

## “Down with the Death Penalty!”— Using Hot Topics with a Twist to Introduce Persuasive Advocacy and Legal Ethics

By Kimberly D. Phillips<sup>1</sup>

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I sat in my office staring down at but not really seeing my desk. As I straightened my military ribbons and re-tucked my shirt into my pressed and starched trousers, I took one last look at my shoes to make sure both shined like mirrors. I took a deep breath, opened my office door, and walked into the lobby. “Good morning Petty Officer Jones,” I said. “Good morning, ma’am,” he replied. I had just nervously met my first client accused of sexually assaulting his child.

I had anticipated this day for many months since the Navy had assigned me to serve as a defense attorney at the Naval Legal Service Office Northwest in Bremerton, Wash. Thus far the Navy had accused my clients of mostly military crimes, such as disobeying orders or fraternization, drug sales and abuse, and miscellaneous other misdemeanor criminal offenses. The crimes these prior clients were accused of were lessened by their willingness to serve their country; either that or they usually just got into trouble for making dumb but costly mistakes. This time, however, my client was accused of something that I found personally

sickening and repulsive.<sup>2</sup> How was I even going to bring myself to shake his hand?

Well, I did shake his hand, and throughout the process of representing him and others like him, I learned one of the biggest lessons of my life: an effective and ethical attorney is one who can

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<sup>1</sup> I extend a sincere thank you to Dr. Natalie Tarenko, Writing Specialist, Texas Tech University School of Law, for her help with this article.

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<sup>2</sup> I certainly did not seek advice from a senior attorney about my feelings. By telling the students my thoughts about my first heinous criminal defense client, I also hope to teach them that talking about their personal issues with representing different types of clients is healthy and productive although not the norm. See Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 *Buff. Crim. L. Rev.* 339, 342 (2006). “In the conventional view the very acknowledgement of our work’s emotional aspects—of the pain we cause, the pain we experience, the costs of the dissonance between role and conscience, the empathy or revulsion we may feel toward particular clients and how we ought to deal with it—seems at odds with law’s essence as a rational and rigorous discipline. In short, acknowledging the role of emotion may brand one as not merely weak, but downright unlaywerlike.”

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identify arguments on both sides of an issue no matter how distasteful or unappealing the issue.<sup>3</sup>

Eight years since defending that client, I am now teaching at a law school, and I want my students to learn this important lesson before they face the situation in real life.<sup>4</sup> Therefore, I introduce them to ethics and effective oral advocacy when representing clients by having them participate in the following in-class exercise. First, I have my students clear their desks of all materials. I also have them move to one side of the room or the other depending on their personal views of the death penalty. For example, if they believe in the death penalty they should sit on the right side of the room; if they do not, they should move to the left side of the room. Next, I write their group's label on the chalkboard: Pro-Death Penalty or Anti-Death Penalty. The excited murmurings of the students combined with their facial expressions reveal their thoughts: "Now this is why I came to law school ... to argue about issues I care about!"

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<sup>3</sup> I do not mean to suggest that students or lawyers should abandon their personal viewpoints or beliefs. See Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 *J.L. & Health* 1, 24 n.95 (1998–1999), where Krieger opines that "[t]here are important distinctions for a lawyer to draw between positions he disagrees with, or positions that are unpopular, and positions that violate his conscience. I believe one must avoid the latter in order to maintain a healthy regard for one's self and all that flows from that self-regard. These are subjective matters. For example, when faced with a potential client requesting action or advocacy of a position that all might agree to be reprehensible, one lawyer may be unable to proceed in good conscience, while another may be compelled to proceed by a genuine and overriding sense of fairness, belief in the nature of the adversary system, commitment to the universality of constitutional rights, etc."

<sup>4</sup> See Edward J. Walters Jr., *Portrait and Perspectives: A Look at Us, Marian Mayer Berkett: A Life and Law Career of "Firsts" for This People's League Co-Founder*, 46 *La. B.J.* 379, 387 (Feb. 1999). During an interview with Berkett, a Louisiana lawyer who had recently won the New Orleans Bar Association award (among other awards) and had practiced law for 61 years, Walters asked Berkett her thoughts on the current reputation of lawyers. Berkett replied, "Our professional obligation is to represent as best we can the interests of our client as if he were speaking for himself. The interest of our clients is not always praiseworthy. Sometimes our clients take positions that are grasping, aggressive and unappealing. We must expect to be criticized, for example, when we defend a criminal, but the criminal is entitled to a defense and we are obliged to afford it and obliged to expect a public distaste because of it."

At this point in the class, I drop "the bomb" on the students. I instruct them to switch sides of the room. I tell them that, during the next 20 minutes, they as a group must develop arguments to support their "new" position. I also have each group choose someone who writes down the group's arguments. I ask them to consider social, policy, legal, moral, and any other arguments they can think of. The result is dropped jaws. "Professor Phillips, how could you ask me to argue for something that I am wholeheartedly against?" they moan. "The lesson comes later," I reply.

As the groups deliberate, I walk around and stimulate their thinking. The students are often so shocked and appalled about having to argue their "new" issue that it helps if I assist their analysis of the issues by asking them questions. For example, I ask the new Pro-Death Penalty students if prison overcrowding is a problem. I ask the Anti-Death Penalty students whether juries more regularly impose the death penalty on certain racial or economic groups. I might also ask the groups whether the death penalty is a specific and/or general deterrent (a subject that they are simultaneously studying in criminal law).

After 20 minutes, I have each group send to the front of the room a representative who presents the group's arguments and theories to the entire class. As one might imagine, the students find presenting their arguments difficult. Because the students are not arguing "their" side of the issue, they often do so in a lackluster manner; some common gestures are rolling eyes, downcast heads, and shuffling feet. I tell the students that if during their legal career as an attorney a client asks them to make arguments on behalf of the client that they personally do not agree with, they have an ethical duty to competently argue these issues. I explain several of the American Bar Association Model Rules of Professional Conduct to the students. For example, Model Rules of Professional Conduct, Rule 1.3,<sup>5</sup>

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<sup>5</sup> *Model Rules of Prof'l Conduct* R. 1.3 (2007), "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

“I ask them to consider social, policy, legal, moral, and any other arguments they can think of.”

“‘Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial. ...’”

comment one, states in part that “A lawyer must ... act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”<sup>6</sup> I instruct the students that zealous advocacy does not include eye rolling or making disgusted faces during argument. However, I also mention Model Rules of Professional Conduct, Rule 1.2,<sup>7</sup> comment five, which states, “Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.”

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<sup>6</sup> *Model Rules of Prof’l Conduct* R. 1.3 cmt. 1 (2007), “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”

<sup>7</sup> *Model Rules of Prof’l Conduct* R. 1.2 (2007), “(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

I continue by explaining Model Rule of Professional Conduct, Rule 1.16(b)(4),<sup>8</sup> which states in part that “a lawyer may withdraw from representing a client if: ... (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. ...” At this time, we discuss two final points. One, defense attorneys exist not to “get people off” but represent clients to ensure that every American has equal access to this country’s justice system and to ensure that judges

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<sup>8</sup> *Model Rules of Prof’l Conduct* R. 1.16 (2007), “(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”

apply the law fairly and consistently to every citizen.<sup>9</sup> Two, we discuss career options; if a student does not ever want to prosecute someone and argue for the death penalty as a punishment, then that student should not seek a career as a prosecutor in a state where the death penalty is an available punishment.

I end the exercise by telling them about my own experiences with clients including my relationship with Petty Officer Jones.<sup>10</sup> I find that students appreciate hearing “war stories” if the professor does not overdo the storytelling. Through the stories, the students see that just like them, professors are

human beings who have emotions when faced with difficult situations and decisions.

In sum, I developed this exercise to introduce students to persuasive advocacy and legal ethics. Because the students must develop arguments for a side or party they do not normally align themselves with, I hope this exercise leaves them with a memorable lesson regarding the duty of attorneys to make persuasive arguments on behalf of their clients and the ethics surrounding those duties.

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“I end the exercise by telling them about my own experiences with clients including my relationship with Petty Officer Jones.”

## Another Perspective

“About six years ago, I had a sudden and unexpected need to hire a lawyer to represent me in a workplace dispute. I was represented by that lawyer for three years, including the filing of a lawsuit in which I was the named plaintiff in a claim against a former employer. This was not the first time I had been represented by a lawyer, but it was the first time I had done so in an ongoing and contentious matter and the first time that I had been a party to litigation.

That experience made me realize that in all of my academic thinking about what makes a good lawyer, I had never really focused completely on the perspective of client. For the first time, I became aware that I would sit in classrooms, conferences, or just informal discussions with lawyers in which we talked at length about ‘the client,’ including what the client wants and needs. However, there were never any clients in the rooms for those conversations. I found myself wanting to shout about the obvious omission (that had not seemed obvious to me until that experience) and to contradict what was being said about ‘the client.’ I began to realize that we make a lot of assumptions about what clients want. A lot of those assumptions help structure legal education and many of them are wrong. We organize legal education around this notion that clients want to maximize their recovery and minimize their liability; that everybody fits in the same mold. We have this one image of an individual that is all about avoiding responsibility or recovering maximum compensation. I learned from my experience that what clients want and need is a lot more complicated than the model used in the law school classroom implies.”

