Perspectives
Teaching Legal Research and Writing

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Twenty Years On:

The Debate Over Legal Research Instruction

By Robert C. (Bob) Berring Jr.

Robert C. Berring Jr. is the Walter Perry Johnson Professor of Law at the School of Law (Boalt Hall), University of California, Berkeley. His recent publications include Finding the Law *(with Beth Edinger, 11th ed. 1999) and* Legal Research Survival Manual *(with Edinger, 2002). He also created the award-winning video series* Legal Research for the 21st Century.

In 1989, a time covered in the mists of memory, a time before the Internet, MySpace, e-mail, cell phones, and Google, Kathleen Vanden Heuvel[1] and I engaged in a lively exchange with Chris and Jill Robinson Wren over the best way to teach legal research. The teaching of legal research has generated a steady, annual flow of articles, but this was different. The Wrens were not law librarians nor were they law professors. They claimed to bring a fresh, real-world outlook to the legal research enterprise. Their idea was "process-oriented" research. Their article, "The Teaching of Legal Research,"[2] set out how legal research training had been handled incorrectly in the past, but proclaimed that now a new path was opening.

According to the Wrens, the process approach used real problems and talked about problem solving. The use of legal information was contextualized, made relevant and digestible for the student. The Wrens contrasted this with the bibliographic approach that they felt most legal research courses employed. The bibliographic approach, which was tied into the role of librarians in the teaching of research, centered itself on the set of books being used. As such it was de-contextualized, abstract, and exceedingly boring. The Wrens' book, *The Legal Research Manual*,[3] made quite a splash and they summarized their ideas in "The Teaching of Legal Research."

The article offended Kathleen and me to the extent that we wrote a reply piece, "Legal Research: Should Students Learn It or Wing It."[4] That generated a reply to the reply.[5] We put a

[1] In 1989, Kathleen Vanden Heuvel was a Senior Reference Librarian at the UC Berkeley School of Law Library; she is now Associate Dean for Capital Projects and Director of the UC Berkeley School of Law Library.

[2] Christopher G. Wren & Jill Robinson Wren, *The Teaching of Legal Research,* 80 Law Libr. J. 7 (1988).

[3] Christopher G. Wren & Jill Robinson Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis* (1983); Christopher G. Wren & Jill Robinson Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis* (2d ed. 1986).

[4] Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?*, 81 Law Libr. J. 431 (1989).

[5] Christopher G. Wren & Jill Robinson Wren, *Reviving Legal Research: A Reply to Berring and Vanden Heuvel*, 82 Law Libr. J. 463 (1990).

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stopper in the bottle by replying to the reply to the reply with a short end note.[6] The tone of the articles carried a passion seldom seen in the pages of *Law Library Journal*, the professional journal of the American Association of Law Libraries. Because of that passion and because the Wrens' article appeared to view law librarians as a big part of the problem with the teaching of legal research, this issue sparked a good bit of interest. Remember this all happened before blogs and social networks kept hot issues moving in and out of view. Interest built, and it was strong enough that a debate was scheduled at the AALL Convention that year.[7] For a few months there was quite a bit of electricity in the air.

Almost 20 years later one might wonder what the fuss was all about. In hindsight the Wrens espoused a more important role for legal research training and they felt that it was best done in an environment where the student was learning how to use the research tools. That is not a very controversial proposition. I doubt that we could find anyone who would advocate the old "roll a book truck into the classroom and just describe each book" school of pedagogy. (That assumes that the modern law student would know what a book truck was.) But the Wrens constructed a straw man that consisted of the worst practices in teaching legal research, and laid this sad product at the feet of law librarians.

What the Wrens did not understand was that many librarians were fighting for better research training. Legal research training was terrible at many law schools, but that was not the fault of the law librarians; it was often despite the best efforts of the law librarians. (The same is true today.) Librarians who taught legal research felt as if they were set up by the Wrens. Everyone would appreciate more time and a better context for teaching legal research. We would love to see a serious research training program that was taken seriously by the law school, with instructors who had status and power in the law school community. But the governing ethic of legal education does not allow for any of those things. Law school faculty members do not see research training as crucial. Research and writing courses have drifted more and more toward legal writing courses. Attempts at changing the first-year curriculum, like Harvard's much ballyhooed effort last year,[8] weaken legal research training. To my mind, most meaningful legal research training for first-year law students is done by Westlaw® and LexisNexis® representatives. They teach the students how to do the things that they need to do.

So it appeared to Kathleen Vanden Heuvel and me that the Wrens were depicting law librarians who teach legal research as the cob-webbed purveyors of boring information about bibliographic expertise. Kathleen and I had spend years working on an advanced legal research course for second- and third-year students that stressed not the bibliographic detail of law books, but instead focused on the nature of the information itself: What is a judicial opinion? What is a statute? How are administrative rules and regulations produced? We believed that if a student really understood how a citator worked, then that student could use one in any format. Though we could not foresee the future, we could guess that new formats and new tools were coming. Further, we made the students work on open-ended questions, incorporating the "process" benefits of the Wrens. I think of this as a functional approach to legal information, not a

[6] Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: A Final Response*, 82 Law Libr. J. 495 (1990).

[7] A Debate on the Methodology of Teaching Legal Research, a program presented at the 83rd Annual Meeting of the American Association of Law Libraries, Minneapolis (June 19, 1990) (speakers were Robert C. Berring and Christopher G. Wren; moderator was Steven M. Barkan). Christopher Wren had spoken at an earlier AALL meeting: Teaching Research Skills: How Successful Are We?, a program presented at the 79th Annual Meeting of the American Association of Law Libraries, Washington, D.C. (July 7, 1986) (audiotape available from Mobiltape Co.) (speakers were Patricia A. Wyatt, Christopher G. Wren, and Lynn Foster). Portions of the Wrens' first article were adapted from this presentation. Wren & Wren, supra note 2, at 7 n.*.

[8] *See, e.g.*, Rethinking Langdell: Historic changes in 1L curriculum set stage for new upper-level programs of study (Dec. 2006), <www.law.harvard.edu/news/today/dec_hlt_langdell.php>; Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st-Century Issues*, N.Y. Times, Oct. 7, 2006, at A10.

bibliographic one. It seemed that the Wrens had chosen the worst aspects produced by the old system and made them seem to be what we aspired to do. That was unfair.

Time for honesty. My personal fuse was lit by the Wrens when they quoted Frederick Hicks, one of my heroes, out of context. They cited his article, "The Teaching of Legal Bibliography,"[9] as the progenitor of bibliographic training. To make their point, they took a sentence out of context. Hicks believed in teaching about sets of books but he also believed in teaching research as a process. As chance would have it, I am a huge fan of the late Professor Hicks and have often aspired to emulate his path. His book, *Men and Books Famous in the Law*,[10] remains a favorite of mine. Since at that point most folks had forgotten Professor Hicks, it just lit my candle to have him resurrected for purposes of misquotation in an article that I viewed as poorly argued. If the wording of our reply was a bit harsh, the razor's edge had been stropped by the cheap shot at Professor Hicks. We may have spoken with too much emotion but, to quote Cool Hand Luke,[11] it seemed like a good idea at the time.

The harshness of the reply surprised the Wrens. How could they have known about my fixation with Hicks? I think that led to their reply to the reply, which was pretty snappy. Kathleen and I decided that enough, indeed more than enough, had been said, and we shut it down.

In the end, though, I think that the Wrens and Kathleen and I were on the same pedagogical ground. None of us liked the bad model of teaching legal research; all of us saw the need for working with the materials and understanding them. By the time we all met for a "debate" at the AALL Convention, we had figured that out. There is much about the work of the Wrens that I came to admire.

But I am glad that we wrote the article. It brought Professor Hicks back into vogue. The Academic Law Library SIS even named an award after him. Legal research training might still be fighting for scraps at the law school table, but at least my hero is back in the collective mind.[12]

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[9] Frederick C. Hicks, *The Teaching of Legal Bibliography*, 11 Law Libr. J. 1 (1918).

[10] Frederick C. Hicks, *Men and Books Famous in the Law* (1921).

[11] *Cool Hand Luke* (Warner Bros. Pictures 1967).

[12] For a biography of Hicks, see Stacy Etheredge, *Frederick C. Hicks: The Dean of Law Librarians*, 98 Law Libr. J. 349 (2006).

In Memoriam: Roy M. Mersky, 1925–2008

Professor Roy M. Mersky, the Harry M. Reasoner Regents Chair in Law, and longtime director of the Tarlton Law Library and Jamail Center for Legal Research at The University of Texas School of Law, died on May 6, 2008, in Austin after a brief illness. He was 82.

Professor Mersky was renowned as a law librarian, legal scholar, and leader in the legal community. He was a nationally recognized expert in legal research, the history of the United States Supreme Court, law and language, law in popular culture, and rare law books. He was a prolific writer, with scores of publications appearing over the past 50 years, including an article in the first issue of *Perspectives: Teaching Legal Research and Writing*. His first professional article appeared in *Law Library Journal* in 1958, and he was working on a legal history project, Unknown Justices, at the time of his death. His best-known work was *Fundamentals of Legal Research*, first published in 1977. This treatise, co-authored with Professor J. Myron Jacobstein, and then Professor Donald J. Dunn, quickly became the classic textbook for first-year law students. In 2006, *Fundamentals of Legal Research* was recognized by the American Association of Law Libraries Academic Law Libraries Special Interest Section as one of the most influential texts in legal research.

Professor Mersky earned his B.S. in 1948, J.D. in 1952, and master's degree in library science in 1953 from the University of Wisconsin, Madison. He was a member of the Bars of New York, Texas, and Wisconsin and actively involved in the American Bar Association. He remained committed to social justice and civil rights issues throughout his life, serving as the president of the Austin Chapter of the American Civil Liberties Union in 1968–1969.

Professor Mersky's distinguished service as a law librarian began at the University of Wisconsin Law Library. He served as Director of the Washington State Law Library and then as Professor of Law and Law Librarian at the University of Colorado before joining the faculty of the University of Texas School of Law in 1965. During his tenure at Texas, he became legendary for his vision and leadership, innovation, and commitment to excellence in librarianship and scholarship.

Professor Mersky was an active member of many associations and honorary societies, including the American Association of Law Libraries, the Association of American Law Schools, the American Law Institute, and Scribes: The American Society of Legal Writers. Among the many honors he received were the American Association of Law Libraries' 2005 Marian Gould Gallagher Distinguished Service Award, the 2006 American Association of Law Libraries' Presidential Certificate of Merit, and the 1994 Scribe's Outstanding Service Award. He was posthumously awarded the 2008 Frederick Charles Hicks Award for Contributions to Academic Law Librarianship and the 2008 Spirit of Law Librarianship Award, which has been renamed the Roy M. Mersky Spirit of Law Librarianship Award in his honor.

Professor Mersky will be remembered for his expertise in legal research, his dedication to mentoring law librarians, his passion for legal history, and his engagement with the academy, the bar, and the judiciary. His was a life well lived.

Legal Research Readings to Inspire and Inform Students

"Supplemental readings help drive home important points and give students a 'real-world' perspective. I find that the most effective articles for my course are informative, interesting, and brief."

Research Matters … *is a regular feature of* Perspectives. *It explores the challenges of teaching the process and strategies of legal research as technology continues to shape research expectations and realities. Readers are invited to comment on the opinions expressed in this column and to contribute to future issues. Please submit material to* Penny A. Hazelton, University of Washington School of Law, e-mail: **pennyh@u.washington.edu**.

By Shawn G. Nevers

Shawn G. Nevers is Reference Librarian at the Howard W. Hunter Law Library at Brigham Young University in Provo, Utah.

Some time ago a *Utah Bar Journal* article caught my eye. Its title read, "The Strength Is in the Research." As a legal research instructor, I read with delight as the author, a practicing attorney, extolled the virtues of legal research. "My students have to read this," I thought as I added it to my introduction to legal research and writing syllabus. While I try my best to help my students understand the importance of legal research, it helps when they hear it from someone in addition to me. As I had hoped, the article was well received by my class and helped spark a good discussion on legal research's place in the "real world."

After this experience I began searching for and incorporating other supplemental readings into my syllabus. I have not abandoned my standard legal research text, because it provides important information, but let's face it—textbooks are boring. Supplemental readings help drive home important points and give students a "real-world" perspective. I find that the most effective articles for my course are informative, interesting, and brief.

As I compiled a list of articles that best met these criteria, I thought it might be of use to other instructors. What follows is a selective annotated bibliography of articles that could be used as supplemental readings in introductory and advanced legal research courses. As part of each annotation I have included my "two cents" about when and why these articles might be used.

Importance of Legal Research

Mark Cooney, *Get Real About Research and Writing*, 32 Student Law., May 2004, at 18–24, available online at <www.abanet.org/lsd /studentlawyer/may04/get-real.html>.

Cooney identifies and dispels 10 myths about legal research and writing in law practice. Some of these myths include, "[y]ou can choose a practice area where you won't need strong research and writing skills" and "[r]esearch and writing doesn't win cases—oral advocacy does." *Id.* at 20. With his experience in private practice and in the research and writing classroom, Cooney authoritatively explores these common misperceptions and provides straightforward rebuttals to each.

Students often need a dose of reality when it comes to the importance of research and writing in law practice; Cooney's article is the answer. Students are likely to relate to some, if not all, of Cooney's "myths," making them eager to understand how to correct their misunderstandings. Cooney provides sound advice that will change students' perception about legal research and writing—a happy thought for most instructors.

Duane L. Ostler, *The Strength Is in the Research*, 20 Utah B.J., May–June 2007, at 42–45.

Ostler, a practicing attorney, illustrates the importance of legal research in the practice of law. After branding legal research as "[o]ne of the least appreciated and most frequently overlooked tools in the attorney's arsenal," Ostler powerfully and succinctly demonstrates the utility of this essential tool. *Id.* at 42. The author provides a number of real-world examples that illustrate how good legal research adds a new dimension (often a winning dimension) to a case. These examples accompany

practical pointers to improve legal research such as "put some time into research" and "don't overlook important sources." *Id.* at 43–44.

This article can be used to start a semester or anytime students lack the vision of the importance of legal research. Students see firsthand the value a practicing attorney gives to legal research and that legal research does matter in the real world. The examples Ostler shares are great discussion starters and show students legal research in action. This article is a relatively short read that packs a punch.

Research Process

Marsha L. Baum, *Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process,* 10 Perspectives: Teaching Legal Res. & Writing 20–22 (2001).

Baum understands the frustration of legal researchers who fail to find a definitive answer to a research question and are at a loss about how to proceed. In this article, she gives suggestions about what researchers can do when their research hits this "brick wall." These suggestions include "[r]eread the problem being researched," "[r]eview the research steps you have already taken," and "[r]ealize that sometimes there is no answer." *Id.* at 20, 22.

This article is a great resource for students, especially first-years, who will inevitably confront the research "brick wall." It teaches students some great ways to get back on the right research path and to evaluate when research is really "done." This reading could be assigned when a legal research assignment is handed out, or recommended when students hit a brick wall with a particular assignment. It is a great resource for students to review anytime their research stalls.

Barbara Bintliff, *Electronic Resources or Print Resources: Some Observations on Where to Search*, 14 Perspectives: Teaching Legal Res. & Writing 23–25 (2005).

Bintliff argues that print and electronic resources should not be used interchangeably. Legal researchers should examine the differences between print and electronic resources and use the format that is best for the situation. After describing differences between print and electronic resources, Bintliff provides examples of situations in which print resources are preferred as well as those in which electronic resources are preferred.

This article helps students understand that both print and electronic resources are important legal research tools; however, effective researchers make calculated decisions on which format to use depending on the situation. Bintliff's guidelines give students a good foundation on which to make decisions between print and electronic resources in their own research. Instructors may want to supplement this reading with a discussion of how subject-based electronic tools fit within Bintliff's guidelines.

Peggy Roebuck Jarrett & Mary Whisner, "*Here There Be Dragons*"*: How to Do Research in an Area You Know Nothing About*, 6 Perspectives: Teaching Legal Res. & Writing 74–76 (1998).

The complexity and breadth of the law often leads legal researchers into uncharted waters. Jarrett and Whisner provide legal researchers with sage advice for traversing unfamiliar research areas. Tips given include "use a research guide," "avoid fishing online," "look for a looseleaf service," and "use librarians." *Id.* at 75–76. In addition to these tips and others, the authors provide helpful examples that demonstrate the benefits of their suggestions. Helpful resources, such as *Specialized Legal Research* and Germain's *Transnational Law Research*, are also identified.

Unfortunately, there's simply not enough time to teach students how to conduct legal research in all areas of the law. This article can help fill that gap. Students are exposed to several good ideas to help them deal with unfamiliar areas of the law and are also introduced to useful resources. This article could be used just before students get ready for summer jobs or, perhaps, when discussing the general research process. It could also be used effectively in an advanced legal research class where specialized research is discussed.

"The complexity and breadth of the law often leads legal researchers into uncharted waters. [The authors] provide legal researchers with sage advice for traversing unfamiliar research areas."

“This article is a great piece to get students thinking about everything that goes into the research process before the research even begins.”

Mary Whisner, *How Do You Know When Research Is Good?* 98 Law Libr. J. 721–725 (2006).

In this "Practicing Reference" column, Whisner examines several ways by which one can measure whether research is good. Does getting the right answer mean good research? How about failing to get in trouble? While these factors and others are part of good research, they do not necessarily equal good research. Whisner focuses on the importance of a good researcher's ability to follow an effective research process and then to explain that process. Coupling all of these factors, Whisner proposes a formula for knowing when research is good.

While written for law librarians, Whisner's article can also work well with law students, as it doesn't get bogged down in law library jargon. This article is great for driving home the point that understanding and following an effective research process is an essential part of becoming a good researcher. Students see that being able to explain their research process will help others (and themselves) evaluate whether they've conducted good research, whatever answer they've found. This article is interesting and informative, as Whisner's "Practicing Reference" pieces generally are.

Mary Whisner, *When Judges Scold Lawyers*, 96 Law Libr. J. 557–570 (2004).

Whisner takes her readers on a research journey to find cases in which judges criticize incompetent research and writing. Along the way she illustrates several effective research techniques including keyword searching, updating with Shepard's® and KeyCite®, and subject-based searching. As her research turns up desired cases, Whisner briefly shares the biting words of judges and the lessons to be learned by legal researchers.

This article kills two birds with one stone in a legal research class. First, it allows students to walk hand in hand with a legal research expert on a research journey. Whisner does a wonderful job of explaining her research thought process. Such an inside glimpse into the research process can be invaluable to students as they develop their research skills. In addition, the article provides real-world examples of what happens when research and writing are done poorly. Students who lack vision about the importance of legal research and writing will be well-served by reading this article.

Mark E. Wojcik, *Ten Tips for Starting Your Research Right*, 91 Ill. B.J., July 2003, at 359–360.

Wojcik presents 10 legal research tips geared toward new lawyers. The tips cover such topics as time, jurisdiction, and methods. *Id.* at 359. Each tip is accompanied by a series of questions to get new lawyers in the right mind-set to begin a research assignment.

This article is a great piece to get students thinking about everything that goes into the research process before the research even begins. Because students have a tendency to rush into research, this article helps them understand the importance of slowing down and making sure they are well prepared to research. As an added bonus, it accomplishes its objective in little more than a page.

Electronic Legal Research

Thomas Keefe, *Finding Haystacks: Context in Legal Research*, 93 Ill. B.J., Sept. 2005, at 484–485.

Keefe argues that beginning research with keyword searching makes legal researchers miss the crucial step of creating context for their research question. Legal research is based on concepts, but keyword searches focus on facts. Fact-based researchers look for "the proverbial needle without having found the correct haystack." *Id.* at 484. Concept-based researchers, on the other hand, first find the right haystack, which leads them more quickly to the needle. The author cites several examples of the importance of context-based research, including the rise of such electronic concept-based tools as Search Advisor on LexisNexis® and KeySearch® on Westlaw®.

This article teaches students the important lesson that keyword searching needs the context provided by concept-based tools to be effective. This lesson increases in importance each year as entering students are more attached to keyword searching. This article gives students examples of print and

electronic concept-based research tools and shows they are relevant even in today's research environment. While there are many articles dealing with the importance of context and concept-based research, Keefe gets his point across quickly and effectively.

