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"They're Practically Learning":
Pointers on Practical Legal Research Exams

By Steven R. Probst and Michael J. Bushbaum

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The pages of this publication have, in the past, addressed a question that sometimes plagues those of us responsible for legal research instruction: how can we tell if the students are getting it? After months of explaining the types and sources of legal authority and how and when to use each, have students actually learned the techniques we've presented and, more importantly, can they correctly apply them? Further discussion among legal research instructors on this topic inevitably concerns what type of assessment is most likely to provide the answer to this question. The objective examination has been taken to task for its failure to accurately measure students' understanding of the process of legal research.[1] The practical or skills-based examination has been proffered as an alternative approach,[2] but what exactly is involved in writing and administering such an exam and would it complement or replace the traditional objective instrument?

These were questions we at the Valparaiso University School of Law faced in recent years as we recognized the need to create and implement a practical exam in our 1L legal research course.[3] Two observations led to the recognition of this need. The first was that the new "collaborative learners" we found ourselves teaching were often too collaborative on weekly assignments and we found ourselves doubting whether each student had encountered and mastered basic concepts

[1] *See* Judith Rosenbaum, *Why I Don't Give a Research Exam*, 11 Perspectives: Teaching Legal Res. & Writing 1 (Fall 2002) ("The problem with [objective exams] is that they teach memorization … [T]he essence of legal research is a search for understanding in which finding and thinking continually cross-fertilize each other and these mental processes cannot be emulated by an objective test." *Id.* at 4).

[2] *See* Brian Huddleston, *Trial by Fire … Creating a Practical Application Research Exam*, 7 Perspectives: Teaching Legal Res. & Writing 99 (Spring 1999). For an integrated approach, see Mary Brandt Jensen, *"Breaking the Code" for a Timely Method of Grading Legal Research Essay Exams*, 4 Perspectives: Teaching Legal Res. & Writing 85 (Spring 1996) (advocating the use of a research journal-type essay exam graded through a coding system in order to speed the grading process and ensure consistency in exam scoring).

[3] In using the term "practical exam," we are referring to a graded exercise in which students demonstrate hands-on, skills-based knowledge of a wide variety of print and online legal research sources covered during the first-year legal research course under timed conditions. At Valparaiso University School of Law, legal research is a stand-alone, one-credit course taught by four of our librarians during both semesters of the first year. Though our curriculum is now being integrated, the course has traditionally covered print sources only during the fall semester.

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involved with each resource. The second observation was that, absent individual experience with each legal research source we taught, our objective examination did not adequately ensure that students possessed the practical research skills we wanted them to have upon completion of our course.[4] While objective exams are beneficial in making sure that students understand basic research principles, they have difficulty conveying a student's understanding of the interrelationship between sources or if the student can connect a specific research need with a source that can fill that need.[5] These are things at which the practical exam can excel—if you are willing to expend the time and energy necessary to create, implement, and continually revise one.

Creation of the Exam

We set about creating the first version of our practical exam in the spring of 2003. After reviewing the methods employed by others who have utilized practical examinations,[6] we decided that we would have to create our own model. This was due in large part to the fact that others had personally accompanied students throughout the library while they completed the exam[7]—something that we felt wasn't possible in administering the exam to 211 students. We decided instead to have students sign up for a time slot with an available librarian, take the exam on their own under time constraints, and upon returning to the librarian's office, be immediately informed of their success or failure.[8]

While the questions on the inaugural run of our practical examination were heavily influenced by both deadlines for the project and the content we were teaching that semester, the concept we adopted is one that has survived numerous revisions. First, we wanted our exam to contain compound questions, with each subpart of the question building on the one before it in order to both demonstrate the interrelatedness of sources and measure students' understanding of this concept. Second, to eliminate the multitude of answers we could expect if our starting point involved search terms and indexes, we wanted students to all be given a common starting point. Focusing on primary authority, we wrote a third of the questions about federal statutes, starting students with the name of an act they could locate in a popular name table. The next third of the questions involved federal regulations, the starting point being the statutory authority for the regulation. For the final third, we started each question with the name of a case, hoping that students remembered being told about each digest's table of cases.[9] While students would

"[T]he questions on the inaugural run of our practical examination were heavily influenced by both deadlines for the project and the content we were teaching that semester. …"

[4] *See* Rosenbaum, *supra* note 1 at 5. The author states:

> The problem with the objective research exam is that it is one-dimensional. The answer is there if the questions are multiple-choice, true-false, or matching format, or the answer can be recalled from memory if the questions are short answer. This type of exam does not mirror in any way the trial-and-error aspects of actual research. It fails to capture the internal feedback loop that comes from reading and analyzing the various sources.

Id. However, we still view the objective exam as an essential component of our course and give one at the end of each semester to ensure that students have committed basic, essential research concepts to memory.

[5] These are essential skills that are lacking among many law school graduates. In a recent survey of large Chicago law firm librarians, 60 percent of those responding were dissatisfied with new attorneys' abilities to research effectively and efficiently, while 66 percent felt the new attorneys' skills were lacking in terms of being able to efficiently locate relevant sources. Mary Rose Strubbe, Keith Ann Stiverson, Sanford Greenberg & Tom Gaylord, Presentation at the Symposium on the Future of Legal Research at Chicago-Kent College of Law: Presentation of Survey Results (May 13, 2005).

[6] Our initial efforts in creating a practical exam were particularly influenced by a presentation given by Pamela Rogers Melton from the University of South Carolina at the 2002 AALL Annual Meeting in Orlando, Fla., entitled Practical Legal Research Exams: Making the Connection Between Theory and Practice (July 21, 2002).

[7] Pamela Rogers Melton, *A Lesson in Exam Building: One Law Librarian's Mission to Create a Practical Legal Research Exam*, 8 AALL Spectrum 10, 31 (February 2004); Videotape: Practical Legal Research Exams: The Connection Between Theory and Practice (Pamela Rogers Melton 2002).

[8] Our experience suggests that independent work can be sufficiently guaranteed by utilizing an honor code and placing time constraints on the exam.

[9] During the first administration of this exam, given in the spring semester when access has traditionally been given to Westlaw® and LexisNexis® at Valparaiso, students could also have searched a title field or segment to locate a case. Since that time, the practical exam questions involving cases have been given only during the fall semester and students are restricted to print sources only.

randomly choose an exam question involving only one type of primary authority, we hoped that knowledge displayed regarding one type of authority would be representative of their knowledge of the other types of primary authority.

The remaining subparts of each question then built on the common starting point provided in the first question. For example, each case authority question had students locate a headnote within their case, identify the West topic and key number from the headnote, and use that topic and key number to locate a specific case from another jurisdiction. All of our questions concluded by testing the student's understanding of the concept of authority verification. A sample question then looked something like this:

a. Provide a complete citation to *Cochran v. Phillips*, a case arising in Indiana.

b. Provide the West topic and key number for headnote # 4 in *Cochran*.

c. Using this topic and key number, locate and cite a 1972 New Jersey Supreme Court case holding that the owner of a horse is not liable without fault for damage done by the animal when unattended on a public highway.

d. Has *Cochran* from question (a) ever been cited in the *Indiana Law Review*? If so, provide the cite.

From this single example involving case authority, it becomes easy to see how a practical exam ensures that every student understands a few basic yet essential research concepts such as which digest to consult for a particular jurisdiction, how to use a table of cases, how to locate headnotes and topic and key numbers, how the topic and key numbers can be utilized in other jurisdictions, which source to consult for citations to an authority, and how to use the chosen authority verification tool. Instructors can also be assured that these students, without being provided any context, are able to link research needs with sources they have learned about and recognize how these sources relate to one another. This is the primary benefit of the practical exam.

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Application of the Exam

As others have noted, an early hurdle that needs to be cleared in administering a practical exam involves the complications of scheduling the exam to accommodate both the students taking the exam and the librarians giving it.[10] Not only must the 1L class schedule be carefully checked, but also each librarian's schedule, to make sure that enough exam slots are provided to ensure each student has at least one, if not multiple opportunities, to take the exam if he or she is unsuccessful on his or her first attempt.[11] We eventually solved these scheduling dilemmas, settling on six time slots per librarians giving the exam each afternoon over a three-week time period, with starting times staggered by 10 minutes. Students then signed up to take the exam as their schedules permitted with any available librarian. At the appointed time, students were to report to the chosen librarian's office where they would blindly draw an exam question from a stack of questions printed on colored card stock.[12] After the librarian noted the question number and starting time, students were then given an hour to go out into the library and complete the open-book exam.[13] Answers were to be typed, if time permitted, and submitted on a separate sheet of paper with citations in proper *ALWD Citation Manual* format.

In order to keep ourselves out of the dean's office were anything to go horribly wrong, our first practical exam was graded on a pass/fail basis with students receiving instant feedback upon

[10] *See* Huddleston, *supra* note 2 at 101; Melton, *supra* note 7 at 11.

[11] We have learned that the minimum number of time slots that must be provided is one-and-one-half times the number of students taking the exam.

[12] Colored card stock is beneficial both in making students in the library taking the practical exam easily identifiable and in ensuring that questions can be reused in the future.

[13] Again, time constraints help ensure that materials utilized during the exam serve only to remind students of how to approach a question, not provide answers to students who haven't prepared for the exam.

completion of the exam. We decided in advance that students had to get each subpart of the exam substantially correct in order to pass.[14] Success in doing so was met with our congratulations and the students' satisfaction that they had finally completed legal research, while failure of any subpart meant signing up to take the exam again after waiting a designated period of time. Students simply had to pass the examination one day before final grades were due in the course.[15] While we were all a little exhausted when the last student had finally passed the exam, it was easy to see that our experiment had been successful. Students had actually been studying for the exam and in our offices asking questions to test their understanding—a marked contrast from previous semesters when we had given only an objective exam. After a little rest on our part we resolved that, in addition to our objective exam, we would give a practical exam in both the fall and spring semesters—but not before undertaking some significant revisions of the process.

Revisions, Revisions, Revisions

Since the spring of 2003, we have created and continually revised separate versions of the practical exam for both the fall and spring semesters. Although we have now integrated our curriculum to include both print and electronic sources in both semesters, the fall semester examination, the direct descendent of our inaugural exam, is still restricted to print sources only.[16] We have, however, made important changes to the fall exam. For instance, the authority verification question (part d from the example above) now requests information that is time or court certain rather than asking for the most recent citation or other information that is subject to change.[17] This eliminates the burdensome process of checking every question before the exam is administered each year to make sure answers have not changed—something we failed to consider when we first created the exam.[18]

Another important change to the fall examination was to have all students answer questions involving the same type of primary authority. On the trial run of our practical examination we found that having case, statute, and regulation questions produced inequitable results. Specifically, we learned that the students with case authority questions were much more likely to pass the examination on the first try than students who randomly chose statute-related questions, and both of those groups of students were more likely to pass than the poor souls who drew questions based on regulatory authority. All questions on the fall examination are now case-related.

Statutes and regulations have since moved to the spring semester version of our practical examination, on which students may use any print or electronic source. This exam, while much more

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[14] "Substantially correct" has come to mean that *ALWD* citation does not have to be perfect so long as one could locate the answer provided and that this information answers the question asked. Note that when multiple librarians are involved in administering the exam it becomes difficult to ensure that the exact same passing standard is being applied by each librarian. Any perceived imbalance in this regard will spread like wildfire between the students who will inundate the schedules of librarians viewed as being "nicer." For this reason, we have found blind sign-ups to be beneficial, with the librarians for each time slot announced only on the day of the exam.

[15] As noted, the scheduled exam period, which included daily sign-up times, lasted only three weeks. However, students who failed to successfully complete the examination during this time period were permitted to independently schedule examination times with a librarian until they had passed. One student took particular advantage of our leniency in this regard, completing the examination the day before final grades were due—two months after the practical exam was first given.

[16] This is due in large part to our commitment to teaching print resources, ensuring that students understand basic concepts in print before moving on to electronic databases.

[17] Part d from the example question provided earlier now reads: "The point of law discussed in headnote #2 of the *Cochran* case from question (a) above was followed in a 1992 decision of the Indiana Court of Appeals. Provide a complete citation to this 1992 case."

[18] Instead, revising and updating questions involves both identifying problematic questions as the exam is being administered and having research assistants work all of the exam questions over the summer, comparing their responses to the answer key.

involved than the fall practical, still follows our basic principles of having interrelated questions and common starting points. It begins by requiring students to find several pieces of information about a specific statute, then having them locate and conduct a similar exercise with a regulation. The exam concludes with a brief question involving legislative history, another subject covered during our spring semester. Because print or electronic sources may be used, a suggested source for answering each question is provided in each question so that answer keys do not have to specify all possible answers.[19]

A representative question from our current spring practical examination would be as follows:

A. Find the Brady Handgun Violence Prevention Act using the Popular Name Table of the U.S.C.S.

   1. One of the codified sections of this Act deals with exceptions. Cite the 2002 session law that amended this section.

   2. One of the codified sections of this Act deals with acts that are unlawful. Give the appropriate *ALWD* cite for this section.

   3. Using LexisNexis and the section from b, find and cite the 1998 United States Supreme Court decision that has cited this section of the Act.

B. Using LexisNexis, locate and cite the regulation(s) governing noxious weed seeds.

   1. Locate and cite the authority under which the regulation in 5B was promulgated. If more than one citation is provided, list only the first one given.

   2. Locate and cite the location in the *Federal Register* where the 2000 amendment to the regulation in 5B is found.

   3. 12 C.F.R. § 337.3 concerns the limits on extensions of credit to officers, directors, and shareholders of insured banks that are not a member of the FDIC. Cite a 1984 case arising in the 6th Circuit that cites this regulation.

C. Using *LexisNexis Congressional* or *LC Thomas* or the print *Congressional Index*, find and cite the introduced version of the bill from the 103d Congress on the Alvaro De Lugo Post Office.

These questions are much more time-consuming to write than the fall semester questions. However, we have enlisted the aid of student research assistants to help us with this process. With this help, we now have enough questions for both the fall and spring practical examinations to give every student taking the exam a different question. We have learned, however, that research assistants must be carefully guided in this process to ensure that disaster does not accidentally follow. For example, we once discovered that a research assistant had used an online database to write questions for the fall print-only exam. This would not have been so bad had the library contained either the regional or state digests students needed to be able to answer these questions (it didn't). Fortunately the problem was discovered several days before the exam was to be given, leaving time for some last-minute question revision by librarians.

Some of the most important changes we have made involve the administration of the exam rather than the exam questions. One of our top priorities was to properly motivate students to prepare for and succeed on the exam, which ultimately reduces the burden on librarians giving it. To accomplish this we have done away with the pass/fail format of the exam

"One of our top priorities was to properly motivate students to prepare for and succeed on the exam, which ultimately reduces the burden on librarians giving it."

[19] Allowing students to use any source to answer an exam question will sometimes produce difficulties for the librarian grading the exam as print and electronic sources are not always consistent. However, giving students a recommended starting point helps alleviate these problems. Should students select a different source and find a different answer, librarians are often able to either check the alternate answer immediately using Westlaw or LexisNexis or notify the student later in the day as to their success or failure after retracing the student's steps in print sources.

and now grade it instead with a declining point total of 50 points for successful completion on a first try, 45 points for a second try, and 40 points for three or more tries.[20] This has definitely encouraged preparation on the part of the students and decreased the number of time slots we have needed to make available for the exam. As a result, rather than giving students until the end of the grading period to complete the practical, the examination period now ends after three weeks without exceptions.

Another revision that we have made in administering the practical is to change the way in which we view a missed subpart of the exam. While we still require that students get each subpart of the exam substantially correct in order to pass, failure of a single subpart no longer means that students have to wait to retake the entire exam on another day. Instead, a missed subpart is viewed as a teachable moment where students, who have expended considerable effort on a series of related questions, are properly motivated to understand where they went wrong and to correct their mistakes. In such cases students are given a few gentle reminders as to where they strayed during their first attempt, and provided an immediate opportunity to return to the library with a fresh clock to answer only the incorrect portions of their exam for a reduced point total. This scheme benefits students by allowing them to retake only a small portion of the exam rather than a completely new question, and also benefits librarians by substantially reducing the scheduling difficulties that can be created when a number of students have to take the examination multiple times.

Practical[ly] Believers

Without question, we have become firm believers in the value of the practical exam as a means to ensure each student's understanding of central research concepts that are difficult to test in our traditional, objective final exam. Additionally, given the level of personal interaction between students and librarians that occurs during a practical exam, this type of exam is much better poised to identify gaps in students' understanding as well as possible gaps in our teaching methods. Admittedly, creating and administering a practical exam takes a great deal of time and energy, and a practical exam will always need revision. But this burden pales in comparison to the combined effort spent over the course of a semester teaching research and seems to be the best method of ensuring that efforts in instruction have not been wasted.