—Symposium Issue, *The Opportunity for Legal Education: Panelist Dean Daisy H. Floyd*, 59 Mercer L. Rev. 859, 884–885 (2008).

<sup>9</sup>“True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men’s burdens and by our efforts we make possible the peaceful life of men in a peaceful state.” John W. Davis, Address at 75th Anniversary Proceedings of the Association of the Bar of the City of New York, March 16, 1946.

<sup>10</sup> Petty Officer “Jones” pled guilty to sexual assault of a child, and the judge awarded him six and a half years at the United States Disciplinary Barracks at Fort Leavenworth, Kan. As a result of the plea deal that I negotiated with the prosecutor, Petty Officer Jones was able to attend, at the time, the only in-depth sexual offender treatment program offered by the military. Several months later, I received a card from him thanking me for helping him enter a treatment program. I will never forget working with and representing him.

# Teaching Tax and Other Tedious Topics

“The easiest way to keep students engaged is to let them see your passion for the subject matter.”

By **John A. Bogdanski and Samuel A. Donaldson**

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In July 2008, Professors Bogdanski and Donaldson spoke about teaching tax and other tedious topics at the annual meeting of the American Association of Law Libraries.<sup>1</sup> Their suggestions and observations about how to improve classroom presentations and discussions have value for legal research and legal writing faculty.

## 1. Let Them See You Care

The easiest way to keep students engaged is to let them see your passion for the subject matter.

We tax professors get credit for “making this stuff interesting,” when the truth is that tax law is already a compelling saga. In our view, there is nothing we need to do to make the subject come alive. But probably not everyone feels that way about tax law, and that’s the point. We often get openly excited—in a decent manner, of course—about the subject and we don’t hide it when we teach.

You might resist the urge to “geek out” on a particular topic for fear of looking like a nerd before your students. Nonsense! Your passion will convey that the topic has importance and relevance. Your energy will suggest that the very topic at hand might be the beacon that calls to them like no other topic in their studies has done to this point. Students are eager to care about something in the law. When they see an instructor who cares about the subject, they see how they themselves might catch the same enthusiasm for their professional pursuits.

This may seem odd, but by showing your zeal for the subject matter you also convey respect and care for your students. When you share your enthusiasm, you open yourself up to the students. They see you not only as an authority but also as a human being. You care enough about them and respect them enough to open up to them and share your interests.

A sad story illustrates this point. Several years ago, one of us attended a memorial service at the law school for a nationally renowned colleague who died unexpectedly. The school’s largest classroom was packed with students, staff, and faculty all in deep mourning. A grief counselor encouraged anyone who wanted to say a few words. One of the students near the front of the room began speaking from his seat, and part of what he said has had lasting relevance. “We just lost someone who cared about the world and who cared about her students,” he said. “She just had so much passion for human rights around the world and for teaching it to her students.”

Think of the teachers that inspired you and what it was about their approach that sparked something within you. Very likely, you sensed that these people cared both about what they were teaching and about you.

When the topic at hand is tedious or technical, a key component of caring is knowing the audience, and striving to put oneself in the position of a student approaching the material for the first time. The more expert the presenter, the greater the temptation to race through the basics and dive into the more challenging and interesting points. Bad move! As a wise old colleague once told one of us, “By the time you say anything that’s interesting to you, you’ve said too much.” He may have overstated the point, but the need to assess what’s “do-able” in any given class period is beyond dispute.

<sup>1</sup> F-2 Teaching Tax and Other Tedious Topics: Top Tax Profs Trade Tips, American Association of Law Libraries, 101st Annual Meeting, July 14, 2008, Portland, Ore.

Although there is no need to mollycoddle students at the graduate level, professors who fail to empathize with them often fail to convey the subject matter to them effectively. Put yourself in the shoes of a reasonably competent, reasonably diligent, but not star student. Is your presentation going to reach that person, and bring the subject to life with accuracy and clarity?

When the subject matter hits a dry or difficult patch, don't be afraid to acknowledge that fact. Warn the crowd in advance when special concentration is going to be necessary or useful. After tackling a particularly tough area, reassure students that with additional study, reflection, and discussion, they can retain the most difficult concepts and details. You can and should refer students to, or even create yourself, review tools that help make this possible.

We are not advocating “dumbing down” technical subjects. Quite the contrary—the best teachers of what might otherwise be dull or difficult subjects are often quite demanding. They take the students to the very brink of overload, but never push them over. Empathy provides good instincts for knowing where the ledge is.

## 2. Know the Material Cold

In addition to knowing the audience well, the teacher of a complex or dry subject needs to know the material cold. When the professor stumbles over a technical point, students become confused, or lose confidence, or both. Perfection isn't possible—one bumps up against the limit of one's knowledge all the time—but the fewer the missteps, the better.

When the mistakes come, fix them. In this era of e-mail, something that was not entirely clear, or flat-out wrong, in class need not fester for days on end before being remedied. A prompt clarifying e-mail can set the stage for a quick tying-up of loose ends in the next class meeting. (It also reinforces the attribute of caring, just discussed.)

Part of maintaining mastery over technical material is keeping a keen focus on which topics are going to be covered in detail, and which are going to be given a survey gloss. It is better to be prepared to

delve deeper into any given topic in response to student questions than to prepare for what to say if questions are not forthcoming. Be ready to answer the questions when they come. Do not court disaster by wandering into technical areas in which students will have obvious questions that you are not prepared to answer.

When you *don't* know the answer, be frank about it. Don't fake it, and don't be afraid to take a moment to think about your answer before you give it. It's your class.

## 3. Give Context to the Unfamiliar

This just in: Students will struggle with a topic about which they have no familiarity. In the basic income tax course, for instance, there are two related cases that often vex students. (The cases, by the way, are *Crane v. Commissioner* and *Commissioner v. Tufts*. At the risk of academic damnation we are not providing their citations because, well, it misses the point.) The cases concern what happens when a taxpayer sells property subject to a nonrecourse mortgage. One problem with these cases is that they involve complex facts. One of them requires some understanding of partnership law and partnership tax to understand it fully. Another problem is that most of the students in the class have yet to become landowners so they have only superficial familiarity with mortgages. But both cases are the foundation for a pivotal doctrine in federal income tax law, so we have no choice but to cover them.

How do we do so without losing students to instant messaging, solitaire, or the crossword? One of us begins very innocuously by asking whether anyone in the room has become a homeowner recently. If someone volunteers, we ask him or her to explain generally how the purchase was financed and about the basic operation of their mortgage. (“If I don't make the monthly payment, the bank can take possession of my house” is easily enough here—it need not get more technical.) We then ask what happens if the bank repossesses the home and then sells it for less than the amount owed to it. Usually the student knows that the bank may be able to come after him or her for the extra amount owed.

“In addition to knowing the audience well, the teacher of a complex or dry subject needs to know the material cold.”

“This PowerPoint thing has spun out of control. PowerPoint is just one of many arrows in your teaching quiver.”

We explain that this is because the loan transaction is very likely a *recourse* debt.

We then explain that there is such a thing as a *nonrecourse* debt, one where the borrower would not be on the hook if the collateral securing the loan sold for less than the amount owed to the creditor. We ask students if they can think of situations where a bank might be willing to make a loan on a nonrecourse basis, given that the bank by definition will be assuming more risk in the event of default. Very often a few students will figure out that a bank may do so if they are confident that the original collateral will sell for more than the amount loaned, especially if offering a nonrecourse loan permits the bank to charge more interest.

We have now reached the point where students can understand the issue of the *Crane* and *Tufts* cases: If a taxpayer is freed of a nonrecourse obligation by transferring the property that secures the loan, must the taxpayer treat that benefit as part of the consideration received in the transaction? Had we started at this point without any context, many students likely would be lost from the beginning. By finding a way to connect this rather abstract notion to something with which a student has experience, we permit students to enter into the discussion with some confidence and an understanding of the stakes.

#### 4. Convert Potential Energy into Kinetic Energy

Even though we have been teaching for many years, we still get nervous. It is, we believe, human nature for someone about to address a group of any size to get a little stage fright. Perhaps the specific fears have changed (early in our careers we wondered whether students would respect us or whether we would be exposed as a fraud by a student who knew more than we did; now as established teachers we fear whether a class will think we are overrated), but what stays the same is that mild panic in the hours or minutes before we “take the stage.” In a strange way, nerves bring a sense of assurance: if we reach a point where we don’t get nervous we may start to worry whether we still have what it takes.