Thomas Keefe, *Books in Space—Online Versions of Print Publications,* 93 Ill. B.J., Jan. 2005, at 42–43.

In this article, Keefe examines online searching alternatives to terms and connectors searching. He covers several online searching tools including natural language, digests, indexes, and tables of contents. He argues that many of these alternatives make electronic searching a much more powerful tool, especially for resources such as statutes.

Using this article is a great way to introduce students to a variety of search options on Westlaw and LexisNexis. The section on natural language provides some good suggestions about when to use such a search. While the discussion of the book-derived tools is not extremely detailed, it can provide a good building block for a discussion on search techniques other than terms and connectors. Since students gravitate to keyword searching, a discussion on concept-based tools is important and Keefe's article is a helpful springboard.

Scott P. Stolley, *Shortcomings of Technology: The Corruption of Legal Research*, 46 For the Defense, 39–41, 51 (April 2004).

Stolley, a law firm partner, decries new associates' reliance on computer-assisted legal research. He argues that computer-assisted legal research is inferior to print research because "the computer is ill-suited for finding concepts" and "computers can't think in analogies." *Id.* at 40. The author recounts experiences in which he posed research questions to new associates who would return with no results after researching online. Stolley's subsequent search through a print digest or treatise would return the desired results in minimal time. Stolley argues that the focus on computers is "eroding lawyers' research skills." *Id*. at 41.

Stolley's article is a good shot in the arm for law students who may be oblivious to the weaknesses of electronic legal research. While I do not agree with everything Stolley says, I think he has some important points for students to consider. This article can be a great way to teach about the weaknesses of electronic legal research in finding concepts or analogies. It can also be useful in exposing students to less-than-positive opinions of electronic legal research that may be held by some of their future supervising attorneys.

Primary Sources

Barbara Bintliff, *Mandatory v. Persuasive Cases*, 9 Perspectives: Teaching Legal Res. & Writing 83–85 (2001).

Bintliff explains the difference between mandatory and persuasive authority and the importance of finding mandatory authority. She also explains what cases are mandatory on which courts in the federal and state systems. Bintliff concludes the article by discussing the degrees of persuasiveness a case can have and how a case achieves its level of persuasiveness.

Bintliff's article is a good review (or perhaps primer) of mandatory and persuasive authority. Most importantly, Bintliff offers a good discussion of the degrees of persuasiveness, as well as the factors that determine a case's level of persuasiveness. Students are taught how they should evaluate persuasive cases and that all persuasive cases are not created equal.

Travis McDade, *Unpublished Cases as Precedent? Location Is Everything*, 36 Student Law., Dec. 2007, at 12–13.

McDade provides an explanation of the ever-changing landscape of citation of unpublished cases. In discussing whether unpublished cases should be cited as precedent, McDade touches on the historical split on this issue in the federal courts and how that changed in 2007 with the rule making unpublished cases citable in all federal courts. He also briefly discusses the split on the issue that still exists among state courts.

"The author recounts experiences in which he posed research questions to new associates who would return with no results after researching online."

“I use these readings to emphasize important points, facilitate interesting discussion, and provide a real-world view of legal research.”

The topic of unpublished cases is a dangerous one to spend little time on in a legal research class because of its tendency to confuse students. However, most of us don't have much class time to devote to it. McDade's article helps students gain an understanding of the issue without dedicating much class time to the topic. It addresses students' common concerns—“Unpublished cases are published?” and “Should I cite them?”—while also explaining the current terrain in federal and state courts.

Travis McDade, *Don't Overlook Regulations as an Important Source of Law*, 34 Student Law., Oct. 2005, at 10–11.

In this article, McDade introduces an often overlooked, but extremely important primary source of law—regulations. He begins with an entertaining real-life application of a regulation, which amazingly enough involves a positive interaction between Howard Stern and the Federal Communications Commission. He then provides a brief explanation of regulations followed by an introduction to the *Code of Federal Regulations* and the *Federal Register*. He ends with a discussion of where these resources can be accessed online, both for a fee and free.

I agree with McDade's observation that “regulations get short shrift from beginning to end,” in the law school curriculum. *Id.* at 10. I touch on them in my first-year legal research class, but students don't get the exposure to them like they do with statutes and cases. For this reason, McDade's article is a good piece to familiarize students with the topic.

Conclusion

Supplemental readings that are informative, interesting, and brief can do wonders in a legal research course. I use these readings to emphasize important points, facilitate interesting discussion, and provide a real-world view of legal research. Students enjoy the change of pace and are generally engaged by the articles—something I can't say about textbooks. In my experience, supplemental readings such as those annotated here enhance the teaching and learning of legal research.

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Another **Perspective**

“The concept of ‘thinking like a lawyer,’ the focus of traditional law school study, takes too narrow a view of how lawyers practice and the range and reach of legal work. Although critical legal thinking is important, it is merely one component of effective lawyering. In addition to learning how to ‘think like a lawyer,’ law school is the place where students learn the language of the law. As such, law schools should take advantage of the best known and most effective approach to learning a new language—the immersion method. The primary characteristic of the immersion method is teaching language and culture in contextualized combination. By creating an engaging learning environment where law students become fluent in the language and practice of effective and compassionate problem solving, the health and well-being of individual lawyers and the legal profession will improve.

The best way to learn a new language is to go to the place where the language is spoken. Therefore, adopting the approach of Legal Immersion Fluency Education, law schools, like good language immersion and student-exchange programs, will immerse students in the vast community of lawyering. Law students will routinely be living in the law by experiencing it in context, rather than spending time primarily in the classroom. This immersion into the community of lawyering includes, but is not limited to, integrating volunteer work, clinical work, externships, court visits, and shadowing practitioners into and throughout the legal education, breaking down the barriers that currently exist between doctrinal and experiential learning.”

—Beth D. Cohen, *Legal Learning for Life: Legal Immersion Fluency Education (LIFE)*, 43 Harv. C.R.-C.L. L. Rev. 605 (2008).

Putting the Puzzle Together:
Choices to Make When Creating a Closed-Universe Memorandum Assignment[1]

Brutal Choices in Curricular Design … *is a regular feature of* Perspectives, *designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other "brutal choices" that should be considered in future issues. Please submit material to* Helene Shapo, Northwestern University School of Law, e-mail: **h-shapo@law.northwestern.edu**, or Kathryn Mercer, Case Western Reserve University School of Law, e-mail: **klm7@case.edu**.

By Judith Rosenbaum

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This article is dedicated to Professor Helene Shapo, in honor of her retirement after 30 years of directing and teaching in the field of legal reasoning, writing, and research. Helene began her career when LRW was in its infancy, and she is one of the pioneers who has made LRW the professional discipline it is today. I owe more than I can ever express to her mentoring. She has been a constant source of inspiration, guidance, and support, and many of the ideas in this article are based on innumerable conversations that we have had on this subject over the course of our 24 years of working together. Many newcomers to the field may not know her, but she is one of the giants upon whose shoulders we all stand today.

I. Introduction

When constructing a first-semester closed-universe assignment, a legal writing professor faces a series of choices—general topic, jurisdiction, cases, issues, and more. The number and complexity of decisions to be made can overwhelm, but the choices become easier if made with the pedagogical goals of the assignment (and the entire course) in mind, and if the choices are approached sequentially. These decisions are critical since our writing assignments are among our most important teaching devices.[2]

"When constructing a first-semester closed-universe assignment, a legal writing professor faces a series of choices—general topic, jurisdiction, cases, issues, and more."

[1] This article is based on a presentation given on July 15, 2008, at the Thirteenth Biennial Conference of the Legal Writing Institute at the University of Indiana–Indianapolis. Many ideas in this article came from mistakes I have made in designing assignments in my years of teaching and I would like to thank those students over the years who may have suffered unknowingly through one of those mistakes. I would also like to thank two former colleagues, Cliff Zimmerman, now Associate Dean of Student Affairs at Northwestern University School of Law, and Christina Heyde, now a middle school teacher in Wilmette, Ill., for their thorough and thoughtful critiques of an earlier version of this article.

[2] Helene S. Shapo & Mary S. Lawrence, *Designing the First Writing Assignment*, 5 Perspectives: Teaching Legal Res. & Writing 94, 94 (1997) (concluding that since "lawyers and judges remember so vividly their first law school writing assignment, we should design the beginning assignment to capitalize on its indelible impact"). *Accord* Jan M. Levine, *Designing Assignments for Teaching Legal Analysis, Research and Writing,* 3 Perspectives: Teaching Legal Res. & Writing 58, 58 (1995) ("The design of assignments is perhaps the most important pedagogical activity in teaching legal research and writing."). *See also* Lorraine Bannai, Anne Enquist, Judith Maier & Susan McClellan, *Sailing Through Designing Memo Assignments*, 5 Leg. Writing 193, 200 (1999) (suggesting assignments are a "secondary 'text'" for a legal writing course).

> “Creating an effective assignment is one of the most daunting tasks a legal writing teacher faces. It is like putting together a jigsaw puzzle.”

Creating an effective assignment is one of the most daunting tasks a legal writing teacher faces. It is like putting together a jigsaw puzzle. There are multiple ways to go about it, but it is accomplished far more efficiently by using a system, such as pulling out the border pieces and assembling the outside frame first. This article describes a system I have used successfully for years. Although the system can be applied to any type of assignment, research or non-research, long or short, straightforward or complex, memo or brief, this article focuses on creating a short, straightforward, closed-universe memorandum assignment. At Northwestern University School of Law, where I teach, this assignment is the first graded assignment that our students write. Thus, it is typically the first one that our beginning writing faculty develop for their individual sections and the one that causes them the most difficulty.[3]

II. Strategic Matters

A. Choosing Which Pedagogical Goals to Emphasize

The first step is identifying the pedagogical goals, not only for the assignment, but for the entire semester, so that you can make sure that students learn basic building blocks first and that more complex tasks can build on a solid foundation.[4] As you think about those goals, you may also want to think about how you will strike the balance between consolidating previously learned material through rewrites and fostering an awareness of different types of rule structures through new and different assignments. Rewrites offer the advantage of giving students an incentive to review their prior work, process our comments, and deepen their understanding of a topic that they may have only partially understood on the first draft. However, with the limited time available in the semester and the amount of time we need to read, comment on, and return assignments, the more we assign rewrites the less opportunity we have to expose our students to new issues and different types of organization. Without exposure to new rule structures, which require students to abstract what we have taught them in one setting and apply it to another, they may tend to think that there is a “one size fits all”[5] approach to writing that can be applied like a formula from one topic to the next. Thus, you want some balance between these two options, though the way you strike that balance will depend on your school culture and the number of credits your school has allocated to your course.[6]

[3] Our preliminary ungraded exercises consist first of a case brief and then of a written legal analysis based on a statute, two cases, and a hypothetical fact scenario. Many of us use a case from our closed-universe memo for the case brief and base the written analysis on Exercise 3-E in Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* (5th ed. 2008). In Exercise 3-E, we give the students a criminal statute and a set of facts and ask the students to answer a series of questions designed to teach them how to identify the elements of a statute and the facts relevant to each element. After a class discussion designed to make sure that the students understand what the issues are and how to introduce a discussion and organize by elements, we give the students two one-page case excerpts and ask them to analyze in writing whether the statute was violated.

[4] *See* Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887, 908 (2002) (suggesting one typical progression).

[5] Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like a Lawyer*, 29 U. Mem. L. Rev. 1, 2 n.4 (1998).

[6] At Northwestern, the way we have approached this issue has changed over the years. When I first started teaching in 1984, we assigned the students four separate memos during the first semester. Two were closed-universe memos and two were research memos. One of the research memos was a guided research exercise and the other was open research. That approach has evolved over the years. First, we stopped requiring separate memos on different but related issues for the first two assignments. Instead we began to require a somewhat longer first memo for the first assignment and then a complete rewrite of that memo for the second assignment. At that point, the students wrote four memos, on three separate topics. Next, we dropped the open research memo and substituted in its place a rewrite of the guided research memo. To make sure that the students did some open research, we added an extra issue to the rewrite; students thus rewrote one of the issues and wrote the other issue for the first time. In the most recent change we switched a guided research memo into an open research memo, which the students rewrote completely without a new issue added on. In sum, today the students still write four memos over the course of first semester, but they write on only two topics, because we now require a rewrite for each memo.

At Northwestern, our pedagogical goals for the entire year include teaching students about the following topics, listed in no particular order of importance: the structure and function of the courts; different types of legal authority; varieties of rule structures; the organization of a legal analysis by the components[7] of controlling law; case analysis and case briefing; analogical reasoning; written description and application of cases; use of facts; the parts of a memo and their functions; sentence and paragraph mechanics; synthesis; citation; research; persuasion; questions of pure law; policy analysis; oral communication; and teamwork. In the first semester, we cover many but not necessarily all of these topics. Of the topics we do cover in the first semester, when we critique the first memo we emphasize the most important substantive skills in our critique of the first draft and only as students begin to master these skills do we add critique on writing style, grammar, and citation mechanics.

I have attempted to list our priorities in the diagram below. In this diagram, the concentric circles together represent the pedagogical goals for the entire first year. The outer circle represents skills

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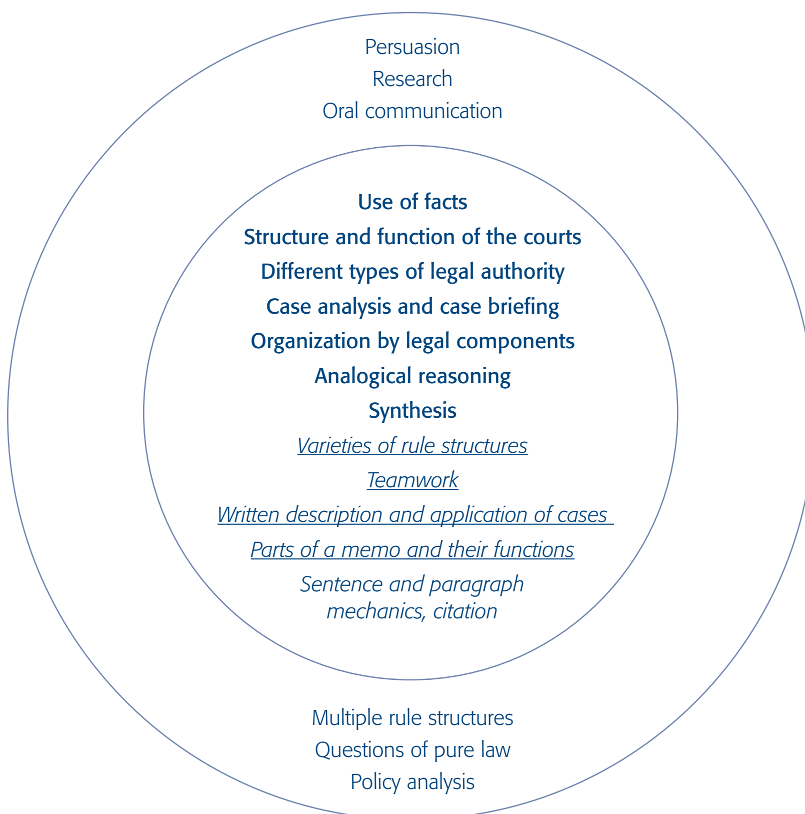

[7] I have chosen the word "components" to include the variety of rule structures, including elements, factors, rule and exceptions, and balancing tests. For an excellent description of the variety of rule structures, see Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 17–26, 29–36 (4th ed. 2006).

“[T]he most important goal in the early part of the first semester is to enable the students to understand that they must organize their analysis by the components of the controlling law.”

that are introduced after the closed-universe assignment, for example, in the late first-semester research memo, or even in the second-semester advocacy assignment. The inner circle represents skills that we aim to teach through the closed-universe assignment. Because, as many writers on the subject have stressed, legal writing is a recursive rather than a linear process,[8] we have already introduced some of these skills in our earlier ungraded exercises, and we use the closed-universe memorandum assignment to give the students another opportunity to practice and hone these skills. I have used a bold font to identify the skills we want students to learn in both the ungraded exercises and the closed-universe memo. The next skill set identified in the diagram includes the skills that we introduce for the first time primarily in the closed-universe memorandum assignment. The diagram uses underlined italics to designate those skills. Finally, the diagram uses a plain font without any attributes to indicate the more mechanical skills that we generally do not comment upon until at least the rewrite of the first memorandum, when our students have begun to understand how to organize their analysis by the requirements of the law and to use deductive, inductive, and analogical reasoning to reach tentative conclusions.

One reason we prioritize some skills over others when critiquing the early memos is that to me, the most important goal in the early part of the first semester is to enable the students to understand that they must organize their analysis by the components of the controlling law. Almost everything else that I teach follows from this goal. My second priority after organization is for the students to learn the other legal analytical aspects of writing, such as the relationship between cases and statutes, the commonly accepted ways to describe the facts and holdings of cases, and the level of detail required for effective analogical reasoning. Only as the students begin to master these analytical challenges do I begin to concentrate on the finer points of their writing, such as grammar and citation. The reason for this sequential approach is that until the students can organize their writing by the requirements of controlling law and until they know enough about how to describe a case and where to locate the description in their analysis, it is not very important to tell them that they should have included a pinpoint cite or that their sentences are not written in parallel form. After all, it is entirely possible that they will alter a case description or move it to a different place in their second draft and that the grammar and citation may change for reasons that relate to analysis and not to mechanics.

B. Choosing a Jurisdiction for the Problem

The next step is to decide where to set the problem. I recommend using a real jurisdiction and not a fictional one.[9] Using a real jurisdiction impresses on the students the important distinction between binding and persuasive authority and between higher and lower levels of authority within a particular jurisdiction. In contrast, using a fictional jurisdiction makes everything just persuasive. Thus, students do not learn how to develop their organization based on statements of the law from the courts in the jurisdiction.[10] Moreover, students

[8] Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1094 (1986); *See also* Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 Seton Hall L. Rev. 653, 664 (1993) (referring to Professor Phelps’ “new rhetoric” paradigm); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 585 (1997) (“[O]ne of the most important tasks a law school writing program should undertake is to teach students the recursive process of conceptualizing, drafting, and revising to produce professional-quality documents.”).

[9] Although at one point, a number of assignments used to be set in fictional jurisdictions, those who have discussed this issue in recent years are unanimous in recommending that all assignments, not just closed-universe ones, be set in a real jurisdiction. *See* Gail Anne Kintzer, Maureen Straub Kordesh & C. Ann Sheehan, *Rule Based Legal Writing Problems: A Pedagogical Approach*, 3 Legal Writing 143, 151 (1997).

[10] In fact, using a fictional jurisdiction where all cases have equal weight does not differ significantly from the messages students get in their other courses where all cases in the casebook are equal, regardless of where they are from or when they were decided. Thus, students are deprived of the opportunity to simulate the work of a practicing lawyer and analyze and synthesize a corpus of law decided under the doctrine of stare decisis. *See* Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process*, 64 Temp. L. Rev. 885, 891 n.23 (1991).

do not have to wrestle with synthesizing cases addressing the same issue in the same jurisdiction but with seemingly inconsistent outcomes. Finally, using a fictional jurisdiction limits students' opportunities to learn how to incorporate relevant persuasive authority into their analysis by evaluating the persuasive authority in light of the law of the controlling jurisdiction. Thus, they do not have to wrestle with determining which of several persuasive cases would be most likely to persuade the courts of the jurisdiction in which the problem is set.

C. Choosing an Appropriate Topic

Beyond setting the problem in a real jurisdiction, the topic must be appropriate for beginning law students. In the fall semester, first-year students are laypersons, even if they have had some "pre-law" courses or experience working in a law office. They have not encountered most legal terminology, and even if they have heard of certain terms, they do not understand them in their legal context.[11] Thus, you not only need a topic that they will be able to understand substantively, you also need a topic that has a readily identifiable rule structure.[12]

The best starting point is either a subject from the first-year curriculum or certain easily understood upper-class subject areas such as family law or agency. Fascinating but knotty problems from your former law practice, interesting as they may have been to you as a practitioner, probably are not going to work for a closed-universe assignment and indeed may not even be appropriate for an assignment later in the year.[13] The complex statutory courses of the upper-class curriculum such as securities law, environmental law, antitrust, labor relations, or tax are beyond the ken of a typical first-year student. In addition, although constitutional law issues often involve compelling fact scenarios, they require more policy analysis than first-year students can handle comfortably early in the first semester, and the cases are often dense and hard to decipher or to reconcile with each other.