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[20] Some experimentation with point totals may be necessary to find a total that will properly motivate students without over-penalizing those who nearly successfully complete the exam on a first try. Having a lower limit on the point total also benefits, while still penalizing, students who may have to retake the exam several times. Often, these students learn a great deal from the experience without being unduly harmed by their grade on the exam. Our practical examination has consistently been worth approximately 10 percent of students' final grades, though we will be changing the point totals for completing the exam on two attempts to 40 points and three or more attempts to 30 points beginning in the fall of 2006 to encourage even greater preparation for the exam.

Why "Walk and Talk"?: The Role of a Practical Skills Exam in Advanced Legal Research Courses

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"Developing and using an oral practical skills exam can be an incredibly rewarding experience. It can also be quite a challenge."

Introduction

Developing and using an oral practical skills exam can be an incredibly rewarding experience. It can also be quite a challenge. Early on, news of your "walk and talk" test may cause panic and fear. Unexpected things can go wrong during the exam. So why do it to the students—or to yourself?

The purpose of this article is to highlight some of the genuine benefits of using an oral skills test. In the right circumstances, this kind of assessment tool can be a terrific alternative to traditional written exams or pathfinders. The benefits can extend to the students, too, and can ultimately help you become an even better classroom teacher.

The practical aspects of developing an oral exam or practical skills test have been documented in various earlier articles.[1] In short, this type of assessment involves the real-time demonstration of skills learned, including oral responses from the student to questions provided by the instructor. For example, in response to a written question, a student might orally explain a research strategy and then use an annotated code to locate specific material. The instructor writes and pretests questions using selected library materials or resources, gives the oral test individually to each student, and can, if desired, grade the test as the exam progresses. At the end of the time allotted—perhaps 45 minutes or so—the instructor may provide feedback and a rough score.

Benefits for Teachers

Perhaps the single biggest benefit of an oral exam is the opportunity to discern real and clear differences in ability. Listening to a student's thought process can be as interesting and enlightening as the results of his or her research. At the start of the test I explain to the students that I will be asking them to "think out loud" and to tell me what they would do at each stage of their work. This oral technique has helped me better evaluate students, especially those who get wrong answers but who had an excellent approach, or those who end up with the right answer but more by luck than skill. It has also helped to differentiate between students who may otherwise seem similar,[2] and to easily establish the far ends of the curve.

Students who are truly accomplished legal researchers typically do well on the oral exam and earn higher grades. The students who struggle, or who are on target but painfully slow or inefficient, tend to earn fewer points. They typically end up with lower grades, if you are also testing for efficiency. Most likely you will be confident in those high grades, and although disappointed, you can usually be sure of those lower grades, too.

[1] *See*, e.g., Pamela Rogers Melton, *A Lesson in Exam-Building: One Law Librarian's Mission to Create a Practical Legal Research Exam*, 8 AALL Spectrum 10 (February 2004); Nancy A. Armstrong, *"Tell Me More About That…": Using an Oral Exam as a Final Assessment Tool*, Legal Reference Services Q., No. 2/3, 2006, at 117. Oral exams are also used in certain areas of graduate and medical education.

[2] Some students are more similar than others, of course—such as identical twins. One year I had a set of identical twins who always sat next to each other. I knew each by name, but their grades had been similar throughout the course and it was hard to distinguish the performance of one from the other. However, during the oral exam, while listening to each one talk, I immediately noted differences in their knowledge and ability. One twin earned a slightly higher grade than the other due largely to his fine performance on the oral exam.

The teacher can also observe patterns. Problem areas can be addressed or corrected in future classes. This is similar to reading the same wrong answer from multiple students on a written exam; the instructor quickly realizes that certain concepts may not have been thoroughly understood. By contrast, it is particularly satisfying to watch students perform first-rate legal research, especially those who have successfully mastered previously unknown material.[3]

One unpredicted pattern that surfaced in my early administrations of practical tests involved traditional book indexes. The reality today is that for many of our students, information routinely comes from a screen rather than from a book. Much of the information they need is acquired by a basic word search in Google or some other Internet resource. As a result, we cannot count on students bringing a traditional "print research" orientation to class. Real comfort using sets of books, i.e., working with a book index or table of contents to find material or looking for that material in another place or book, is no longer intuitive or for some, even familiar. For the teacher, this became very obvious when I used a practical skills exam. Many of us already know this from anecdotal experiences, but recent studies are also documenting this change.[4]

Carefully crafted, a practical skills test can accurately measure a student's knowledge and ability. Breaking down each question into separate parts lets you award points for each step, if desired. For example, points can be earned for using the index, finding the correct citation, interpreting the statute, using the pocket part, and explaining the research strategy. A student who does all five steps well can earn more points than another student who does not.

Another advantage for the instructor is that grading can be real-time. For my class it is the last graded assessment of the course, and I can easily generate a student's tentative grade at the end of our hour together. If all other graded exercises have been tallied throughout the term, plugging in the oral exam score is a fairly straightforward last step in calculating final grades. Final grades for your course might even be finished early, leaving time during the traditional exam period for other tasks.[5]

Finally, a pleasant side benefit for the instructor is the opportunity to observe firsthand some special ability or experience that you can use in letters of recommendation. Sometimes something the student has said or done in an oral exam setting will generate a memorable event that fits nicely into your recommendation form or letter. An instructor can usually quickly recall the student who came up with a clever alternate route to solve a problem that paralyzed others, or the one who showed remarkable efficiency and agility compared to others.

Perhaps an example would help illustrate this point. One memorable student oral exam allowed me to observe up close the machine-like precision and thinking of a law student trained in engineering. Deep into a serious mistake on his practical skills test, this student methodically checked and rechecked his work, found his error, self-corrected, started again from scratch, systematically repeated his steps, and eventually got the right result.[6] Watching this kind of process unfold step by step can provide insights not easily observed in more typical student-teacher interactions.

"For my class it is the last graded assessment of the course, and I can easily generate a student's tentative grade at the end of our hour together."

[3] My personal favorite is watching a student successfully use a looseleaf service.

[4] *See* Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?*, 97 Law Libr. J. 661 (2005); Erika V. Wayne & J. Paul Lomio, *Book Lovers Beware: A Survey of Online Research Habits of Stanford Law Students*, Robert Crown Law Library Legal Research Paper Series, Research Paper No. 2, June 2005, at <www.law.stanford.edu/publications/projects/lrps/>.

[5] I usually teach in the spring, but May is also the last month of our fiscal year, so the month must be reserved for budget work, not grading.

[6] Former students of mine may recognize themselves here and elsewhere. All student examples noted are real and are used primarily to help illustrate the point being made.

"Can there be benefits to an oral exam *for those taking it*? At first blush, a student might be hard-pressed to compile such a list."

Benefits for Students

Can there be benefits to an oral exam *for those taking it?* At first blush, a student might be hard-pressed to compile such a list. This kind of exam can be extremely stressful for the person taking it. Some students break into a serious sweat before we even get started. Additionally, there is tremendous pressure to work efficiently, which is not always easy to do. Finally, and perhaps most importantly, students know they cannot fake their way through an oral exam. This is especially true when their instructor is standing next to them, carefully listening to their every word.

Despite these concerns, a list of benefits really does exist. First, for confident researchers, there might actually be *less* stress in an oral exam. A skilled researcher may find it easier to simply demonstrate learned skills and explain what's being done rather than to write about this process.[7] For some students a 45-minute walk and talk can be less pressure than having to produce a dozen written pages in a final exam that lasts for three or four hours. Maybe it's not a pleasure for them, but it's not nearly as bad as the alternatives.

Students also have a great opportunity to "think on their feet." Obviously, this is a very useful skill for many areas of law practice. Other courses such as trial advocacy use live, real-time assessments instead of written exams, and these experiences are usually valued by students. With the overwhelming curricular emphasis on written work, students with stronger oral communication skills may also feel they have a more level playing field in an oral exam setting rather than in a written exam.

Another benefit comes to those students who experience a lot of stress and pressure from not being able to fake their way through the test. In my experience, most of these students take preparation for their exam very, very seriously. This in turn means that they actually do learn the material, since they know they will be required to show me their skills and that I will be watching and listening very carefully.

There are also some indirect benefits that are related to the nature of the exam administration. First, because the test must be given individually, students can elect the time to schedule their oral exam. For some folks this is truly a fantastic thing. Our students do not normally have discretion in scheduling exams, so the chance to get even one exam scheduled at the student's convenience is rare indeed. In addition, because I require that the oral exam appointments be completed before the final examination period begins,[8] students can actually complete all requirements of one course before their other final exams begin. This is another truly fantastic thing for them.

In other courses offered at law schools, an exam often represents 100 percent of a student's grade. For my course, the oral exam is only a fraction of the whole course grade. So, another indirect benefit to the student is that a weak performance on the practical skills test doesn't necessarily spell disaster.[9]

Perhaps the biggest advantage for all of the students is that preparation for and completion of this experience helps them develop a needed, practical, and marketable skill. Some of my students returned to campus this fall, after their summer jobs, with some interesting stories about their research skills. A few said they felt a distinct advantage over other summer associates because they were already familiar with library resources. One said she could work efficiently and find things quickly when others could not. It also seems that certain law firms still

[7] At least that's what some of my former students have reported to me, when asked directly.

[8] I substitute one contact hour of class for the one hour of contact in the oral exam setting and require that this be done during the last weeks of the class schedule, not during the exam period.

[9] Of course, the oral exam could be counted as 100 percent of the grade if the instructor so desired. For a number of pedagogical reasons I would not recommend this. It would also put a great deal of pressure on both the student and teacher, and may produce unexpected and undesirable results.

want to see research done using print resources! And they expect summer associates to be able to perform such research efficiently. One student reported that he became the "go-to" person because he could actually use a looseleaf service.

Would the students have had this kind of positive experience at their jobs without the practical skills testing found in their oral exam? I'm sure they would. But, the preparation that went into "proving" their skills to me on the oral exam gave them well-earned confidence, and ultimately helped them prove it to their new employers, too.[10] Since students from past classes had also reported the same kinds of things, I feel comfortable noting this as a significant benefit for a student.

One additional advantage for our students is that if an elective course with the oral exam is listed for "skills" credit, those who sign up generally want to master new skills. After successfully demonstrating their newfound skills on a practical skills test, students actually do get some satisfaction that they have, indeed, learned something.[11]

Challenges and Opportunities

Let's get right to the point: taking on this project will involve a lot of work. Instructors must be prepared to invest a fair amount of time into developing a practical skills exam. Of course, the more time invested up-front the more likely a satisfying end result. I would be remiss if I did not mention this, and present some of the other challenges involved. Of course, with a creative and open perspective, most of these challenges can also be viewed as opportunities.

Challenges for Teachers

Using an oral exam requires flexibility. Instructors *must* be prepared to make changes—sometimes as you are speaking—when something unexpected develops. You may need to "tweak" the test when you administer it for various sound pedagogical reasons. This process could be very disconcerting, though, for those who prefer teaching with 100 percent fully planned, preset arrangements.

What kind of real-time challenges might you face? The most likely involve questions that require computers for answers. The network might be down, Web sites can disappear, and Web pages can load at very different rates depending on the time of day. Still, I have used online resources for testing and when problems come up I simply make adjustments that are applied equally and fairly to all test takers.

For example, an established Web site disappeared for a few days in the middle of my most recent test administration. I substituted another page for that student and all subsequent students who needed it, and accepted answers from either site.

It worked out in the end, but it was somewhat unsettling for me and for the first student who encountered the problem. Adequate preparation made the difference, as alternative sites had been reviewed and selected in case of technical difficulties. No doubt additional technological solutions might also be available to address some of these issues.

Naturally, if you adjust something for one person, you must be prepared to adjust it for all. This is not unique to an oral exam; the same is true for a written exam administration. Consider a typographical error in the written test materials. In a testing room, an announcement might be made about the typo in the exam materials. That adjustment would also need to be communicated to students in another room, and to those who take the test at a later time.

During the oral exam similar corrections may be needed, but they occur with only one student at a time. The problem and resolution need to be similarly applied two days later with the next

> "Using an oral exam requires flexibility. Instructors *must* be prepared to make changes—sometimes as you are speaking—when something unexpected develops."

[10] In addition, many of these students received permanent job offers from their firms. No doubt their sharp legal minds and excellent grades were the primary reasons, but the fact that they could efficiently find the law and use legal materials did not hurt.

[11] Certain credit hours of skills classes are required at our school, so our students are also knocking off a requirement through something they really want to learn. Whether they would prefer to do that without taking an oral exam could be debated, though.

"Another area to consider is how and when you will ask and answer questions. Typically I write questions and let students talk."

student, four days later for two more students, the next week for additional students, and so on. This can be a little tricky or disconcerting the first time you encounter it, but it usually works out just fine by the time it's all over.

Another area to consider is how and when you will ask and answer questions. Typically I write questions and let students talk. For this method to work well, though, your initial questions need to be very clearly stated. If you continue questioning with oral questions, it may be hard to be consistent from student to student, if that is one of your goals. It's also important not to answer a question for one student that provides an advantage over the others.

Another challenge of using an oral exam for both the student and the teacher is the potential for a significant negative impact of one "bad day." We are all familiar with such days, particularly the serious ones when a student is facing a family crisis or receives news of a serious medical illness. These days are not particularly conducive to concentrating on any kind of exam. But they are particularly hard for an oral exam, which inherently has a social aspect that involves two-way communication with another person.

Since using the oral exam I have become more aware of these issues than I ever could have imagined. They have made me rethink my views on weighting exams, rescheduling exams, and other related matters. There is a wide range of potential problems, including those less serious issues you would expect, such as the student who is anxious before any test. Indeed, the oral exam format will provide quite an opportunity to experience the intensity of such feelings in a very direct and personal way.

But unfortunately, there is a very real possibility that a major family, medical, or other personal crisis might affect a student right before the oral exam, and you may need to or wish to reschedule. This has already happened more than I would have expected. Each instance was a true emergency or crisis, not an elaborate fabrication created for the purpose of avoiding or postponing a test. Of course, there is always the risk that such events may be "created." However, at a smaller school like ours there is almost instantaneous community awareness of a serious emergency or crisis, and rescheduling may be the only way to proceed.[12]

At some schools, rescheduling exams is done by others, typically an associate dean or registrar's office. When you schedule your own exams individually with each student, though, you will need to consider your views on rescheduling. Specifically, you will need to consider what balance you plan to strike between maintaining a firm schedule, the need to fit in a certain number of students in a fixed time period, how much other work you need to get done during the days you devote to exam administration, and flexibility for unexpected but serious student problems.

A teacher must also carefully consider what percentage of the final grade the oral exam will be. Of course, in many law school courses, 100 percent of the grade is earned at one sitting during the final written exam. A bad day then can cause serious trouble. In my course the oral exam is less than 50 percent of the final grade. I have a total of five to seven assignments, which produces a range of scores before the final. No single component is weighed too heavily.

[12] Three real examples are included here for those who may be new to the issue of rescheduling exams. They illustrate the unexpected nature and the potential seriousness of such problems, and how they might present themselves. One student was called upon to rush a classmate to the emergency room (he called me via cell phone, en route to the hospital). Another student's pregnant wife received a devastating medical diagnosis the day before his exam (he e-mailed before taking his wife for further medical diagnosis/treatment at a major medical center). Another student had a sudden veterinary emergency (he came in person right at exam time, pale as a ghost, and then raced out of the library to get his dog to the animal hospital). Others might have different views about whether pet emergencies should interfere with exam appointments, but on a purely personal level, I do not plan to be the cause of an animal's death if it just happens to need emergency veterinary care at the same time as its owner's oral exam. In the end, two of the emergencies had happy endings, but one did not. All three students had their exams rescheduled to a later date.

Arriving at the wrong balance for your practical skills assessment can be awkward. For example, one year I weighted the oral exam as a significant percentage of the course. After observing the effects of some minor bad days, though, the next year I lessened the percentage. Unfortunately, this was too much of an adjustment. Now too small a percentage of the grade to make a real difference, the practical skills assessment did not adequately reward the very best researchers. In addition, having an exam as a very low percentage of the overall grade might mean that students would not take the exam seriously. However, that has not been my experience.

Now my oral exam counts for approximately 40 percent of the total grade. This is enough weight for me to reward the folks who do a super job, and it creates a real difference in points earned from the top to the bottom of the class. But it's not so much of their grade that if they have a really bad day they won't drop two letter grades in an hour.[13] Instructors will need to consider all of these issues and assign a weight for the exam that works best for them.

Another issue that comes up in using an oral exam is evaluating the students in the middle range of scores. They can get there from different paths, which in turn may make their performances harder to compare. For example, one student may have an excellent research process, but miss the final results and overall earn a middle range score. An average performance can also come from someone who knows a lot about one question, but little about the next one. These patterns do also emerge in traditional written exams, and an instructor should consider his or her views on this topic when designing the exam.