The good part about all these nerves is that they are unleashed in the form of kinetic energy. We both tend to move a lot around the classroom, use varying volumes and tones in our voices, and use lots of dramatic hand gestures. These actions help soothe our nerves but they also provide some variation or entertainment for students. Obviously most of us would prefer an active performance over someone fixed behind the lectern droning in monotone. If your tendency is to freeze when you are nervous, try to let yourself go. Motion and variance will give your nerves something to do, easing your panic.

As with everything in life, too much is no good. Constant pacing, nonstop gestures, and random voice fluctuations are distracting. You want to appear enthusiastic, not maniacal. If you get a chance, have one of your class sessions recorded and watch yourself. It’s perhaps the most painful thing you can do, but the camera doesn’t lie (except that it adds 10 pounds).

#### 5. PowerPoint Is Your Tool, Not Your Master

This PowerPoint thing has spun out of control. PowerPoint is just one of many arrows in your teaching quiver. Like any tool it has its pros and cons. We tend to think most teachers misuse PowerPoint. Before explaining why, however, we should give credit where it is due. We have used PowerPoint in the classroom and like it very much for its benefits. PowerPoint slides offer what we often cannot—clear writing that can be seen clearly by all students. It permits us to diagram transactions in advance, saving us time that we would otherwise use in class playing Pictionary on the white board. (Is it a person? A dog? Oh, a corporation!) For these purposes, PowerPoint is wonderfully useful.

But PowerPoint is not flexible. Class discussions have a way of meandering in paths we do not anticipate but very much enjoy. If, while slide 4 is on the screen, a student appropriately raises an issue that is addressed on slide 10, the teacher must either flip rapidly through five slides to get there or take another cumbersome path (right-click the mouse and use the pop-up menu to advance to the desired slide). Then the instructor has to follow the same

process to return back to slide 4 or slide 5. There are worse sins, but this inelegance is awkward and, for those less technically proficient, time-consuming.

Another significant drawback to PowerPoint is its temptation. PowerPoint offers so many bells and whistles—noises, exciting transitions, tons of fonts, loud backgrounds, and more—that new users often feel compelled to test-drive everything in a single presentation. The result is a cacophony of images and text that distracts the viewer. The other temptation is to paste all of the lecture notes onto slides. This results in the speaker simply reading the slides to the class.

A final drawback relates to lighting. PowerPoint often requires dimming lights in the classroom to enhance visibility of the slides. This presents obvious risks for napping or laptop distraction. For this reason, we suggest that when you use PowerPoint you do so only for selected intervals and not for an entire 50- or 90-minute class session.

A recent article by Deborah J. Merritt offers several helpful tips for using PowerPoint, all based on scientific learning theory.<sup>2</sup> Among the better suggestions:

- Use more images and fewer words. Graphics engage the right brain and permit students to see relationships between concepts. Words are already before the students in their casebooks and any handout you may have distributed.
- Use PowerPoint for big pictures and not for details. PowerPoint is great for road maps and checklists. If you want to use PowerPoint for tables, keep the cells blank and have students fill them in through discussion.
- Avoid the sound effects and animations if they are only gimmicks. As Merritt states, “Research suggests that distractions in presentation style

can substantially impair learning. Irrelevant sounds and music, for example, significantly reduce students’ retention of relevant material. Equally important, these embellishments also reduce students’ ability to apply accompanying concepts to new situations. Animations can also reduce learning; several studies find that static diagrams teach more effectively than animations.”<sup>3</sup>

- Stick to plain backgrounds and use text colors with high contrast. Pair white text with dark backgrounds and black text with light backgrounds.

We have some additional tips. First, resist the demand to distribute slides before or after class. Remember, PowerPoint is most effective as a supplement to class discussion, not as another avenue for content. Students would not ask you to make your drawings on the whiteboard available online, so they should not have the need to ask for copies of your slides. There is nothing wrong with converting slides into class handouts that can be distributed in class or online, but students should not be accustomed to getting lecture notes through PowerPoint slides. Second, consider the use of TurningPoint or other “clicker” software that permits students to participate through polling. When students can participate anonymously they will be more willing to do so (and honestly). Finally, never use more than two fonts on one slide. In fact, it is better to use only one font per slide, but occasionally you can get away with one font for the title and another font for any supporting text.

## 6. On Humor

It is critical to be yourself so that students can relate to the real you. We are lucky in that we see the funny side of things and have a knack for making jokes. Used at the right moment, humor can make an effective and memorable point. But if

“Remember, PowerPoint is most effective as a supplement to class discussion, not as another avenue for content.”

<sup>2</sup> See Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. Sci. & Tech. L. 39 (2008).

<sup>3</sup> *Id.* at 56.

“Striving for spontaneity in humor is a subset of a more general goal: being present in the moment.”

you are not naturally funny, don't try to be funny in the classroom.

We find that improvisational humor is usually much more successful than scripted humor. The key is to keep your eyes and ears open for moments when a joke might be unfolding before you. When a cell phone starts ringing in class, for example, say something like “if it's for me, tell them I'm in the shower.” You not only add some levity but you also make the point that the distraction should be silenced without coming across like a meanie.

Speaking of being a meanie, humor has this nasty tendency to become cruel and demeaning if used without temperance. There might be humorous moments in class that, if brought to everyone's attention, would embarrass a student. That is the Forbidden Forest. Also taboo are jokes that would take your classroom beyond the PG or PG-13 environment.

Your humor will get you in enough hot water just observing these basic rules—every once in a while someone will take offense at a joke or remark that you felt sure was innocent. One of us was confronted after class by a student for using the phrase “gold digger” to describe one of the actors in a particular case. The student found the term sexist (and this was before the 2005 Kanye West song that may have added more fuel to the term's apparent fire). So you can expect the occasional objection to your humor, but on balance it is worth finding moments of levity in what may otherwise be a time of high anxiety for students.

Striving for spontaneity in humor is a subset of a more general goal: being present in the moment. Showing an awareness of the goings-on in students' lives—be they the temperature of the room, the events of the day, or the latest news on campus—can relieve some of the tedium and angst that tend to lurk in technical courses. Getting one's nose out of the lecture notes and into the classroom aisles and hallways puts a human face on the subject matter, once again exhibiting the care for students that often makes them more susceptible to grasping tough subjects.

#### **Moral**

The high-wire act between too much detail and not enough can be daunting. But stepping back from one's course descriptions, and reimagining them, can be a valuable exercise that ultimately improves one's performance up there. Teaching is a highly creative enterprise; sometimes the best creativity takes place long before day-to-day class preparation begins in earnest.

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# Three Vignettes

By Richard K. Neumann Jr.

*Richard K. Neumann Jr. is a professor of law at Hofstra University School of Law in Hempstead, N.Y.*

This article is for Ralph Brill, who is the spirit and conscience of legal writing.

These are examples of how a person's growth can be helped or hurt by what another person says. They're just vignettes. They don't prove anything.

## Max Perkins<sup>1</sup>

In an earlier era of books, Charles Scribner's Sons was perhaps the most prestigious publisher, and Maxwell Perkins was Scribner's most influential editor.

In 1928, Scribner's received a gargantuan manuscript written by an unknown and unpublished young man in North Carolina. The story that a hand truck was needed to move it up from the street is a myth. Perkins, who had discovered and edited Ernest Hemingway and F. Scott Fitzgerald, agreed to read it.

A few months later, the young writer arrived, shy but uninhibited. He later recalled Perkins to be "gentle in dress and manner. He saw I was nervous and excited, spoke to me quietly, told me to take my coat off and sit down."

Perkins started talking about a scene early in the manuscript. "I know you can't print that!" exclaimed the young man. "I'll take it out at once, Mr. Perkins." Perkins told him that it was some of the best writing he had ever read. The writer seemed not to hear this. Perkins turned to other passages. Each time, the young man declared that what was on the page was horrible and would be removed. And each time Perkins told him that the

writing was beautiful but would be more effective with changes, which Perkins described.

When the writer finally realized the gist of this conversation—that Scribner's would publish his novel, that it would need radical reorganizing and sentence-by-sentence rewriting, and that Perkins would show him how to do it—tears appeared in the writer's eyes. A contract was signed, and in the following days he walked around Manhattan, not sure where he was going or why, clutching the contract in his pocket as though it might otherwise vanish.

For the next several months, Perkins met with him regularly, explaining how to tighten the manuscript and bring characters and scenes into sharper focus. For the writer, these conversations were painful, as he kept bringing work back, only for Perkins to show him how much more rewriting was needed. Gradually, the huge manuscript shrank into eloquence.

This was Thomas Wolfe,<sup>2</sup> and the manuscript became *Look Homeward, Angel*. It was followed by *Of Time and the River* and *You Can't Go Home Again*. They quickly became best sellers and classics of American fiction.

John Gardner, a novelist and a writing teacher, once made a list of some of the exasperating characteristics common to novelists, including "incivility ... obstinacy ... a lack of proper respect, mischievousness, an unseemly propensity for crying over nothing ... a criminal streak of cunning; psychological instability; recklessness, impulsiveness. ..."<sup>3</sup>

“These are examples of how a person's growth can be helped or hurt by what another person says.”