Even within the first-year curriculum, certain issues are better than others. Torts topics work well if you use elements-based torts and stay away from issues that involve complex economic analysis like products liability and primary and secondary assumption of risk. Most criminal law topics work well, too. These subject areas typically work well because the facts are easily understood and the rules

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[11] To them, "negligence" may mean "careless," "motion" may mean "movement," and "release" may mean "let go." Terms like "estoppel" or "proximate cause" or concepts like "damages" and "jurisdiction" are as unfamiliar as would be new words in a foreign language. *See* Julie M. Spanbauer, *Teaching First-Semester Students That Objective Analysis Persuades*, 5 Legal Writing 167, 170 (1999).

[12] Kintzer et al., *supra* note 9, at 151 ("Early assignments that use an elements rule structure or a simple category rule structure are often easiest for students.").

[13] For example, before coming to Northwestern, I had done a lot of work in the area of litigation over judicial discipline and disability retirement. The facts in judicial discipline cases can be very interesting, because when judges are disciplined, the discipline is often for outrageous behavior. For example, in one case the court found that a judge on different occasions called a female judge various names such as "bitch" and "cunt," said "fuck you" to the female judge, and told her to "get her 'fact, fucking ass' to the clerk's office" to sign papers. That same judge also set off firecrackers in a male judge's office and left death threats in his mailbox. He also signed official court documents such as plea forms, court registers, and bench warrants with names other than his own, including "Adolf Hitler," "Mickey Mouse," and "Snow White." Finally, he had improper ex parte contacts with criminal defendants whom he had placed on probation and executed bond documents for odd amounts such as 13 cents or $9.99, knowing that the clerk's office did not have the capacity to make change for these amounts. In re Jones, 581 N.W.2d 876, 883–891 (1998). Although the facts in many judicial discipline cases involve similar bizarre fact patterns, I have never used these cases for a writing assignment, because the governing rules are amorphous and because a judicial disciplinary case is a procedurally complex administrative matter. Often an adjudication by the administrative body is not published or is merely a recommendation to a state Supreme Court, which the supreme court can accept, modify, or reject. For an explanation of the complexity of these proceedings, *see* Judith Rosenbaum, *Practices and Procedures of State Judicial Conduct Organizations* (1990). The administrative complexity and the difficulty extracting a clear rule make these cases hard for a first-year student to work with in a writing assignment, no matter how interesting the facts of the cases may be.

> “[T]he best topics are those that have a clear rule with elements or factors that must be analyzed in light of the facts to see whether the requirements of a cause of action or defense are satisfied.”

are clear.[14] In other first-year subject areas, likewise, some issues work well, while others are too complex for a beginning first-year student. For example, in civil procedure, certain issues on the commencement of a lawsuit, such as service of process or one of the methods of establishing general jurisdiction, generally work well. These issues also offer the additional benefit of helping to teach students some of the basics of how litigation begins, which is not necessarily something they pick up in their doctrinal courses, even civil procedure. In contrast, other issues such as long-arm jurisdiction, collateral estoppel, res judicata, and joinder of parties or claims, are best saved until later in the year when students begin to get a better understanding of the operation of the legal system. In contracts, simple issues of contract formation work well, but the calculation and types of damages are too complicated for early in the first year. In property, adverse possession, fixtures, gifts, and landlord/ tenant issues are good beginning topics, but nuisance, servitudes, and land use planning are too hard.[15]

D. Choosing an Organizational Structure

The other important consideration that bears on the selection of the particular issue within the area of law you will use is the type of organizational pattern that the issue will present. Our first assignments may teach many things, but they must teach organization, because structuring the memo properly is the foundation on which most of the rest of the first-year legal writing course must build. Thus, the closed-universe assignment, and indeed, most first-semester assignments should involve an organizational structure that first-year students can readily discern from the cases or from cases and a controlling statute. Typically the best topics are those that have a clear rule with elements or factors[16] that must be analyzed in light of the facts to see whether the requirements of a cause of action or defense are satisfied.[17]

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[14] When I use a tort or criminal law topic, however, I prefer not to make intent an issue. This doesn’t mean that I never create a problem where intent is one of the elements, such as a problem involving an intentional tort. If my problem does involve intent as an element, I simply make sure that whether intent is present or not is clear on the facts. The reason I avoid using intent as an element at issue is that in our short ungraded exercise, intent is at issue under the statute that the students analyze. When students work on that exercise, I find that they have a hard time understanding what inferences they can and cannot draw with respect to intent. I prefer to deal with inferences in the early weeks of the first semester by working with my class on the difference between what they know as a fact and what they can infer from facts in the cases they are reading for the assignment and, to the extent intent is relevant to my assignment, to be completely clear in the facts I set up whether intent is present. Avoiding putting intent at issue is my personal preference, however, and not a viewpoint shared by everyone.

For a discussion of the difficulty of proving intent, *see* Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 187–90 (4th ed. 2001) (“[O]ne rarely has direct evidence of a person’s state of mind: people do not carry electronic signboards on their foreheads on which their thoughts can be read at moments the law considers important.”).

[15] Nuisance cases, although they have great facts, are complex because of the remedy issues they present. Sometimes the plaintiffs are seeking damages, sometimes an injunction, and sometimes both. Given the differences in the remedies and thus the difference between actions at law and equitable actions, these cases are too hard for beginning first years to understand. For a somewhat contrary view on using nuisance as a topic, *see* Kintzer et al., *supra* note 9, at 152–53.

[16] In this article the term “elements” refers to fixed requirements. These requirements are the black letter rules that students are learning for their doctrinal courses, such as what is needed to prove promissory estoppel in contracts, or domicile in civil procedure, or a prima facie case in torts. “Factors,” in contrast, refer not to fixed elements, but to the particular facts or categories of facts that courts look to in determining whether a fixed element is satisfied. For example, in Illinois one of the “elements” required for substituted service is that service must be at the defendant’s “usual place of abode.” 735 Ill. Comp. Stat. Ann. 5/2-203 (West 2003). That “element,” along with four others *must* be satisfied if an attempt at substituted service is to be upheld. But in determining whether a place is the “usual place of abode” courts look at a variety of factors, not all of which may be present in any given case. These factors include the place where the defendant resides, the defendant’s spouse and children reside, the defendant receives mail, the defendant is registered to vote, and the defendant registers his or her driver’s license. United Bank of Loves Park v. Dohm, 450 N.E.2d 974, 976 (Ill. App. Ct. 1983).

The terms “elements” and “factors” are sometimes used rather loosely among legal writing faculty. *See* Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 Me. L. Rev. 239 (2004) (describing a survey of legal writing faculty conducted by the authors to determine whether legal writing faculty were developing a new vocabulary and if so, the extent to which that vocabulary had a consistent meaning among members of the discipline). We would do well to define these terms and use them consistently in all our programs. By doing so, we can help our students to clarify their analysis and ultimately develop a generation of lawyers with a common vocabulary. An excellent step in this direction can be found in Shapo et al., *supra* note 3, at 80–85.

[17] For the first assignment, I do not necessarily favor using a statutory claim over a common law claim or vice versa, because my larger priority is that the governing rule have clear elements that can set up the organization of the memo. However, whichever type

Such a topic fulfills many of the pedagogical goals for a first assignment. First, using a topic with a clear rule requires students to learn the relationship among an issue, a holding, and a rule of law and how all of these relate to facts.[18] Second, it requires students to synthesize cases to determine which factors courts use in deciding if an element is present. Third, it requires them to use analogy and distinction to compare the facts in cases with the facts in their problem.

In contrast, other types of legal issues such as those on the cutting edge of the law or those involving balancing tests or pure questions of law are far too complex for beginning assignments. All of these issues involve complex organizing strategies. First-semester law students are tempted to organize their analysis by cases or sources consulted. They typically struggle with organizing by elements of a rule and factors relevant to the elements and would be overwhelmed by an assignment with a complex organization.[19] Moreover, questions of pure law or on the cutting edge of the law usually require using precedents where the facts of cases reaching opposite conclusions are the same and the difference in outcome depends on underlying subtle reasons such as public policy or broad analogies to precedent from related areas. First-semester law students typically look for cases with identical facts and have trouble recognizing similarities in categories of facts.[20] They do not have enough background to find related areas to use for analogy and even if they could find such areas, they do not have the sophistication to evaluate which of these precedents would be persuasive to a particular jurisdiction and why.

The final strategic consideration that I require for my closed-universe memo is to be sure that there are at least two elements in the claim that can be placed at issue, even if in order for students to complete the analysis within the page requirement, one element is relatively easy to analyze

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of claim I choose for my first assignment, statutory or common law, I try to choose the opposite for the second assignment, so that students gain experience with both. *See* Kintzer et al., *supra* note 9, at 151 ([A] Methods course that consistently assigns only common-law problems short-changes students in this world where statutory law is increasingly important.”).

18 In teaching my students, I tell them that the holding is the court's decision based on the facts. A holding answers a particular question in a particular case, based on the particular facts before the court in that case. A holding in one case may thus be that all the elements of a cause of action have been satisfied, while in another case a holding may be that one of the elements is not satisfied. If a court holds that one element is not satisfied, it may or may not reach a decision on the other elements, and even if it does, there has been debate about whether its discussion of those other elements is holding or dictum. In each case, however, the part of the case that is holding is fact-dependent, even if the holding is the adoption of a new rule. *See, e.g.*, Sommer v. Kridel, 378 A.2d 767 (N.J. 1977) (showing an interesting interplay between a holding announcing a rule of law and holdings then applying that rule to facts). A rule of law, in contrast, is broader than a holding in that it is a normative statement based on a synthesis of the holdings of many cases within a particular jurisdiction on that issue. Thus, by my definitions, a holding answers the question at issue by applying the rule to the facts to reach the result. A rule is abstract and a holding is outcome specific.

19 In fact, on a first assignment, I also stay away from an organizational structure involving a rule and exceptions. Even in later assignments, students often have a hard time understanding how to subdivide the analysis when the issue involves whether an exception to a general rule applies. For example, before New Jersey eliminated the fireman's rule by statute, N.J. Stat. Ann. § 2A:62A-21 (West 1994), I used to do a fireman's rule problem. Under New Jersey law, a police officer injured in a high speed chase sued the other driver for her injuries. New Jersey had already held that the fireman's rule applied to police officers. Berko v. Freda, 459 A.2d 663 (N.J. 1983). Since the facts involved a lawsuit by a police officer against a tortfeasor, the facts fell squarely within the fireman's rule and the real issue in the case was whether any of the exceptions to the rule recognized by New Jersey applied so that the lawsuit was not barred. To analyze the problem the students needed to indicate briefly in their thesis paragraph that the case fell under the fireman's rule, that the rule applied to police officers as well as fire fighters. They also could have mentioned the policy behind the rule. They did not, however, need to devote any analysis to whether the facts fell under the rule, since the facts fell squarely within the rule. Nonetheless, many students spent at least one-third of the memo analyzing whether the facts fell within the rule instead of conceding the applicability of the rule as a given and focusing on whether the application of any exception would take the case out of the rule.

I also save embedded rule structures for later memos. What I mean by an embedded rule structure is when one or more of the organizational divisions of the memo, such as elements themselves, have a rule structure that must be broken down in order to analyze the issue. For example, the issue may break into two main elements, where element one consists of two elements, each of which must be discussed, and element two is a rule with exceptions. In order to satisfy the overall claim, both subdivisions of element one must be satisfied and none of the exceptions in element two may be present.

20 Maureen J. Arrigo, *Analogization: Lost Art or Teachable Skill*, 1 Perspectives: Teaching Legal Res. & Writing 36 (1993).

> “An advantage of using a problem based on real facts is that you do not have to develop problem facts, even though you have to find a jurisdiction and appropriate cases.”

and only one is fairly complex.[21] To ensure that students actually organize their analysis by the issues and not by the cases, I also try to make sure that at least one or two cases address both elements, so that when the students write their analysis they have to use some aspects of a case for one of the elements at issue and different aspects of it for another element.[22]

III. Tactical Matters

A. Choosing an Issue

Once you have established your pedagogical goals for the first assignment, understood the advantages of using a real jurisdiction, picked a legal subject area for the assignment, and know, at least generally, the type of rule structure you want to employ, the next steps are the less theoretical and more mechanical tasks of choosing the precise issue, determining the specific jurisdiction, selecting the cases, and preparing the facts of the problem. When choosing an issue, you have two options. One option is to pick a real situation from current events, from a real case, or even from your own or a friend's life. The other option is to identify a subject area and a rule that interests you and, after finding a jurisdiction and cases for the issue, to develop your own problem facts around the cases you select.

An advantage of using a problem based on real facts is that you do not have to develop problem facts, even though you have to find a jurisdiction and appropriate cases.[23] Another advantage is that students tend to enjoy problems based on current events. They see the assignment as relevant, since it is based on something actually happening in the world, and they feel, more than with a hypothetical problem, that they are working as lawyers. I have also successfully given my students an assignment based on a real case from my husband's practice. I changed the names of the parties and gave them the complaint, which had been met with a motion to dismiss. I then asked them to evaluate the sufficiency of the complaint. My class enjoyed comparing its conclusions to the decision in the actual case.[24]

The advantage of using current events does not necessarily hold true for problems based on your own life or someone else's. While some students will enjoy working with “real” facts, rather than purely hypothetical ones, other students will find that a problem from someone else's life experience that has nothing to do with the world they inhabit—particularly when it is not based on an actual case file—is no different from a hypothetical.[25]

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[21] Although I tend to avoid embedded rule structures in the first memo, because I think that students can get lost in the various subdivisions of the rule, I have effectively used a false imprisonment assignment where the only element at issue was “restraint,” but more than one aspect of “restraint” was at issue. In false imprisonment, restraint can be established by any of five different methods. The facts in my assignment could have satisfied the requirements of restraint by duress or restraint by threat of force, and the students did not seem to get lost in the organization. They were able to dispose of the nonissues up front and then set up a separate analysis of restraint by duress and restraint by threat of force.

[22] I do this because one year I had a student write a memo discussing all five cases from the memo assignment, one case at a time. When I tried to explain to him that he had used a case-by-case analysis and not a structured analysis, he responded that the first three cases were about the first element at issue and the second two were about the second element. Although this approach does not provide a guarantee that students will not organize by cases, it does seem to help in showing them how certain aspects of a case may be relevant to one element and other aspects may be relevant to another element. A side benefit to this approach is that when students have to use the same case a second time in their memo for a different issue, you have an opportunity to teach them how to introduce the case for the new point by giving some context but not completely restating facts already covered.

[23] Developing assignment facts that fit well with the cases is essential to having a good problem. While most legal writing teachers truly enjoy the creative writing aspect of developing facts, some do find that creating a good set of facts is quite difficult and time-consuming and are relieved to use a real-life scenario.

[24] The trial judge had dismissed that particular count of the complaint, and the dismissal had not been appealed because other counts had survived.

[25] One of my favorite closed-universe assignments, which some readers may have seen in the Idea Bank at an LWI conference, is a problem involving substituted service of process on an elderly mother who is served while staying with her son, the defendant in a civil suit, and daughter-in-law on her annual three-month visit. One of the issues in that assignment is whether service was performed at the defendant's “usual place of abode.” I was able to create an issue about the usual place of abode based on the living arrangements of a colleague whose family had a condominium apartment in Chicago but spent weekends, holidays, and summers

There are a couple of drawbacks to using current events, some of which are also relevant to using a real case file or a problem from real life. First, some current issues can trigger painful emotional reactions in students. Even if you favor raising such issues in your class, as many legal writing professors do,[26] the closed-universe memo creates enough anxieties on its own simply because it is typically the first major integrative piece of writing for the students and often the first graded assignment as well.[27] Thus, it may not be the assignment where you want to open up classroom discourse on a controversial topic. There are substantive as well as emotional disadvantages to using a topic from real life. Often when you use a problem from current events, the cases in the jurisdiction where the problem arose do not work well pedagogically with the facts. They may not provide enough analysis or they may all hold the same way, thus making synthesis difficult.[28] Alternatively, there may be no relevant cases, or there may not be enough of them to give the students a corpus of binding law with which to work. Of course, if you switch the problem to a jurisdiction that works better or if you change the facts to work better with the facts of the jurisdiction, it is no longer "real life" and you lose many of the benefits a current events problem may provide.

If you don't use an issue from real life for your assignment, then the other option is to pick a topic you think will work well pedagogically and to build the cases around the topic and then the problem facts around the cases. Many sources can help you generate ideas for issues. Some of the ones I use include first-year casebooks, student study aids or outlines, *U.S. Law Week*, national legal newspapers, or local daily or monthly legal news. The main advantage of this approach is that you can carefully thread the facts of the assignment into the law of the jurisdiction and often you can create a problem that is pedagogically more satisfying than one based on current events or other facts from real life. A disadvantage to building your own topic this way, however, is that it can be quite time-consuming, particularly once you have an issue you like but have to find a jurisdiction with cases that fit together in the right way to allow you to accomplish your pedagogical goals. Additionally, sometimes you need considerable creativity to come up with facts that are realistic and that work well with all the cases.

B. Selecting the Cases

Once you have identified an issue or fact scenario you would like to use, the next step is to pick the cases you will include in the assignment. Picking the cases necessarily involves determining the jurisdiction in which your problem will be set and thus which cases will be binding and which will be persuasive, although the proportion of binding to persuasive cases will vary with the issue, the jurisdiction where you set the assignment, and the specific cases you decide to use, including the number you decide to use.[29] I prefer to use a

"Once you have identified an issue or fact scenario you would like to use, the next step is to pick the cases you will include in the assignment."

at a lake house in the northern Chicago suburbs. These "true" facts allowed the problem to work perfectly, but I doubt that it mattered to my students that some of the underlying facts were truth and not fiction.

[26] Brook K. Baker, *Incorporating Diversity and Social Justice Issues in Legal Writing Programs*, 9 Perspectives: Teaching Legal Res. & Writing 51 (2001); Emily Zimmerman, *Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy*, 10 Perspectives: Teaching Legal Res. & Writing 109 (2002).

[27] *See* Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 Stetson L. Rev. 1193, 1210 (2000).

[28] One such problem was a problem one of my colleagues based on a highly publicized recantation by the complaining witness in a rape case. The problem was hard to work with in the controlling jurisdiction because the cases all held the same way. While my colleague could have changed the facts somewhat so that there was at least more balance to the problem or something to give the students a basis for distinguishing the facts of the assignment from the facts of the precedent cases, changing the facts would have taken away the "real-life" basis of the assignment.

[29] There is no "magic" number of cases that should be included in the package for the closed-universe memo, but the range of choice is not all that large. I generally use about five or six cases for a paper with a page limit of six to seven pages. I have found that using fewer than five cases often does not give the students enough to work with when they have to synthesize cases, particularly if some of the cases address only one of the elements at issue. But, because students often feel obliged to use every case you provide in the package for a closed-universe assignment, if you use many more than six cases they may have a hard time staying within your page limit. If your page limit is shorter than six pages, you may want to use fewer cases, and if your page limit is longer than seven, you can probably use an extra case or two.