Those who teach elective classes may be concerned that an oral exam would deter enrollment. That has not been my experience. People do voluntarily sign up for this experience, and my advanced legal research course—well known for its walk and talk final exam—has now been wait-listed for many semesters in a row.

There are a few challenges during the exam itself. Other students from your class may be close at hand while you are in the middle of giving the test. They might not be deliberate eavesdroppers, just diligently preparing for the exam or reviewing materials in the same area where you need to be. This can be tricky in a smaller library facility, where core materials might be in close proximity to each other. Some simple communication usually does the trick. We are also interrupted during the exam by others who do not realize the exam is in progress. This year I developed some signage and strategies for coping with this problem.

Challenges for Students

The obvious big challenge for a student is that it's very, very hard to fake your way through an oral practical skills exam. This type of exam presents a very realistic "moment of truth": either you know how to find the court rule, or you don't.

Students can also feel overwhelmed by having to know how to use so many resources, especially those used infrequently. Many also feel tremendous pressure having their instructor looking over their shoulders while they are working. They are very aware of the time pressure, too, if you are testing them for efficiency. While it might be adequate to find a statute in 10 or 15 minutes, students are generally very aware that a higher grade would likely go to the person who finds it more efficiently in five minutes.

"The obvious big challenge for a student is that it's very, very hard to fake your way through an oral practical skills exam."

[13] I've also learned that a random good day is far less likely than a random bad day. In other words, people will likely perform at a certain level whether feeling average or great, but that performance can go down drastically due to distractions, emotional upsets, etc.

Conclusion

Developing a practical skills test and observing and evaluating students in this way has helped me adjust my teaching methods to address problem areas. It has completely changed the way I teach and test, and made me think harder about what I am doing. In short, for me it has been a better evaluation method for what I'm looking for in student learning.

A side benefit is that the oral exam has also made me aware of problems using print materials in some of our younger students. In addition, the entire process has made me much more sensitive to personal issues in students' lives that can impact on their studies and classes.

Finally, the oral exam provides an opportunity to set expectations and tangible standards of competency for students enrolled in your course, which in turn helps bring into focus what you teach and why. On balance, the exam creates an opportunity to develop and grow, and to witness extraordinary student mastery of the subject matter that you teach.

"On balance, the exam creates an opportunity to develop and grow, and to witness extraordinary student mastery of the subject matter that you teach."

Another **Perspective**

"Lawyers in active practice, even of long standing, either admit that they do not know easily how to extract information from their books, or bewail the fact that they did not learn it earlier in their careers. Law teachers also have said repeatedly in print and from the platform that a knowledge of legal bibliography is an essential part of the education of a lawyer. It is an obvious corollary of King George the Third's reputed remark that lawyers know not so much more law than other people, but they know better where to find it."

— A. Hays Butler, *Frederick Hicks's Strategic Vision for Law Librarianship*, 98 Law Libr. J. 367, 373 (2006) (citing Harlan Fisk Stone, Report of the Dean, Columbia Law School, for the Academic Year Ending June 30, 1919, at 2 (1919) (unpublished manuscript, available at Columbia Law Library, bound in Annual Reports of Dean Stone, 1914–1923, Columbia University Law School)).

Integrating Print and Online Research Training: A Guide for the Wary

By Suzanne Ehrenberg and Kari Aamot

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My students are staring at me in disbelief. Several jaws are dropped and giggling is breaking out here and there in the room. I have just described to them in detail how I learned to update my legal research in law school with print *Shepard's® Citations*. "In fact," I add, "Frank Shepard used to personally and regularly mail stickers to law libraries, which the librarians would stick in the books to update them as new cases came out."[1] Heads are shaking slowly and incredulously. One student mouths the word "stickers" in wonderment.

I understand my students' reaction, and indeed a part of me is incredulous that we would ever have relied on such a slow, cumbersome means of disseminating legal information. On the other hand, I can also remember the time when mailing stickers was efficient and sensible. When it comes to technology, I'm a member of the "bridge" generation.

In fact, most of us who are teaching now—with a few exceptions among the youngest teachers—are "bridge" researchers. We grew up on print, with indexes and tables of contents as our tools. Research meant a trip to the library; we knew what a card catalogue was and how to use it. Then, somewhere along the way, we learned the computer, and now we are proficient online researchers, relying heavily on computers for our personal needs and teaching online research to our students. But can we, who are familiar with both print and online research systems, teach effectively to students who have never learned to research print materials? To what extent is the content and style of our research training a product of how we ourselves learned to research? And if we do teach in ways shaped by our "former selves"—book researchers—are we teaching our students what they need to learn, in ways likely to be successful for them? In short, how do bridge researchers teach research to students who have never known a print-only world?

"In fact, most of us who are teaching now—with a few exceptions among the youngest teachers—are 'bridge' researchers. We grew up on print. …"

At Chicago-Kent, we now teach print and online research in an integrated format. This means our training is organized around legal research sources, rather than around the methods by which those sources may be accessed. We aim to emphasize the content of legal research, and not the containers in which the content is placed. We do not withhold LexisNexis® or Westlaw®; students can access both systems from the first day of class. We teach secondary sources first, covering both print and online research skills. We then teach case law research, both online and print. Finally, we teach both print and online statutory research. When appropriate (which is increasingly often) we teach both commercial and noncommercial online research simultaneously. The students see that they can find the same cases or background information in multiple formats and places. They learn that in legal research there truly is "more than one way to skin a cat." This is just one of the many benefits to the integrated approach to research training.

This article will proceed in two parts. First, we will respond to three of the common criticisms of integrated research training, and explain why integrated training is more effective and responsive to student needs than the old method

[1] Theodore A. Potter, *A New Twist on an Old Plot: Legal Research Is a Strategy, Not a Format*, 92 Law Libr. J. 287, 288 (2000).

of teaching print research first, followed by online research. Second, we will provide practical tips for implementing an integrated approach, and share some of the lessons and teaching techniques we have learned as we transitioned to integrated training.

"Second, we may simply have to accept that some students will do little or no print research even after they are forced to complete a classroom project using print tools only."

I. Why Integrated Research Training Is a Better Approach

Criticism of integrated research training is plentiful. Perhaps the three most fundamental critiques of the approach are these:

1. If students do not learn print research before online, they will never learn print research;
2. Students who do not learn print research before online research never really understand the concepts of jurisdiction and hierarchy of authority; and
3. Print research is superior to online because it better enables students to gain a "big picture" understanding of the legal issues they are researching.

To the three most fundamental criticisms of integrating online and print research training, we have essentially two responses. The first is to "teach to it," and the second is to "get over it." Behind the criticisms are various understandable concerns about what will be lost if we abandon the bifurcated approach to research training. Where those concerns are not only understandable but warranted, we must be sure to adjust our teaching to avoid the problems raised by critics as we shift to integrated research training. Where, however, a concern is understandable but ultimately unjustified, we may just need to get over it.

A. But What If They Never Do Print Research?

The first criticism is that if students are not force-fed print research before online research they will never learn to research in books.[2] This criticism is unwarranted for several reasons. First, the "eat your vegetables, they're good for you" approach to print research training simply doesn't work. Anyone who has taught bifurcated research has watched in frustration as students tune out print training, convinced that you are simply holding back the "good stuff," the online research tools. Ironically, we found that by teaching print and online researching side by side, we were in a much better position to explain the pros and cons of each technique. Moreover, the students were in a better frame of mind to receive that comparative information because they did not suspect that a game of hide-the-ball was afoot.

Second, we may simply have to accept that some students will do little or no print research even after they are forced to complete a classroom project using print tools only.[3] Our students, unlike us, were not raised on print research techniques.[4] Furthermore, it is becoming increasingly rare for practicing lawyers to research in print materials—even lawyers practicing in small firms or doing public interest work. If our students never have researched in print and never will, on what basis can we insist that they do so for us? This criticism is not really about what skills our students must acquire; rather, it is about our anxiety as bridge lawyers that today's students might never research the way we did—by poring over books in the library stacks and filling notebooks with research notes. It is time to put this anxiety to rest. As online databases become more complete and can be searched in multiple ways, including by index, by key number, and by tables of contents, book research offers little that cannot be replicated online.

Critics who bemoan the demise of rigorous print research training argue that students who do not learn print research skills well will be unable to learn effective online researching because they won't be

[2] Potter, *supra* note 1, at 288.

[3] *See generally* Potter, *supra* note 1.

[4] Thomas Keefe, *Teaching Legal Research from the Inside Out*, 97 Law Libr. J. 117, 118 (2005); Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 Akron L. Rev. 151, 160 (2006).

able to "visualize" the sources they are using.[5] This criticism assumes that online skills flow from print skills and that teaching online research before students are proficient in print puts the cart before the horse and undercuts students' capability in both systems.

This concern presupposes something that is no longer true, namely that students come to us from their undergraduate educations familiar with print researching. We know that students learn best when we meet them where they are; we should aim to teach from the familiar to the new.[6] When most of us learned legal research, online training followed print training—the bifurcated approach still used in most schools. This was a pedagogically solid approach 20 and even 10 years ago when electronic research in college was rare and students came in with print research skills in other areas. In our era, the bifurcated approach moved students from the known to the unknown; it was an effective way to teach legal research.

Today's students, by contrast, come to us with weak or nonexistent book research skills, but fairly sophisticated skills for researching online. Thus, it serves students best for us to begin teaching online legal research, building on what they already know.[7] Because integrated print and online research training does a better job of meeting them "where they are," it is the pedagogically superior choice for today's students.

B. Jurisdiction and Hierarchy Concerns: You Are Going to Cite *What*?

The second criticism of integrated research training is that students who do not get rigorous training in print resources never understand the critical concepts of jurisdiction and hierarchy of authority because everything that appears online looks the same. "[L]egal materials [online are a] vast sea of undifferentiated data," writes one commentator. "All laws [are] equal. … 'Justice' has the same code status as 'implant.'"[8]

This criticism is valid. Researching in books does impress upon students the concepts of jurisdiction and levels of authority in a very real way, if only because they have to physically consult a different volume for a different state or level of court. The novice online legal researcher is much more likely than the novice print legal researcher to rely on nonbinding or very weak authority for an argument, simply because there is no obvious visual distinction online between cases from different jurisdictions or levels of court.

This is not an insurmountable barrier, but it does present a challenge for legal research educators. We must rise to the challenge and teach jurisdiction and hierarchy of authority in such a way that students respect these key concepts as they learn online research. Beginning the first day of law school, students see dozens of cases in their casebooks, all looking more or less the same. We teach them quite quickly, however, to look more closely: Which court? Which jurisdiction? What is being appealed? Similarly, we must train students to look more closely at everything they pull up online, and to ask the questions that must be answered before the source is put to any use: Is this primary or secondary authority? Is it controlling or persuasive? *How* persuasive? Integrated research training should feature substantial in-class online research, where instructors can model the habit of asking hierarchy of authority and jurisdiction questions as soon as a source is pulled up. In the course of any open research assignment, students will inevitably turn up authorities of questionable value and argue that they've found "the answer" to the problem. Evaluating these authorities together in class further impresses upon students the

> "We know that students learn best when we meet them where they are; we should aim to teach from the familiar to the new."

[5] Potter, *supra* note 1, at 288–89.

[6] Keefe, *supra* note 4, at 117–118.

[7] *Id.* at 119 (advocating teaching online research before print research in order to "maximize the amount of learning we transfer to our students. … by recognizing the world our students have come from and the world to which they are headed. …").

[8] Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 Law Libr. J. 285, 299, 302 (2001); F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 Law Libr. J. 563, 584 (2002).

importance of jurisdictional boundaries and the weight of various kinds of sources.

C. Fostering Thoughtful and Precise Electronic Research

A final concern, which is shared even by those who recognize the benefits of an integrated research curriculum, is that if students jump immediately into online researching, they will be seduced by the apparent ease of locating authority online and will engage in superficial or careless electronic research. This concern arises from the premise that print research, by nature, is slower and more reflective than online research.[9] The assumption is that by learning print research first, students will learn effective research habits and understand the value of being thorough, careful, and meticulous.

> "It has been observed that so-called 'Google researchers' tend to see research as 'an event as opposed to a process.'"

There is indeed a temptation for students to research less thoroughly online than they do in print. They may bypass secondary source databases, use Boolean searching as the default technique for all research tasks, mindlessly compose their Boolean search requests, and rely on their initial research results if they find at least one relevant authority, without delving any further. It has been observed that so-called "Google researchers" tend to see research as "an event as opposed to a process."[10]

Some critics have labeled this danger an "index" problem, and point to the lack of online indexes as part of the difficulty.[11] When students research in books, they are forced to browse through various indexes. This browsing necessarily develops their understanding of the "bigger picture," the surrounding context for their legal issue. As students get less print research training, goes the argument, they do less index consultation and thus never develop the contextualized grasp of the law that index-based research gradually instills in the researcher.

Critics also point out that online research emphasizes case law research at the expense of research in secondary resources.[12] Because secondary resources are the tools lawyers use to learn about a new or unfamiliar area of the law, shifting focus away from them raises the danger that students will not be as facile with those resources when they confront a problem in an area of the law with which they are unfamiliar.

These concerns about online research used to be valid, but they are largely outdated. Currently, there are many resources online designed to permit researchers to get a "big picture" grasp of an area of law before proceeding to more detailed research in primary sources. It is possible to do index-guided searching in case law databases on both LexisNexis and Westlaw, and many students will gladly make extensive use of these options, especially if you impress upon them how "hit-and-miss" Boolean searching can be when they are unfamiliar with the area of law they are researching. Furthermore, most secondary resources are currently available online, and these resources are available with online indexes.[13] In fact, as the cost of print resources escalates, many of our students may find themselves with greater access to secondary resources online than in print.

It is true that print researchers have more incentive to *start* with secondary sources. It is often easier to find relevant primary authority through secondary sources than through digest searching if researching entirely in print. With online research, by contrast, students can often quickly find helpful primary authority through Boolean searching if they can identify the relevant database. Many students are

[9] Gallacher, *supra* note 4, at 183.

[10] Keefe, *supra* note 4, at 122; Barbara Bintliff, *Electronic Resources or Print Resources: Some Observations on Where to Search*, 14 Perspectives: Teaching Legal Res. & Writing 23, 24 (2005).

[11] *See, e.g.*, Bast & Pyle, *supra* note 8; Hanson, *supra* note 8.

[12] Gallacher, *supra* note 4, at 162.

[13] Even the *Code of Federal Regulations*, which is notoriously difficult to research and which has never been indexed in print form, is newly available on LexisNexis with an index.

tempted to stop researching at this point. Thus, our teaching must adjust. We must emphasize the importance of doing background research in online secondary sources where one is unfamiliar with an area of law. Furthermore, we must give appropriate attention to the full range of electronic search tools (i.e., natural language searches, tables of contents and indexes, and Westlaw key number searches). Students must understand that Boolean searching is not always the best method for locating material online, that such searches can be faulty if not phrased properly, and that they should generally be backed up with an alternate search technique.

Online legal research need not be sloppy legal research. With careful instruction, we can teach students to replicate online the habits of thoughtful, methodical research that characterize our use of print sources.

II. Implementing an Integrated Research Curriculum: Some Practical and Pedagogical Considerations

If you have been persuaded that the integrated research curriculum is a desirable method for teaching research to our techno-savvy students, you may still have concerns about implementing such a curriculum. Will you have to change research texts? How can you accommodate additional research instruction within the tight confines of the first-semester syllabus without significantly altering the number and timing of the assignments? How can you avoid information overload and ensure that your students retain all the material you have taught them? Each of these concerns can be addressed without sacrificing the benefits of an integrated research curriculum.

A. Choosing a Research Text

The good news is that virtually any of the major legal research textbooks can be used effectively in teaching integrated legal research. Indeed, several of them so closely intertwine their discussion of electronic and print research that they can be more difficult to use in teaching the traditional bifurcated curriculum than an integrated one. With apologies to the Foundation Press and West publishing companies, we will focus on the three most popular textbooks (all published by Aspen): *The Process of Legal Research*[14] (hereinafter, Kunz text), *Just Research*[15] (hereinafter, Oates text), and *Basic Legal Research*[16] (hereinafter, Sloan text).

The Kunz text provides the greatest emphasis on print research of the three. However, its discussion of print and electronic research media is integrated, with the authors focusing on the "dominant mode" of research for each source. For example, in the chapters on encyclopedias and treatises the focus is on print research,[17] while electronic research is the focus in the chapter on legal periodicals.[18] Both print and electronic research are discussed in the chapters on restatements and case law.[19] The introductory chapter on research strategy includes an assessment of the relative strengths and weaknesses of print and electronic research.[20]

The Oates text is truly process-oriented, in the sense that its chapters are organized around researching particular types of legal *issues* rather than around specific research *sources*. Thus, for example, the book has no separate chapter on secondary sources. Rather, these sources are discussed in the context of specific legal research problems.[21] The book heavily emphasizes electronic research. Although the first few chapters provide parallel plans for researching issues in print and electronically,[22] thereafter electronic research is the default mode.[23] Considerable

"With careful instruction, we can teach students to replicate online the habits of thoughtful, methodical research that characterize our use of print sources."