<sup>1</sup> See A. Scott Berg, *Max Perkins: Editor of Genius* 128–140 (1978); John Gardner, *On Becoming a Novelist* 34 (1983).

<sup>2</sup> Thomas Wolfe was not related to Tom Wolfe, a journalist and the author of *The Bonfire of the Vanities*, *From Bauhaus to Our House*, and other books.

<sup>3</sup> Gardner, *supra* note 1.

“The earlier draft has rough edges. But it also has more passion, a more distinctive voice, and some electrifying passages that did not survive into the final draft.”

There’s no record of Perkins ever becoming upset with a writer, not even those who (like Thomas Wolfe in later years) treated him shabbily. Nearly all the writers he worked with were difficult people. He succeeded because he helped them become who they wanted to be. He believed in them—and they knew it.

#### **Karl Flodin**<sup>4</sup>

At the beginning of the 20th century, Jean Sibelius was an early-career writer of classical music with a regional reputation in his native Finland and the rest of Scandinavia. He wanted to break out of this and gain acceptance into the German and Austrian musical elites. Sibelius never accomplished that, and within a few years he stopped caring about it. But for a time he was vulnerable to the opinions of influential people.

As a student and later as a young composer, Sibelius had been mentored by Karl Flodin, the leading Finnish music critic. Although Sibelius usually ignored opinions he didn’t like and cultivated a bohemian image of roughness, his self-confidence was affected to some extent by Flodin’s approval.

Sibelius wrote a violin concerto, which was performed in 1904. Flodin published reviews judging it to be poorly organized, too complicated, and a “mistake.” Flodin criticized the orchestration, the tone color, the dialog between violinist and orchestra, and the degree of difficulty for the violinist. The essence of this critique was that the work and Sibelius’ motivations in writing were inadequate because they didn’t conform to what Flodin wanted them to be.

To a friend, Sibelius confided that the concerto had become a “secret sorrow.” He rewrote it, and the final draft was performed in 1905. That version eventually became a hit. Today, it’s the most frequently performed concerto for any instrument written in the 20th century. Young rising-star violinists master it to prove themselves.

For 87 years, Sibelius and his heirs forbade any performance of the earlier draft. Finally, in 1991 it was recorded in a small Finnish town by a previously obscure conductor, violinist, and orchestra.<sup>5</sup> The recording won awards, and it reveals how the concerto benefitted from criticism—and was harmed by it.

Comparing the two drafts shows that when Sibelius rewrote the concerto, he responded in one way or another to every one of Flodin’s criticisms. The final draft more closely satisfies accepted concerto format and listener expectation. It flows more smoothly and by conventional standards is technically better music than the earlier draft.

The earlier draft has rough edges. But it also has more passion, a more distinctive voice, and some electrifying passages that did not survive into the final draft. Nobody knows for sure why those qualities were suppressed as Sibelius reworked the piece. But Sibelius’ wife Aino, who preferred the earlier draft, complained that he rewrote it “when the critics tore it to pieces.” Nearly all the criticism had come from Flodin.

As a teenager Sibelius had studied to become a concert violinist, and the violin was his natural instrument. But this experience was so painful that he did not write a second violin concerto.

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<sup>4</sup> See Harold E. Johnson, *Jean Sibelius 19–20*, 115–116 (1959); Robert Layton, *Sibelius* 138–140 (1965); Alex Ross, *The Rest Is Noise: Listening to the Twentieth Century* 176–177 (2007); Erkki Salmenhaara, *The Violin Concerto in The Sibelius Companion* 103–119 (Glenda Dawn Goss ed. 1996); 1 Erik Tawaststjerna, *Sibelius* (Robert Layton transl. 1976); *Jean Sibelius, The Music, Violin Concerto*, <[www.sibelius.fi/english/musiikki/ork\\_viulukonsertto.htm](http://www.sibelius.fi/english/musiikki/ork_viulukonsertto.htm)> (last visited September 2, 2008).

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<sup>5</sup> Jean Sibelius, *Violin Concerto in D Minor, Op. 47, Original Version 1903/04 and Final Version 1905* (Osmo Vänskä, conductor; Leonidas Kavakos, violin; Lahti Symphony Orchestra; BIS CD-500; 1991).

## Norm Sherry<sup>6</sup>

In the arts and in athletics, skills are taught through coaching—observing the student’s performance and commenting on it. Actually, “student” isn’t entirely accurate. Even the most accomplished ballet dancers and speed skaters still want and need coaching. Branch Rickey was known as the Mahatma for his wisdom on this and other subjects. “Coaching,” he said, “is not a matter of compulsion but of fertility of suggestion.”

In baseball, a pitcher throws a ball past an opposing player holding a bat. The pitcher succeeds if the batter can’t hit the ball.

A catcher has two functions. One is to squat behind the batter and catch what the pitcher throws. The other is to walk out to the pitcher and say whatever words might help the pitcher do a better job. This is a form of coaching, even though the word “coach” isn’t in a catcher’s job description. A pitcher, like a novelist or a composer, lives on the edge and can fall off.

Norm Sherry was a catcher. He wasn’t superior at the squatting and catching part. Today he’s remembered for three comments he made to a pitcher during a single game in 1961.

The pitcher had been a failure for six years, having lost more games than he had won. He was on the verge of quitting baseball to earn a living selling electrical equipment.

Accounts differ about what Sherry said to the pitcher, whose name is Sandy Koufax. Each of them has retold the story to many people who have themselves retold it. The details have mutated, but all versions agree on the essential points.

*Comment #1:* At the beginning of the game, Koufax was pitching badly. Sherry walked out to

him and suggested doing less rather than more. (“Don’t throw so hard.”) Koufax had heard statements like this many times before but without effect, perhaps because it’s counterintuitive. The most obvious way to pitch well is to throw the ball powerfully past the batter. Out of a deep motivation to succeed, Koufax had put all his strength into every pitch for six years. Now he did what Sherry suggested and immediately accomplished the most effective thing he could under the circumstances. (In technical language, he struck out the side.)

*Comment #2:* Shortly afterward, Sherry pointed out to Koufax the paradox that he had pitched better by doing less. (“You just now threw harder trying not to than you did when you were trying to.”)

*Comment #3:* Later in the game, Koufax slipped back into old habits. Sherry walked out to him and repeated Comment #1.

On that day, Koufax pitched so well that jaws dropped.<sup>7</sup> And his life changed.

Within six months he broke a strikeout record that had stood for 58 years. He broke many more records over the next few years. In a World Series game he pitched so well that more than 60,000 people, who had been rooting *against* him, rose in a standing ovation. People in a position to know said that he had become one of the greatest pitchers in history.<sup>8</sup>

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<sup>7</sup> If you dislike technical terms, skip this: In a spring training game, Koufax pitched a seven-inning no-hitter and struck out eight. He walked three batters in the first inning, which caused Sherry to make Comment #1, and two batters in the fifth inning, which lead to Comment #3. Except for those walks, no opposing batter got to first base.

<sup>8</sup> For example, Casey Stengel: “Forget the other fellow [Walter Johnson]. You can forget Waddell. The Jewish kid [Koufax] is probably the best of all of them.” Geoffrey C. Ward & Ken Burns, *Baseball: An Illustrated History* 380 (1996). Robert Creamer: “I saw Lefty Grove, Dean, Bobby Feller, later on Warren Spahn, Whitey Ford, Steve Carlton, Seaver, Clemens . . . and yet when I think of great pitchers, Koufax is like Mt. Everest.”

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<sup>6</sup> See Branch Rickey’s *Little Blue Book* 24 (John J. Monteleone ed. 1995); Peter Golenbock, *Bums: An Oral History of the Brooklyn Dodgers* 494–495 (1984); Edward Gruver, *Koufax* 125–127 (2003); Sandy Koufax, with Ed Linn, *Koufax* 147, 154–155 (1966); Jane Leavy, *Sandy Koufax: A Lefty’s Legacy* xiii–xiv, 102–103 (2002).

“In the arts and in athletics, skills are taught through coaching—observing the student’s performance and commenting on it.”

“‘In the arc and force of the pitcher’s motion, Pinsky saw everything he wanted his students to know about writing. ...’”

Koufax has never stopped saying that Sherry made this possible. “I had heard it all before,” Koufax recalled. “Only, for once, it wasn’t blahblahblah. . . . There comes a time and place where you are ready to listen.”

Robert Pinsky, who has been the national poet laureate, put Koufax into a poem called “The Night Game.” Pinsky is a writing teacher, and for years he kept on his office door a photograph of Koufax uncoiling from his windup, the ball about to leave his hand at nearly 100 mph.