“If the synthesis that I incorporate into the assignment is particularly difficult, I may not use any persuasive cases at all.”

jurisdiction where there are enough cases that all, or at least a majority of the cases, come from the controlling jurisdiction and thus are binding and not persuasive. My reason for using a large number of cases from a controlling jurisdiction is to ensure that the students will have to look closely at the facts and holdings of the cases and to synthesize the law.[30] In fact, to ensure that synthesis is built into the assignment, I try to make sure that several cases directly address at least one of the elements at issue, and that in at least one of the cases addressing that element, the court reaches an opposite holding from the other cases based on slightly different facts. By setting the assignment up in this way, I try to get my students to think deeply about the factual differences among the cases and to give them the opportunity to identify a higher level of abstraction that can explain the outcomes in the cases and can serve as a rule that, in turn, can be applied to the assignment's facts.[31]

If the synthesis that I incorporate into the assignment is particularly difficult, I may not use any persuasive cases at all. If I do use persuasive cases, I generally try to pick one or possibly two cases that are closer to the assignment's facts than any cases from the controlling jurisdiction so that the students can use the persuasive cases to help them resolve the factual ambiguities in their assignment. For example, in my assignment on substituted service of process, one of the issues is whether the defendant's elderly mother who is visiting him on her annual three-month visit is a "person of the family" for purposes of substituted service under Illinois law. The synthesized rule requires that the person served spend considerable time in the defendant's abode and "considerable time" is determined by looking at whether the defendant and the person served slept under the same roof and ate their meals together. This rule is based on two cases with counterintuitive facts leading to opposite holdings.[32] In the first case a 13-year-old brother from Florida received a summons while he was in Illinois on a two-day visit at his older brother's home. After the trial court entered a default judgment against the older brother, the older brother appeared specially to quash service of summons claiming that his younger brother, as a Florida resident, was not a "person" of the older brother's family. The court agreed with the older brother and held that even though the younger brother was a blood relative, his presence in the home for two days was not enough to make him a "person" of his older brother's family for purposes of the abode service statute. In the other case, the sheriff gave the summons to the defendant's landlady. The defendant had been boarding in the landlady's home for three years. The court held that the landlady was a "person" of the boarder's family.[33] The persuasive case that I throw into that mix is a Florida case with an aunt from England who is served with a summons for the defendant while she is visiting in the United States for four months.[34] Thus, it is

30 My colleague, mentor, and friend Helene Shapo does not necessarily agree that most of the cases have to come from the controlling jurisdiction. She has successfully used closed-universe assignments with a single case from the controlling jurisdiction. The other cases then present factual similarities to the facts of the assignment and the students have to decide why, based on the single binding case, the courts in the controlling jurisdiction would follow certain of the persuasive cases but not others. *See* Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law Teacher's Manual* 132–333 (4th ed. 1990).

31 For example, in a DUI assignment that I adapted from a colleague, Ben Brown, the controlling statute made it a crime for an intoxicated person to be "in physical control" of an automobile. Tenn. Code. Ann. § 55-10-401 (2007). The fact that could explain the differences in the outcomes of the cases on the issue of "physical control" was whether the defendant was steering the motor vehicle at the time of the accident. *Compare* State v. Lane, 673 S.W.2d 874 (Tenn. Crim. App. 1983) (affirming defendant's conviction when he was sitting behind the wheel of his incapacitated car while it was being pushed along the shoulder of the road) *with* State v. Carter, 889 S.W.2d 231 (Tenn. Crim. App. 1994) (reversing defendant's conviction when she was behind the wheel of an incapacitated car that was in a parking lot and not moving at the time of her arrest).

32 *Compare* Cumbo v. Cumbo, 293 N.E.2d 694 (Ill. App. Ct. 1973) (brother on a two-day visit) *with* Edward Hines Lumber Co. v. Smith, 172 N.E.2d 429 (Ill. App. Ct. 1961) (boarder).

33 *Compare* Cumbo v. Cumbo, 293 N.E.2d 694 (Ill. App. Ct. 1973) (brother on a two-day visit) *with* Edward Hines Lumber Co. v. Smith, 172 N.E.2d 429 (Ill. App. Ct. 1961) (boarder).

34 Sangmeister v. McElnea, 278 So. 2d 675 (Fla. Dist. Ct. App. 1973).

factually closer on this issue than any of the Illinois cases.[35]

Although choosing the jurisdiction goes hand in hand with case selection, for me, the importance of finding the right cases controls the choice of the jurisdiction and not the other way around. In other words I never decide that I want to set a problem in a particular state and then look for cases within that state. I always look for cases that will set up a good problem and then when I find enough cases that work well together from a single jurisdiction, I set my problem in that jurisdiction. I have three requirements for what constitutes a "good case" for a closed-universe assignment. Two of the requirements must apply to all the cases I use, and one must apply to some but not necessarily all of the cases. The requirements that all cases must satisfy are first, that they have clear and consistent rule statements and second, that they have fact-based outcomes. The one requirement that is a little more flexible is that a few of the cases must have some reasoning about how the court reached its decision.

The reason that I look for cases with clear and consistent rule statements is that early in the first semester, first-year law students want to give meaning to every single word that seems like a rule in a case. If the language that the courts use in defining the rule controlling an issue is different from one case to the next, then on the first memo, students have a very hard time determining the rule. Their rule statements often consist of long quotes of the slightly different language from each of several cases. Thus, I either look for cases where the courts have stated the rule in the same language from one case to the next, or, because this is a closed-universe assignment, I "doctor" the cases so that the rule statements are consistent.[36] For example, on the service of process assignment described earlier, some of the cases say that a "person of the family" is determined by whether there is enough of a "relation of confidence … between the person with whom the copy is left and [the] defendant that notice will reach [the] defendant."[37] Other cases describe family as a "collective body of persons who live in one house, and under one head or manager. … "[38] After years of seeing the students try to write their rule for this element of the case by stringing together quotes about a confidential relationship and a "collective body" of individuals who live under one roof, I decided that I would alter the cases so that they all used the "confidential relationship" rule.[39] Once the students had fewer quotable phrases to string together in their rule, they could begin to think about what the facts in the cases told them was required for a confidential relationship.

In addition to clear and consistent rule statements, each of the precedent cases I use in my closed-universe assignment must have a fact-based outcome on one or both of the elements at issue. By fact-based outcome, I mean that the courts must

> "[T]he importance of finding the right cases controls the choice of the jurisdiction and not the other way around."

[35] When I first created this assignment, the Florida statute was worded identically to the Illinois statute, which gave the students a good basis to justify their use of the persuasive authority. However, the wording of the Illinois statute has changed slightly, so now to avoid the extra complexity that would come from having to justify the use of a case based on a differently worded statute, since this is a closed-universe assignment, I give my students a copy of the statute as it was phrased before the amendment.

[36] To me the way that the cases work together with the facts of my assignment is more important than fidelity to the exact language of the cases or even to the level of court deciding the case. For many years I have taken some liberties with the cases I include in my assignments, including altering the rule statements for consistency, changing an intermediate appellate court decision to a decision of the state's supreme court, and even making up a case based on a headnote and syllabus, which were the only part of this particular case included in the reporter. Of course, where I make changes in a case, when we are done with the assignment I do tell my students that the cases have been altered from their original and that they may want to mention this fact to prospective employers if they use the memo from this assignment as a writing sample. Shapo et al., *supra* note 30, at 133 (saying that it is permissible to "take liberties" with cases but recommending that students should be informed that the cases have been altered from the original).

[37] Cumbo, 293 N.E.2d at 695.

[38] Edward Hines, 172 N.E.2d at 432.

[39] This task used to involve a complicated cut-and-paste job, and usually the patchwork aspect was readily apparent to the students. Today with the ease of downloading from LexisNexis® or Westlaw®, this is an almost effortless process.

look at the law governing the elements and decide whether, under that law, the facts in the case satisfy or fail to satisfy the element. For example, if I were creating a closed-universe assignment for a burglary problem and one of my issues was whether a carport that was open on the sides but covered by a roof was a "building" for purposes of Article 140 of the New York Penal Law,[40] I would try to include cases in which the courts had to consider whether various types of structures were buildings. Ideally, the cases might include cases where a gasoline pump[41] and a railway box car[42] were held not to be buildings, along with those where a chicken coop[43] and a fully enclosed porch with windows and wooden walls running along the length of a house[44] were held to be buildings. My first goal in setting the problem up in this way would be for the students to try to figure out what factors made the gasoline pump and the railway box car different from the chicken coop and the porch;[45] in other words to synthesize the holdings on this issue into a rule or factors that could explain the difference in the outcomes. My second goal would be for the students to decide whether their facts were closer to the gasoline pump and the railway box car or to the chicken coop and the porch, and to explain their reasoning; in other words, I would expect them to use analogical reasoning in applying law to fact and to justify their prediction.

> "I use cases with fact-based outcomes for the closed-universe assignment, because students have a very hard time understanding how to work with a question of pure law."

I use cases with fact-based outcomes for the closed-universe assignment, because students have a very hard time understanding how to work with a question of pure law. They have trouble deciding which of two competing rules a jurisdiction should adopt. In most of the cases that raise this type of issue, the legally relevant facts are the same and the issue is resolved not by comparing and contrasting facts but by using canons of statutory construction, legislative history, or public policy, or often some combination of all of these. Early in the first semester, students need to learn how to extract rules from cases and how to apply those rules to different facts. They will learn better if they have mastered these more fundamental skills before they have to move on to the more abstract thinking that comes with choosing from competing rules.

Finally, I try to ensure that at least a few of the cases included in the closed-universe assignment contain some reasoning. In my opinion, using opinions with some reasoning will help students to synthesize rules and will give them a better understanding of the issue of their assignment so that they can give a better explanation of why cases are either analogous to or distinguishable from their facts. While students can certainly synthesize common factors based on nothing but a few cursory facts, this type of synthesis is most useful in an early exercise that helps students identify controlling facts that tip a result one way or another.[46] These early controlled exercises allow students to see how facts can determine outcomes. However, most cases that students read, whether in our class or in their doctrinal classes, are filled with dicta. Early in the first semester, as soon as they have to deal with extra language in an opinion and not the bare facts, they will have a hard time straying from the exact language in an opinion. No matter what you have taught them about the differences between cases and statutes, they will tend to treat the language in the court's opinion as if it were as controlling as the language in a statute. If the package for a closed-universe memo assignment includes a few cases where there is some additional reasoning, you will be able to use those cases to teach the students that when they synthesize rules from cases, they

[40] N.Y. Penal Law §§ 140.00, 140.20 (McKinney 2008).

[41] People v. Lamphere, 219 N.Y.S. 390 (N.Y. App. Div. 4th Dept. 1927).

[42] People v. Chapman, 611 N.Y.S.2d 991 (N.Y. Sup. Ct. Bronx County 1994).

[43] People v. Snyder, 148 N.E. 796 (N.Y. 1925).

[44] People v. Lewoc, 475 N.Y.S.2d 933 (N.Y. App. Div. 1984).

[45] One possibility might be that structures that were buildings were in a permanent location and had a roof and walls, even if the walls were open.

[46] Most legal writing texts have basic synthesis exercises like this. *See, e.g.*, Shapo et al., *supra* note 3, at 50–52 (explanation and exercise on factors relevant to parental immunity from suit by a child).

can move a bit away from the words used by the court. In addition, the extra reasoning in some cases helps them to develop richer explanations in writing their memo of why some cases are like or not like their case.

C. Writing the Problem Facts

If you are not using a problem based on real facts from current events, then the final step in creating the assignment, apart from the mechanics of proofing it and testing it out, is to develop the facts that will set up the problem you will ask the students to address in their memo. Again, in selecting the cases, I always try to make sure that at least three or four cases address at least one of the elements at issue and that at least one of these cases reaches a holding on the issue that is the opposite of the holdings of the other cases. The way that I use these cases in developing the facts of the assignment is to construct the facts so that they slice between the facts of the cases with opposite results.[47] My goal is to make the outcome indeterminate enough that the students can easily conclude either way in their analysis.[48] In fact, I often set up the closed-universe assignment with the students acting as clerk to a judge who has to decide the case so that my students do not feel constrained to shoehorn their analysis into a conclusion for the side that happens to be their client.

Sometimes it is easy to figure out a way to set up the facts so that they fall between the cracks of the precedent cases. However, when I have trouble creating the right set of facts, I set up the same type of synthesis chart that we teach our students to use.[49] I find that when I can see on paper which facts are cutting each way, I have a much easier time visualizing the facts that will slide in the middle of the precedents.

Another consideration that is relevant to both selecting the cases and drafting the facts for the assignment is the way that the procedural posture of the precedent cases relates to the procedural posture of the problem that you create. If all the cases that you use for precedent come up on a motion to dismiss, then be careful not to pitch the "call of the question" in your assignment to ask about the merits. While students might not notice the discrepancy, if they do, they may become confused or you may lose credibility with them. Sometimes you can modify the cases to ensure that their procedural posture is consistent with the way you want to set up the facts of your assignment. When you cannot modify the cases, you may have to take some time to develop a credible set of facts that has a procedural posture that is similar to the cases. For example, in one of my assignments, the cases all were decided on a motion for a directed verdict or a judgment notwithstanding the verdict. Since these motions take place either after the plaintiff's evidence is presented, after the close of evidence, or after a jury verdict,[50] in order to make the facts of my assignment work with the cases, I had to put my facts in the form of a trial transcript to provide the appropriate context for a motion for a directed verdict to be raised.

"My goal is to make the outcome indeterminate enough that the students can easily conclude either way in their analysis."

[47] Shapo et al., *supra* note 30, at 132 ("Provide facts for this issue that will make them 'play' with the facts a bit and require them to give both sides of an argument.").

[48] In the service of process assignment described earlier, the precedent cases that hold that the person served was a "person of the family" include a case where service is on the defendant's sister, who lives in an apartment adjacent to his and who spends a great deal of time in her brother's apartment, often eating meals there, Anchor Finance Corp. v. Miller, 132 N.E.2d 81, 83 (Ill. App. Ct. 1956), and a case where the service is on the landlady of a boarder who has roomed in his landlady's house for approximately three years, Edward Hines Lumber Co. v. Smith, 172 N.E.2d 429 (Ill. App. Ct. 1961). The cases that hold that the person served was not a "person of the family" include a case where a brother from a different state is visiting his brother, the defendant, for two days, Cumbo v. Cumbo, 293 N.E.2d 694 (Ill. App. Ct. 1973), and a case where a stepdaughter is served while in the defendant's apartment to water plants and pick up the mail while he is out of town, Conley v. McNamara, 79 N.E.2d 645 (Ill. App. Ct. 1948) (abstract only). The Conley case is published in the reporter in abstract only, but I have created a full case out of it by obtaining a copy of the transcript of the case from the Illinois Appellate Court. I have also modified the Conley case to be an Illinois Supreme Court case, because it covers both issues in the assignment and I want students to pay careful attention to it.

[49] *See* Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* (4th ed. 1990) at 143.

[50] These cases all were decided under state procedural law and in any event were all decided before the change in the Federal Rules of Civil Procedure that combined these motions into a motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50.

“[E]ven with the system I’ve outlined, creating the closed-universe assignment from start to finish will still take quite a bit of time.”

A final consideration is how to present the facts of the assignment to the students. Although the easiest way to put the facts together is to write a narrative telling the students what the problem is about and who the parties are, and this may be the way that you have to present the facts if you are facing a deadline, it is not the best approach from a pedagogical point of view. Lawyers do not learn facts about their clients in neatly packaged narrative stories. Even though we may not be able to mirror all of the complex fact investigation that goes into researching all the facts on behalf of a client, the more that we can present the facts the way students will learn about facts in practice, the better we prepare our students for their work as lawyers. Ideally, you should present the facts to the students through various types of documents that they may encounter in practice, such as transcripts of client interviews, all or parts of relevant pleadings, deposition excerpts, transcripts of hearings, or excerpts of relevant documents such as leases or contracts.

One advantage of presenting facts in this way is that the students will receive the facts from various people involved in an action or a transaction based on their perception of what happened. This approach mirrors the way that lawyers learn about facts in practice better than a neat narrative in chronological order from an omniscient observer. Students will have to reorganize the facts into a coherent order in their memo, rather than simply following the order of the narrative. Putting the facts into the words of legal documents or the mouths of witnesses allows us to add jargon, either legal or colloquial, or irrelevant material into our assignments, forcing students to sift through the facts to determine what is relevant rather than parroting what we have written back to us in their statement of facts.

Conclusion

This article has attempted to provide a system to help new or even experienced legal writing faculty put together the pieces of the closed-universe memorandum assignment puzzle. Even when you sort the pieces and decide to work on one area at a time, completing a complex puzzle still takes a considerable amount of time. So, too, even with the system I’ve outlined, creating the closed-universe assignment from start to finish will still take quite a bit of time. Sometimes topic ideas do not work out because you cannot find the cases that have the requisite amount of reasoning and fact-based outcomes. Sometimes, you have to search through most of the 50 states before you find a jurisdiction with the right lineup of cases. Sometimes, even when you have a jurisdiction with good cases, you struggle to get your creative juices flowing enough to create a credible fact pattern. However, just as with a puzzle, a little patience and willingness to re-engage after you are stuck will get you through to the end of the project.

Sometimes when you get to the end of a puzzle, you find you have somehow lost a piece or two along the way. Sometimes the closed-universe assignment you thought would work perfectly has a glitch or two that you learn about only after your students are working on it. For the most part, the system described here will help you to avoid those glitches. Beyond that, take heart; unlike losing a puzzle piece that you may never recover, a small glitch in a writing assignment can be fixed by changing a case or changing some facts the next time you use the assignment.

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The "Grammar Bee"—

One Way to Take the Pain Out of Teaching the Mechanics of Writing

By Edward H. Telfeyan

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Consider the following:

You are a newly hired legal writing instructor at Podunk Law School. You withstood a rigorous application process for the position during which you learned that you would be responsible for instructing new law students in legal writing and research. Over the summer, before the start of the fall semester, you prepared for the job by brushing up on your research skills and by reading a few texts on legal writing and analysis.

You envisioned your job to include intensive instruction in the "legal paradigm" of analytical reasoning and expected the biggest hurdle for your students would be understanding the significance of "rule explanation," "rule application," and "rule synthesis."

The semester begins and you receive the first writing assignment from your students. It's a simple two-paragraph draft that required the use of analogical reasoning. You fully expected the students to have some trouble in drawing the factual comparisons necessary to establish the analogy, and, sure enough, they did.

But, much to your surprise, the deficiencies in understanding what constitutes an effective analogy were dwarfed by the glaring and horrendous number of basic writing errors that appeared in all too many of the papers. These students, you suddenly realize, don't know how to write!

Now consider your reaction to this realization. You go through various stages of the following emotions: anger ("I wasn't hired to teach them how to compose complete sentences"); panic ("I can't possibly teach them how to write like lawyers if they can't even write like college graduates"); frustration ("how am I going to succeed at the job I was hired to do if they don't have a base level of competence in the fundamentals of writing?"); confusion ("how am I going to deal with this problem, assuming I'm even supposed to?"); and maybe several others that, if left unchecked, can produce dire (or at least adverse) consequences for you and your students.

I had just such an experience, and many of the same emotional responses, nine years ago, when I left the crazy world of the private practice of law for the presumed sanguinity of a full-time position as a legal writing instructor.

Here's a real example of the kind of "writing" I'm talking about (from a student memo):

"It is commonly known that if an area is located in a public place and considered dangerous or allows only certain people to enter; that there should be apparent signs posted which notifying the public that they are not permitted and are sufficient efforts made to enclose such areas to keep others out."

Huh? What do you do with a student who honestly believes that "sentence" is well-written? How do you address the problem if you have a sizeable segment of your class that agrees (or even composes more horrific "sentences")?

If you're like me, you first consider ignoring the problem. After all, teaching basic grammar isn't what you signed on for, it isn't what you were told you'd be responsible for, and it might not even be something the "powers that be" at Podunk realize is a problem at all.

So, the first solution I considered was to do the job I was hired to do and leave it to someone else (having no idea who that someone might be) to deal with the gross writing deficiencies I now realized many of my students had.

"[M]uch to your surprise, the deficiencies in understanding what constitutes an effective analogy were dwarfed by the glaring and horrendous number of basic writing errors. …"

“The critical elements for the Bee are a lightened classroom atmosphere, a no-risk competition, numerous opportunities to win, and learning as the end result.”

Moreover, even if I wanted to address the problem, I had no idea how to do so. And even if I did, how could I justify taking valuable class time to do it? After all, my syllabus was already crammed to the max with all the required components of the course I was responsible for.

So, absent a plan that would make effective and efficient use of precious class time, and not at all sure that I should take any time away from the core components of my course, I effectively punted.

The type of punt used can vary from instructor to instructor, largely depending, in part, on the instructor's personality. Here are a few that I tried, along with the reasons they failed to solve the problem:

Assign Outside Reading

Outside reading for 1Ls? You have to be kidding. They can hardly keep up with the reading they are assigned, especially considering the endless flow of cases they have to brief, the mountain of substantive law they have to learn, the intimidating outlines they have to prepare, and the time-consuming legal memos they have to write. Outside reading, to most 1Ls, means reading that isn't required and therefore isn't done.