[14] Christina L. Kunz et al., *The Process of Legal Research* (6th ed. 2004).

[15] Laurel Currie Oates & Anne Enquist, *Just Research* (2005).

[16] Amy E. Sloan, *Basic Legal Research* (3d ed. 2006).

[17] *See* Kunz at 63–77.

[18] *See id.* at 84–89.

[19] *See id.* at 103–113 and 138–168.

[20] *See id.* at 19–21.

[21] *See, e.g.*, Oates at 51–53 and 107–108.

[22] *See id.* at 37–136.

[23] *See id.* at 137–372.

discussion is devoted to Internet research, but you will find no mention of pocket parts, the *Index to Legal Periodicals*, or the *Current Law Index*.

The Sloan text provides the most balanced treatment of print and electronic sources. Each chapter contains subparts addressing the particular research source in its print format and in its electronic format, with corresponding descriptions of how to research in each.[24] In addition, the book has a separate chapter on electronic research techniques, which contains a useful discussion on deciding between print and electronic sources.[25] Any of these textbooks could be used effectively in an integrated research curriculum, and indeed the Kunz and Oates texts are better suited for an integrated curriculum than for a bifurcated one.

> "In an integrated research curriculum, both print and electronic research must be covered during the initial research instruction period."

B. Accommodating Additional Research Instruction Within the First-Semester Syllabus

In the traditional first-semester legal writing course, students begin with a closed universe office memorandum. After the closed memo is submitted, they receive print legal research instruction. The period of instruction for print research is typically two to three weeks (hereafter, these weeks prior to the open memo deadline during which students learn fundamental research skills will be referred to as the initial research instruction period). After the initial research instruction period, students typically have several additional weeks to research and write an open memo. Within the traditional research curriculum, students receive electronic research instruction either later in the first semester, after the first open memo has been submitted, or during the second semester.

In an integrated research curriculum, both print and electronic research must be covered during the initial research instruction period. This leaves the instructor with several alternatives, no one of which is ideal: 1) retain the same research training schedule, and simply teach more material—both print and electronic research—during the initial research instruction period; 2) allocate more time to research training prior to the open memo, but give students less time to actually research and write the memo; 3) allocate more time to research training prior to the open memo and extend the due date for the open memo, which will require you to either shorten the time for completing later assignments or eliminate an assignment from the syllabus.

At Chicago-Kent, we opted for the first alternative because we did not want to eliminate any assignments or give the students less time to complete their assignments. However, to avoid squeezing too much material into the initial research instruction period, we tried to break up the training so that we did not have to cover every research topic during the brief window between the submission of the closed and open memos.

As the sample syllabus at the end of this article indicates, we postponed teaching statutory research in both print and electronic media until after the open memo was completed.[26] After the students submitted this memo, they received their statutory research instruction and were then required to research and write up brief conclusions on a statutory law issue.

By removing statutory research instruction from the initial research instruction period, we substantially reduced the amount of material we had to cover during the first phase of research training. We further streamlined the instructional content during that period by teaching basic LexisNexis and Westlaw skills (i.e., signing on, retrieving documents, and printing documents) during orientation or during the first few weeks of class. Students learned this material on their own using self-paced exercises, so we did not have to devote class time to it. We were

[24] *See, e.g.*, Sloan at 31–48 (researching secondary sources in print) and 48–53 (researching secondary sources electronically).

[25] *See id.* at 340–343.

[26] This required that the open memo involve a purely common law issue (or one in which a statute played only a minor role and was clearly identified in the case law).

then able to focus exclusively on secondary sources and case law research, as well as more sophisticated search techniques, during the instruction period between the closed and open memos.

C. Avoiding Information Overload and Fostering Retention of Material

Related to the practical concern about accommodating more research instruction within a brief instructional window is the pedagogical concern that students will be overwhelmed by the amount of information they receive during integrated research instruction. Teaching too much material during a short period of time results in information overload, which may cause students to simply "check out" during the training process and not absorb anything, or to forget relatively soon anything they may have learned. However, if research training is spread across the first semester, as suggested above, rather than concentrated into a single two- or three-week period, students are more likely to absorb and retain their research instruction.

It is also useful to break down both the research sources and the research techniques into small but logical increments. For example, you can focus exclusively on natural language searching while you are teaching about secondary source databases and postpone Boolean searching, as well as key numbers and digests, until you teach about case law databases. Electronic indexes and tables of contents are search tools that logically can be taught in the context of statutory research.

In a traditional bifurcated research training program, students are apt to forget rather quickly what they have learned about legal research if they are not required to put it to use repeatedly. In an integrated training program, information retention is an even greater challenge. It is imperative, therefore, to reinforce class instruction with out-of-class exercises in both print and electronic research.

Then, review, review, and review some more. Because you will no longer be teaching electronic research in the latter part of fall semester or the early part of spring semester, you can use this time for review. We suggest that you begin at least one class per week with a research hypothetical that students work on individually or in groups. Use the hypothetical to reinforce basic bibliographic information as well as to generate discussion about research strategies. Moreover, as suggested above, do electronic searches together as a class and always ask questions about the nature and weight of each authority.

We also recommend that students be required to submit a research log on all initial drafts of open memos. The research logs will encourage students to reflect upon their own research process and possibly inspire them to use a broader range of sources and techniques than they might otherwise use. Equally important, the logs will give you crucial information about how your students are putting their research instruction into practice. You will be able to determine what material they have grasped and you can focus on the weaker areas of research during your review sessions.

Conclusion

It is always tempting to continue to teach the same skills the same way year after year. But as legal research instructors, we must keep moving forward. The research habits and techniques of working attorneys are rapidly changing. To prepare our students for practice, we must keep pace with those changes. It no longer works well to insist that students learn print research first—nor does it work to insist on strictly separating print and online research instruction—when so often the best research approach is either to work entirely online or to use a combination of online and print techniques.[27] Integrated research instruction is efficient, effective, and attainable without undue difficulty in most any first-year legal writing program.

"The research habits and techniques of working attorneys are rapidly changing. To prepare our students for practice, we must keep pace with those changes."

[27] Bintliff, *supra* note 10, at 23 ("Experienced researchers develop an almost intuitive sense of which format to use in a given situation, and consult both print and electronic resources in the course of a research project.").

Sample First-Semester Syllabus for Teaching Integrated Research Curriculum

(Fourteen-Week Semester/Two Classes per Week)

Five Main Assignments: Closed Memo and Rewrite; Open Memo and Rewrite; Statutory Research Assignment (Brief Conclusions and List of Authorities)

Week 1
Signing on to LexisNexis and Westlaw; retrieving documents; printing documents. Vendors can provide short training session or students can do self-paced exercises, so class time is not wasted.

Week 2
No research training.

Week 3
No research training.

Week 4
Closed memo due on Monday.
Introduction to legal research. Overview of research sources (primary, secondary, finding tools); research media (LexisNexis, Westlaw, and Internet); and searching techniques (indexes, topic outlines, digests, and natural language and Boolean searching). Developing a research strategy; formulating issues/search terms.

Week 5
Secondary sources in print format.
Secondary sources in electronic format; natural language searching.

Week 6
Case law in print format (reporters and West digests); case law in electronic format; Boolean searching; Westlaw key number searching and online digests.

Week 7
Shepard's and KeyCite®.
Review of research methodology and strategy.

Week 8
No formal research training, but research on open memo discussed in class and each class begins with a new research problem hypothetical.

Week 9
Research and citation game show (e.g., *Jeopardy* or *Millionaire*).

Week 10
Open memo due on Monday.
Researching statutes in print format.

Week 11
Researching statutes in electronic format; using online index, table of contents, popular name table.

Week 12
Open memo returned and research strategy discussed.
Focus on common problems revealed in research diaries.

Week 13
No formal research training, but research on statutory research assignment discussed.

Week 14
Statutory research assignment.

You've Sent Mail:
Ten Tips to Take with You to Practice

By Anne Enquist and Laurel Oates

Anne Enquist is the Associate Director of the Legal Writing Program and Laurel Oates is the Director of the Legal Writing Program at the Seattle University School of Law in Washington.

When we think about all the ways legal writing classes prepare students for practice, it is surprising that we may have neglected an important area of "legal writing"—drafting e-mails. As our students prepare for clerkships and our graduates prepare for that first job, consider whether you might want to use your last class to talk about professionalism and how that plays out in e-mail. The following article sets out 10 tips that we plan to share with our students.

Most attorneys have an e-mail horror story. One manager sends another manager an e-mail suggesting that the company could save money by forcing all of the employees who are over the age of 60 to retire. A client unthinkingly hits "Reply to All" and sends a message to more than a dozen people in which she admits that she committed a crime. A new associate attaches the wrong file to an e-mail, accidentally sending opposing counsel a copy of an office memo that outlines the firm's trial strategy.

The horror stories confirm what most of us know: e-mail is both a blessing and a curse. It has made communication easier and faster, but like most new tools, e-mail has a learning curve. Most people are still learning how to use it appropriately, and in the meantime, many professionals, including lawyers, are learning that careless or ineffective use can cause serious problems. Many of the serious and not so serious e-mail problems can be avoided by using a little common sense. Below are several tips that many professionals, particularly lawyers, find helpful for their work-related e-mails.[1]

Tip 1: Do Not Include Anything in an E-Mail That You Would Not Want Read Aloud in Court

No matter what types of statements about confidentiality you insert in your e-mail, there are no guarantees that your e-mail will remain confidential. Thus, the best policy is not to include anything in an e-mail that you do not want shared with the rest of the world. The best way to ensure confidentiality is to give the information orally, preferably in person in a room with the door closed.

Tip 2: Use the Same Professional Language That You Would Use in an Office Memo, an Opinion Letter, or a Business Letter

Sending an office e-mail is not the same thing as text messaging a friend. No matter how well you know the person to whom you are writing a work-related e-mail, use the same language that you would use drafting an office memo, an opinion letter, or a business letter. Do not use abbreviations, code words, slang, or emoticons.

Example 1: Inappropriate Language

BTW, if you have questions, feel free to call me 24-7.

Example 2: Revised: Appropriate Language

Finally, if you have questions, please free to call me.

[1] For more information on how students can conduct themselves professionally on the Internet, see Katherine Mangan, *Etiquette for the Bar: First-Year Students at Drake U.'s Law School Learn the Value of Online Discretion*, Chron. Higher Educ., Jan. 12, 2007, at A31. The article discusses the efforts of Drake University law professors Lisa Penland and Melissa Weresh to teach law students how to be more professional in their online communications.

Tip 3: Make Sure That the Tone of the E-Mail Is the Tone You Intend

"Flaming" in e-mail is the oral language equivalent of shouting at a person. Messages written in all caps or other attention-getting fonts should be used with extreme care.

> **Example 1:** Inappropriate Tone
>
> I got your request for the meeting with Chong. ARE YOU SERIOUS ABOUT WANTING AN HOUR WITH HIM?
>
> **Example 2:** Revised: Appropriate Tone
>
> I got your request for the meeting with Chong. An hour meeting seems excessive. Would a shorter meeting work for you?

Notice, too, that while some people can interpret very short e-mails as efficient, others may read them as having a curt or rude tone. In addition, it is often a good idea to follow up a request for information with a quick note of thanks so that colleagues and employees know you have received their e-mails and that their follow-up was appreciated.

> **Example 1:** Inappropriate Tone
>
> Original e-mail:
>
> Do you want to review the draft before I submit it to O'Brien?
>
> Curt reply:
>
> No.
>
> **Example 2:** Revised: Appropriate Tone
>
> Original e-mail:
>
> Do you want to review the draft before I submit it to O'Brien?
>
> Revised reply:
>
> No, that won't be necessary. Thanks for your hard work on this project.

Finally, in drafting an e-mail, keep cultural differences in mind. If you are e-mailing a person in a culture in which it is customary to begin a conversation with an exchange of pleasantries, include the same kind of opening pleasantries in an e-mail to that person.

Tip 4: Before Hitting "Send" or "Reply," Reread Your E-Mail, Including the Address Lines

Although it takes a bit of extra time, rereading an e-mail before sending it is time well spent. Before sending an e-mail, take a few minutes to proofread the e-mail and to double-check the address lines. While many people are forgiving of small typographical errors in e-mails, others are not. In addition, some typographical errors can lead to serious miscommunication. Remember, too, that if you are using a Blackberry® or other type of device that tries to predict what word you intend as you type (an "autocomplete" feature), you may end up sending gibberish if you do not proofread your messages before sending them.

Tip 5: Do Not Misuse the "High Importance" or the "Read Receipt" Functions

Marking every e-mail as being of high importance is a bit like calling "wolf" every time you hear a noise in the bushes. At some point, no one pays any attention to e-mails that come from you with the high importance mark. Thus, limit your use of the mark to those e-mails that are, in fact, of high importance.

In addition, do not ask for a read receipt for every e-mail you send. At best, most individuals find the process annoying; at worst, it sends the message that you do not trust the individual to whom you are sending the e-mail. If you would like a response, you can ask for such a response in the text of your e-mail. If you need proof that someone received information, use one of the more traditional communication methods: send a letter or other information through a delivery service or by some type of registered mail.

Tip 6: Be Selective in Attaching Large Files to an E-Mail

If you know that someone uses a Blackberry or similar device to retrieve e-mail, do not attach large files without first checking with the recipient to make sure he or she will be able to receive and open the file. Similarly, if the person to whom you are sending the e-mail is traveling in a country where e-mail access is limited, do not send large files without first checking with that individual.

Tip 7: Make Sure That the Subject Line Accurately Reflects the Topic or Topics Discussed in the E-Mail

In sending e-mail back and forth, change the subject line so that it matches the topic or topics discussed in the e-mail. In addition, in composing the subject line, select labels that will increase the chance that the recipient will open the e-mail and that will allow the recipient to easily store the e-mail in appropriate folders or easily retrieve the e-mail.

Tip 8: As a General Rule, Do Not Copy or Forward an E-Mail Message or Attachment Without the Author's Permission

In most instances, ask for the original author's permission before forwarding an e-mail or an attachment to an e-mail. Asking for permission demonstrates your personal integrity and can help prevent misunderstandings. Do, however, use common sense. You do not, for example, need to ask for permission to forward an e-mail to a colleague who is working on the same project.

Remember, too, that when you forward an e-mail the recipient may read the whole string of exchanged e-mails in the message, not just the last message that was sent.

Tip 9: There Is Really No Such Thing as "Delete"

Many people mistakenly assume that they can eliminate the paper trail they have created through e-mail by simply deleting old messages. While computer experts may have the necessary skills to permanently delete old e-mails, they also have the skills to recover e-mails the typical user believes he or she has deleted.

Tip 10: When in Doubt, Sleep on It or Get a Second Opinion Before Hitting "Send"

E-mails allow us to respond to someone else's ideas or comments almost instantaneously. Sometimes in the heat of a situation, that is not a good thing. Use the speed and convenience of e-mail to your advantage, but remember that in some situations, it may be to your advantage to take a breath, slow down, and not respond immediately.

Another **Perspective**

"The messy desk is not necessarily a sign of disorganization. It may be a sign of complexity: those who deal with many unresolved ideas simultaneously cannot sort and file the papers on their desks because they haven't yet sorted and filed the ideas in their head."

—Malcolm Gladwell, *The Social Life of Paper*, New Yorker, March 25, 2002, at 92, 93.

Revising Revision in the Classroom

"The revision process stresses the importance of organization, clarity, style, citation, grammar, and proof-reading."

By Karen J. Sneddon

Karen J. Sneddon is an Assistant Professor of Law at Mercer University School of Law in Macon, Ga.

While I love to converse with students, I dread when Alison Achiever sulks into my office after the first graded assignment and, with a choke in her voice, mutters, "I'm an English major, and I've always gotten As on my papers." Needless to say, Alison did not earn an A on her first assignment. Despite her initial consternation over her grade, Alison is really asking how to improve her writing skills from what has worked in the past. To do that, she must learn not how to write, but how to revise.

In the age of computer composition, most students, like Alison, have little experience with revision. Students' prior writing experiences rely heavily on the creativity and quality of the students' ideas. As such, students have found success with the stream-of-consciousness process of writing, which generally consists of great ideas that are developed in the writing process in an unorganized document riddled with proofreading and mechanical errors. In contrast, the organization of legal writing is geared to the reader. A novice legal writer cannot simply write a well-reasoned, coherent document from start to finish in one sitting. Emphasis on revision in the legal writing classroom reinforces the concept that writing is a process; and, of course, it is a process that cannot be completed the night before an assignment is due … or at least not anymore!