Jane Leavy, who wrote a book about Koufax, asked Pinsky about the photo. Here is her summary of his response: “In the arc and force of the pitcher’s motion, Pinsky saw everything he wanted his students to know about writing: balance and concentration; a supremely synchronized effort; the transfer of energy toward a single, elusive goal.”<sup>9</sup>

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## Another Perspective

“Law school is like Oz. Law students, like Dorothy, want to fly over the rainbow, where they believe they will find happiness, justice, and a meaningful life. Although many do not know what lurks over that rainbow, that belief compels them to enter law school. True, law students go to law school willingly, whereas Dorothy entered Oz only after a cyclone intervened. Once they are in law school, however, students feel as disoriented as Dorothy did when she walked out of her battered house and realized she was not in Kansas anymore. Like Oz, law school could be a transforming experience that enriches and empowers students to do justice. However, all too often, like the Yellow Brick Road, the path in law school is wide, winding, and full of dangers and diversions. Dorothy had to contend with dark forests, poisonous poppies, flying monkeys, the Wicked Witch, and the man behind the curtain. Law students must contend with challenges to their values and sense of self, the competitive and sometimes hostile learning environment, exhaustion, the allure of materialism, and the use or misuse of power. Overcoming or transcending dangers is a necessary part of life’s journey; however, some dangers are gratuitous and could deter the student, as they did Dorothy, from their ultimate destiny. Imagine how more enriched and empowered law students would be if law schools offered a transformative experience where students had help navigating their journey. Instead of putting all of their energy into finding directions, students could remain focused on more significant questions such as: how they define justice, how they can fulfill their life’s purpose, how they can work in the service of justice, how they can become creative problem solvers, and how they can be both ethical and moral.”

—Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly Over the Rainbow*, 47 Washburn L.J. 327–328 (2008).

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<sup>9</sup> Leavy doesn’t say which photo Pinsky had on his door, but Google Images locates several.

# It's a Small World: Using the Classic Disney Ride to Teach Document Coherence

By Michael J. Higdon

*Michael J. Higdon is a legal writing professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas.*

For new legal writers, one of the biggest initial challenges is simply learning all the different “pieces” that comprise a legal document. Thus, most legal writing educators spend a lot of time at the beginning of that first semester covering the legal paradigm (such as IRAC or CREAC) and its component parts, which typically include rule statements, rule explanation paragraphs, rule application paragraphs, and conclusions. As the semester progresses, however, a new challenge emerges. Specifically, while most students come to understand the parts of the paradigm and the order in which those parts are arranged, their writing nonetheless lacks cohesion. Instead, the students write in a very choppy manner in which the component parts, like rule statements and rule explanation paragraphs, seem arbitrarily stuck next to one another instead of flowing logically from one to the other.

As most of us know, the key concepts behind document cohesion are (1) logical organization and (2) transitions. For many students, however, simply hearing about these two concepts fails to inform them of what we really mean or how the students should go about implementing them. Thus, one of the techniques I have used to help explain document cohesion is to draw an analogy to the Disneyland ride “It’s a Small World” (IASW). For those of you who have never experienced IASW, visitors take a leisurely boat ride during which they are treated to a collection of animated dolls, representing the children of the world, each singing the song “It’s a Small World” in their native tongue. In making this analogy, I have put together a PowerPoint presentation that takes students on a virtual tour of IASW in which I illustrate how the

design elements of that ride are very similar to the design elements that would go into an effective legal document. What follows are the key teaching points relating to document cohesion that I bring up during this virtual tour.<sup>1</sup>

## Why the Analogy to a Theme-Park Ride

As an initial matter, I like to remind my students that IASW, like every ride in every amusement park in the world, did not simply spring into being. Instead, it was thoughtfully and carefully designed. Furthermore, the designers did not simply sketch out the ride in a few minutes and then immediately begin construction. Instead, Walt Disney and the rest of the individuals who designed Disneyland likely spent hundreds of hours developing IASW. I ask my students to picture the initial meeting where someone pitched the idea, the countless meetings that likely went into hammering out the exact content of the ride, the numerous sketches of what the dolls in the ride would look like, and the various discussions over how those items would be organized.

The reason I ask the students to think about all of this preliminary planning is to underscore one of the basic themes of all my legal writing classes: effective legal writing requires critical thinking. As I tell my students, when we write, we do not sit down and just start pounding on the keyboard hoping that something decent comes out. Instead, we plan, we revise, and we question our choices. And, throughout all that, we ask very tough questions about what “works” in the document; we answer those questions by drawing upon our various skills as writers (a skill set that hopefully expands as the semester progresses). So, just as

“As I tell my students, when we write, we do not sit down and just start pounding on the keyboard hoping that something decent comes out.”

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<sup>1</sup> I am also happy to provide a copy of the PowerPoint presentation to anyone who is interested. Simply e-mail the author at michael.higdon@unlv.edu.

“One of the reasons I enjoy using the IASW analogy to teach document cohesion is that the design of the ride does an excellent job of illustrating logical organization.”

Walt Disney was very critical about how he built IASW, so too must students be critical in how they design and construct their papers.

### Why Cohesion Is Important

As the virtual ride begins, I ask the students to take note of the fact that visitors to Disneyland experience IASW by sitting in a boat; however, they need not row the boat. Instead, the boat moves quite nicely by itself. Continuing the theme I raised earlier about the design decisions that Walt Disney made, I ask them why Disney did not design the ride such that visitors had to row the boat. Of course, students immediately point out that many would not enjoy having to row the boat and, more importantly, it would have distracted them from what was going on around them. Based on their response, I ask the students to draw an analogy to how one designs a legal document.

The answer, of course, is that our “visitors” (i.e., legal readers) are primarily interested in the substance of our document and do not want to have to work too hard to get that substance. Furthermore, as I remind the students, this point is especially true of legal readers, who typically are extremely busy readers with little time to devote to any one document. Thus, we need to write our documents in such a way that our readers can move through them relatively quickly, without having to “row.”<sup>2</sup> Likewise, we need to construct our document so that the eyes of the reader, like the boat in IASW, can keep moving forward at a normal pace without having to stop and repeat a section to understand the writer’s meaning. As I tell my students, rarely will you hear a visitor during the IASW ride say, “Huh, I’m confused.”

The question then becomes how we achieve this cohesion. It is at this point in the virtual ride that I

introduce the concepts of logical organization and transitions.

### Logical Organization

One of the reasons I enjoy using the IASW analogy to teach document cohesion is that the design of the ride does an excellent job of illustrating logical organization. In fact, it does so in two ways: first, the ride shows that logical organization involves moving from the general to the more specific; second, IASW illustrates that, when announcing to our audience that we are going to deal with a specific topic, we cannot deviate from that topic without first announcing our intention to deviate and then explaining the reason for the deviation.

### General to Specific

The IASW ride has been around for a very long time and is known worldwide; thus, most visitors already know when they get on the ride what they are going to see: singing dolls from around the world. However, visitors soon learn that there is an organization to the dolls. For instance, the dolls are not randomly thrown together along the ride; instead, they are organized by continent. Thus, while in Europe, visitors see only those dolls that represent the countries of Europe, such as a doll from Spain dancing the flamenco.

As I explain this setup to my students, I ask them to pay attention to the logical progression of the ride. Overall, the ride is about the children of the world, yet the ride then changes its focus from the world to, more specifically, Europe and then, even more specifically, to Spain. In other words, we moved from the general (the planet) to the specific (a specific continent and then a specific country within that continent). I ask the students to imagine what the ride would be like if they simply mixed up all the children from the various continents with little justification to the order. They invariably respond that (1) the ride would be more confusing given that visitors would have to look at each doll and first try and figure out what continent and then what country the doll represents (as there would be no organization to provide context); and (2) the ride might become somewhat repetitive given that many of the dolls, even though they represent different

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<sup>2</sup> Aside from helping me teach document cohesion, another benefit of this exercise is that it provides me some shorthand phrases I can use when critiquing papers. For example, after taking the virtual tour of IASW, I need only write “I’m having to row here!” on a student’s draft for the student to understand the problem I had with that portion of his paper.

countries, are dressed somewhat similarly (for example, dolls from Switzerland and Germany) and, if placed apart from one another, may cause the visitor to simply think the ride is repeating itself instead of presenting two separate countries.

For many students, this discussion starts to remind them of a similar one we had earlier in the semester about the legal paradigm. During that time, I explained to the students that the legal paradigm is not an arbitrary structure that legal writing professors invented, but is instead a breakdown of how the human brain logically digests a given problem. Part of that logic involves moving from the more general aspects of a problem to the more specific. For example, no human would logically be able to decide to eat dinner at Applebee's (a more specific focus) without first taking account, even if only for a nanosecond, of the fact that he is hungry, that he can even go out for dinner, or that Applebee's is an attractive option (all of which are more general points).

Bringing the discussion back to legal writing, I then review with students that legal writers need to follow a similar organization when creating legal documents. Thus, when writing about a problem that deals with negligence, a legal writer would first have to identify the rule for negligence before talking specifically about any one element of that cause of action. To talk about the element first (1) would fail to give the reader the necessary context to fully understand the writer's analysis and (2) would likely lead to some redundancy once the writer got around to talking about the overall rule.