Browbeat the Entire Class

You don't want to get personal with any individual, so you just rant and rave to the whole bunch of them. "If you people don't learn how to write a complete sentence, you're never going to pass this course." "You are expected to know basic grammar; if you don't, you'd better find a way to learn it." "I'm not here to teach you basic grammar; you're supposed to know it, and I expect to see it on your memos." Any and all of those rants, even if offered more tactfully, are guaranteed to lose you an entire class.

Write Nasty Comments on the Memos

This one is the best way to lose your students. Remember, these are Gen Xers and Millennials we're dealing with. They aren't used to even the most constructive of criticism, let alone downright obnoxious slams. Furthermore, they think they write beautifully. They have been told nothing less throughout college, where most of them were only graded on the "quality of their thinking." So now you're going to come across like a first-class jerk and expect them to respond positively?

Send Them to a Tutor

Right. Pass the buck. It's an easy solution for you, but not likely to be one the students are going to use. Tutors, if they can be found, will charge for the service, and the time spent with them will be time lost to the more pressing tasks of briefing cases, preparing outlines, drafting memos, and completing research assignments. First-year students who are told to go to a tutor will ignore that advice as soon as you recommend it to them.

None of those "punts" worked in my first year, and the cumulative effect of them was that I lost my students and almost lost my job. The following summer was a tough one for me, as I rediscovered the trial lawyer's collateral disease: insomnia.

But, as many trial lawyers have learned, some of the best solutions are delivered in the dead of night. And so it was with me, sleepless in Sacramento as I was. At 4:30 one night, I came upon a possible solution, and that solution, over the next few months, became the "Grammar Bee."

The Bee, as I'll refer to it, turns the negative command—"You must learn your grammar"—into a positive experience—"Learning grammar will be fun."

The critical elements for the Bee are a lightened classroom atmosphere, a no-risk competition, numerous opportunities to win, and learning as the end result.

The Bee works because it's easy to conduct and administer, it doesn't take much class time (never more than five minutes), the students immediately embrace it, and it provides them with a natural motivation to learn what they otherwise consider unnecessary and/or irrelevant and/or unduly burdensome and/or trivial and/or irritating.

The hook for our Gen-X and Millennial students is that it combines the basic aspects of the traditional game show (e.g., *Jeopardy*) and the now ubiquitous

reality/survivor shows. And the title—Grammar Bee—recalls, for most of them, the elementary school equivalent, the spelling bee, thereby allowing them to consider the experience a throwback to a more innocent and less stressful time in their lives. (I'm no psychologist, but doesn't everyone seek solace in the innocence of childhood in times of stress? And isn't the first year of law school a maximum time of stress for almost all law students?)

Here's how the Bee works:

First of all, understand that the title—Grammar Bee—should be interpreted in the broadest possible sense. In other words, it should cover the mechanics of good writing, generally, and good legal writing, specifically. Thus, everything from the most basic common errors (e.g., the difference between *it's* and *its*—a surprisingly misunderstood/never understood "rule") to the more stylistic aspects of good legal writing (e.g., brevity over length, simplicity over complexity).

At the start of the fall semester, the game is introduced to the entire class. (Our legal process sections at McGeorge average 20–22 students, but the Bee can work in sections of as many as 40 students.) At the beginning of each class session, three (or four if class size is larger) students are randomly chosen as contestants for that day. They are then given answer cards (with A, B, or C on them) that they will be required to show when they are asked to give their answer to the question that is shown to the entire class (via PowerPoint or equivalent). Those who choose the correct answer advance to the next round; those who choose an incorrect answer are eliminated (as in the old spelling bees). But, as I'll explain in a moment, eliminated contestants should be given several opportunities to "challenge back" into the competition.

The questions are the multiple-choice type (save for the semifinal and final rounds, about which more later) with one correct and two incorrect choices. Hence the lettered answer cards. Here's a typical question that might be given in an early round:

Which of the following formulations constitutes a complete sentence?

A) He argued.

B) Being the lead attorney and yet still feeling somewhat of a novice in his first jury trial.

C) James, even without his three-piece suit, in the center of the courtroom.

After the contestants have indicated their answers, the correct answer should be shown to everyone, along with the reason it is correct and the others are not. Thus, for the above example, the class would be shown these explanations:

Only "A" is a complete sentence, containing both a subject (he) and a verb (argued).

"B" appears to be an introductory clause that, standing alone, lacks either a subject or a verb (or both), the two requisites of a complete sentence.

"C" may have a subject (James), but it lacks a verb (an action word that describes/explains what James is doing).

As the semester progresses, the questions should become more difficult. Here are two examples, together with the explanations provided for the correct and incorrect answers:

Which alternative is the preferred form of a question?

A) Why did you take such an action?

B) What, in your opinion, led to the creation of the problem?

C) How do you know she complained about it?

"C" states the point directly, using the verb "to complain" rather than a nominalization of it (e.g. "had registered a complaint").

"A" and "B" are both examples of nominalizations of verbs ("action" instead of "act," "creation" instead of "create"). Nominalizations (nouns that derive from verbs) create longer sentences, stating points less directly.

Choose the sentence with the correct punctuation.

A) The doctrine of res judicata includes: merger, bar, and collateral estoppel.

"The questions are the multiple-choice type … with one correct and two incorrect choices. Hence the lettered answer cards."

B) The doctrine of res judicata includes: merger; bar; and collateral estoppel.

C) The doctrine of res judicata includes merger, bar, and collateral estoppel.

"C" correctly omits any punctuation after the word "includes."

"A" and "B" both improperly place a colon after "includes," and B also improperly separates the three concepts in the series with semicolons. (Colons are used to introduce a series only when the phrase that precedes it can stand alone as an independent clause, and semicolons are used to separate items in a series only if the series is complicated or contains internal commas).

These and the other examples included at the end of this article can be used or modified to suit the needs of individual classes and instructors. I modify my questions every year based in part on what I saw on the memos my students submitted the previous year.

The key is to be flexible and to be creative. Part of the fun of teaching is in developing our skills even as we are trying to do the same for our students. The Bee works best when the instructor prepares it as carefully as he or she prepares any other part of the course. Use the examples provided with this article as starting points for your own Bee. Develop your own questions, consistent with your assessment of your students' needs.

"The key is to be flexible and to be creative. Part of the fun of teaching is in developing our skills even as we are trying to do the same for our students."

A few procedural tips that I have adopted over the years keep the competition challenging (and fun). First, always allow verbal appeals to incorrect answers, and be liberal in sustaining them. Occasionally students will misinterpret a question that is less artfully worded than you may have intended. And, sometimes, students will apply a rule to another part of the sentence or question to come up with a different answer that, by applying that rule, would make their answer correct.

The key is to avoid the appearance of arbitrariness and to encourage students to develop grammar and writing expertise. It is more important to encourage that kind of result than to be "right" as the professor/administrator of the competition.

Second, spice up later rounds of the competition. (A round consists of a complete run through your roll sheet, which, if you have 20 students, may take six or seven classes. Over the course of the semester, I usually get through about four rounds before getting to the semifinals and finals on the last few classes of the semester.) For example, in later rounds, I require the contestants who choose the correct answer to explain why it is correct (or why the others are incorrect) before I show the explanations to the entire class.

Third, in the semifinal and final rounds, require the surviving contestants to rewrite a poorly written sentence (or paragraph). In this way, you will be relatively sure that your winners are students who really have mastered the requisites of good writing.

Here's an example of a question for students who get to the semifinals in my competition:

Rewrite and correct the following "sentence" so that it is grammatically correct and clearly states the writer's intended thought (time limit—10 minutes):

> Historically, attorneys from large firms, having served the public through selfless efforts and often never receiving compensation therefrom, but never complaining or ask for recognition.

This question would be posed to the semifinalists before or after class, so as not to take class time. (The semifinal round will usually have no more than four or five students, as the others will have bowed out somewhere along the way. The students with the top two answers for that question then become the finalists.)

During class, show everyone the question the contestants were given and provide a "model" answer, such as this one:

> Historically, attorneys from large firms have served the public selflessly, never complaining or asking for recognition, even though they often have received no compensation for their efforts.

Finally, as I mentioned earlier, the Bee works best when most students remain in the game for as long as possible. Therefore, I provide students who have been eliminated with several opportunities over the

course of the semester to "challenge back" into the competition. At various points, I will announce a "challenge-back" round, which consists of a single question given to all students who have previously been eliminated. All who get that question correct are readmitted into the competition.

By the end of the semester, the Bee will have helped every student in the class, irrespective of his or her initial level of competence. It will help students who, for whatever reason, never grasped the basic rules of competent writing. It will help students who know their grammar but come to law school with a "humanities-oriented" approach to writing (i.e., long-winded, impenetrable, rambling discourse). And it will help students who have all the basics down but haven't figured out how to "sound like a lawyer."

I recommend use of the Bee throughout the first semester. I start every class session with a single question posed to three (sometimes four) contestants. The competition is best used in the first semester for several obvious reasons. First, you want to get the students on track with respect to the basics of good writing as soon as possible. Second, during the first semester, they are most open to this kind of "different" classroom activity. And finally, by the second semester, most students have developed their writing skills beyond the level addressed by the Bee, and those who haven't probably need more help than the Bee can provide.

But the Bee can also be used during the second semester (or even in advanced writing classes—I make it a one-day contest in my advanced legal writing course) as a means of addressing specific problems that are appearing too often on the students' memos.

And, finally, be sure to provide rewards for the winners (and runners-up) of your Bee. I give my winners a "bump" of one percentage point on their final grades in my course. (We don't have grade inflation at McGeorge.) I also conduct a little ceremony at the end of the semester, and the school provides some public relations with photos in the law school magazine. At the ceremony I present the winners a T-shirt that memorializes their accomplishment. (On the front it says "Winner—Telfeyan's Grammar Bee"; on the back it says "Hooray for me—I do'd it.")

In addition, I encourage my winners to include their accomplishment on their first-year resumes, and I have noted the accomplishment on letters of recommendation I have written for them.

When properly constructed and administered, the Bee is fun for students, promotes creativity for the teacher, and results in real learning, so that the "sentence" I got from one of my students can be (and was) rewritten by that same student at the end of the first semester. (See the before and after below.)

> Before: It is commonly known that if an area is located in a public place and considered dangerous or allows only certain people to enter; that there should be apparent signs posted which notifying the public that they are not permitted and are sufficient efforts made to enclose such areas to keep others out.
>
> After: If access to a public place is limited to certain individuals or if the area in question is considered dangerous, appropriate signs should be clearly posted and sufficient efforts should be made to enclose the area.

Additional examples of questions for a successful Grammar Bee:

Select the sentence that best expresses the thought the writer intended to convey.

A) Among legal scholars, disagreements are common regarding almost every issue in the law.

B) The lack of uniformity of perceptibility is apparent to anyone who reads any number of treatises.

C) Legal scholars are almost never in complete unification on any issue in the law.

"A" uses appropriate words to express the thought the writer intended to convey.

"B" uses the wrong forms ("uniformity" and "perceptibility") of what are probably the wrong words for the sentence. ("Consensus" or perhaps

> "By the end of the semester, the Bee will have helped every student in the class, irrespective of his or her initial level of competence."

"unity" and "opinion" is probably what the writer means.)

"C" uses the wrong form ("unification") of what may be the wrong word for the sentence. ("Accord" or "agreement" is probably closer to what the writer means.)

Select the sentence that is the most "reader-friendly":

A) The fact that she died created a widespread feeling of grief.

B) Her death caused widespread grief.

C) Grief was felt by many when her death was reported.

"B" conveys the necessary information in a minimum number of words.

"A" contains surplus wording ("The fact that she died" instead of "her death" and "created a ... feeling" instead of "caused").

"C" states the point in the less desirable passive voice ("Grief was felt by many") instead of the preferable active voice ("Many felt grief").

Which sentence is punctuated correctly?

A) Judges must make numerous decisions in every trial, including whether they should exclude testimony and permit expanded cross-examination.

B) Judges must decide whether to exclude testimony, and whether to permit expanded cross-examination.

C) Judges must decide whether to exclude testimony and they must also rule on objections to expanded cross-examination.

"A" correctly places a comma before the subordinate clause in this complex sentence.

"B" incorrectly places a comma in the middle of this simple declaratory sentence. The sentence does not consist of two separate clauses; it has one subject (judges) and one verb (must decide) followed by two alternatives, neither of which can stand alone as a separate clause.

"C" improperly omits a comma (before "and") in this compound sentence. The sentence consists of two separate clauses (each of which can stand alone) joined by a conjunction.

Choose the grammatically correct sentence and indicate specifically what is wrong with the other two:

A) The issue regarding the defendants' contradictory statements are whether either of them can be believed.

B) When the defendant contradicted himself, especially after his attorney gave him an opportunity to correct his testimony, his credibility became an issue.

C) Contradictory statements, such as the one uttered by the defendant, makes credibility an issue.

"B" contains no grammatical errors.

"A" fails to conform subject to verb. (If the subject is "issue" the verb should be "is"; if the verb is "are" the subject should be "issues.")

"C" contains the same defect. (If the subject is "statements" the verb should be "make"; if the verb is "makes" the subject should be "statement.")

Select the correctly written question:

A) Where is the men's room?

B) Where is the mens room?

C) Where is the mens' room?

"A" correctly places an apostrophe before the "s" in "men's."

"B" incorrectly omits an apostrophe in "mens."

"C" incorrectly places the apostrophe after the "s" in "mens."

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Teaching Practical Procedure in the Legal Writing Classroom

By Stephen E. Smith

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The legal writing professor is in a unique position in the legal academe to engage students not only in the study of "thinking like a lawyer," but also in doing the things lawyers do. Beyond IRAC and citation, and beyond induction and deduction, legal writing classes can also teach the basic skills and vocabulary of litigation procedure, making it possible for students to hit the ground running when they arrive at an employer's doorstep during summers and after graduation.

The legal research, writing, and analysis class is a student's introduction to an entire discourse. It teaches a standard usage model that is new to the students, and shows concretely how the rules they are learning in their doctrinal classes are put to use. Learning procedural usage—the terminology used every day by lawyers to describe their actions and those of the other legal actors around them—can reinforce and augment what is learned in a civil procedure classroom, as well as provide a "hands-on" understanding of how these things work in practice.[1]

Access to more information on a topic makes it easier to understand. This is unremarkable—the more we see something, from the greatest number of perspectives, the better we know it. By addressing procedural issues in the legal writing class, we can provide students with yet another perspective on the procedural issues they are studying in their doctrinal classes—not in a way that interferes or distracts, but one that provides additional and, ideally, clarifying information.

This article is premised on the existence of a legal writing class that includes the preparation of persuasive briefs, typically, dispositive motions such as motions to dismiss or for summary judgment.[2] When these are a part of the writing program, numerous opportunities are presented to teach students the practical procedure they will encounter in their professional lives. This practical procedural training may include introduction to legal documents, legal vocabulary, local rules, and beyond.

Litigation Documents

A civil procedure class typically teaches motion practice in general terms, focusing on the important concepts underlying particular motions. A class segment on summary judgment, for instance, will focus on a topic such as how to determine whether an issue of fact is "material." There remain, however, many practical issues of motion practice that go unaddressed. It is a rare class that will explain to students that a California motion for summary judgment will be supported by a notice, a memorandum of points and authorities, and a "separate statement of undisputed material facts."[3] It is a rarer one still that will provide examples of these various documents.

The legal writing class provides those opportunities. It can show a student the types of documents lawyers produce, and explain their contents. From caption, to table of authorities, to the manner in

"A civil procedure class typically teaches motion practice in general terms, focusing on the important concepts underlying particular motions."

[1] This is not a concept applicable only to the law, but one generally endorsed by proponents of "writing across the curriculum." "Writing assignments of this sort are designed to introduce or give students practice with the language conventions of a discipline as well as with specific formats typical of a given discipline." The WAC Clearinghouse, <wac.colostate.edu/intro/pop2e.cfm> (last visited May 12, 2008).

[2] This is increasingly common. The 2007 survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute indicates that 110 of 181 schools providing responses use pretrial motions as teaching assignments. The survey is available at <www.lwionline.org/survey/surveyresults2007.pdf>.

[3] *See* California Rule of Court 3.1350(c).

“Within the realm of practical procedure, I also include developing the vocabulary and standard usage of in-court lawyering.”

which deposition testimony must be introduced,[4] the legal writing class exposes students to the micro-procedure of litigation documents. Students need to know not only whether a fact is material, but how that fact is physically presented to a court in the first place.

An important part of the practical procedure class component is familiarizing students with local rules. Elsewhere, they learn the broad language of the Federal Rules of Civil Procedure, but students must also discover the detailed requirements of particular courts. Here, students learn not only what documents must support a motion, but the detailed contents of a memorandum, and things as simple as page limits. The goal, of course, is not to ingrain whether a court requires 26 or 28 lines in a filed document,[5] but to know that such requirements exist, and that they must be considered when producing any court document.

The Language of Litigation

Within the realm of practical procedure, I also include developing the vocabulary and standard usage of in-court lawyering. In the course of teaching students to write briefs, they must learn not only techniques of persuasion, but the language used in the process of persuasion. Lawyers and judges, of course, have their own usages, which include not only terms of art, but standard phrasings that a knowledgeable member of the legal community will have internalized.[6] The legal writing class is the gateway to entry into that shared discourse.[7]

Student fluency in legal usage is important to later reception in the legal community. Personal credibility depends, in part, on a lawyer's ability to "speak the language." But the ability to participate in the discourse community takes time and experience. Familiarity with these usages may arise after years of participation in the legal world, but that world will be more receptive if students are given a head start.

By way of example, in California and some other jurisdictions, what would be a Rule 12(b) motion in federal court is called a "demurrer."[8] My students, the majority of whom end up in California practice, need to learn the simple terminology of the demurrer. Initially, I provide instruction on its language. I tell them a demurrer is referred to as such—not a "motion for demurrer," just a demurrer. I tell them they will "demur" to the complaint, not "move for a demurrer." I explain to them that demurrers and objections are "sustained," unlike motions, which are "granted."

Similarly, students need to know *who* uses the various terms they become familiar with through their readings. A student recently wrote, "we find the Plaintiff's complaint to be without merit." He was writing a brief for defendant. This provided an opportunity to deepen his understanding of situational or positional usage—only triers-of-fact "find" things in the law. Litigants *hope* for particular findings.

This sort of usage information is necessary at even the simple level of document title. My students are assigned to write a "memorandum of points and authorities in support of" a demurrer or motion.[9] Nonetheless, I persistently receive multiple submissions by students of their "Motion of Points of Authority for Demurrer." Initially, I found this frustrating, but after realizing that one time is not enough for almost any concept, I began to embrace the opportunity it provided to further explain standard legal usage.

Usage norms that every lawyer takes for granted can be new and strange to an unfamiliar student.

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4 *See* California Rule of Court 3.1116.

5 *See, e.g.,* United States District Court for the Northern District of California, Local Rule 3-4(c)(2) (requiring no more than 28 lines of text per page).

6 For further treatment of this issue, *see* Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 Clinical L. Rev. 501 (2006).

7 Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489, 508–09 (2002).

8 Cal. Civ. Proc. Code § 430.10.

9 *See, e.g.,* United States District Court for the Northern District of California, Local Rule 7-4(a).

A colleague tells of a student describing a party as having been "depositionized." Practical procedure training includes even material so seemingly minor as explaining to young lawyers that "deponents" are "deposed."[10]

Matters of Evidence

Students regularly have trouble understanding the relationship between allegations and evidence. Many of the problems I use involve pre-answer motions, contending that a plaintiff has failed to state a claim. Invariably, students use language about evidentiary standards. They mention the preponderance of the evidence standard. They assert that plaintiff has "no evidence," or decry an "absence of evidence." They contend that a litigant "can't prove" an element, before proof is an issue at all.

This provides yet another opportunity to engage an important procedural issue in a practical way. In discussing the difference between allegations and evidence, my students learn important concepts underlying motion practice

The Right Law in the Right Place

In motion papers, both substantive and procedural law are raised and argued. Typically, students know about *Erie*[11]and its progeny by the time I am addressing motions, but they have, of course, never come face-to-face with its principles in practice. They may have heard about the issues that arise in a motion, and have some general understanding of how the issues are treated, but they have not had to dig in and get their hands dirty presenting the law to a court.