The revision process stresses the importance of organization, clarity, style, citation, grammar, and proofreading. Students should revise drafts before submitting them and be able to revise a document based on comments received from the professor or an employer. While the importance of revision in the writing process may be recognized, many students are unsure how to revise. When confronted with a document that has been reviewed and marked by a professor, many students mechanically input the professor's comments.

Peer review can be an invaluable tool for incorporating revision into the classroom.[1] However, integrating peer review into the legal writing classroom can be tricky. When I first announced a peer review, a mask of consternation descended over the faces of my students. Cacophonous chaos erupted as sighs reverberated against the classroom walls. Even distributing more detailed guidelines did nothing to quell the students' frustrations and misgivings about peer review.[2]

Often students are apprehensive about sharing their work with other students. Students are competing against their fellow students academically and may be wary of sharing their carefully crafted ideas. Students may also be embarrassed to share their work because of their perceived inadequate work, or they may be reluctant to use peer review if they have had prior peer review experiences that yielded inconsistent quality comments.

Notwithstanding the students' trepidations, peer review can also be difficult for the professor to incorporate successfully into the classroom. With novice learners, the peer review process can be difficult because students do not have a solid grasp of the principles of legal writing. They are simply

[1] There is a wonderful depth of articles about the use of peer review. *See, e.g.*, Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 Legal Writing 1 (2003). Peer review was the subject of a presentation at the most recent Legal Writing Institute Conference. Steve Berenson and Linda Berger presented Leaping from the Peer: Peer Reading and Writing Groups in Action at the 2006 LWI Conference in Atlanta, GA, on June 10, 2006.

[2] A great article discussing self-editing, including sample guidelines, is Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 Legal Writing 175 (1997). The guidelines can be used as peer review guidelines too.

unsure as to what is good writing and what is poor writing. In addition, peer review can be unwieldy to monitor; everyone's paper is different. As such, most class discussion veers toward generalities or gets mired in the idiosyncrasies of an individual student's work.

I devised an exercise (one of which is included at the end of this article) to combat these concerns while still incorporating revision into the classroom. I created a single writing sample for the entire class to review and revise. This exercise is somewhat akin to exercises found in grammar books that ask students to determine whether the sentences are grammatically correct or not.

To create the exercise, I begin with an excerpt of a sample memo. The sample memo is either a model answer that I have prepared, a previous student written memo, or an example from a textbook. Depending on the professor's goals for the exercise, the excerpt can range from a one-paragraph exercise that is to be completed during class to a multiple-page exercise that is to be completed outside of class. While I typically use this exercise during instruction on objective writing, the exercise can be used during instruction on persuasive writing by using a sample trial or appellate brief.

After selecting an excerpt, I incorporate various types of mistakes into the excerpt. I strive to incorporate common student errors, which have appeared in the current set of papers. The errors on the exercise can range from basic spelling and citation errors to more complex organization and synthesis errors. Depending on the length of the excerpt, the sentences with errors can be numbered so that the students have direction as to which sentences to evaluate. From the professor's point of view, incorporating pet peeves into the exercise can alleviate the frustration of seeing the pet peeves continually crop up in assignments.

With every exercise, I am sure to create a separate sheet of professor comments for the exercise that contains the "answers." Then, I can be sure that I won't be stumped by a student question about the exercise!

The ideal time to introduce a revision assignment is after the students receive their first assignment on which the professor has provided written comments, whether graded or ungraded. I have found it effective to use the exercise when the students have received comments on an assignment and are in the process of completing a rewrite or final draft of the assignment. However, different incarnations of the exercise can be used in varying degrees throughout the semester. For example, the first use of the exercise may contain straightforward errors, such as proofreading errors. As the semester progresses and the students' skill level increases, the exercise can contain more complex errors, such as incorrect rule synthesis.

Just as with peer review, collaborative and cooperative learning is incorporated into the classroom by having the students discuss the exercise in groups of twos or threes in class. Since all the students are reviewing the same exercise, discussion is facilitated. The discussion can become very active as the students voice different suggestions for the revision.

Using the revision exercise not only models the revision process but also models construction and critical reading. The discussion about the revisions, both the need for the revision and possible versions of the revision, is uninhibited. The students are not tempering their critiques for fear of insulting a fellow student. The students' comments resemble a brainstorming session, much like they would use when revising their own work.

In conclusion, the revision process can be incorporated into the process without using peer review. Through the use of the exercise, students have a model as to how to approach revision. The end result is that the student develops a writing process that includes revision. And, hopefully, after Alison receives the grade on her next assignment, she will triumphantly soar into my office proclaiming the value of all that she has learned about revision.

"Using the revision exercise not only models the revision process but also models construction and critical reading."

Revision Exercise—Professor Comments[3]

Review the following excerpts from a discussion section of an objective memorandum regarding adverse possession in Mississippi. For each numbered text sentence or citation sentence, identify the problem (or problems) and revise the sentence accordingly. You may need to read the section in its entirety to identify the problems. Problems may relate to analysis, structure, style, citation, or grammar.

To assert a claim of adverse possession, a possessor must establish by clear and convincing evidence that possession of the property was: (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful. [**1**] West v. Brewer, 579 So.2d 1261 (Miss. S. Ct. 1991). *[According to BB R 6.1, the spacing of the reporter is incorrect. Should be So. (space) 2d. The citation is missing the pinpoint page 1262. According to BB T.1 (Mississippi), the Mississippi Supreme Court should be abbreviated as "Miss."]* The ten-year period is established by statute. Miss. Code Ann. § 15-1-13 (1998).

[**2**] Fourthly, possession must be continuous and uninterrupted for a period of 10 years. *[Evaluate the strength of the topic sentence. Legalese should be avoided: "fourthly" should be "fourth." According to BB R 6.2(a), numbers zero to ninety-nine should be spelled out.]* West, 579 So. 2d at 1262. [**3 – relates to next two text sentences**] Courts in other jurisdictions have generally found that seasonal use is continuous and uninterrupted if the use is consistent with the nature and character of the property. See, e.g., Kraus v. Mueller, 107 N.W.2d 467, 472 (Wis. 1961). Sporadic or intermittent use fails to satisfy the "continuous" element. Buford v. Logue, 832 So. 2d 594, 603 (Miss. Ct. App. 2002). *[The order of sentences should be reversed. The rule from the controlling jurisdiction, Mississippi, should be presented first. Also, general rules should be provided before specific or qualifying rules are provided.]*

[**4**] Where a possessor lives on the property for less than ten years, but uses the property as a garden and for storage for more than ten years, the Mississippi Court of Appeals holds that the use is not sporadic or intermittent. *[This sentence is phrased like a rule statement rather than an in-text case illustration. For case illustrations, provide the court's reasoning to give the court's holding context. In addition, the verb tense is incorrect. The past tense should be used to describe the facts of a case and what a court did in a case.]* [**5**] Id. at 603. *[The period in id. must be underlined. The pinpoint should not be included in this cite, because id. refers to the directly preceding authority, which includes the pinpoint 603.]* While Mississippi courts have not addressed whether seasonal use of property constitutes continuous and uninterrupted use, courts in other jurisdictions have generally found that seasonal use is continuous and uninterrupted if the use is consistent with the nature and character of the property. See, e.g., Kraus, 107 N.W.2d at 472 (finding that a hunting shack occupied only during hunting season on wooded property constituted continuous and uninterrupted possession). [**6**] The Vermont supreme court argued that continuous use "is not synonymous with constant use. *[Capitalization of court is incorrect. It should be "Vermont Supreme Court" because the full names of courts are capitalized. There is also a word choice problem: courts decide, state, conclude, rule, and hold. Courts do not argue, feel, or believe. The close quotes are missing.]* Darling v. Ennis, 415 A.2d 228, 230 (Vt. 1980). [**7**] Where the claimant used and improved a structure on property, continuous use could be established by considering how an average property owner would use it. *[Inconsistent term use: the writer used "possessor" rather than "claimant" previously. The examination of the analogous case is missing some key facts about the case. What is the structure? (It was a hunting camp.) How often was the structure used? (It was used yearly.) What was the nature and condition of the property? (It was wooded.) Vague word choice problem: "it" should refer to "the property," but sounds like "it" refers to "the structure."]*

[3] My thanks to my former Tulane Law School colleague Andrew Clark for preparing the sample memorandum on which this exercise is based and to my former Tulane Law School colleague Tina Boudreaux for her comments and additions on this exercise.

Id. The nature and condition of the property must be considered. Id. Therefore, the yearly use of a hunting camp could establish continuous and uninterrupted use for the statutory period. Id. [**8**] See also Charles L. Montgomery et al. v. W. Barry Branon, 278 A.2d 744, 748 (Vt. 1971) (Since hunting camps are generally occupied only during certain periods of the year, such use may be considered continuous and uninterrupted if such use is consistent with the nature and character of the property.). *[Evaluate use of signal "see also." According to B4.4 and BB R 1.2, the signal "see also" indicates additional material that supports the proposition, which the citation does. According to BB R 1.2, the use of an explanatory parenthetical with the signal "see also" is encouraged. According to B11 and BB R 1.5, an explanatory parenthetical must be one of the following formats: (1) a phrase beginning with a present participle; (2) a quoted sentence; and (3) a short statement. The format of the explanatory parenthetical is incorrect and should be revised. A possible revision is "holding that the use of a hunting camp during certain periods of the year may be continuous and uninterrupted if such use is consistent with the nature and character of the property." According to BB R 10.2.1(g), given names should be omitted from case names. The case name should be Montgomery v. Branon.]*

[**9**] Grant must establish that his use of the property was continuous and uninterrupted for a period of ten years. *[The transition to the rule application, such as "in the present case" is missing. The conclusion is not clearly stated. A possible revision is "Grant will be able to establish … "]*
[**10**] Yazoo Paper will argue that Grant's use was not continuous because he did not occupy the settlement as a permanent residence and only used it twenty weekends a year. *[The phrase "will argue" presents a problem. The better phrasing is "Yazoo Paper might argue" or "Yazoo Paper could argue."]*
[**11**] Not unlike the possessor in Buford, Mr. Grant did not live on the property. *[Evaluate the analogy. A specific fact from Buford is missing so that the analogy is not explicit and obvious. The Buford citation is missing. A possible revision is "Like the possessor in Buford, 832 So. 2d at 603, who used the property as a garden rather than a residence, Grant did not reside on the property year-round. Grant used the property as a fishing camp." Word choice problem: change "not unlike" to "like." Inconsistent word use: "Mr." should be omitted because not consistent with previous use of "Grant."]* A court may find that Grant's use of Tract 34 is sufficiently continuous, just as the Buford court found the possessor's gardening and storage sufficient to establish continuous use. Id. Moreover, like the possessors in Darling, 415 A.2d at 230, and Montgomery, 278 A.2d at 748, who used the property for a short period of time during the year for hunting, Grant's seasonal use of the property for fishing for approximately twenty weekends each year has been consistent with the character of the property Tract 34. Tract 34 is swampy and heavily wooded like the wooded property in Darling. 415 A.2d at 230. Grant has used Tract 34 with his friend since the early 1970s and as the sole owner since 1993, satisfying the ten-year statutory requirement.
[**12**] Grant may be able to prove that his use of Tract 34 was continuous and uninterrupted for more than ten years. *[Evaluate the conclusion. The transition "In conclusion" is missing. Also, this sentence should be phrased as the conclusion. A possible revision is "In conclusion, Grant will probably be able to prove that his use of Tract 34 was continuous and uninterrupted for more than ten years."]*

Grant will probably be able to prove each of the six elements by clear and convincing evidence. Although Grant did not use the settlement year-round, he will likely be able to establish that his use of Tract 34 was consistent with the nature of the land. Moreover, although GP never "saw" Grant's settlement, notice will likely be imputed to GP, given that anyone traveling along the Yazoo River would have seen the settlement. Accordingly, Grant will likely be able to establish a valid affirmative defense of adverse possession.

Le Mot Juste

> "The right word—or better, many right words working together—can be essential for protecting your client's interests, money, or even freedom."

By Gregory G. Colomb and Joseph M. Williams

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

The best writers have a large vocabulary, because they need to use the right word to make a case that is accurate, precise, concise, memorable, and vivid. But even writers with a large vocabulary can struggle to choose *le mot juste*—or less pretentiously, the right word.

For many legal documents, *le mot juste* can be a wasteful luxury. Workaday documents don't need to be works of art; they need to be clear, easy to read carefully, and even easier to scan. If your words are good enough, you waste your time and your client's money searching for better ones. To borrow an ugly but useful term from economics, your words need only to "satisfice," to do what is necessary to get the job done, and no more.

But when the stakes are high, the situation is competitive, and the environment is noisy with other parties' words, the right word is no luxury. The right word—or better, many right words working together—can be essential for protecting your client's interests, money, or even freedom.

We can give you no advice that will work in every case, but we can identify principles for choosing words in particular situations. We addressed some of those principles in earlier columns, but that advice was scattered and missed some of the questions most commonly asked about choosing words. What follows are 10 common questions about word choice in pleadings and other competitive, high-stakes documents.

1. Whose Story Should I Tell?

Nothing should influence your choice of your words more than the point of view of your "story." Recall that with everything you write, whether a narrative in a statement of facts or a complex legal analysis, readers will understand and remember it in terms of a mental scenario that is essentially a narrative.[1] Each sentence adds to the general story your readers take away. But if you manage them carefully, your sentences will also shape the structure of that story. In that shaping, your most important tool is how you begin sentences.

When your sentences consistently begin with some one person, entity, legal principle, or idea as their main character (usually the subject of the sentence), readers are likely to put that character at the center of their remembered story and so see everything in relation to that point of view. It's the difference between these two:

A. Hillary Clinton prepared the document that Susan McDougal used to obtain illegal loans in the Whitewater matter. The First Lady …

B. Susan McDougal used a document prepared by Hillary Clinton to obtain illegal loans in the Whitewater matter. Ms. McDougal …

In a longer passage, such a consistent point of view can determine not only what story readers understand and remember, but how they judge the people and events in that story.

We can't give you a single, clear principle for deciding which character—if any—creates the most effective point of view. You have to consider details specific to the case. The only general rule is to choose the character that puts your client on the right side of the law (or your opponent on the wrong side) by

[1] *See* Joseph M. Williams & Gregory G. Colomb, *Telling Clear Stories: A Principle of Revision That Demands a Good Character*, 5 Perspectives: Teaching Legal Res. & Writing 14 (1996).

highlighting those actions and details that work for your argument.

But we can give you a specific strategy for making that decision: restate your story so that the characters and the story match familiar stereotypes (what Aristotle called *topoi*):

- Our client is a responsible professional who must limit discovery to protect the confidential information that his clients have entrusted to him.
- Our opponent is a lazy, ineffective employee who thinks she is discriminated against when harder working, more responsible employees are rewarded for their good work.
- The law clearly sets forth the procedures complainants must follow; those procedures were clearly explained to this complainant, who then ignored them.
- Our clients are innocent bystanders whose businesses will be ruined by unintended consequences of the proposed regulation.
- Our client's customers will be bewildered and confused, not informed, by the labeling requirements in the proposed rule.

You probably won't write anything so stereotypical in your pleading, but if you can reduce your best argument to such a formula, then you should build that argument around the character highlighted in it.

Often you will have more than one stereotype to choose from:

A. Our opponent is a lazy, ineffective employee who thinks she is discriminated against when harder working, more responsible employees are rewarded for their good work.

B. Our client treated this employee fairly, following to the letter all of its procedures and the applicable rules.

In that case, you have to hope that you have the skill and experience to know which story (or mix of stories) will effectively move your specific decision maker.

Of course, you cannot substitute stereotype for carefully reasoned argument. But if you build your story around that character and introduce the stereotype into occasional sentences, readers will get the message and (you can hope) structure their understanding of your argument around it.

2. What Should I Call the Parties?

Most lawyers refer to the parties by their institutional roles, plaintiff or defendant. Those generic terms can be useful: sometimes they help decision makers know who's who in a complex matter with many participants; sometimes they characterize the parties in ways that support the rhetorical appeal of your argument. But just as often, those terms are unnecessarily vague, bland, and at cross-purposes with your rhetorical appeal to a decision maker.

Every party to a dispute or controversy has many names:

defendant—debtor—borrower—homeowner—Johnson—Esther Johnson

plaintiff—supermarket industry—Grocery Manufacturers of America—grocers—food stores

Each name creates a different image of the party, an image that can support or contradict your overall story. Which name(s) should you use? The one whose *image* is most consonant with your story.