### **Sticking to the Announced Topic**

IASW also illustrates another aspect of logical organization: sticking to the announced topic. Building on the idea of moving from the general to the specific, I point out that, during the ride, the creators never stray from their announced topic. To illustrate, I use two photos from the ride itself. The first is a picture of three female dolls doing the cancan. I show the picture to the students and then ask what their reaction would be if they were to encounter those three dolls during the part of the ride that is set in Europe. The students usually

seem confused by the question and respond that they would have little reaction given that one typically associates the cancan with France, a country in Europe. Thus, the placement of those three dolls makes perfect sense.

I then show them the same photo, but in this picture, I have superimposed a singing Eskimo from another part of the ride. This time when I ask the students for their reaction if they were to encounter those dolls on the actual ride, they report that it would confuse them. One student even said that, at that point, she would probably want the boat to stop moving so she could look further at this confusing sight to try to "figure it out." Another student confessed that he would not only be confused by the inclusion of the Eskimo, but he would likely be distracted by it for some time, even as the ride moved on.

I find that these two photos and the resulting student comments provide a really nice analogy to the organization of legal documents. Specifically, after announcing to the reader that he is going to talk about a specific legal point, the legal writer needs to stick to that point. Throwing in something completely different not only slows down the reader, but could distract the reader so much that she is unable to really concentrate on the remainder of the document. Thus, as an example, when talking about "duty" in a negligence memo, the legal writer should stick to duty and not suddenly veer off into "breach" without first, via some transitional device, explaining to the reader why she is changing focus.<sup>3</sup>

### **Transitions**

The second component of document coherence involves the effective use of transitions. Again, IASW serves as a great illustration. As an initial matter, throughout my virtual tour of IASW, I have included a few "signs" for the students. Now, due to the popularity of IASW and the fact that most

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<sup>3</sup> Once again, my virtual tour provides a great shorthand comment to write on the draft of a student who has strayed off course. I simply write, "Eskimo!"

“Building on the idea of moving from the general to the specific, I point out that, during the ride, the creators never stray from their announced topic.”

“Transitions make it easier for the legal reader’s eyes, just like the boat in IASW, to keep moving at a steady pace.”

visitors already know what to expect, most of these signs do not exist in the actual ride. However, I have created and included these signs to teach the students the importance of guideposts and transitions when communicating information to a new reader. The first such sign that comes up in the PowerPoint is one that begins the virtual tour. This sign says “Let’s Visit the Children of the World! First Stop: Europe.” I ask the students why Walt Disney might have decided to include such a sign. The answer, of course, is that it provides an overview of what the ride is about and also tells visitors at what discrete point the ride is going to begin. In drawing an analogy to legal writing, this sign then functions much like an umbrella paragraph that informs the reader of the overall rule and the order the writer is going to explore that rule’s elements.

The point I want to focus on with this example, however, is why the visitor to the ride needs to know *ahead of time* that the ride will begin in Europe. After all, once the visitor rounds the corner into the first room of the ride, he’s going to look around and see representations of things like the Eiffel Tower and Big Ben and likely figure out that he is in Europe. So why not just let that happen? The reason is that, during those moments when the visitor is looking around and figuring out where the ride begins, he is distracted from the specifics of his surroundings. Thus, while orienting himself and making the determination that he is in Europe, the visitor may miss the cancan girls. In other words, by telling the visitor (before he even gets there) that he is going to start off in Europe, the creators of the ride minimized the likelihood of distraction and uncertainty during those first few moments. Likewise, at the end of Europe, a sign that says “Let’s Now Visit the Land Down Under” would serve the same purpose. Without this heads-up, many riders (if they had any control over the boat) would likely need to stop the boat for a few moments during their initial exposure to the new room to figure out what is going on.

As I then explain to the students, legal writers need to include transitional words and phrases throughout their papers for the exact same reason. Transitions make it easier for the legal reader’s eyes, just like the boat in IASW, to keep moving at a steady pace. As I tell the class, it is perfectly all right for a legal reader to want to stop reading and reread something for enjoyment purposes. What is not all right, however, is when a legal reader *is forced* to stop reading and reread to understand the substance of the new idea. Lack of transitions makes it more likely that a reader will have to reread portions of a legal document since, without a transition, the legal reader will first have to read to orient herself to the nature of the new topic and then reread for substance. Thus, by telling the reader beforehand what topic you’re moving on to and how it relates to the previous topic, you greatly reduce the likelihood that the reader will have to read something twice to simply digest it.

At the end of the virtual tour of IASW, I show students a photograph of happy visitors sitting through the actual IASW ride at Disneyland. I ask the students to tell me what they think those folks would have to say about the ride immediately after the ride is over. Responses typically include such things as “that was a lot of fun” and “let’s do it again!” Here, in drawing an analogy to legal writing, I must begrudgingly confess to my students that the legal reader will rarely want to reread their document for fun. Nonetheless, just as cohesive elements can make IASW a more enjoyable ride, so too can those same cohesive elements make their documents a more enjoyable read to the legal reader.

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# Teaching to Different Levels of Experience: What I Learned from Working with Experienced Writers from Different Fields

By Ann M. Piccard

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Legal writing teachers have certain requirements that we feel must be met in each piece of student writing. Most significantly, we expect to see analysis that follows a predictable, logical pattern, whether it be IRAC,<sup>1</sup> CREAC,<sup>2</sup> or some variation thereon.<sup>3</sup> However, not all of our students come to us fresh from undergraduate school; many arrive after, or even during, careers in which they have developed an effective writing style of their own.<sup>4</sup> Our response to these students' writing should demonstrate thoughtful consideration of the experiences that they bring to the classroom.

As the U.S. economy weakens and jobs are lost,<sup>5</sup> law schools can expect to see an increase in the enrollment numbers for nontraditional students. These may be professionals from other fields who have been writing successfully in the workplace for decades; some may even be older than the faculty

employed to teach them. In the field of legal writing this presents a particular challenge for teachers because experienced writers will wonder why they should be expected to abandon the writing habits and preferences that have served them so well over the years. It is, indeed, a legitimate question, and one the legal writing faculty should be prepared to address.

The ultimate answer is that successful experienced writers should not be expected to start from scratch when they enroll in a legal writing class. There is no reason they cannot be taught to adapt existing skills to suit a new audience. Legal writing teachers can often be heard to complain about the utter lack of writing experience in students who come to law school in their early or mid-20s, fresh from college; we wonder what these kids are being taught in college these days. We should celebrate, then, when we encounter students who arrive with years of writing experience in other fields. It may require some flexibility on our parts, but that is nothing more than we ask of our students: the ability to adapt is a key to success in legal writing.<sup>6</sup>

It is important to clarify what is meant by the term "experienced" writers. Not all nontraditional students are part time, and not all part-time students are experienced. Not all nontraditional students have been successful writers. Doctors, for example, are not always skilled writers, although certainly some of them are; their particular brand of professional success may have been attained without the need for much writing at all.<sup>7</sup> The focus

“We should celebrate, then, when we encounter students who arrive with years of writing experience in other fields.”

<sup>1</sup> Judith B. Tracy, “I See and I Remember; I Do and Understand”: Teaching Fundamental Structure in Legal Writing Through the Use of Samples, 21 *Touro L. Rev.* 297, 310–11 n.27 (2005).

<sup>2</sup> Joel R. Cornwell, *Languages of a Divided Kingdom: Logic and Literacy in the Writing Curriculum*, 34 *J. Marshall L. Rev.* 49, 56 (2000).

<sup>3</sup> Christine M. Venter, *Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills*, 57 *Mercer L. Rev.* 621, 624 n.12 (2006).

<sup>4</sup> According to Dean Darby Dickerson’s 2008 State of the Law School address at Stetson University College of Law (Sept. 3, 2008), 25 percent of Stetson’s Fall 2008 incoming part-time students come to law school having already attained some postgraduate degree. See also, Jean Boylan, *Crossing the Divide: Why Law Schools Should Offer Summer Programs for Non-Traditional Students*, 5 *Scholar* 21, 22 n.4 (2002).

<sup>5</sup> Louis Uchitelle & Michael M. Grynbaum, *Job Losses Raise Recession Fears*, *N.Y. Times*, Feb. 1, 2008, at A1.

<sup>6</sup> Amy R. Mashburn, *Can Xenophon Save the Socratic Method?* 30 *T. Jefferson L. Rev.* 597, 632 (2008).

<sup>7</sup> Several of the part-time classes I have taught have included medical doctors. Some of them have been excellent writers, but others have not.

“An experienced writer, on the other hand, can be expected to question the need for or usefulness of a rigid approach to writing legal memoranda or briefs.”

of this essay, however, is the student, whether young or old, part time or full time, who brings to law school a well-established set of writing skills that make him or her an effective communicator in one or more other fields, if not yet in the legal field.