Every motion my students write contains a section addressing the legal standard to be applied to the motion. This section tells the court what information it must consider in ruling on the motion. It describes how the court should look at that material. This changes, of course, based on the type of motion. Is it a motion to dismiss for failure to state a claim?[12] For lack of personal jurisdiction?[13] Is it for judgment on the pleadings?[14] Each requires the court to take a particular approach.

This realm, of course, is one purely of the jurisdiction in which the motion is filed. It is astonishing, however, what may be found in the "legal standard" section of a student brief. Where a student should be referring to Rule 56 or *Anderson v. Liberty Lobby*,[15] she may recite the summary judgment standard in a faraway state court. This is a good opportunity to make concrete the class's understanding of *Erie*, to say "I know that the substance/procedure distinction is a difficult one to make, but here's a place where it is clear." Students may cheer this one patch of clarity in their otherwise confusing first year.

Erie aside, issues of jurisdiction arise regularly in the legal writing classroom—when are we using persuasive and binding precedent, and why? The same student who cites state law in describing the federal summary judgment standard may also provide language from a different federal circuit, from 1955. This provides the opportunity to discuss why one might or might not make such a choice.

Choice of law issues, too, may arise in student work. I recently assigned a motion for summary judgment filed in federal court, against a complaint for defamation arising under California law. I received a draft memorandum providing the elements of defamation, with citation to a recent California case—so far so good—that quoted two Florida cases. The elements of defamation, of course, are familiar and well-developed and

"Many of the problems I use involve pre-answer motions, contending that a plaintiff has failed to state a claim."

[10] This article describes the procedural language likely to be encountered in the context of writing a persuasive trial court brief, but there are of course numerous other procedural terms that students need to learn even earlier in their studies, simply to be able to understand the cases they read—terms like *plaintiff, defendant, complaint, summons, affirm, reverse,* and the list goes on.

[11] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[12] Fed. R. Civ. P. 12(b)(6).

[13] Fed. R. Civ. P. 12(b)(2).

[14] Fed. R. Civ. P. 12(c).

[15] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

> “After I comment on a set of drafts, I always devote a portion of a subsequent lecture to issues of practical procedure that have arisen in student papers.”

available in most, if not all, jurisdictions. Accordingly, I suspected what turned out to be true—she had cited a California court that was deciding a matter under Florida law. This provided an opportunity to discuss not only federal-state issues, but also the question of why we might choose one state's law over that of another.

Creating Assignments to Engage Procedural Issues

From practical applications of *Erie*, to the use of proper terminology, to the specifics of local court rules, procedure permeates the task of writing to courts. Legal writing teachers should not shy away from engaging these issues, but treat them as a natural and necessary part of a new lawyer's professional development. Problems should be developed that can exploit this educational need.

It is perhaps impossible to teach law students to write persuasive memoranda *without* including some automatic amount of procedural education. A motion assignment necessarily results in student familiarity with what a motion *is*, and will lead to some amount of terminological familiarity.[16] There are ways, however, to further the goal of increased familiarity with practical procedure. These are obviously non-exhaustive, but provide some ideas.

First, the use of a variety of motion assignments will necessarily result in more exposure to more concepts and terms. Instead of two 12(b)(6) motions, a teacher might assign one, along with a subsequent Rule 56 motion. This will introduce students to different types of documents: a Rule 12 motion might include only a complaint that the memorandum responds to, while a Rule 56 set of materials may have to engage declarations and exhibits.

Second, assigning separate state and federal motions will result in student exposure to distinctions in national and local terminology and rules. It is important for students to be aware of the separate sovereigns, with separate sources of substantive and procedural law. A variation on this theme is to assign problems in which state law is the basis for a cause of action for a diversity action in federal court, or in which federal law is alleged in a state court.

Additionally, assignments may require the resolution of some practical procedural question. Can a particular attachment to a complaint be considered by the court? Was a local rule violated, and what are the consequences?

Lecture Strategies

Aside from the obvious answer of creating a list of practical procedure issues to address, students can tell a legal writing professor what they need to learn through the drafts they produce. As students struggle to enter into their new milieu, they inevitably (and yes, sometimes comically) make errors. They make legal errors. They make language errors. These errors may point out shortcomings in our teaching—“she should have known that, did I forget to mention it?” But they may also simply demonstrate how much there is to learn. This can be useful because it lets the teacher know what it is in the world of procedure and procedural discourse that requires further explanation. After I comment on a set of drafts, I always devote a portion of a subsequent lecture to issues of practical procedure that have arisen in student papers.

It can also be useful to simply go through cases the students are discovering in the course of their research and to isolate practical elements useful for them to learn. What sorts of documents are the courts considering? What sort of terminology are they using?

The legal writing class provides many opportunities to introduce students to the breadth of micro-procedural matters that arise in practice every day. A certain amount of procedural material inevitably arises, but we may provide even more than these inevitable basics and exploit the opportunity to teach students more about the things they must know to be able to be effective, conversant lawyers early on in their careers.

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[16] For example, the student might become familiar with basic usage such as a motion is “granted,” rather than, say, “approved.”

The Art of the Writing Conference:

Letting Students Set the Agenda Without Ceding Control

By Christy DeSanctis and Kristen Murray

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Introduction

In an ideal world, writing would be taught exclusively in the context of a one-on-one relationship. This is true of all writing—both academic and professional—given the nature of the writing process itself. Writing is, at bottom, a highly individualized enterprise requiring hands-on practice and implicating a range of personal styles, preferences, and, often, idiosyncrasies on the part of both writers and audiences. When we are asked to give presentations to large groups on "good writing," our reaction is often that the task and the goal are fundamentally incompatible. While some features of good writing can be conveyed in lecture format, the reality is that most learning is the result of a more extended give-and-take process: the student-writer executes an assignment, and the teacher-reader reviews the work product and provides extensive commentary on what worked well and what could be improved going forward.

For this reason, teaching writing is often analogized to teaching pitching. One can only learn so much from a coach's descriptions of the art of pitching, even if such discussions are accompanied by demonstrations of pitching techniques or even examples of good and bad pitching. At the end of the day, true learning comes when a student executes the skill being taught—that is, she goes to the mound and hurls one over the plate.

An integral part of the process of honing such a skill, of course, comes from the individual feedback she receives on her attempts. For many writing teachers, this feedback is naturally delivered in *written* responses. There is little question, however, that students also benefit from the chance to *talk* about writing one-on-one. Such verbal feedback is valuable not just in the process of executing a particular assignment. Moreover, the value comes not just from talking about writing generally. For most students, what they need—and appreciate—are conversations about *their* writing.[1]

That said, teaching or supervising the writing process through one-on-one conferences can be extremely time-consuming. No legal writing program can be based exclusively on a series of one-on-one meetings; according to a 2007 survey, legal writing professors are assigned an average number of 40 students per semester,[2] making it practically impossible to administer a program in a one-on-one capacity. Short of employing an exclusively one-on-one tutorial model, however, there is considerable room for incorporating individual meetings with students during the course of the semester. The question necessarily becomes how best to structure these meetings in order to maximize efficiency and utility.

While conferences typically are most effective when students set the agenda,[3] a professor need

> "In an ideal world, writing would be taught exclusively in the context of a one-on-one relationship."

[1] Muriel Harris, *Teaching One-to-One: The Writing Conference* 3 (1986).

[2] *2007 Survey Results, Association of Legal Writing Directors/Legal Writing Institute*, available at <www.alwd.org> or <www.alwd.org/surveys/survey_results/2007_Survey_Results.pdf> (2007) [hereinafter 2007 ALWD Survey] 62 (last visited Dec. 27, 2007). In 2007, legal writing faculty in the required legal writing program taught an average of 44.36 students in the fall and 42.71 students in the spring. *Id.*

[3] Erika Lindemann, *A Rhetoric for Writing Teachers* 249 (4th ed. 2001).

“Conferencing with students one-on-one is a common pedagogical technique employed in the course of supervising many law school writing assignments.”

not cede control of the conference and become solely a passive participant. To the contrary, effective, efficient student conferencing is an art that requires forethought and active planning on the part of the professor. Toward that end, this article attempts to establish a “philosophy of conferencing.” It explores the theoretical basis for implementing a student-driven writing conference as part of a legal writing curriculum, and then discusses ways in which law professors can adhere to these principles while also engaging in their own agenda setting. Finally, it provides suggestions on how this concept can be executed in three law school settings: first-year legal research and writing courses, upper-level legal research and writing courses, and upper-level seminar courses in which a research paper is written.[4]

Why Conference?

Conferencing with students one-on-one is a common pedagogical technique employed in the course of supervising many law school writing assignments. Conferences often are a required part of a first-year legal research and writing curriculum,[5] sometimes mandated for each major writing assignment and sometimes required to occur at a strategic point in the course of a longer assignment. They also may be employed in upper-level legal research and writing and seminar courses, or in the process of journal note writing. And, almost by definition, independent legal writing projects are supervised in a one-on-one setting. Thus, on a practical level, one-on-one professor-student conferences have long been recognized as an important resource for the execution of a variety of law school writing assignments.[6]

As a theoretical matter, student conferencing also accomplishes several important pedagogical goals. Talking about the writing process and talking through individual assignments or specific writing problems stimulates independent learning. For example, by forcing students to ask specific questions—rather than simply “preview” a paper—conferences can serve as a vehicle for helping students identify their own answers.[7] As previously stated, student conferencing also provides an individualized learning experience. From the students’ perspective, this kind of individual attention assuages some of the anonymity concomitant with hundred-person lectures that often comprise the bulk of a first-year student’s law school experience. From the teachers’ perspective, individual meetings enable them to address—and even to embrace—differences in skill levels in a way that a large class setting typically does not.[8] At a more personal level, the one-on-one meeting offers an opportunity to get to know students as people and also as writers.

In the same vein, one-on-one conferences can be used to teach specific strategies to specific students, making it more likely that teachers will “tie instruction to the particular paper and focus on what to do next, suggesting strategies for the writer to use rather than merely identifying problems.”[9] Similarly,

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[4] This also encompasses students working on independent research papers with faculty supervision but separate from a classroom-based course.

[5] For example, according to the 2007 ALWD Survey, 163 legal research and writing programs use student conferences as a method for providing feedback on writing assignments. *2007 Survey Results, supra* note 2, at 14. *See also* Eric B. Easton et al., *Sourcebook on Legal Writing Programs* 60 (2006).

[6] *See* J. Christopher Rideout & Jill Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 79 (1994) (“Teaching writing has always worked best one-to-one. In that context, student and teacher can discover the means for working on the paper together; the student can actually write; and the teacher can be a direct, personal resource for the student.”). Conferences are also an important part of undergraduate composition programs. *See generally* Harris, *supra* note 1. For a more detailed discussion of the theoretical pedagogy of the law school conference, *see* Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. Tex. L. Rev. 255 (2004).

[7] Harris, *supra* note 1, at 10–11.

[8] *See* Harris, *supra* note 1, at 14–15.

[9] Harris, *supra* note 1, at 15.

teachers can (and should) use conference teaching at strategically placed times throughout the writing process depending on and determined by the teacher's goals and the students' needs. As Erika Lindemann notes, "student-teacher conferences can occur at any time during composing and offer teachers an excellent way to provide feedback when it is most useful, during planning, drafting or prewriting."[10]

Perhaps most importantly, given that one-on-one meetings necessarily depend on live interaction between writers and readers, conferencing can help emphasize that writing is a form of *communicating*. A popular adage is that clear writing comes from clear thinking. For many first-year law students navigating their way through the complexities of legal rules and (sometimes arcane) legal doctrine, clear thinking is often the by-product of verbalization and discussion. Stated otherwise, the dialogue between student and professor itself is a vitally important part of the writing process. For example, professor and student may need to have a conversation to flesh out a student's topic, or a student may need to explain the intent behind her written choices in order for a professor to provide helpful advice for improvement.[11] "[O]ne-on-one dialogue between a student and a professor … provides a unique opportunity for focused attention to the student's legal reasoning and analysis and for significant breakthroughs in the student's ability to think like a lawyer."[12]

On a more practical level, conferences actually can be more efficient than providing comments solely through written feedback. Stated simply, more comments can be provided during an in-person conference than in equal time spent writing.[13]

Moreover, there is a degree to which teacher and student can "cut to the chase" in a face-to-face conversation in a way that is unparalleled in written feedback.

Finally, and to the benefit of all participants, teacher-student conferences can be used after the fact to shape classroom dynamics. This use of student conferencing is often underestimated, especially if the conference is viewed as facilitating only the short-term goal of "getting the student through the assignment." If, instead, professors take notes during (or shortly following) individual conferences with an eye toward gathering global comments, that feedback later can be shared with the class as a whole and may assist students who did not present certain issues but nevertheless would benefit from their discussion in the long term. For example, if some students display difficulty in selecting information that is more appropriate for a case citation parenthetical than for text, while other students have not yet grasped the notion that parentheticals can serve an important function in the presentation of information, the feedback that a teacher gets from the students who have engaged in the endeavor can be translated into a lesson on how best to accomplish the task. In short, writing teachers can employ the same types of "issue-spotting" techniques that we teach our students.

Professors also can take cues from the students in these meetings to gather information about the students' learning styles, and about what has worked and has not worked in the classroom. With this information, professors can bring teaching techniques to the classroom that accommodate different learning styles. Finally, but not insignificantly, professors can use these one-on-one meetings as an opportunity to get to know their students on a personal level. In both first-year and upper-level seminar courses, external issues can have an effect on the classroom and course participation of the students, and the students' learning process can benefit when their professors have information about these issues.

"On a more practical level, conferences actually can be more efficient than providing comments solely through written feedback."

[10] Lindemann, *supra* note 3, at 249.

[11] *See* Thomas A. Carnicelli, *The Writing Conference: A One-to-One Conversation, in* Eight Approaches to Teaching Composition 101, 107 (Timothy R. Donovan & Ben W. McClelland eds., 1980).

[12] Wellford-Slocum, *supra* note 6, at 257.

[13] Carnicelli, *supra* note 11, at 106 ("The tongue is faster, if not mightier, than the pen."); *see also* Harris, *supra* note 1, at 18 (noting the time-saving value of student conferences).

“Writing professors largely agree that meetings are most productive and valuable to students when students set the agenda for the conference.”

Agenda Setting

Student conferences take a variety of forms; deciding among the models is largely a function of individual preference and, of course, resources. Conferences may be professor-mandated for all students; professor-requested (with requests targeted to specific students); or student-requested. They may be timed to occur in connection with a specific assignment, either while it is in progress or after a writing project has been produced and graded, or they may occur at one or more specific times during the composition process for a longer assignment, anywhere from the initial planning stage to the time between a "final" product and mandatory rewrite.

No matter the origin and timing of the conference, however, one of the most important features of a successful conference comes in setting the agenda, or identifying "one or two major concerns that will be the focus of the conference."[14] Writing professors largely agree that meetings are most productive and valuable to students when *students* set the agenda for the conference. Muriel Harris, for example, has noted that "[t]o make writers self-sufficient, able to function on their own, we have to shift the burden to them, not an easy task for students conditioned to wait for a higher authority to pass judgment on what they should do."[15]

A solely professor-driven conference agenda likely will be unsuccessful for several reasons. First, it generally results in less investment of the student-writer.[16] The professor may provide too much feedback for the student to handle intellectually at the time of the conference. Though it is difficult to envision a world in which professors provide too much feedback, the reality is that a solely professor-driven conference can be overwhelming. On the flip side, the focus of the conference may be too specific, with the student getting only a narrow idea of what needs to be fixed. The risk here is that students will come to think of feedback more as line edits than as the constructive dialogue that a conference is ideally intended to be. The reality is that many students are seeking black-and-white answers; the retort we often hear is "just tell me what you want me to write." The goal, of course, is not to tell them what *you* want them to write but, instead, to foster higher-level and transferable thought about writing choices—why a writer makes them and what effect they might have on a reader. In short, a professor-driven conference risks placing too much attention on the written product, at the expense of a more general exploration of ideas.[17]

Thus, at the very least, students generally should be expected to participate significantly in the agenda setting for a one-on-one meeting.[18] That said, turning over the task of agenda setting is not the same as ceding control of the conference. The student's ability to set the agenda is necessarily shaped by her experience and comfort level as a legal writer; this, in turn, determines how heavy an influence the student needs from the teacher's guiding hand. As one moves along the spectrum from novice law student to experienced legal writer, there are various techniques that professors can employ to engage the student in a way that leads to a productive, yet largely student-driven, writing conference.

Still, different populations of students will require different considerations. Our experience has been that first-semester law students, unsurprisingly, generally will require more direction in agenda

[14] *See* Thomas Newkirk, *The First Five Minutes: Setting the Agenda in a Writing Conference, in* Writing and Response: Theory, Practice, and Research (1989), *reprinted in The Allyn and Bacon Guide to Writing Center Theory and Practice* 41, at 302, 303 (2001). Newkirk notes that without an agenda, "a conference can run on aimlessly and leave both participants with the justifiable feeling that they have wasted time." *Id.*

[15] Harris, *supra* note 1, at 28.

[16] For example, a teacher's rigid agenda may not be responsive to student concerns, resulting in both a lack of engagement by the student and an unproductive meeting. Newkirk, *supra* note 14, at 309.

[17] *See, e.g.*, Donald M. Murray, *The Listening Eye: Reflections on the Writing Conference*, 41 C. English 13, 16 (1979) ("I'm really teaching my students to react to their own work in such a way that they write increasingly effective drafts.").

[18] *See* Newkirk, *supra* note 14, at 312–13.

setting. They simply may not have enough information yet about legal writing discourse to formulate useful questions—or even to know that they have questions in the first instance. In years where we have asked our students simply to "come to the conference with an agenda," we have received everything from long lists of questions to claims of having no questions at all. And even where conferences are timed to occur after written feedback is provided, we still have met with students whose primary goal is to decipher handwriting and students who merely say they have read our comments and understand everything we said.

For these kinds of conferences, professors can dictate a more detailed agenda by asking predetermined questions about the assignments. To facilitate useful answers, conferencing questions should be broad enough to encourage participation but narrow enough to anticipate a wide range of answers. Toward that end, we have found it useful to issue, in advance of a conference, a "questionnaire" that serves a dual purpose: self-reflection and conference preparation. Over the course of a year, these questionnaires can make more specific and higher-level inquiries as students become acclimated with the paradigms of practical legal writing. For example, in our earliest conferences, we ask the students to consider several writer-based questions involving the writing process, areas of focus, and comfort level with the material. More often than not, the students identify the strengths and weaknesses in their papers without being specifically asked to do so; when specifically asked, most novice legal writers will say that they have no strengths because they lack the confidence and feedback to know what they are doing right. The answers to these questions are the starting point for our early conferences, which enable us to learn more about the student as a writer and to have a discussion that is not limited to the work product that has emerged.

Our mid-year conferences move from solely writer-based questions to both reader- and writer-focused questions. At this juncture, we are concerned not only with the student's experience with the writing project, but also with the product itself. Thus, though we continue to ask questions about the student's experience, we also begin to discuss what the student-writer feels are the strongest and weakest parts of the paper from a reader's perspective. At this point, students often are more comfortable with both legal writing and conferencing, and they consequently bring a more ambitious agenda to the conference than our guided questions propose. However, asking the questions still enables students to analyze their own papers as critics, and to provide substance to conferences that otherwise might be left thin on substantive material.

Finally, by the end of the year, our conferences move largely to reader-based discussions. These discussions transcend the writer-as-individual and, instead, focus on how choices influence readers. Because we teach responsive writing in the spring semester (and pair students with opposing counsel for their assignments), we ask students questions not only about their own writing, but about the work produced by their opponents. We have found that this process enables students to engage with substantive arguments at an advanced level, and to learn positively from looking at examples of others' writing. We attempt to keep the discussion positive, so we tend to favor questions directed toward how the student-writer would respond to an argument rather than how she could make that argument better. Thus, by the end of the first year, students have moved from writer-based discussions where the product is the focus to reader-based discussions where the effect is paramount. As a result, we have found a stronger tendency on the part of our students to evaluate critically their own work, as well as that of their colleagues, in a depersonalized and structured way that is probably not possible at the outset of the year.

