however, and all print digests must be cancelled, the librarian probably will not be accused of misfeasance; the absence of print digests may not even be noticed.

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“State, and regional digests that include the home state, are the most preferred by both librarians and their libraries’ users.”

## 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.*

Kenneth A. Adams, *A Manual of Style for Contract Drafting* (2004) [Chicago, IL: American Bar Association Section of Business Law, 256 p.]

Addresses how to draft clear and effective contracts. Focuses on how to express contract provisions in prose free of the problems that often afflict contracts. Highlights common sources of inefficiency, dispute, and misunderstanding and recommends how to avoid them.

David Barker, *The Character and Recognition of Legal Research in Australia*, 22 Penn. St. Int'l L. Rev. 441 (2004).

Discusses the state of legal research (legal scholarship) by law professors in Australia, doing so by examining several papers and reports on the topic.

*Bibliography Issue*, 19 Ohio St. J. on Disp. Resol. 1137-1285 (2004).

An annual issue that lists books and articles by authors' names and articles and book entries by search terms and index numbers. More than 140 pages in length.

Gertrude Block, *Legal Writing Advice: Questions and Answers* (2004) [Buffalo, NY: William S. Hein & Co., Inc., 194 p.]

A compilation of "Language Tips" written over the past 20 years and published in five different bar journals. Arranged under 13 topics.

Tracy Bowles, *Space Law Cases and Publications Since 2000*, 29 J. Space L. 213 (2003).

An unannotated bibliography regarding all

aspects of space law that is arranged by books, articles, notes/comments, and cases.

Lauren Breen et al., *An Annotated Bibliography of Affordable Housing and Community Economic Development Law*, 13 J. Affordable Housing & Commun. Dev. L. 334 (2004).

A detailed update of a bibliography published in 1998. Subheadings are arranged separately under affordable housing development, community development, community development lawyering, and legal education.

Marcia Canavan, *Using Literature to Teach Legal Writing*, 23 Q.L.R. 1 (2004).

In two parts. "Part I provides an explanation of the components I borrow from traditional legal writing methodology, rhetoric, literary criticism, and storytelling. Part II explains how literature can be used as a transition and to teach legal writing to first year law students." *Id.* at 4.

Jennifer L. Cordle, *ALWD Citation Manual: A Grammar Guide to the Language of Legal Citation*, 26 U. Ark. Little Rock L. Rev. 573 (2004).

"[E]xamines the differences between the [*ALWD Citation Manual* and *The Bluebook*], the goals of legal citation, the usefulness of each manual as a tool for teaching legal citation, and whether its usefulness as a teaching tool affects the *Bluebook's* or the would-be usurper's ability to meet the goals of legal citation." *Id.* at 576.

Anne Coyle, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 Fordham L. Rev. 2471 (2004).

Reviews the leading cases regarding unpublished opinions, discusses the pros and cons of the issue, and concludes that new Rule 32.1, which permits citation to

unpublished opinions in the federal courts of appeals, should be adopted.

Lynn Foster, *Courts and Lawyers on the Arkansas Frontier*, 26 U. Ark. Little Rock L. Rev. 543 (2004).

Describes the formation and structure of the early courts in Arkansas and discusses some of the earliest judges and attorneys. Uses record books and court files from the Arkansas Post courts (the district seat of an area then known as the District of New Madrid) from 1808 to 1814.

Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 Law Libr. J. 475 (2004).

“[P]rovides . . . an overview of the rules and practice related to the nonpublication of judicial decisions.” *Id.* Uses a question-and-answer format to assist librarians in responding to patron inquiries about unpublished opinions. Includes a selective annotated bibliography.

Max Huffman, *Judge Painter's Forty Rules: A Review of Judge Mark Painter, The Legal Writer: 40 Rules for the Art of Legal Writing (2d ed. 2003)*, 72 U. Cin. L. Rev. 1011 (2004).

A glowing review of Ohio Court of Appeals Judge Mark Painter's book that attempts to show how to write clearly, effectively, and persuasively.

Jonathan Mermin, *Remaking Law Review*, 56 Rutgers L. Rev. 603 (2004).

Argues that law review students are unpaid editors of imperfect works while research assistants for professors get paid but do not get the benefits from being on law review.

H. Kumar Percy, *Admiralty and Maritime Law Articles Published in Non-Maritime Law Journals (2003)*, 35 J. Maritime L. & Comm. 405 (2004).

The second annual subject-matter, annotated bibliography of admiralty and

maritime law articles published in U.S.-based legal journals, exclusive of the four journals devoted specifically to these topics.

Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 Me. L. Rev. 239 (2004).

The results of a survey of legal writing faculty regarding the terminology used in the legal writing vocabulary.

Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. Legal Educ. 119 (2004).

An “attempt to summarize and categorize the various approaches of advanced legal writing courses.” *Id.* at 120. Groups the courses under four approaches (along with the textbooks available in each category) and then discusses the advantages and disadvantages of the various approaches.

West's Encyclopedia of American Law, 2d ed. (2004) [Farmington Hills, MI: Thompson-Gale, 13 vols.]

Originally published in 1997, this new edition contain 325 new entries; thousands of revised articles; 900 photographs; 620 biographical timelines; hundreds of tables, charts, and graphs; citations and bibliographies; a dictionary; indexes; and primary sources and milestone case documents.

Mary Whisner, *When Judges Scold Lawyers*, 96 Law Libr. J. 557 (2004).

“[E]xplores techniques to use in the quest [for cases where judges scold lawyers for incompetent research or writing] and identifies a number of cases that might be useful in a variety of instructional contexts.” *Id.*

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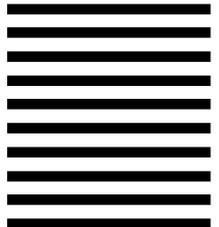
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Teaching Legal Research and Writing

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