First-year legal writing classes may stress the importance of logic almost to the exclusion of anything else: the organizational scheme has to be logical or the written document makes no sense to its intended audience.<sup>8</sup> We generally require students' papers to fit some formula, optimally based on syllogistic reasoning. We expect to see analogical reasoning demonstrated in a prescribed fashion; this is how we teach legal analysis. Some legal writing teachers even use a template so students can see exactly what their memos are supposed to look like. A fairly strict formula helps many students, particularly those who have spent their whole lives in school and who, as members of Generation Y, are eager to please their teachers by following instructions.<sup>9</sup>

An experienced writer, on the other hand, can be expected to question the need for or usefulness of a rigid approach to writing legal memoranda or briefs. We should encourage these, and all, students to ask the “why” questions in legal writing. Our goal is to have the students produce substantive legal analysis, not to have them blindly follow instructions without question. When we encounter experienced writers in our classrooms, we should encourage them to trust their instincts when they write for us. Too often, these students are discouraged and told that their “style” is wrong for law school.

I began observing the differences between traditional and nontraditional law students in the spring of 2005, when I first taught a group of part-time students. In early office conferences with some

of the nontraditional students I found myself in the slightly uncomfortable position of trying to justify my fairly rigid requirements to people who were, like me, experienced professionals, and whose writing was generally accomplishing its purpose. Of course these students needed to meet the same standards as every other group of legal writing students, but it seemed appropriate to take the students' life experiences into consideration when I evaluated their written work.

In the summer of 2006, I became a returning, experienced, nontraditional, part-time student myself, pursuing an LL.M. degree from the University of London's External Studies Programme.<sup>10</sup> After I adjusted to the initial shock of being a student again, and to the immense amount of self-discipline required as a part-timer, I began to see how and why I might reshape my teaching approach based on my experience as a student.

A useful place to begin seemed to be with a writing sample from each student, preferably done in the classroom with no outside assistance. A simple one-paragraph description of a case is enough to serve as a diagnostic tool. From this, the teacher can determine who has the basic level of writing skills necessary to be considered an effective experienced writer. Many students will be neither effective nor experienced writers, and for these it only makes sense to start at the beginning and teach grammar along with logic. Others, however, should be encouraged to adapt and utilize existing skills to achieve the goals of the legal writing course.

IRAC and CREAC are helpful when students are struggling to grasp the concept of analysis, but we should recognize that there are students who come to us as experienced, successful writers, and who may be beyond the need for such strict organizational structures. Certainly, legal analysis is a complex concept that must be taught using some method that the novice writer can understand; IRAC and CREAC and their kin are tools toward that end, but are not necessarily ends unto themselves. It can be

<sup>8</sup> John C. Dernbach et al., *A Practical Guide to Legal Writing and Legal Method* 115 (2007).

<sup>9</sup> Much has been written about the current crop of college and graduate students. See, for example, Kristen Peters, *Protecting the Millennial College Student*, 16 S. Cal. Rev. L. & Soc. Just. 431, 466 n.242 (2007).

<sup>10</sup> <[www.londonexternal.ac.uk](http://www.londonexternal.ac.uk)>.

counterproductive and frustrating for both teacher and student to insist that these, and these alone, are the tools for successful legal writing.

This point can be illustrated by considering how two different students, with different levels of writing experience, might approach the analysis of my favorite case, *Miles v. City Council of Augusta*.<sup>11</sup> A novice legal writer would be instructed to utilize IRAC or CREAC when applying *Miles* to a hypothetical fact pattern. The resulting analysis might look something like this:

Our client's daughter does not need a business license to operate a lemonade stand in the family's driveway. A business license is only needed if a person supports herself by engaging in the activity for profit. *Miles*, 551 F. Supp. at 353. Our client's daughter will not support herself with the proceeds of her lemonade stand. Because our case is distinguishable from *Miles*, a business license should not be needed.

The result may not be particularly sophisticated, but it is at least organized in a discernible, logical fashion: Conclusion, Rule, Explanation and Analogy, Conclusion. For many legal writing teachers, this novice writer would be well on her way to success.

On the other hand, a student who has been successfully writing in a different field might approach the exercise differently. For example, consider the following paragraph:

Our client's case is distinguishable from *Miles*, so the result should be different. A child selling lemonade does not support herself from the proceeds of her "business," and so should not be expected or required to obtain a business license. If one's rent is paid from funds generated by selling the services of a talking cat, then one is indeed supporting oneself by that enterprise, and a business license is needed. *Id.* at 353. But a child selling lemonade is not "engaged in a business."

<sup>11</sup> 551 F. Supp. 349 (S.D. Ga. 1982).

The municipality cannot have intended to include such activity in the business license ordinance. However, it may ultimately be cheaper and easier to obtain the license than to fight city hall.

The second example does not fit the "traditional" organizational scheme, following more of a CARC format (with a recommendation thrown in for good measure), but all of the necessary pieces are actually there. It is also, frankly, a more interesting paragraph to read. But a teacher who is wedded to strict adherence to IRAC or CREAC would probably give the first example paragraph higher marks than the second.

It would be difficult for me to explain to an experienced writer why the second paragraph deserved a lower grade than the first. Adherence to rules for the sake of rules does not make much sense in this context. The writer of the second paragraph is clearly comfortable with his "voice." What would be accomplished by discouraging this previously successful writer? I might urge this writer to focus more on law and less on facts, but I would also urge him to trust his instincts as a writer and maintain his narrative voice. It would be a disservice to this writer for his teacher to reject his experience and effectiveness.<sup>12</sup>

Legal writing teachers can and should be sensitive to students whose life experiences include significant writing. In my first semester of teaching part-time students, I read one paper that stood out from all of the rest because it read like a novel. It was entertaining and enjoyable. But it did not follow the format I had instructed my students to follow in that it contained, interspersed throughout the analysis, some extraneous paragraphs of a very practical and conversational nature. I chose to give

<sup>12</sup> Much has been written lately about metacognition and the importance of thinking about how we learn. See, for example, Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 Fla. St. U. L. Rev. 271 (2008); Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 Widener L. Rev. 33 (2006).

“In my first semester of teaching part-time students, I read one paper that stood out from all of the rest because it read like a novel.”

that paper a relatively high grade because it did contain everything I was looking for (and then some) albeit in a different organizational scheme. If the paper had been poorly written, I would not have rewarded its writer. But as a teacher of writing, I could not bring myself to penalize a student whose writing was successful in spite of its differences.

In May of 2007 I sat for my first LL.M. exams; these were the first exams I had written since I took the Florida bar exam in 1985. I had prepared for my exams, substantively and stylistically, hoping to fit my knowledge of the material into the British

academic scheme of things,<sup>13</sup> but there was no way I could divorce myself entirely from my training and experience in the American legal system. I could only hope that the exam readers<sup>14</sup> would find my efforts acceptable, and my approach recognizable. Apparently I succeeded, and I was quite happy with my grades.<sup>15</sup> Thus, my experience as a student validated my instincts as a teacher: success can come in a variety of forms, and students should not be asked to leave their life experiences outside when they enter our classrooms.

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## Another Perspective

“A ‘disorienting moment’ occurs ‘when the learner confronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner’s prior understanding—referred to in learning theory as “meaning schemes”—of how the world works.’ While the experience of a disorienting moment is often eye-opening, the experience itself is only the first step in the learning process.

Adult learning theorist Jack Mezirow describes two more stages that students must undergo after experiencing the disorienting moment in order truly to learn from their experience: exploration and reflection, then reorientation. Following the first stage of exposure to the disorienting moment, students must have an opportunity to ‘explore and reflect’ upon the disorienting moment before having an opportunity to ‘reorient’ their ‘meaning schemes about justice’ in light of what they have experienced. If a teacher simply exposes students to the disorienting moment and does not ‘provide a proper environment for these three stages to unfold,’ students are more likely to ignore or reject the experience than to learn from it.”

—Emily Hughes, *Taking First-Year Students to Court: Disorienting Moments as Catalysts for Change*, 28 Wash. U. J.L. & Pol’y 11, 16–17 (2008).

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<sup>13</sup> The University advises students to write “academically” rather than succinctly.

<sup>14</sup> Each exam answer is read and evaluated by three different graders.

<sup>15</sup> In August 2008, I received notice from the University of London that I have successfully completed the requirements for the Master of Laws, and that the degree will be awarded “with Merit,” which is similar to Honors.

## How Do You Update the Code of Federal Regulations Using GPO Access?

*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, e-mail: craig.smith@law.vanderbilt.edu.*

**By Patrick J. Charles**

*Patrick J. Charles is Associate Director of the Chastek Library at Gonzaga University School of Law in Spokane, Wash.*

One of the most challenging tasks that researchers face is updating federal regulations. Official government publications traditionally provide minimal indexing and limited readers' aids. In 1996, Lydia Potthoff offered advice on how to update the *Code of Federal Regulations* (CFR) in print, on Westlaw®, and on Lexis.<sup>1</sup> Over the past decade, although Web-based access to the *Federal Register* and the CFR has simplified the process, updating federal regulations still requires several steps.