Here's a strategy for deciding: imagine—or better, ask a friend to imagine—what mental picture each name conjures up. For example, close your eyes and picture a defendant. [____] Now picture a plaintiff. [____] Do those terms give you *any* mental picture? (Focus on the pictures themselves, not all the other things you know about plaintiffs and defendants.) How specific are your pictures? How different are they? Now picture a debtor. [____] Now, picture 68-year-old homeowner Esther Johnson. [____]

Here's the point: when readers create their mental scenario from your text, they generate different mental images from different names for the same person or entity, images that can influence how they understand and judge your argument.

You cannot avoid naming parties by their generic, institutional names. But neither are you restricted to them. And the more generic the name, the less vivid the picture. When your story is best served by

"Every party to a dispute or controversy has many names. … Each name creates a different image of the party, an image that can support or contradict your overall story."

seeing a party as a distinct individual, use the proper name. When it is best served by seeing a party in some specific social or legal role—*debtor*, *seller*, *employer*, *teacher*, *farmer*, and so on—use that name. When it is best served by having readers ignore all of those specifics, then by all means call the parties *plaintiff* or *defendant*.

3. Is It *the Plaintiff* or Just *Plaintiff*?

This seemingly punctilious point is sometimes raised by writers who think that one is correct and the other incorrect. They are wrong. You can use either form. But sometimes, the question is asked by those who think they can feel a difference between the two, but are not quite sure what it is. They are onto something—a subtle, but real difference in the rhetorical effects of using general terms.

As standard count nouns (any noun that you can put *a* in front of), the terms *plaintiff* and *defendant* normally appear with the definite article *the* when they refer to specific parties. Although lawyers sometimes drop the *the* (*Plaintiff argues* …), English speakers normally do not:

This: The rock is under the paper.

Not this: Rock is under paper.

On rare occasions we may drop *the* when a noun is used in a generic sense, as in statements of instructions or general principles, especially those that include terms naming a social or institutional role:[2]

Paper covers rock.

Father knows best.

Teacher is always right.

[2] This is analogous to the common usage in which no definite article is used for mass nouns that refer to a general substance:

Coffee is my favorite drink.

Air is necessary to life.

Contrast these cases that refer to specific subsets of the general substance:

The coffee spilled.

The air rushed out of the balloon.

When you refer to your opposition without *the*, as just *plaintiff* or *defendant*, you reduce them to their institutional role, making them even less individualized, less distinctive. That's why writers drop articles most often in case reports, where we care about the parties not as individuals but as representative instances:

Plaintiff in this case had sold defendant …

Here, plaintiff was a union that had …

If you want to reduce a party to its institutional role, if you want to keep readers from creating a vivid mental image of a party, if you want your prose to feel generic, distant, and hyper-legalistic, then use *plaintiff* or *defendant* without *the*. If not, use the more normal form: "The plaintiff hereby asks this court … "

4. How Should I Address the Court?

Although every pleading seems to *ask* for something, it actually tells a decision maker what she *should* or even *must* do. Some lawyers happily give decision makers what sound like orders: "For these reasons, the court must award … " But many more find it awkward to demand things from a court, since few people respond well to orders from supplicants.

We can't give you a general rule: sometimes you should address the court directly, sometimes not. But we can help you predict how readers will respond to your choices so that you can make informed decisions that suit your overall rhetorical approach.

When you plead for a decision maker to take a specific action, you manage your tone primarily through your subjects and verbs. Subjects assign responsibility for actions, which determines how aggressively you seem to be pleading. In choosing subjects, you have three choices:

1. You can address the decision maker directly. This is the most aggressive approach that focuses on both the decision maker's responsibility and your demand.

- The court should grant the motion.
- This Commission must not implement the proposed rules without modification.

"When you plead for a decision maker to take a specific action, you manage your tone primarily through your subjects and verbs."

2. You can use a passive verb to drop the decision maker out of your sentence entirely. This is less aggressive: while you are still making a demand, you focus more on the outcome than on the decision maker's responsibility for making it happen.

- The motion should be granted.
- The proposed rules must not be implemented without modification.

3. You can deflect responsibility away from yourself and the decision maker by assigning responsibility to the law, the evidence, or other abstract features of the process:

- The law requires that the motion be granted.
- The evidence shows that the proposed rules must be modified before implementation.
- These precedents indicate that all four prongs of the *Wilson* test must be considered.

A somewhat more aggressive version of this strategy is to have the law or evidence compel the decision maker:

- The law requires this court to grant the motion.
- The evidence makes it clear that the Commission cannot implement the proposed rules without modification.
- These precedents indicate that this court must consider all four prongs of the *Wilson* test.
- Justice demands that the plaintiff be compensated for his loss.

Your subjects determine how aggressive your demand seems; your verbs determine how aggressively you seem to be making it.

The court must … / is required to … / cannot avoid … / should …

The law demands … / compels … / requires … / leads to …

The evidence compels … / requires … / shows …

Finally, you can manage how aggressive you seem by introducing yourself as the main character and then using different verbs to characterize your claim on the decision maker:

Plaintiff demands that the court … / requests that the court … / begs the court …

Which tone should you choose? The one that best matches your overall rhetorical strategy. You have to base that decision on the details of your case and the character of the decision maker, but here are a few general considerations:

- If there are no special circumstances, make your default choice a moderate to slightly aggressive tone (*the court should, the law requires, the plaintiff requests*).
- If your case is weak, be resolutely moderate. Don't let your tone signal your weakness, but also don't try to mask weakness with an aggressive tone. No one responds well to claims that they are compelled to do something based on no good reason.
- If your case is strong and you are confident that the decision maker will see that, take a moderate or even soft tone. If the evidence and the law speak for themselves, don't put yourself in their way.
- If you suspect that the decision maker may not recognize the full force of your argument, take an aggressive tone and assign responsibility to the law (evidence, equity, etc.) whenever possible.

5. How Should I Characterize Claims?

Since pleadings are by definition arguments, you cannot avoid making claims and responding to the claims of others. But when you report what others claim, your words will also *characterize* that claim—"spin" it in terms of its plausibility, certainty, fairness, appropriateness, and so on. (You can also spin your own claims: "Plaintiff begs this court to … ") Choose those words wisely, and you can make your argument more persuasive. Choose poorly, and you can damage both your argument and your credibility.

When you choose, the most important variable is what aspect of the claim a term emphasizes. For example, the phrase *plaintiff states* is neutral with respect to the nature of the claim and your stance toward it. On the other hand, with phrases such as *plaintiff contends* or *plaintiff proposes*, you step back from the claim to emphasize that it is the *plaintiff* who makes it and that you do not (at least in the

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"The key to thinking about the level of vocabulary you should use is not authority or geography but class and its effect on your ethos."

current sentence) endorse or accept it. With phrases such as *plaintiff insists* or *plaintiff maintains*, you emphasize the *manner* of making the claim. Doing so, you not only highlight the maker of the claim but also emphasize that the claim is contestable. (When you use such terms for your own claim—*I insist* or *I maintain*—you emphasize both its contestability and your conviction.)

The following chart lists some common terms for making claims sorted by what they emphasize. Use it (and your thesaurus) to prime your thinking until you develop a wide range of terms for characterizing what others say.

Neutral	Maker	Manner/ Contestability
say	claim	maintain
write	assert	avow
state	contend	answer
report	avow	petition
argue	propose	demand
aver	advocate	insist
show	advance	proclaim
	profess	press
	submit	protest
	declare	accuse
	proffer	complain
	allege	beg
		clamor
		boast
		declaim
		implore

When you choose, look for words

- that emphasize those characteristics of the claim that support your argument
- that readers will accept as accurate, or at least plausible
- that do not cross the bounds of fair advocacy

Each choice depends on the details of the situation and your rhetorical goals. As with all matters of style and tone, the best policy is to use relatively neutral words most of the time, in order to set a background against which your more pointed sentences can pop off the page. Both shouts and whispers lose their effect when that's all a decision maker hears.

6. Should I Avoid Legalisms?

Most legal controversies require you to use the technical terms of the law: plaintiff, discovery, proximate cause, estoppel, and on and on. Though too arcane for ordinary readers, they are not a problem for decision makers schooled in the law. You can and should use them as needed.

However, there are other terms and phrases that are not necessarily technical terms, but that *feel* like legalese because only lawyers use them. These are entirely avoidable. A few examples:

for the reasons explained **hereinafter**	**absent** such evidence
during the **pendency** of this matter	the state **made a showing** that …
the **aforementioned** case	**said** statement

When you use unnecessary legalisms, you don't help readers understand your story, but you do significantly affect their mental image of *you*—that projected character or persona called your *ethos*. Experienced practitioners sometimes use such legalisms out of old habit, which gives their prose a tired, rumpled, legalistic air. Young ones sometimes use them to project a more authoritative ethos, but the effect is usually the opposite: they too easily seem inexperienced, wearing grown-up clothes that don't quite fit. These terms rarely improve your ethos or advance your cause.

A related way your vocabulary can damage your ethos is when you show off not that you know lots of legalisms but that you know that a particularly graceful fistfight might also be called a contretemps. Inexperienced lawyers sometimes think that such fancy words give them authority (even if they need a dictionary to make sure they got them right). And sometimes they do, when judiciously used.

The key to thinking about the level of vocabulary you should use is not authority or geography but class and its effect on your ethos. Whenever you use lots of words that less educated people would have to look up, you project an image of someone asserting a class privilege: you are better, smarter, and more educated than most *and you want your readers to notice*. That can work for you on some occasions,

and a few specialty firms thrive on a white-shoe image that includes documents that are classier-than-thou. But that image goes against the mainstream of American culture.

Let your readers' linguistic limits set the bounds for your vocabulary. You don't have to go to the extreme of the mythic Ivy-educated, small town lawyer who could explain the etymology of *contretemps*, but whose language is more suited to a barroom brawl. But never send your readers to the dictionary.

7. Should I Avoid Technical Terms?

Legal controversies routinely involve technical knowledge in fields beyond the law—economics, environmental science, medicine, sociology, psychiatry, and many others—all of which have their own body of technical terms that can feel arcane, even offensive, to lawyers. But when your argument turns on such external specialized knowledge, those alien terms of art may be hard to avoid.

If your decision makers are specialists, as for example in a comment on proposed FTC regulations, then use technical terms as freely as you would necessary legal terms. (But remember that a decision maker who is a generalist will always be less well-versed than you are on the background to your issue.)

If your decision maker will recognize but might not fully understand the technical terms, then use those terms but pair them with nontechnical explanations, either before or after.

- When you use unnecessary legalisms, you significantly affect readers' mental image of you—that projected character or persona called your *ethos*.
- Readers understand what you write through several *parallel mental representations*. These are mental images or "maps" representing different aspects of your text—its grammar, its underlying story, its argument, its organization, your ethos, and so on.

If your decision maker might be baffled or put off by a technical discussion, make your case in ordinary language and reference a more technical account that you include elsewhere (footnote, appendix, etc.).

A. [in text] The drugs called calcium blockers are used to treat high blood pressure (hypertension), chest pain (angina), and abnormal heart rhythms (arrhythmias). They decrease the heart's pumping strength and relax blood vessels because they limit how much muscles contract. When the calcium in muscle tissue is reduced, the muscle fibers are less likely to contract excessively, which then relaxes blood vessels and reduces how much the heart pumps.

B. [in footnote] Muscular contraction is the result of the interaction of proteins in the sarcomere, the fundamental unit of contraction. Contraction is a product of the interaction of myosin, an ATPase or energy producing protein, and actin, a contractile protein. This interaction is controlled by the inhibitory protein tropomyosin. When the myoplasmic concentration of Ca++ exceeds 10-7, tropomyosin no longer inhibits the interaction, which produces contraction. By limiting the concentrations of Ca++, calcium blockers limit contraction.

8. When Should I Disparage the Other Side?

One of the most tempting rhetorical appeals is that the other side is a bad actor. It is always helpful to show that your opponent breaks rules, violates covenants, acts in bad faith, abuses the system, harms others, or otherwise deserves scorn—if true. But it is worth a moment's thought to ask whether that is the story that best serves your argument and your ethos.

You must, of course, highlight your opponent's bad *actions* that involve the substance of a dispute, central elements of a case, or key factors in a decision. But you may go too far if you also disparage the *actor*. Don't distract your decision maker with name-calling, even if you are sure that the decision maker will share your disapproval. (In fact, a responsible decision maker will try to avoid deciding on the basis of personal disapproval, especially if the bad actor is the weaker party.)

Be especially cautious when your opponent's bad actions involve not the substance of the dispute but its procedures. Do explain how their abuses have unfairly harmed your client. But if your language

"Don't distract your decision maker with name-calling, even if you are sure that the decision maker will share your disapproval."

reflects too much of your own anger and frustration, you can obscure the key issues.

> Once more plaintiff raises an unnecessary issue of discovery to exhaust the defendant and distract the court from its repeated, intentional failures to meet the court's entirely reasonable deadlines. Plaintiff shows no intention to let the court resolve this dispute. Since plaintiff originally filed this action without a good faith basis, it is not surprising to see him repeatedly show bad faith in all of his dealings with the court and the defendant. Given plaintiff's total loss of credibility, the court should deny the current request, enforce its deadlines, and put an end to these unfair and unethical tactics.

Since the other side will give as good as they get, you can reduce the dispute into a shouting match in which it is hard for the court to care about the difference between your good cause and their bad deeds.

Only if you believe that your opponent's bad character is your very best argument, should you take the time and space to paint it in the worst possible light (but first see #9).

9. How Should I Disparage (or Praise)?

When you do decide to paint your opponent in a bad light (or your client in a good one), you'll do a better job if you rely less on adjectives and adverbs and more on nouns and verbs. It's the difference between claiming that something is so and showing it.

> *Not* A. When Jones's excessive and unfounded anger led her to work more slowly and less carefully, Chang reasonably thought that Jones would probably act in ways that would be deleterious to the group's work environment.
>
> *But* B. When Jones's pique led her to neglect her work, Chang reasonably suspected that Jones might be a troublemaker.
>
> *Not* A. Once more this deceptive plaintiff raises a bogus issue of discovery to force a less wealthy defendant to use legal services it cannot easily afford and to keep the court from noticing that it has repeatedly and intentionally not met the court's deadlines.
>
> *But* B. Once more plaintiff manufactures an issue of discovery to exhaust the defendant's limited resources and distract the court from its repeated decisions to ignore the court's deadlines.

When you use adjectives and adverbs to express personal judgments, those judgments are right on the surface: they seem to be *your* judgments that you hope readers will share: "Jones's excessive and unfounded anger"; "this deceptive plaintiff"; "repeatedly and intentionally not met." But with nouns and verbs, those judgments seem to be less *imposed* on the story and more *embedded* within it: "Jones's pique"; "plaintiff manufactures an issue"; "repeated decisions to ignore."

10. When Should I Paint a Picture?

Every trial lawyer knows the persuasive value of a good picture, blown up to life-size or larger. You gain some of that persuasive power when you tell your story in ways that readers can easily picture. But there are also moments when you can paint verbal pictures that "sell" your argument without actually making it. Here, for example, an industry association is trying to block what it sees as excessive food labeling requirements:

> These regulations would mandate warning labels for trace amounts of ubiquitous naturally occurring substances, including nutrients and natural food constituents that are not deliberately added to food and pose no significant risk. Under these regulations, every local food store would become a forest of warning labels, frightening ordinary consumers with warnings on every product, not just those composed of a stew of artificial chemicals but every perfectly safe one containing only naturally occurring substances. How could any mother without a degree in chemistry differentiate between organically grown broccoli, with its warning label covered by more than 40 items she's never heard of, and artificial sweetener, with only two?

Almost always, such verbal pictures work when they depict extreme cases that show that a rule or conclusion is impractical, harmful, unfair, or otherwise intolerable on its face. To be effective, such a picture must closely match its less vivid argumentative counterpart:

"Every trial lawyer knows the persuasive value of a good picture. … You gain some of that persuasive power when you tell your story in ways that readers can easily picture."

> Consumers are unlikely to confuse the TOPs mark for its computer networking hardware and software with Abco's toy top mark for its brand of copier paper. …
>
> No clerk ever went out to buy paper for the copying machine and came back with a computer network. And what IT specialist could be so confused by the two marks that he might try to network the office computers with sheets of paper?

These verbal pictures must supplement, not supplant, your legal argument. They are best used early, when you first frame an argument, or as a final flourish after the argument is complete.

"These verbal pictures must supplement, not supplant, your legal argument. They are best used early, when you first frame an argument, or as a final flourish after the argument is complete."

Another **Perspective**

"The case method should be only one tool in the lawyer's tool box. To use a crude analogy, it is as if we were teaching carpenters how to build houses through a three-year training program in which the entire first year was spent teaching them how to use hammers (e.g., how to hammer floorboards, how to hammer the framing, how to hammer the wallboards, and how to hammer the shingles on the roof). In the second and third year of their training, we hand them an occasional screwdriver and pair of pliers. But by this time, of course, the hammer has become the tool of choice. It is no surprise that after graduation, when faced with a construction problem, our carpenter's immediate solution is: "Let's hammer it!" If we wish to avoid this consequence, we must start training our carpenter early in the use of other valuable tools. We still want our carpenter to be able to use the hammer, but in the first year we will also expose the carpenter to the saw, the level, the screwdriver, the wrench, and the pliers. We want to inculcate our carpenter early with instruction in a variety of tools, and with the flexibility of mind to reach for the right tool at the right time. We want our carpenter to understand early that there is a range of options."

—Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf,* 34 Cal. W. L. Rev. 351, 355 (1998).

Show Me, Don't Tell Me!

Teaching Case Analysis by "Thinking Aloud"

"Using a think aloud gives me the opportunity to show my students the cognitive processes I use as I read and analyze a judicial opinion."

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**.

By Leah M. Christensen

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Introduction

I was the nerd's "nerd" in law school. I briefed every case before class. I used six different highlighter colors to represent the various structural components of a case. I have recurring nightmares about being called upon in class even now, 15 years later. The nightmare usually involves my property professor emerging out of a cloud of mist, his somewhat beady eyes scanning the dreaded seating chart only to land on my name: "Ms. Christensen, let's talk about adverse possession." I wake up in a cold sweat.

Looking back, I realize I was a good student. I studied hard. I took good notes. I went to class. But during that first year of law school, I simply did not understand what my professors were asking me to "get" out of a case. I could regurgitate the facts, holding, and issues of any case, but I always seemed to be missing something in the classroom discussions. I had been very successful in academics before, so why was I having such a difficult time? Fortunately, between my first and second year of law school, something clicked and I became proficient at exams; my writing improved and I ended up doing very well in law school despite my slower start. I will never forget that first year. I understood what it felt like to struggle.

Since beginning my teaching career as a legal writing professor, I have noticed there are always a handful of students who struggle during their first-year writing course. They are often just a second or two behind the rest of the class. They never quite seem to grasp the importance of a case or how to apply its reasoning to the facts of a memo. How do we help these students? What could make a difference to them? I recently had a teaching "epiphany." Sometimes, instead of telling students how to master a particular skill or concept, we need to "show" them. This is particularly true of case analysis. I have come to the conclusion that one of the most effective ways to teach case analysis in the legal writing classroom is to model how I read a case. I have begun using the "think-aloud" methodology in class. My students enjoy this experience as much as I do. Using a think aloud gives me the opportunity to show my students the cognitive processes I use as I read and analyze a judicial opinion. The lesson is invaluable.

The "Think Aloud"

A think aloud is most often used as a research tool in the field of cognitive psychology. In a think aloud or verbal report, participants state their thoughts as they read and think out loud. Verbal reports "allow access to the reasoning and purpose underlying cognitive behaviors."[1] This is particularly true when we study experts in any field. Researchers often ask the question: how do we discover the knowledge and strategies that experts use? You generally cannot ask

[1] Suzanne E. Wade et al., *An Analysis of Spontaneous Study Strategies*, 25 Reading Res. Q. 147, 150 (1990) (citations omitted).

experts how they do something because experts who engage in a process usually cannot express "how they know what they know."[2] This is particularly true for those of us who teach legal writing. Think of your typical writing professors. Haven't they likely practiced law for many years, written hundreds of briefs, and graduated in the top of their law school classes? Even when the most talented legal writing professors try to be explicit about a particular topic or case, they "often cannot break down the reasoning process to the degree necessary to communicate it effectively to some students."[3] What if instead of "hiding the ball" in class, we explained the process for accomplishing a particular task? When it comes to reading and case analysis, we need to be willing to show our students how to read a case by providing an example. The think aloud is a simple technique that provides our students with a glimpse into our own cognitive processes and shows them what we cannot express in words.

Consider the sentiments of a first-year law student who had just completed his second memorandum assignment. He was still struggling with reading and analyzing case law despite the fact that he worked hard, attended classes, and sought outside help from his writing professor. After first semester, he fell in the bottom 10 percent of his class. During an interview, he talked about his difficulties with case reading and analysis.[4]

> **Interviewer:** If you think back to the beginning of first semester when you first started reading cases, what was most difficult?
>
> **Student:** Everything. Because I remember getting that outline of what you should look for and I had no idea. It took me the longest time. I felt like when I was in class, when the professor would say well, what's the holding? I'd be like I don't know—I hadn't figured it out. And then the professor would say what the holding was, so I'd underline it. And then I just learned, OK, that's what a holding is. I started to learn from that. I literally just—I really didn't get it. It was very difficult for me to get the parts of the case.
>
> **Interviewer:** Do you think it would have helped to have the professor actually read aloud a couple of the cases during those first weeks of law school?
>
> **Student:** Oh yeah. Definitely. Definitely.

This student wanted to figure out what was going on in the cases he read so that he could apply the law properly in his writing assignments. He wanted to understand what his professors expected him to "get" out of the cases. Having his legal writing professor show him by using a think aloud in class might have helped a great deal.

Using the Think Aloud in Class

Although any professor could use a think aloud in class, legal writing professors have particular advantages when it comes to this type of exercise. First, our class sizes are smaller. Therefore, we get to know our students earlier in the semester and usually have established a good rapport. Second, most of us feel comfortable using different teaching methodologies and can adapt to this exercise easily. Third, if we use the problem method of teaching, i.e., teaching within the context of our actual memo problem, students are particularly attentive to and interested in how we might analyze a relevant case. And, we can use the think aloud to discuss not only case analysis, but almost any other topic we might touch upon during the semester, e.g., legal argumentation, synthesis, or rule application.

The following lays out an example of a think aloud I have used before in my first-semester legal writing

"When it comes to reading and case analysis, we need to be willing to show our students how to read a case by providing an example."

[2] Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407, 409 (1987).

[3] Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 Willamette L. Rev. 315, 321 (1997).

[4] This interview was part of a larger empirical reading study on how law students and lawyers read legal text. I used a think-aloud protocol to collect data on reading strategies. Following each think loud, I interviewed each student to learn more about the challenges they experienced reading legal text.

class discussing the case of *Olson v. Walker*, 781 P.2d 1015 (Ariz. App. 1989).[5]

> OK, today you were assigned to read the case of *Olson v. Walker*. I'd like to spend the first part of today's class showing you how I might read the case if I picked it up for the first time. As you listen to the way I go about it, consider not only what I notice about the substance of the case, but also pay attention to how I go about reading the case—my process. Each of you will develop your own process for legal reading. However, make sure that your process, whatever it is, allows you to extract all the necessary information out of that case.
>
> The first thing I do before I begin to read a case is to think about why I'm reading the case. I guess you'd call this my "purpose" for reading. If you ask any practicing lawyer how he or she reads a case, the lawyer will usually tell you that he or she always has a purpose for reading. So, when I read a case, I assume I'm a practicing lawyer because that role is most familiar to me. I pretend to read the case in preparation for a client interview. Don't be afraid to put yourself in a "role" or give yourself a purpose for reading the case other than simply reading it to prepare for class.
>
> So, I pick up *Olson*. I usually preview the opinion to see how long the case is. This case is pretty long, 12 pages. Yikes. OK, this is the Arizona Court of Appeals decision, so it's not the highest court. There may be other precedent out there that could be more authoritative than this opinion, so I'll need to make note of that. This decision was published in 1989, so it's not that recent. I'll probably want to find out if there are more recent cases addressing this issue. Looks like the Supreme Court denied review that same year. Hmm … guess they didn't want to hear the case. I wonder why? Oh wait, there's a footnote there that states that three of the justices wanted to take review of at least three of the issues. Interesting. I'll make a note of that.
>
> OK, now I usually skim the headnotes of the case. Looks like this case is about punitive damages or "exemplary" damages. That's a new term. I need to look that up before I go on to make sure I understand what that is. (Looks up the word in the dictionary before proceeding.) Boy, there are a lot of headnotes here. There are a number of headnotes about the "constitutionality" of the statute—so this must be another important issue. I'll keep those in mind.
>
> OK, now I'm ready to tackle the opinion. The chief judge wrote the opinion; Judge Grant. Nope, don't know the judge. Sometimes if I know the judge, it makes a difference in how I view the decision.
>
> (Reading from text) "This appeal primarily concerns the award of punitive damages in a personal injury action. A secondary issue concerns the trial court's refusal to strike certain expert testimony. For the reasons explained below, we affirm."
>
> Based upon this first sentence, this is an appeal. So, someone lost in the lower court. Yes, the defendant lost. OK, looks like he got sacked with punitive damages in a personal injury action. So, he's appealing that. And, the second issue is that the trial court allowed some expert testimony to come in. The court of appeals is "affirming," which means they are upholding the lower court's decision. OK, they agree with the lower court. Moving to the facts. …

The think aloud is simple and casual. Nonetheless, as I was reading through the case, I illustrated several important reading strategies even before getting to the fact section of the opinion. If students paid attention to "how" I read in this example, they learned that I established a purpose before I read, put the case in context, noted the court and date of the decision, identified the key issues in the case, and understood the procedural posture of the case.

"The think aloud is simple and casual. Nonetheless, as I was reading through the case, I illustrated several important reading strategies even before getting to the fact section. … "

[5] I use this case in orientation to introduce case briefing and I return to it throughout the semester to discuss other aspects of the case related to various class topics.

Although we might assume our students naturally pay attention to all these details, they do not.

If I were to continue thinking aloud using the case above, I might also comment or discuss the following:

1. Diagram or create a mental image of the fact section.
2. Illustrate how each individual issue relates to the case as a whole.
3. Comment upon how you try to resolve confusion or questions. For example, if you come to an unusual term, look up the word and have your class watch you do it. If you have questions as you read, illustrate how you go back and reread to answer your questions before moving on.
4. Ask out loud why the court came to its conclusion. What rule comes out of the case? How might this rule apply to a different factual situation?
5. Illustrate what notes you would make. Write on the board as you read. What parts of the opinion did you find noteworthy? What portions did you skim? Summarize key aspects of the case in your own words. Why is the case important? Is the decision correct? How will the opinion serve as precedent for future cases?

When my first-year writing students witness me using this formula, they begin to understand the many facets of case analysis. They learn to read actively. Further, when I verbalize my thoughts to my students out loud, I make my thinking "visible."

There are some who might disagree with this approach, arguing that students gain more when they struggle individually with how to think like a lawyer.[6] For some students, this may be true. But for others, there is simply too much to learn. First-year law students in any typical legal writing curriculum are overwhelmed with new concepts, e.g., the facts of a problem, the structure of a memo, basic legal terminology, etc. In addition, the tools and strategies they may have used to think and write "well" before law school no longer work in quite the same way. Research by cognitive psychologists shows that novices in a field show greater growth in learning when knowledge and strategies are directly taught rather than when students are encouraged to discover them on their own.[7] At least during the first semester of our legal writing curriculum, we need to provide our students some direction. In any learning context, it is "the job of the expert to make explicit the secrets of her craft."[8] If we work to make our cognitive processes more visible to our students, we can enhance their learning in the first year and help them through some of the many cognitive challenges of approaching legal writing for the first time.

"Research by cognitive psychologists shows that novices in a field show greater growth in learning when knowledge and strategies are directly taught. …"

[6] Peter Dewitz, *Conflict of Laws Symposium: Reading Law: Three Suggestions for Legal Education*, 27 U. Tol. L. Rev. 657, 672 (1996).

[7] *Id.*

[8] *Id.*

Searching for Legal Articles

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.*

By Judy Meadows and Kay Todd

We asked law librarians for their thoughts on searching for legal articles. As Mary Hood, from the Heafey Law Library at the University of Santa Clara, so succinctly put it, "The question for the researcher is not whether an article exists on the subject being researched, but rather how can the researcher efficiently locate an article that will answer many of the questions presented by the research question."

Specifically, we wanted to know who still relies on indexes, and if so which ones are preferred. We also were curious if anyone still used the print indexes. We asked what law librarians think are the virtues and/or drawbacks of free text searching of electronic files for law reviews, such as Westlaw®, LexisNexis®, or HeinOnline. And we wondered if they ever use Google or another search engine to find free sources that law schools have posted on the Internet. Following are the responses we received.

Print Indexes

We were not surprised to learn that most of our colleagues avoid the print indexes. The most common reason for this is the lack of cumulation. Researchers found them very cumbersome, and when online searching became available that was soon the first and only method used. We were told that many law librarians keep the old print indexes on the shelf—mainly for the list of journals and subjects in the front of each volume; however, they are not used as they were prior to the advent of computer research. One responder told us that LegalTrac is available in her office, and the print index is at the other end of the building (which seems several miles away). Thus it is the sheer convenience of having desktop access that drives a lot of research techniques.

However, some like the way a paper index enables them, while skimming through the subtopics, to find those articles that they did not know they were looking for. It was also pointed out by Mike Miller, retired director, that print indexes allow one to quickly focus in on a particular time period when you think an article was written. He said that this is especially helpful when conducting legislative history research.

Indexes in General

The two major legal indexes are Legal Resource Index and Index to Legal Periodicals. Both of these are available on LexisNexis and Westlaw and as stand-alone licenses (the former known as LegalTrac). Two other indexes of note are Index to Foreign Legal Periodicals, and Current Index to Legal Periodicals. Law librarians like the controlled vocabulary that is available in an index. They are unmatched for both precision and recall of results. Unless there is a specific term, name, or statute involved in the search, full-text searching can lead to frustration and lost time. Another reason why the indexes are used is that not all law review articles are searchable on either LexisNexis or Westlaw. Rob Richards, a former reference librarian and now a law student and research assistant, told us:

> I still rely on indexes, because I find full-text searching in Westlaw, LexisNexis and HeinOnline too imprecise: searches retrieve too many false hits, because there is no controlled vocabulary. I think LexisNexis affords an advantage over the other two services, though, because it allows one to restrict a key word or phrase search to the "summary" field of an article; this allows more precise searching. I'm

not sure all law review articles in LexisNexis have coded "summary fields," however.

I use indexes only in electronic form, never in print. I use LegalTrac, ILP, IFLP, CILP, and Ingenta. I also look for preprints and articles on LSN and Jurist. I sometimes will look for articles on current topics on FindLaw or law.com.

When researching topics in U.S. law, I always search both ILP and LegalTrac, because their subject indexing varies considerably. For example, when I searched today for the subject "adversary system" limiting dates to 2003–2005, ILP retrieves 89 citations, and LegalTrac 17. When I searched today for the subject "secured transactions," limiting dates to 2003–2005, ILP retrieves 132 citations, and LegalTrac 170. So I always search both to be sure I haven't missed anything.

The profession's preeminent legal research authority, Mary Whisner, of the University of Washington's Gallagher Law Library, told us that she uses periodical indexes often and extensively. The one she uses most is LegalTrac. It covers a good range of periodicals (including legal newspapers and bar journals) for a good range of time (1980 to present). ("I remember when Current Law Index was new, but that was—golly—25 years ago!" she said.) Mary told us that starting with an index is more effective than full-text searching for most topics. With a few words, the researcher can usually find a list of articles that are relevant (or that have links from their subject headings that will lead to good articles). If the terms are in the title or the subject headings, then the articles are much more likely to be relevant to the research need, rather than just appearing randomly somewhere in the text of the article.

LegalTrac also covers a lot of journals whose full texts are not available on LexisNexis or Westlaw (much to the surprise of law students). Sometimes the online systems don't carry the publication at all; sometimes they carry it, but not for the full run. LegalTrac has been adding the text of selected journals, but the searching itself is still just run on the subject headings, author, title, etc. The text is handy—especially when it's available in PDF. (Many like to see the typesetting, the graphics, and so on better than a printout of plain text from LexisNexis or Westlaw.)

However, that being said, a significant number of librarians at law firms no longer use any kind of indexes. They rely on the searchability of LexisNexis and Westlaw, even though they know they are not getting everything. Most law firms and many court libraries have cut back significantly in their law review subscriptions. They rely on what is free, or what they already are paying for through flat contracts. That situation is even more likely for the sole practitioner or small firm with no library.

HeinOnline

HeinOnline's extensive holding of law reviews has made it possible for hundreds of law libraries to jettison both their law reviews and the indexes that were used with them. It is possible to do a "search all" approach with this service, but the results are not great. Generally it is used when the citation to the article is already known. Thus HeinOnline is used primarily as a document retrieval tool. As one of our colleagues said, it's a nice alternative to lugging bound volumes over to a photocopier.

Searching on LexisNexis and Westlaw

At the firms that have no indexes, the law librarians teach search techniques for Westlaw and LexisNexis that will make the online results more effective. Sue Johnson, the librarian for the Carrington law firm in Dallas, told us, "I try to teach our attorneys to narrow the databases; for example, to search Texas journals and law reviews in the Texas library on Westlaw rather than 'all' if the topic is more regional. Usually these techniques are productive." The Idaho state law librarian prefers searching in Westlaw for journals, and generally does field searching. He finds that the title field, e.g., ti(daubert), is an easy way to limit the searches. He also will search for the names of statutes in the title field. The author field is helpful along with a date restrictor, as sometimes informative articles are written shortly after a foundational U.S. Supreme

Court opinion comes out. Others agree that when they use Westlaw and LexisNexis for journal searching they make use of the field restrictions or segments, as a way to narrow their searches, and they try to teach students to do the same.