Even with upper-level students who have been through the first-year writing experience and are working on independent writing projects, seminar papers, or journal notes, agenda setting should not fall by the wayside, though it may serve different purposes. For writing projects not anchored by classroom time, or which are the companion to but

"[W]e have found it useful to issue, in advance of a conference, a 'questionnaire' that serves a dual purpose: self-reflection and conference preparation."

not the focus of a classroom seminar, agenda setting can provide necessary structure to the writing experience. That is true even if the only practical result is establishment of and adherence to a workable production schedule, though we certainly should strive for more than that. At a minimum, however, agenda setting enables a professor to present her availability to her students, and to have the student generate a schedule of interim and final deadlines with which she promises to comply.

Substantively, one-on-one meetings at this level should be timed to occur along a natural arc beginning with topic selection and ending with the final draft. In early conferences, when students have a topic but must engage in a narrowing process, the agenda necessarily will be more abstract and process-oriented. Again, professors can use guided questioning at this stage to help a student determine what she wants to say and how best to support her thesis with substantial research. Mid-process meetings will be largely student-driven because they are often student-requested; professors can manage these meetings by offering to answer specific student questions ("Is this a supportable assertion?") rather than assenting to often-sought-after generalized feedback ("Am I on the right track?"). Later meetings likely should center on the product itself (outline or draft), which often are precipitated by a student having some written work already in hand. As a pedagogical matter, professors should be unambiguous as to their availability and willingness to review outlines, drafts, and other interim products; one should be prepared, however, to provide at least one substantive review of a paper before the final draft is submitted. A conference on this draft can be shaped by the margin or end comments provided on the paper; at this level, students should be expected to internalize those comments and to formulate a conference agenda where they not only attempt to answer specific questions, but seek additional advice regarding organization or substance of the draft.

"Even when there is time for such individualized instruction, it is all too easy to squander the opportunity that these face-to-face meetings create."

Conclusion

One-on-one student conferences can and do serve important pedagogical and practical functions as part of a law student's legal writing experience. Even when there is time for such individualized instruction, it is all too easy to squander the opportunity that these face-to-face meetings create. In addition to being pedagogically—if not psychologically—sound, they also can provide meaningful points of contact between writing teachers and their students, which can not only enhance individualized learning, but can facilitate learning both in the writing classroom and beyond.

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Another **Perspective**

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

Authors are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. The *Perspectives* Author's Guide and Style Sheet are posted at **west.thomson.com/signup/newsletters/perspectives/perstyle.aspx**.

Library Lifesavers:

Bite-Sized Research Instruction

Teachable Moments ... *is a regular feature of* Perspectives *designed to give teachers an opportunity to describe techniques or strategies for presenting a particular research or writing topic to their students. Readers are invited to submit their own "teachable moments" to the editors of the column:* Elizabeth Edinger, The Catholic University of America, e-mail: **edinger@law.edu**, or Craig A. Smith, Vanderbilt University Law School, e-mail: **craig.smith@law.vanderbilt.edu**.

By Ann Hemmens

Ann Hemmens is Assistant Librarian for Reference Services at the Marian Gould Gallagher Law Library, University of Washington School of Law, in Seattle.

During the 2006–07 academic year, the reference librarians at the University of Washington's Marian Gould Gallagher Law Library decided to try a new form of instruction: brief research sessions during the lunch hour every Tuesday. These bite-sized instructional sessions were called "Library Lifesavers." While the target audience was law students, all members of the law school community were invited to attend the sessions. Library Lifesavers sessions were held in a law school classroom between 12:45 and 1:15 p.m.; the student lunch hour runs from 12:20 to 1:30 p.m. Each session consisted of two 15-minute presentations on distinct legal topics, for a total presentation time of 30 minutes per week. The short session length was designed to appeal to busy students on tight schedules and to minimize preparation time by librarians. One of the major goals of the sessions was outreach—we wanted to give the reference librarians face time with the students in order to promote our services and our role in helping them succeed in their coursework and research.

The selection of topics for Library Lifesavers was based on many resources including a brief online survey of the law school community, a review of the first-year legal research and writing assignments, and a review of the topics covered in our annual Bridge the Legal Research Gap programs, a legal research refresher program held at the end of each school year. After developing the initial list of topics, we brainstormed about how to promote the sessions. An artistic staff member created a nautical image of a "library lifesaver" to use on fliers throughout the year. The sessions were advertised on a regular basis, through the law school's weekly newsletter, e-mail announcements, and fliers. All five reference librarians and one law librarianship student taught sessions.

During the fall quarter, participation was light: five or six students attended each session. During the winter quarter, when one of the first-year legal research and writing faculty members gave extra credit to students who attended sessions, attendance rates soared to 25 students per session. This type of faculty endorsement is worth encouraging. In the spring quarter, attendance dropped to five or fewer attendees per session. Attendance incentives included offering candy throughout the year and running a "raffle" in the spring quarter with the chance of winning either a copy of *Washington Legal Researcher's Deskbook 3d* or a $25 gift certificate to the University Bookstore.

Over the course of the academic year, there were 28 sessions covering 56 topics. Attendance totaled 545 students and 102 staff members. The law school staff who attended sessions expressed appreciation that they were included, and several were regular attendees. At the end of each quarter and at the end of the year, we surveyed students to assess the effectiveness of the sessions. While we received a limited number of responses, the submissions indicated that the Library Lifesavers sessions reinforced the message that the library staff is accessible and willing to help. Another positive result was the increased awareness of our large

"The short session length was designed to appeal to busy students on tight schedules and to minimize preparation time by librarians."

> “On balance there were many positive outcomes from offering a series of bite-sized, drop-in instructional sessions. …”

collection of online library research guides. Two of the more popular guides, created for Library Lifesavers, include Word Tips (available at <lib.law.washington.edu/ref/wordtips.html>) and *Bluebook* 101 (available at <lib.law.washington.edu/ref/bluebook101.html>). The major drawback affecting attendance appeared to be that the lunch hour time slot presented too many conflicts for students—student organization meetings, guest lectures, socializing, class preparation, etc. Additionally, we noted that the students usually did not have a “need to know” about the topic we were covering at that moment—so their incentive to attend was not very high. After extended discussion and reflection, we decided to discontinue the weekly Library Lifesavers series and redirected our student outreach efforts to targeted campaigns throughout the school year. Some ideas included offering more targeted research sessions for student organizations, clinics, and journals (trying to reach the students at the “need-to-know” moment) and sponsoring fun student events and relating them to the library (e.g., the weekly Student Bar Association student social gathering during National Library Week). On balance there were many positive outcomes from offering a series of bite-sized, drop-in instructional sessions: we increased our visibility outside the library, we developed our teaching expertise, and we benefitted from regular interactions with students and staff.

Selective List of 2006–2007 Library Lifesavers Sessions

If you are considering implementing bite-sized instructional sessions, these topics worked well.

- Using the Library Catalog
- Finding the Right Westlaw® and LexisNexis® Databases
- Google Tips
- Finding a Paper Topic
- Word Tricks
- Word Tricks for Outlines
- HeinOnline and Law Review
- *Bluebook* Tips
- *Bluebook* 101: Statutes
- *Bluebook* 101: Secondary Sources
- *Bluebook* 101: Congressional Materials
- Fifty-State Surveys
- Bloglines
- Movie Trivia
- Selecting CALI Lessons
- Creating Links in Documents
- Exams on the Web
- Westlaw: Advanced Searching with Terms and Connectors
- Effective Natural Language Searching on LexisNexis and Westlaw
- Foreign Law Research: Starting Points
- International Legal Research: Starting Points
- Federal Legislative Research: LexisNexis Congressional
- Westlaw Cite Checking Tools
- LexisNexis Cite Checking Tools
- Low-Cost Resources: Casemaker
- Low-Cost Resources: Loislaw
- Litigation “How To” Tools
- What you always wanted to know about legal research but were afraid to ask

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Understanding "Style" in Legal Writing

By Stephen V. Armstrong and Timothy P. Terrell

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

One of the more elusive, and controversial, characteristics of professional writing (legal writing included) is a writer's "style." In our programs for practicing lawyers, most of the audience seems surprised that this topic arises at all. Style, they assume, is something a reader encounters in literature; lawyers, on the other hand, are just hard-working, anonymous purveyors of careful legal analysis. In any case, they also assume, a writer's ability to imbue prose with "style" is something innate. Even if they wanted to make their writing "stylish," it would be beyond their talents.

They are wrong, on all counts. Style is an unavoidable element of anyone's writing, even a lawyer's. The only question is whether the writer has control of it, and can therefore exploit it properly, or does not, thus leading to unintended and sometimes embarrassing results.

Misunderstanding Style

Two other assumptions also make it difficult to get lawyers or law students to accept style as a legitimate characteristic of legal writing. The first is that style is synonymous with sentence structure, and therefore any micro-level changes in a document are by definition "stylistic." We disagree. Although aspects of a writer's style will often manifest themselves in those details, style also emerges from a document's organization and overall approach to its readers. The second assumption is that style is equivalent to "personal preferences"—as one commentator put it, "the tastes, needs, predilections, and pet peeves of readers."[1] Certainly style suggests something individual, and it does involve choices among options. But it is a mistake to think of those choices as merely idiosyncratic and irrational. As much as any of the other choices we make when we write, they should have a rational, conscious purpose.

To help lawyers understand why style matters, and why they cannot ignore it even if they wanted to, we have found that it helps to turn—appropriately, given our topic—to a metaphor. Style is sometimes thought of as "the icing on the cake." This is an unfortunate image, for it suggests that you could somehow scrape off the "style" and leave the substance unaffected. Quite the contrary, properly understood, style is *embedded* in the document, like the flavor of the cake itself. It is unavoidable, but it is nevertheless distinct from—or, at least, distinguishable from—the nutritional substance.

The Importance of Style

So we need a better metaphor. Our suggestion is this: Style in professional prose is like mountain air.

Note the connections:

First, mountain air is invisible; it is transparent; you never see *it*. But everything you see *through* it seems to stand out in sharper detail. It is as if, when you travel to the top of a mountain, your eyesight suddenly improves. Style in professional prose should have the same qualities: It sharpens the reader's intellectual eyesight, rather than calling attention to itself through jokes or poetry or fancy words.

Second, mountain air is cool, pleasant, and invigorating: The place has a "nature," an aura about it that is refreshing and stimulating. You

> "One of the more elusive, and controversial, characteristics of professional writing (legal writing included) is a writer's 'style.'"

[1] Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton*, 1 Leg. Writing 143, 154 (1999).

actually enjoy waking up in the mountains and traveling through them.

From that metaphor, we draw the two most important goals of a professional style. First, it should make the substance stand out more clearly and memorably, and keep the reader awake and engaged no matter how dense the analysis. Second, it should create a credible, engaging persona, one in whose company the reader is glad to spend some time.

> "To help novice legal writers focus on their style in a manageable, practical way, the best starting place is with two concepts: 'rhythm' and 'character.'"

Analyzing Style: Rhythm and Character

Countless techniques in writing can produce these effects, so the potential breadth of a discussion of style is immense. To help novice legal writers focus on their style in a manageable, practical way, the best starting place is with two concepts: "rhythm" and "character."

Because we discussed rhythm in an earlier article,[2] in this one we will simply summarize. Rhythm refers basically to the changes in the pace and flow with which a reader moves through your writing: quickly or slowly, smoothly or with pauses and interruptions. An invigorating rhythm avoids monotony by variation. But the variation is not random: It is used for emphasis and focus, so the reader pays most attention to the most important information. These qualities of variety and emphasis can be produced at both micro and macro levels. At the former, our previous article described the familiar techniques: primarily, variations in the lengths of sentences and in their internal structure and punctuation. At macro levels, similar effects can be created by varying the lengths of paragraphs and sections, by using interrupting white space and devices like bullet points and lists, and by using subheadings.[3]

For legal writers, however, "character" is even more important than rhythm, because it goes more directly to a writer's credibility and to the connection between a writer and reader. When you write, you necessarily reveal a professional persona. Ideally, that persona should be consciously chosen and shaped; often, though, it emerges as if by accident because the writer fails to control the signals about character that all but the most impersonal, contract-like documents inevitably send.

Like rhythm, character is manifested at both the macro and micro levels. At the macro level, it arises from such organizational choices as whether to move cautiously toward a conclusion or begin with one, or whether to work through authorities toward a coherent analysis or to imbed authorities in an analysis that is clearly yours, not just "the law's."[4] At the micro level, character arises from diction and syntax: the words we choose and the structure of the sentences in which we place them. We will discuss the micro points first, and conclude with larger examples that combine and illustrate both levels.

"Micro" Character: Diction and Syntax

Consider the following two opening paragraphs of judicial opinions, each written by a male. Their gender is relevant because the writing reveals so

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[2] Stephen V. Armstrong and Timothy P. Terrell, *The Subtlety of Rhythm*, 12 Perspectives: Teaching Legal Res. & Writing 174 (2004).

[3] Rhythm is an important part of the context for the contentious debate about footnotes. Footnotes interrupt both the pace and flow of the reading process (see what just happened to you?). As a result, they are not only distracting; they can also have the unintended effect of emphasizing what is in the footnote. They should therefore be avoided unless the alternative is even worse—for example, intruding a long quotation or digression into the main text. For legal readers, however, citations are *not* digressions—lawyers are seldom slowed down or distracted by seeing a citation in the text.

[4] Organizational "character"—for example, the distinction between the "stance" and "substance" of a legal analysis—has been discussed by one of the present authors in the context of judicial opinions. *See* Timothy Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 Judges' J. 4 (1999).

much of their character that, once you know their gender, you can actually describe how both of them dress coming to work.

Example 1:

This case comes before the Court on the third intermediate accounting of the trust under the will of Jane F. Smith. On a prior accounting, the West Carolina Supreme Court held that a provision in a will leaving property to "issue" of another is presumed not to include the adopted child of the daughter of the testatrix. We are now asked to reconsider the question based on subsequent changes in the decisional law of this State. The case raises a substantial, if not altogether novel, question of the duty of a court to enforce a prior holding, the legal reasoning of which has been undermined by later rulings.

What clothes would suit this style? When we ask audiences that question, the answers usually include "bow tie," "three-piece suit," "watch chain with a Phi Beta Kappa key hanging from it," and the like. The style is very formal; the character that emerges from it will seem comfortingly dignified to some, slightly pretentious or old-fashioned to others. Now consider:

Example 2:

In this malpractice lawsuit the issue on appeal is whether the trial judge properly granted the defendant's motion for summary judgment. The defendants filed a motion to dismiss because the complaint failed to state a claim on which relief could be granted. The defendants then filed four affidavits to support their motion and moved the court to treat the motion as one for summary judgment against them.

Here we see at most a blazer (if that). The starkly different impressions generated by these two passages are a function of just two elements: sentence structure and word choice. The first writer favors more complex sentences and more formal diction. The second, in contrast, uses very plain sentence structure with no internal punctuation, and equally plain words.

The difference between these two characters is, in part, a difference in formality, and that is an aspect of character to which legal writers should be particularly alert, especially when they are writing to nonlawyers. Among the following four sentences, all having the same legal substance, which has the formality (or informality) that best suits your own professional persona?

1. Prior to plaintiff's purchase of the automobile, defendant's salesman provided him with information about its previous owner that subsequently proved to be false.
2. Before the plaintiff purchased the automobile, the defendant's salesman provided him with information about its previous owner that later proved to be false.
3. Before the plaintiff bought the car, the defendant's salesman gave him information about its previous owner that turned out to be false.
4. The sucker got stuck with the lemon because the salesman fed him some **** about the guy who got rid of it.

The diction in these sentences descends from the hyper-formal to the plainspoken. When we ask audiences to vote for their preference (ruling #4 out of order, despite it being the universal favorite), we will usually have no votes for #1, perhaps a quarter to a third of the audience will pick #2, and everyone else will choose #3. Then we turn the question around: Of these three, which is the one you expect to see most often in the legal prose you read? The overwhelming majority choose #1. Why the disconnect? Why do lawyers imagine themselves as #3s when readers (even legal readers) most often perceive #1? The problem is that at this level of detail, busy writers often operate on automatic pilot without much thought to the character they are portraying in their prose. And, when legal writers are on automatic pilot, most tend to drift into more

"The style is very formal; the character that emerges from it will seem comfortingly dignified to some, slightly pretentious or old-fashioned to others."

formal prose, because they have read so much of it during their education.

The differences among these examples have to do with more than formality, however. They also affect the relationship between the writer and reader. Is it distant and impersonal, or direct and, so to speak, face-to-face? Does the writer seem elevated above the reader, or on the same level? For example, here is a letter sent by a lawyer to a client announcing the settlement of litigation. Imagine yourself to be this client:

> Dear Mr. Richards:
>
> In reference to your case, please be advised that defendant has agreed to a settlement, the preliminary terms of which are set forth in the document enclosed herein. Prior to the completion of the remaining details of the agreement, this office must be in receipt of the following documentation:
>
> 1. A written estimate from Dr. Jones for the completion of therapy in regard to plaintiff's leg injury.
> 2. …

The distance, formality, and even arrogance of this writer are palpable, though probably unintentional. Here is a revision that establishes a much more direct and personal connection:

> Dear Mr. Richards:
>
> As we discussed yesterday, Trust Us Auto Sales has agreed to settle your suit against it. The terms are set forth in the enclosed document, which you should review carefully. I believe the terms are favorable, but I urge you to think them through carefully and to phone me if you have questions.
>
> In order to complete the details of the agreement, I will need the following documents by next Thursday:
>
> 1. A written estimate from Dr. Jones for the completion of therapy for your injured leg.
> 2. …

"The differences among these examples have to do with more than formality, however. They also affect the relationship between the writer and reader."

"Macro" Character: Beyond Clarity

Character at the macro level is a large topic indeed, involving subtle choices between "reporting" an analysis and "dominating" it. The goal for legal writers is to demonstrate to the reader not only that they can organize material clearly, but that they also deserve the reader's professional respect—because they are impressively competent and show justifiable confidence in their work. Organizational forms that can produce this respect are, of course, numerous, so we will close with just two quick examples that illustrate rather than exhaust the point. The first is careful, precise, formal, and objective, perhaps to a fault. The second is aggressive and snappy, again perhaps to a fault. Note how these impressions, produced by the basic organization and approach, are reinforced in both examples by a corresponding "micro" persona as well.

> **Example 1:**
>
> This is a class action brought by plaintiffs on behalf of all persons (the "Class") as described below, other than defendants and related parties, who purchased shares in BigBroker's Term Trust 2003 ("Trust 2003") during the period from its inception on or about April 22, 1993, to July 19, 1994, and/or shared in BigBroker's Term Trust 2000 ("Trust 2000") during the period from its inception on or about December 22, 1993, to July 19, 1994, inclusive (the "Class Period"), for violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "1933 Act") and Section 13 of the Investment Company Act of 1940 (the "1940 Act"). The gravamen of the federal securities claims is that defendants made false and misleading misrepresentations and omissions concerning the Trusts in violation of the federal securities laws in prospectuses issued on the offering of the Trusts (the "Offering Materials") and in the marketing of the Trusts.

Example 2:

This case belongs in California.

Plaintiff is a California resident who was injured, while in New York, by false and defamatory statements published in California blaming him for the collapse of a California company.

Defendants—two huge multinational conglomerates that do business in California plus an officer of both who was personally served here—now argue for a *forum non conveniens* dismissal of the action in favor of their home turf in France. This argument ignores:

- the critical California events animating the claim,
- the relevant evidence in California, and
- the fact that these events and this evidence continue to be the subject of government inquiry, civil litigation, and public interest in California.

Brief writers would describe the difference between these two as either getting to the point quickly, or wasting the judge's time with background information rather than an argument. But the difference matters not only to the brief's efficiency and persuasiveness; it also matters to the judge's perception of the writer's persona: Is the writer in control? Bold enough to state a point of view immediately? Even perhaps a little too argumentative at the start? Or, instead, hiding out quietly behind all the background information?

None of the choices we have been describing is "correct" in some fundamental sense. They are indeed choices. In specific documents, the choice may depend on the situation: your audience, your purpose, and the conventions of the situation or the document. Over a career, however, the choices should also depend on a writer's conscious decisions about the professional character he or she wants to create.