The obvious disadvantage is that often they get a huge number of hits, many of which are irrelevant, which is why most law librarians still prefer the periodical indexes. June MacLeod told us that when she was at a major law firm she was told not to use LexisNexis or Westlaw unless there was a client account to charge. She said, "Periodical research can be nebulous at best at times, and it was difficult to do general searches with the fear of racking up client charges looming overhead."

At the University of Richmond, they have just about given up on teaching the print versions of journal indexes. The electronic ones are so much easier to use, and much as they hate to admit it, the fact that coverage only goes back to 1980 in most cases is not going to be a problem. As Chuck Ten Brink from Michigan State University College of Law said, "Now that it is older than most of my students, the chronological limitation seems much less important."

Other Sources

Many academic law libraries have access to the EBSCO/Proquest databases, which are available through statewide contracts. There also are indexes of state legal periodicals created by some academic and court law librarians. We were told that researchers can use *American Law Reports* and *American Jurisprudence 2d*. These tools have so many references tied to research topics that using them is very similar to the process used to identify sources in a print index. Publishers such as Commerce Clearing House and RIA® have subject-related Web libraries (e.g., tax, estate planning), which have search links to the journals and newsletters that they publish (*Journal of Multistate Taxation*, etc.) in that area.

The California Digital Library project has added a plethora of materials and can be very useful for finding articles. Nancy Carol Carter from the University of San Diego told us that she uses the paper copy of old *Monthly Catalogs of Government Documents* to locate historical articles on Indian law.

The Wisconsin State Law Library has access to some nonlegal periodical indexes provided by Ebscohost and ProQuest. They use these more often than they used to as more and more "legal reference questions" spill over into the areas of medicine, insurance, employment, current events, etc. These databases also have good newspaper coverage, especially for local Wisconsin newspapers not in Westlaw or LexisNexis.

Google

Experienced legal researchers tend to use Google only when they have exhausted all other sources available. Mariann Storck, with the U.S. Attorney's office in Denver, told us, "Time is money and even though there's a cost involved in using LexisNexis or Westlaw or HeinOnline, a searcher may be able to get enough or everything with one search in one of those than searching the Internet. Also, for Lexis and Westlaw, you can't beat the search options and speed of response." Another colleague said that she used Google to locate home pages of associations or companies that publish specific journals. Often those sources include links to the latest issues (although there frequently is a charge for retrieval.) Google Scholar is sometimes helpful in locating authors. Rob Richards told us that although he never uses Google or other general Internet search engines to locate free articles on the Internet, he will look for the author's law school Web site for articles or lectures unavailable from other sources.

Conclusion

Barb Golden, the Minnesota state law librarian, said, "The bottom line is that I first use whatever is available to me in the library, then, when necessary, I go beyond the library. We generally do not have to create an exhaustive bibliography. If the patron doesn't already have a particular article in mind, they usually only want some recent articles on a topic." Nancy Carol Carter said what we all think, "If I am completely honest, what appeals to me about using an online, flexible product such as the LegalTrac

index is that it permits me to be lazy, lucky, and meticulous all at the same time!"

For those who teach legal research, the salient question is whether to even mention print indexes when teaching law students how to research periodical literature. Mary Hood said that there are two more valid reasons for knowing how to use a print index. When the law student graduates, he or she may not have access to the online indexes on LexisNexis or Westlaw, as they are not part of the basic subscription. Mary also reminds us of "the vagaries of power, network connections, and the Internet. You cannot be assured that all will be working when you need to do your research." Law students should be taught to be flexible and have back-up plans in place. Libraries' back-up plans are to provide both online and print indexes, and students should know how to use both.

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Another **Perspective**

"Being published in The New Yorker was a milestone for [James] Wilcox—an affirmation, of sorts—and he happily sent a copy of the magazine to his parents. But the piece didn't exactly cause a stir in Hammond, Louisiana. 'Jimmy sure has good punctuation' was one neighbor's only comment."

—James B. Stewart, *Moby Dick in Manhattan, in* The New Gilded Age: The New Yorker Looks at the Culture of Affluence 243, 247–48 (David Remnick, ed. 2000).

Hierarchy, Respect, and Flying Sandwiches:
A Review of *Teacher Man*

By Frank McCourt
Schribner, 2006

"McCourt faces challenges to his clout, as all teachers do, and recounts many of them throughout the book."

Reviewed by Brady Coleman

Brady Coleman is an Assistant Professor of Law at South Texas College of Law in Houston.

Frank McCourt certainly keeps hope alive for the unaccomplished retiree. His first novel, *Angela's Ashes*, won the Pulitzer Prize—when he was 67—for the story of his boyhood in Ireland. He followed this up with a second autobiography, *'Tis*, of his early years in America. *Teacher Man* is his latest memoir, of his 30 years spent teaching at high schools in New York City. What took him so long to write his first masterpiece? "I was teaching, that's what took me so long," McCourt explains in the prologue. "When you teach five high school classes a day, five days a week, you're not inclined to go home to clear your head and fashion deathless prose. After a day of five classes your head is filled with the clamor of the classroom." (p. 3)

His teaching degree does not prepare him for his very first day of class in 1958 at McKee Vocational and Technical High School in Staten Island, when a boy named Petey throws a baloney sandwich wrapped in wax paper at another boy, which then falls to the floor near McCourt. The students are all staring at him. How should he respond?

> Professors of education at New York University never lectured on how to handle flying-sandwich situations. They talked about theories and philosophies of education, about moral and ethical imperatives, about the necessity of dealing with the whole child, the gestalt, if you don't mind, the child's felt needs, but never about critical moments in the classroom. (p. 16)

But McCourt's instincts carry the day. Rather than overreact, and create hostility, or ignore the incident, and risk losing his authority, he picks up the sandwich, unwraps it, and enjoys eating it slowly while the class watches in admiration. "Petey said, Yo, teacher, that's my sandwich you et. Class told him, Shaddap. Can't you see the teacher is eating? I licked my fingers. I said, Yum, made a ball of paper bag and wax paper and flipped it into the trash basket. The class cheered." (p. 17)

McCourt is keenly sensitive to classroom dynamics. He is warned that "first impressions are crucial. … They're watching you. You're watching them. … They'll take your measure and they'll decide what to do with you. You think you're in control? Think again. They're like heat-seeking missiles. When they go after you they're following a primal instinct. It is the function of the young to get rid of their elders, to make room on the planet." (pp. 39–40) McCourt faces challenges to his clout, as all teachers do, and recounts many of them throughout the book. How do the best teachers deal with them? They anticipate and welcome such inevitable challenges from students. What a great thing that contemporary American students try to challenge their teachers; they certainly haven't in many places and in many times. After all, as the Irish McCourt reminds us, America is the "land of the free and home of the brave." (p. 83) But McCourt's anecdotes remind us that skilled teachers learn to draw sharp and visible lines of expected classroom civility, and enforce them consistently and firmly.

That consistency can be a difficult challenge for any human. What teacher has not shown up at class in a foul mood, and later regretted letting his anger out unfairly on the class: "You're just another teacher, man, so what are you gonna do? Stare down the whole class? Fail the whole class? Get with it, baby. They have you by the balls and you created the

situation, man. You didn't have to talk to them like that. They don't care about your mood, your headache, your troubles. They have their own problems, and you are one of them." (p. 68)

Interspersed throughout his memoir as a teacher, McCourt recounts early failures in the classroom, struggles with an unsuccessful marriage, being fired from one high school, his seemingly endless stack of student papers to correct, being unable to complete a Ph.D., and a persistently low self-esteem. But somehow he gets a job teaching at the prestigious Stuyvesant, "the top high school in the city, the Harvard of high schools, alma mater of various Nobel Prize winners, of James Cagney himself." (p. 183) He remains there until the end of his teaching career, and is wildly popular. Students sit in windowsills to attend his classes; there are admiring jokes from colleagues about him filling Yankee Stadium; he wins "Teacher of the Year" awards. Still, he worries he is liked only because he is an easy grader, and not tough enough on his students. He goes through periods trying to toughen his image (humorously, but inevitably, his students see right through the facade).

Some teachers are respected but disliked; others liked but disrespected. But we know it's not a straight line, with "respect" on one end of the continuum, and "like" on the other, because fortunate teachers manage to get lots of both reactions. A teacher's personality and experiences strongly influence which reaction he most desires from his students, and for McCourt, it is unquestionably a need to be liked. Still, one suspects McCourt's students must have respected him as well, and that he ruminates about these struggles with respect to, well, to be liked more by the readers of *Teacher Man*.

But ruminate he does. "There's no respect for easy teachers. One teacher at Stuyvesant was called Something for Nothing. I want to make them earn their grades. Have respect." (p. 201) Although one of his popular Stuyvesant classes is already filled up, a girl wants in so badly that her divorced mother offers to spend the weekend with McCourt at a resort as payment to let her daughter in the class. When an astonished drinking buddy asks McCourt why he refused, he replies, "There wouldn't be any respect." (p. 201) His obsession with respect predates his teaching years. For example, he writes that "if you even hint that you read Shakespeare, people give you that look of respect." (p. 36) Working on the docks before getting his teaching certificate, McCourt learns that certain insults must be met with fists, or "you lose all respect." (p. 60) He had "more respect for [a dockworker] than [he] had for any professor." (p. 63) But he's advised to leave the docks: "You just go be a teacher, honey. You'll get more respect." (p. 65)

Gratefully, McCourt doesn't offer budding teachers a list of pedagogical principles to follow. But he does conclude the book by recalling this advice to a young substitute teacher:

> I'll admit I didn't always love teaching. I was out of my depth. You're on your own in the classroom. … One unit of energy against one hundred and seventy-five units of energy, one hundred and seventy-five ticking bombs, and you have to find ways of saving your own life. … I know I'm exaggerating but it's like a boxer going into the ring or a bullfighter into the arena. You can be knocked out or gored and that's the end of your teaching career. But if you hang on you learn the tricks. It's hard but you have to make yourself comfortable in the classroom. You have to be selfish. The airlines tell you if oxygen fails you are to put on your mask first, even if your instinct is to save the child. (p. 255)

McCourt doesn't so much write to his audience as he speaks to it. Indeed, his first book, *Angela's Ashes*, likely won so many awards because of McCourt's brilliance with portraying spoken dialect in print. This same talent comes through in *Teacher Man*, particularly as he depicts the different ethnic accents of his students. Some have suggested avoiding the print version, and getting a copy instead of the audio version of the book—spoken by the author himself, with the appealing remnants of an Irish brogue.

"A teacher's personality and experiences strongly influence which reaction he most desires from his students. … "

"We can display a genuine equality of respect independent of status; and a common civility regardless of position."

Although a captive storyteller and brilliant stylist, at times one wishes for fewer anecdotes and more rigorous reflection. In particular, McCourt doesn't reveal much deep thought about an issue that appears repeatedly throughout the book—that of status. McCourt is plagued by doubts about his place in the social hierarchy: "Teacher, my arse. I should have stayed in the army with the dogs. I'd be better off on the docks and the warehouses, lifting, hauling, cursing, eating hero sandwiches, drinking beer, chasing waterfront floozies. At least I'd be with my own kind, my own class of people, not getting above myself, acushla." (p. 55) As a secondary school teacher, he admits that he "envied" college professors, with their comparatively light teaching loads. (p. 103) And he "envied" the writer Edward Dahlberg for "living the life of a writer." (p. 106) Before getting his job at Stuyvesant, in a short stint as an English as a Second Language teacher to immigrant children, he says, "I could have been one of them, part of the huddled masses. … I know English, but I'm not so far removed from their confusions. Rock bottom in the social hierarchy." (p. 130) Indeed, his motivation for writing *Teacher Man* is "the nagging feeling [that he had] given teaching short shrift" in his previous book *'Tis*: "In America, doctors, lawyers, generals, actors, television people and politicians are admired and rewarded. Not teachers. Teaching is the downstairs maid of professions." (p. 4)

McCourt's fixation with status is familiar to most of us, but particularly so in legal education. Indeed, so much of our talk—in the hallways, in the faculty lounge, in formal meetings—appears increasingly to be of hierarchy: the *U.S. News & World Report* ranking system is flawed and destructive; a law school department (or school of thought, as reflected in hiring and promotion) lacks deserved status; the traditional classroom deference owed to us as professors—which deteriorates annually, according to some reports—must be restored. And of course there is the dismally routine politicking for superior perceived status between academic coequals, conducted without any of the idealism that supposedly underlies our scholarly writing or public service or religious beliefs.

Reading *Teacher Man* reminded me of a couple of lessons learned when our law school was moving toward tenure-track status for legal writing professors. First, hierarchy battles are zero-sum games; the more status I have, the less you have, because there is (tautologically) a limited supply of high-status institutions and positions, despite an unlimited ability to shift relative social power. If it is human to want more status, it is just as human to not want less—and legal academics are intellectually adept at rationalizing either outcome as the more legitimate. But respect and civility are not zero sum; they are behavioral rather than structural. We can display a genuine equality of respect independent of status; and a common civility regardless of position. The link between respect and hierarchy is a strong one, reinforced by both nature and nurture, but it is not a necessary one. In both classroom and faculty settings, hierarchy becomes ugly, and therefore divisive and challenged (or quietly resented), when civility disappears: perhaps there is a needlessly blunt assertion of dominance; or a sarcastic remark about powerlessness; or some humiliating reminder of existing constraints. This is a lesson McCourt learns early on, although with his students, not his colleagues: "If you bark or snap, you lose them. That's what they get from parents and the schools in general, the bark and the snap. If they strike back with the silent treatment, you're finished in the classroom." (p. 68)

Second, we would all do well to gently laugh a little more at ourselves and our institutions of power (as McCourt does so often) lest we become miserably self-absorbed. In *Teacher Man*, McCourt does manage to mock his romanticized image of the envied class: "No one is forcing you to stay in this miserable underpaid profession and there's nothing to keep you from going through that door to the shimmering world of powerful men, beautiful women, cocktail parties uptown, satin sheets." (p. 152) Of course, the same tenured faculty member at your nonelite law school who obstinately argues against your tenured status, for example, is herself not equally considered for membership on important Association of American Law Schools (AALS) committees, has had her substantively

superior article rejected by top journals because of her school's rank, and has surely been ignored (one quick glance at the bottom half of the name tag?) at AALS cocktail parties, all for reasons of institutional status that are analogous to your own. That the emperor has no clothes is not an argument for complacency within the legal writing community; rather, it is a reminder of the omnipresence of hierarchy, and therefore a call for a more civil if more tenacious fight, moderated by more of McCourt's graceful self-effacing humor toward the teaching profession, all around.

History has taught us this much: attempts at abolishing all social hierarchy end in bloody tragedy at worse, or inefficiency and collapse at best. Simultaneously, struggles for greater equality—the defiance of existing hierarchies—must be fought if justice be gained. And to ourselves and our allies (unsurprisingly), we leave the task of distinguishing just from unjust hierarchies.

No philosopher will resolve the enduring challenges of social organization. Still, we know of many who have written rigorously about them. And by their thoughtful explorations of status and justice, hasn't the occasional suffering that follows from our own personal encounters with such challenges been leavened? Or at least, by expanding our awareness, haven't we then been able to smile at, rather than hide behind, our own daily hypocrisies toward hierarchy: damn the oppressive deanery above me (their notion of hierarchy always too strong), and damn the cheeky administrative staff below me (their notion of hierarchy always too weak).

Of course, McCourt is not a professional philosopher; indeed, he makes no pretensions in the book to even being an amateur one. His lack of explicit depth and profundity are in fact the inverse of his greatest strengths, which are his charming modesty and approachable prose. To any of us who speak in a room full of students for a living—whether such students are rambunctious kindergarten kids or college graduates seeking law degrees, whether they are overseas Chinese businessmen practicing English conversation or American inner-city high school teenagers—*Teacher Man* will likely educate and entertain, as well as soothe and appease. I wondered briefly before getting the book whether it would have any relevance at all to my own teaching, based on a glance at the jacket cover. After all, McCourt's experiences are mostly decades old, he taught largely to secondary school students in a very different American subculture from Texas, and he did not teach legal subject matter. My doubts were soon eliminated as the relevance of the book became quickly apparent. I recognized the universality of the teaching experience far outweighs any superficial distinctions I had imagined.

"To any of us who speak in a room full of students for a living … *Teacher Man* will likely educate and entertain, as well as soothe and appease."

Perspectives

Teaching Legal Research and Writing

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

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