So we are back, then, to "personal preference," but to a preference guided by principle rather than habit: How do you define yourself as a professional, and how do you want your readers to perceive you? About these choices, reasonable people can disagree. For example, in the letter to the client above, some people find the revision too informal and folksy, and indeed argue that their clients expect a kind of professional aloofness in their lawyers' communications. But that is precisely the kind of editorial conversation that should take place when writers discuss style, and it is a long step forward from "it's just style."

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"In specific documents, the choice may depend on the situation: your audience, your purpose, and the conventions of the situation or the document."

Another **Perspective**

"Civility 'can be taught and learned.' Law professors often object to this statement, arguing that law students should already know how to behave with civility, and if not, it is too late. But it is not too late. Law students are smart. They understand what matters. If we show that civility is important by naming it, modeling it, teaching it, providing feedback on it, and evaluating it, students will learn those skills. In teaching professionalism skills to his students, one professor of medicine provides them with what he calls the 'three 'E's—expectations, experience and evaluation.' He first provides clear expectations for his medical students, naming the behaviors he seeks. Second, he tells them how they will be evaluated. And finally, he gives students opportunities to practice and get feedback on those skills. He has had no difficulty in having his students learn professionalism. As another physician noted regarding the teaching and measuring of medical professionalism, people 'don't respect what you expect; they respect what you inspect.' Teaching medical students to develop emotional and social skills is now a part of the medical school curriculum. Medical students must also show they have these skills to get their license to practice. We law professors can similarly ask students to be civil, explain what civility means, provide feedback on civility, and assess how they practice civility. Perhaps acting with civility might even one day be a bar requirement."

—Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 Legal Writing 113, 131–132 (2007).

Legal Research and Writing Resources: Recent Publications

Compiled by Barbara Bintliff

Barbara Bintliff is the Nicolas Rosenbaum Professor of Law and Director of the William A. Wise Law Library at the University of Colorado Law School in Boulder. She is a member of the Perspectives *Editorial Board. This bibliography includes references to books, articles, bibliographies, symposia, and research guides that could prove useful to instructors of legal research and writing and their students. Also included are citations to related resources that may be of interest to those who teach legal research and legal writing. It includes sources noted since the previous issue of* Perspectives*, but does not include articles in* Perspectives *itself.*

Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. Pitt. L. Rev. 1–22 (2007).

Described as "a primer on the fundamentals of logical thinking," this article attempts "to explain, in broad strokes, the core principles of logic and how they apply in the law school classroom." *Id.* at 2. The article explains deductive reasoning, inductive generalizations, and reasoning by analogy and concludes with a discussion of the limits of logic in legal reasoning.

Annotated Legal Bibliography on Gender, 14 Cardozo J.L. & Gender 211–265 (2007).

Annual update on journal articles on a range of topics related to gender. Organized by topics, which include abortion and reproductive rights, gender and violence, fatherhood, parenting, religion, sex industry, and social class. Entries are well annotated.

Daniel L. Barnett, "*Form Ever Follows Function*": *Using Technology to Improve Feedback on Student Writing in Law School*, 42 Val. U. L. Rev. 755–795 (2008).

"The goal of this Article is to encourage law professors to examine the different critiquing formats available and to consider using some form of electronic critique." *Id.* at 757. The article provides a brief comparison of different types of critique formats (including handwritten or typed comments, global comments to the class, conferences, and types of electronic critiques), describes considerations in using various forms of feedback, and provides a guide to help professors master current technology.

Bibliography: Articles from Law Reviews and Copyright Periodicals, 55 J. Copyright Soc'y U.S.A. 111–123 (2007).

An unannotated, extensive bibliography of current articles on copyright issues, divided into "United States" and "Foreign" sections.

Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Developing an Empirical Model to Test Whether Required Writing Exercises or Other Changes in Large-Section Law Class Teaching Methodologies Result in Improved Exam Performance*, 57 J. Legal Educ. 195–204 (2007).

The authors "examined whether multiple practice essays, combined with peer and self-assessment using annotated model answers, had any effect on first-year law students' ability to break a legal rule into its component parts and perform a complex factual analysis on an essay exam." *Id.* at 197. Many questions were identified that warranted further investigation, but the conclusion was that, "[o]n average, students in the writing exercise class performed better on the essay exam questions, but the most statistically significant benefit inured to students who had above-the-median LSAT scores and above-the-median UGPA scores." *Id.*

Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 Cal. W. L. Rev. 219–255 (2007).

"This article answers two questions: 1) How can law schools better prepare students to practice law; and 2) Why do law schools not do this already? This article proposes remedies which many thoughtful and concerned observers of legal education say are obvious and long overdue. This article also argues that the bench and bar are in the best position to initiate change in legal education which is necessary for law schools to produce competent new attorneys." *Id.* at 219.

Anne M. Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students*, 82 St. John's L. Rev. 609–674 (2008).

The author asks if there are secrets to success in law school, and if so, what are they? She then investigates the possible answers through a study of six law students, "two of whom were predicted to be marginally successful C students, two of whom were predicted to be moderately successful B students, and two of whom were predicted to be highly successful A students." *Id.* at 611. Similarities and differences in the approaches of the students to their legal writing classes were identified and described. Somewhat surprisingly, LSAT scores and undergraduate GPAs "had little, if any, predictive value for the six students in the study." *Id.* at 668. The students' first-year law school grades and their first-semester legal writing performance were significantly better predictors of their overall level of success in law school.

Michael Evans et al., *Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research*, 4 J. Empirical Legal Stud. 1007–1039 (2007).

This article gives an overview and assessment of using text classification to conduct empirical research on legal issues. Text classification, a method of using computers to sort textual information, relies on the application of algorithms to the data to be sorted with a goal of automatically coding and organizing documents without the need for human intervention. The authors report on experiments designed to understand the strengths and weaknesses of the method, using the contents of briefs submitted to the U.S. Supreme Court in the *Bakke* and *Bollinger* affirmative action cases, and make suggestions for technical and infrastructure improvements.

Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking About the Law, 2007 [Chicago, IL: University of Chicago Press, 341 p.]

The author presents what he considers some of the most valuable tools for thinking about the law—ideas, theories, and analytic techniques that can assist legal thinking and clarify substantive law. The book has 31 chapters, organized into five parts: Incentives; Trust, Cooperation and Other Problems for Multiple Players; Jurisprudence; Psychology; and Problems of Proof. Each chapter begins with examples and questions that provide context for the following discussion. Methods covered range from the prisoner's dilemma to the importance of recognizing hindsight bias to the challenges in avoiding slippery slopes. The writing is clear and readable, and each chapter includes suggestions for further reading.

Ian Gallacher, "*Who Are Those Guys?*"*: The Results of a Survey Studying the Information Literacy of Incoming Law Students*, 44 Cal. W. L. Rev. 151–217 (2007).

Based on a 2006 survey of beginning law students, the author suggests that "incoming law students overestimate their writing and research skills and come to law school inadequately trained in information literacy." *Id*. The article includes an analysis of the author's survey in the context of other studies of law students and new lawyers, and offers some suggestions for possible remedies.

Peggy Garvin, The Government Domain: Rich Resources from the Librarians of the Fed, LLRX.com, April 4, 2008 (available online at <www.llrx.com/columns/govdomain34.htm>).

Explores the resources and portal developed by the librarians of the Federal Reserve Bank of St. Louis, recognized as the center for research data relating to current economic indicators and related information. The article focuses on the Liber8 portal and its extensive linked resources.

Jane Kent Gionfriddo, *Thinking Like a Lawyer: The Heuristics of Case Synthesis*, 40 Tex. Tech L. Rev. 1–36 (2007).

The article explains the importance of case synthesis in legal problem solving, and offers a methodology that will enable lawyers and law students to properly use the skill to its full potential. Examples illustrating the use of the methodology are offered.

Margi Heinen & Jan Bissett, Learning to Love Those 50 State Surveys, LLRX.com, Jan. 19, 2008 (available online at <www.llrx.com/columns/reference56.htm>).

The authors focus on sources of multistate legal research, in both print and electronic format, and describe many ways to research efficiently the laws of multiple states. Live links are embedded in the article.

Margi Heinen & Jan Bissett, Reference from Coast to Coast: Making a Federal Case Out of It, LLRX.com, April 4, 2008 (available online at <www.llrx.com/columns/reference57.htm>).

Describes briefly seven sources of federal case law available free on the Web: FindLaw®, LexisONE, Cornell's Legal Information Institute, AltLaw, Justia, Public Library of Law, and PreCYdent. Live links to these sources are embedded in the article.

Tamara S. Herrera, Arizona Legal Research, 2008 [Durham, N.C.: Carolina Academic Press, 156 p.]

The author covers the most important resources and techniques for legal research in Arizona. She begins with a description of the research process, describes online and print sources and research methods, and includes a chapter on Arizona tribal law.

Michael H. Hoeflich, *Serendipity in the Stacks, Fortuity in the Archives*, 99 Law Libr. J. 813–827 (2007).

The author, a professor of law and a legal historian, writes of the importance, and pleasures, of serendipity in research. He suggests ways in which libraries and archives can assist researchers in making these chance findings, and warns of the dangers of "over-efficient and economically rational disposal policies" that can impede or prevent fortuitous discovery. *Id.* at 814. The conclusion includes ways in which students can be taught to be open to the "blessings of serendipitous discovery." *Id.*

Craig Hoffman & Andrea E. Tyler, United States Legal Discourse: Legal English for Foreign LLMs, 2008 [St. Paul, MN: Thomson West, approx. 64 p.]

This work is intended to assist nonnative, English-speaking foreign law students learn to read three types of U.S. legal documents—cases, academic articles, and legal memoranda—and evaluate their substantive contents and argumentation style. The book must be supplemented by full-text documents on a TWEN® (The West Education Network®) site, other course Web site, the Internet, or in print.

Marci B. Hoffman & Robert C. Berring, International Legal Research in a Nutshell, 2008 [St. Paul, MN: Thomson West, approx. 313 p.]

Aimed at the novice international law researcher, the authors' goal is to describe and discuss the best and most important resources, whether electronic or in print. After introducing and describing basic concepts and terms, it then covers international law sources, European Union and United Nations materials, and the resources of other major international organizations. The book concludes with suggestions for a general research strategy and methods for keeping up-to-date on new developments.

David A. Hollander, *Interdisciplinary Legal Scholarship: What Can We Learn from Princeton's Long-Standing Tradition?* 99 Law Libr. J. 771–792 (2007).

Princeton University's long-standing tradition of interdisciplinary legal studies, and the library support required to support this research, can provide law school libraries with guidance and information on how today's growth in interdisciplinary research in law schools may impact law school libraries. The author's descriptions of Princeton's programs and their development provide context for the conversation among law librarians about the "changing nature of legal scholarship and reference." *Id.* at 773.

Rob Hudson, A Little Grafting of Second Life into a Legal Research Class, LLRX.com, May 9, 2008 (available online at <www.llrx.com/features/secondlife.htm>).

The author discusses some of the benefits and drawbacks he realized in his experiment in using Second Life in a legal research class. The online environment was used to conduct a tour of the virtual offices of international law firms, courts, libraries, and government agencies with Second Life presences; host a

guest lecture from a European Parliament member; and accommodate a student presentation when the student was unable to attend class physically. His conclusion was that using Second Life enhanced and complemented the class, but several factors contributed to its use as an optional part of class only.

J. Paul Lomio & Henrik Spang-Hanssen, Legal Research Methods in the U.S. and Europe, 2008 [Copenhagen, Denmark: DJØF Publishers, approx. 329 p.]

This work is a general introduction to legal research in the United States (a common law country) and Europe (civil law countries); it is intended for those who are not native to or educated in the laws of the foreign jurisdiction being researched. The authors suggest that law students involved in the Jessup International Law Moot Court Competition may find its contents especially useful.

Caleb E. Mason, *An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L. Rev. 643–703 (2008).

The author, an assistant U.S. attorney, defends and supports the use of non-precedential opinions (NPOs) issued by the federal courts of appeals in all their forms, including per curiam opinions, memorandum opinions, orders, and summary orders, whether signed or not. He characterizes the NPO as "a valuable decisional form that plays a useful if not vital role in inculcating in practitioners the perceptual faculties required to classify, analyze, and innovate within the cultural tradition of the common law," and describes features of NPOs that especially aid this purpose. *Id.* at 643.

Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. Sci. & Tech. L. 39–72 (2008).

The author examines recent research by cognitive scientists that have advanced knowledge of the process of learning. She illustrates the developing principles through an examination of PowerPoint technology, showing their broader implications for the legal classroom. "The article focuses on three fields of cognitive science inquiry: the importance of right brain learning, the limits of working memory, and the role of immediacy in education. Those three areas are fundamental to understanding both the effective use of new classroom technologies and the constraints of more traditional teaching methods." *Id.* at 40.

Yasmin Morais, The Caribbean Court of Justice: A Research Guide, LLRX.com, Feb. 27, 2008 (available online at <www.llrx.com/features/caribbeancourtofjustice.htm>).

The Caribbean Court of Justice is a new regional appellate court created in 2005 and based in Port of Spain, Trinidad and Tobago. The court is expected to serve as a court of last resort for the 12 signatory Caribbean Community (CARICOM) members. The guide traces the court's history, structure and jurisdiction, and funding, and includes information on its justices and recent judgments. Links are included to the court's judgments and code of ethics, and to references for more in-depth information on the court and CARICOM.

Shawn G. Nevers, *Candy, Points, and Highlighters: Why Librarians, Not Vendors, Should Teach CALR to First-Year Students*, 99 Law Libr. J. 757–769 (2007).

"CALR is such a critical part of legal research today that its instruction cannot be taken lightly. Vendor instruction has been useful in the past and it continues to be useful today in certain situations. First-year students in 2007, however, need the guidance of a librarian to effectively learn CALR. It must be taught in an unbiased way in which its place in legal research as a whole can be clearly stated." *Id.* at 769.

Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, 39 Loy. U. Chi. L.J. 123–185 (2007).

The authors propose a student-centered teaching method that equips students with the knowledge and information to identify the analytical shortcomings of their papers

before the work is graded. In this guided discovery process, errors are used as a teaching tool early in the writing process instead of being identified in the finished product by the writing professor and used to penalize the student with a lower grade.

Sarah E. Ricks, Essay, *A Modest Proposal for Regulating Unpublished, Non-Precedential Federal Appellate Opinions While Courts and Litigants Adapt to Federal Rule of Appellate Procedure 32.1*, 9 J. App. Prac. & Process 17–35 (2007).

Ricks argues that "[c]ircuit courts should expressly confer persuasive value on non-precedential opinions, provide specific criteria to guide the publication decision, and permit anyone—not just parties—to move the court to reissue a non-precedential opinion as a precedential opinion." *Id.* at 18. She contends that these practices would help provide consistency in non-precedential opinions from the same circuit and mitigate the need to re-litigate cases in the district courts, among other positive outcomes.

Troy Simpson, The Art of Written Persuasion: The Rise of Written Persuasion, LLRX.com, May 30, 2008 (available at <www.llrx.com/columns/persuasion1.htm>).

This first in a series of articles covers the history of written advocacy in three jurisdictions—England and Wales, Australia, and America—setting the context for a discussion of the importance of written advocacy skills and suggesting some remedies for the continuing under-development of writing skills in today's law students and practitioners.

Ken Strutin, Criminal Law Resources: Criminal Defense Investigation, LLRX.com, Jan. 21, 2008 (available online at <www.llrx.com/features/criminaldefense.htm>).

"This article aims to highlight select online resources describing defense investigation standards and practices, training and certification options, and to point out some useful guides and educational materials." Introduction.

Ken Strutin, Criminal Law Resources: Fingerprint Evidence Challenges, LLRX.com, April 4, 2008 (available online at <www.llrx.com/features/fingerprintevidence.htm>).

The research guide includes "a collection of select resources published on the web concerning the reliability and admissibility of fingerprint evidence. Links to guides, standards and related materials are listed to provide some background on the processes and application of this identification technique." Introduction.

Larry L. Teply, Legal Writing Citation in a Nutshell, 2008 [St. Paul, MN: Thomson West, approx. 300 p.]

Teply focuses not on the details of citation format, but on "the process of legal citation and knowing what the 'issues' are: how to go about citation, recognizing what needs to be looked up, and knowing where differences in citation systems are likely to occur." *Id.* at v–vi. He defines five steps for the process of legal citation, and explains each thoroughly.

Shane Tintle, Note, *Citing the Elite: The Burden of Authorial Anxiety*, 57 Duke L.J. 487–516 (2007).

This note explores the emphasis on citation in legal writing. It describes the "anxiety of authority," which prompts extensive citation, and argues that "excessive citation developed as a unique literary device that enhanced the ability of academic authors to play a substantive role in the resolution of issues because of its semiotic force. As a result, heavy citation became, and remains, standard within academic legal writing." *Id.* at 490.

Ted Tjaden, Doing Legal Research in Canada, LLRX.com, April 4, 2008 (available online at <www.llrx.com/features/ca.htm>).

This extensive and comprehensive guide provides information and links to print and online resources for Canadian legal research. It is aimed at researchers outside Canada. The information is divided into six categories: the Canadian legal system; primary legal resources; secondary legal resources; legal organizations; legal publishers; and a brief explanation of and series of resources on 25 topics.

Jeff Todd, *Undead Precedent: The Curse of a Holding "Limited to Its Facts,"* 40 Tex. Tech L. Rev. 67–87 (2007).

"This Article argues that [a judicial decision] 'limited to its facts' should mean one of two things. First, when the original opinion declares that the holding is limited to its facts, that opinion announces no general rule and should be treated as dictum. Second, when a subsequent case limits the holding of a prior case to its facts, the process of implicitly overruling the prior case begins." *Id.* at 69. Because both outcomes present significant problems, the author provides recommendations to aid courts in being more direct and specific in their intent when issuing decisions limited to their facts.

Jorge A.Vargas, Mexico and Its Legal System, LLRX.com, Feb. 27, 2008 (available online at <www.llrx.com/mexicolegalsystem.htm>).

The increasing necessity for American courts to apply Mexican law compels a greater knowledge of Mexico and its legal system. Professor Vargas' research guide includes a general description of the major features of the Mexican legal system, including some of its distinct legal institutions. He also gives a brief historical background and basic information about Mexico as a country to give users a better context within which to use legal information.

Vern R. Walker, *Discovering the Logic of Legal Reasoning*, 35 Hofstra L. Rev. 1687–1707 (2007).

The author proposes the development of a general methodology for legal reasoning, much like the methodologies found in other academic and professional fields that guide analysis of data and research. His argument is that the rule of law rests on the quality of legal reasoning. "An important means, therefore, of achieving the rule of law is articulating and evaluating the various elements of legal reasoning—the reasoning involved in interpreting constitutions, statutes, and regulations, in balancing fundamental principles and policies, in adopting and modifying legal rules, in applying those rules to cases, in evaluating evidence, and in making ultimate decisions." *Id.* at 1687. His article is intended to lay the groundwork for the empirical research required to actually identify the patterns of good legal reasoning.

Mary Whisner, *The Pajama Way of Research*, 99 Law Libr. J. 847–850 (2007).

"While acknowledging the attractions of being able to conduct legal research in the comfort of one's home—in your pajamas no less—Ms. Whisner notes what a student misses by relying solely on computer-assisted legal research systems. She encourages librarians to engage in outreach efforts that will not only alert patrons to services they might be missing but also persuade them the services would [b]e helpful." Abstract.

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Another **Perspective**

"Law reviews are too important to be left to the editorial caprice of callow law students. Law reviews serve a number of useful purposes: they provide outlets for academic thought for faculty; they provide an avenue for the development of the law; they affect legislation and judging; they serve as reference material; they permit the profession and academy to question orthodoxy; they provide student training; they serve as a vital credential for students and law faculty; they are the heritage of legal education and modern legal thought. Because of their presumed and often actual value, most law reviews can profit from professional editing."

—Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 Ohio N.U. L. Rev. 563, 563 (2007).

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Prepared by Mary A. Hotchkiss

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Perspectives

Teaching Legal Research and Writing

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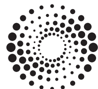

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