After demonstrating how to update the CFR on GPO Access to scores of students, I decided to create an illustrated research guide with sequential screen shots and step-by-step how-to instructions. I felt the use of illustrations would help visual learners and make the updating process vivid.

Basing a research guide on screen shots has its risks and rewards. One risk is that the changing nature of the Web means the screen shots will become outdated. On the other hand, users are rewarded with a visually attractive guide that illustrates a

fairly dry procedure. The key to the longevity of the guide is pairing clear narrative with the screen shots. My hope is that the illustrated research guide reproduced below provides useful assistance to law students, summer associates, and attorneys who need to update the CFR.

### **A Guide to Updating the CFR Using GPO Access**

The CFR contains the final rules and regulations promulgated by federal administrative agencies. The CFR is published annually in four quarterly installments. Titles 1 through 16 are updated on January 1 of each year, titles 17 through 27 on April 1, titles 28 through 41 on July 1, and titles 42 through 50 on October 1. The CFR is not updated by pocket parts; new or amended regulations are published in the *Federal Register*. These changes are not incorporated into the CFR until a new set is published. Therefore, one needs to look at the *List of CFR Sections Affected* (LSA) and the *Federal Register* to see if a regulation has been changed. Although there are several ways to update a CFR citation online, including on Westlaw and LexisNexis®, the advantage of using GPO Access is that GPO Access is current to the day, unlike Westlaw and LexisNexis, which are current within a week. Also, GPO Access is free!

<sup>1</sup> Lydia Potthoff, *Teachable Moments ... “How Do You Update the Code of Federal Regulations?”* 5 *Perspectives: Teaching Legal Res. & Writing* 28 (1996).

1. Retrieve your section in the most recent version of the CFR using Retrieve by Citation. For purposes of this guide, we are focusing on 5 C.F.R. § 950.101. Note the date this section was last revised. The revision date is included at the top of each page of the CFR in parentheses after the citation information. You can view PDFs of the most recent version of the CFR on the GPO Access site at <www.gpoaccess.gov/cfr/index.html>.

Retrieve  
5 C.F.R. §  
950.101.

The screenshot shows the GPO Access website interface. At the top, there are navigation tabs for 'LEGISLATIVE', 'EXECUTIVE', and 'JUDICIAL', along with 'HELP' and 'ABOUT'. A search bar is located at the top right. The main heading is 'Code of Federal Regulations (CFR): Main Page'. Below this, there is a brief description of the CFR and a search box containing the text '5 CFR 950.101'. A 'Retrieve by Citation' link is highlighted in the sidebar under 'DATABASE FEATURES'.

5 C.F.R. § 950.101,  
revised as of  
January 1, 2008

The screenshot shows the text of 5 C.F.R. § 950.101. The title is '§ 950.101' and the edition is '5 CFR Ch. I (1-1-08 Edition)'. The regulation is organized into subparts: Subpart E—Undesignated Funds, Subpart F—Miscellaneous Provisions, Subpart G—DoD Overseas Campaign, Subpart H—CFC Timetable, and Subpart I—Payroll Withholding. The text includes definitions for 'Administrative Expenses, PCFO Expenses, Campaign Expenses, or CFC Expenses' and 'Domestic Area'.

2. At the main page, click **List of CFR Sections Affected** on the left side under *Related Resources* to display the main page for *List of CFR Sections Affected (LSA)*. This page explains the updating process and includes a *Quick Search* text box.

The screenshot shows the GPO Access website. The top navigation bar includes 'LEGISLATIVE', 'EXECUTIVE', and 'JUDICIAL'. The left sidebar contains 'DATABASE FEATURES' and 'RELATED RESOURCES'. Under 'RELATED RESOURCES', 'List of CFR Sections Affected' is highlighted with a blue box. The main content area is titled 'Code of Federal Regulations (CFR): Main Page'. It includes a search box with a 'Submit' button and a section for 'Most Current 50 Titles (2006-2007)'. Below that, there is a section for '1996 through current year' based on the CFR update schedule.

3. At this page, click **Browse the LSA** on the left side under *Database Features*. This page is located at [www.gpoaccess.gov/lsa/browse.html](http://www.gpoaccess.gov/lsa/browse.html). Click the most recent month listed, e.g., **January**.

January 2008 is the latest LSA available.

The screenshot shows the GPO Access website. The top navigation bar includes 'LEGISLATIVE', 'EXECUTIVE', and 'JUDICIAL'. The left sidebar contains 'DATABASE FEATURES' and 'RELATED RESOURCES'. Under 'DATABASE FEATURES', 'Browse the LSA' is highlighted with a blue box. The main content area is titled 'List of CFR Sections Affected (LSA): Browse (1997 forward)'. It includes a table of LSA issues published in 2008 and 2007. The 2008 table has 'January' highlighted in the first column.

LSA issues published in 2008		
January	February	March (Annual Titles 17-27)
April	May	June (Annual Titles 28-41)
July	August	September (Annual Titles 42-50)
October	November	December (Annual Titles 1-16)

  

LSA issues published in 2007		
January	February	March (Annual Titles 17-27)
April	May	June (Annual Titles 28-41)
July	August	September (Annual Titles 42-50)
October	November	December (Annual Titles 1-16)

4. Consult the most recent monthly *List of CFR Sections Affected* to see if your CFR part or section is listed. Click either the TEXT or PDF version. Although it may be slower to load, the PDF version is easier to read.

Resources by Topic  Site Search: advanced

LEGISLATIVE EXECUTIVE JUDICIAL HELP

A-Z RESOURCE LIST FIND A FEDERAL DEPOSITORY LIBRARY BUY PUBLICATIONS

Home Page > Executive Branch > List of CFR Sections Affected > Browse > January 2008 LSA

### January 2008 LSA (List of CFR Sections Affected)

January 2008 LSA  
(File sizes: TEXT less than 170K, PDF less than 160K)

Title	Subject Category	File Format
Introduction	Instructions for use of this Finding Aid	TEXT PDF
Checklist	Checklist of CFR Volumes for this Month And Other Related Publications	TEXT PDF
Title 1	General Provisions	TEXT PDF
Title 2	Grants and Agreements	TEXT PDF
Title 3	The President	TEXT PDF
Title 4	Accounts	TEXT PDF
Title 5	Administrative Personnel	TEXT PDF
Title 6	Domestic Security	TEXT PDF
Title 7	Agriculture	TEXT PDF
Title 8	Aliens and Nationality	TEXT PDF
Title 9	Animals and Animal Products	TEXT PDF
Title 10	Energy	TEXT PDF
Title 11	Federal Elections	TEXT PDF

**DATABASE FEATURES**

- List of CFR Sections Affected Main Page
- Browse the LSA
- Search
- Search Tips
- Retrieve a Federal Register Page
- LSA Compilation, 1986-2009
- About the List of CFR Sections Affected

**RELATED RESOURCES**

- Federal Register
- Regulations.gov
- Unified Agenda
- Code of Federal Regulations
- Search all Regulatory Applications
- All NARA Publications

**ABOUT GOVERNMENT**

Ben's Guide to U.S. Government

Acrobat Reader

5. Check to see if your CFR part or section has been affected by looking for final rules or proposed rules. Entries for rules are arranged numerically by CFR title, chapter, part, and section. If there has been a change, the LSA will refer you to the pages in the *Federal Register* on which the change is published. Check the referred pages to determine the changes made to your regulation. Make certain the coverage of the LSA begins the day after the date of revision for your CFR section in the main volume.

Recall that 5 C.F.R. § 950.101 was current to January 1, 2008. This January 2008 LSA covers changes to title 5 of the CFR from January 2, 2008, through January 31, 2008.

JANUARY 2008		11
CHANGES JANUARY 2, 2008 THROUGH JANUARY 31, 2008		
<b>TITLE 1—GENERAL PROVISIONS</b>		
No amendments to 1 CFR have been published in the FEDERAL REGISTER since April 9, 2004.		
<b>TITLE 2—GRANTS AND AGREEMENTS</b>		
No amendments to 2 CFR have been published in the FEDERAL REGISTER since December 27, 2007.		
<b>TITLE 3—THE PRESIDENT</b>		
Presidential Documents		
<b>Proclamations</b>		
7785 See Proc. 8214 .....		1488
7747 See Proc. 8214 .....		1489
8987 See Proc. 8214 .....		1489
8214 .....		1489
8215 .....		3875
8216 .....		3856
8217 .....		4073
8218 .....		5705
8219 .....		5707
<b>Executive Orders</b>		
11890 Amended by EO 13486 .....		4077
17010 Replaced in part by TR		
<b>TITLE 4—ACCOUNTS</b>		
No amendments to 4 CFR have been published in the FEDERAL REGISTER since September 4, 2007.		
<b>TITLE 5—ADMINISTRATIVE PERSONNEL</b>		
Chapter I—Office of Personnel Management (Parts 1—1199)		
581.608 Regulation at 72 FR 34362 confirmed.....		1490
581.609 Regulation at 72 FR 34362 confirmed.....		1490
Chapter II—Merit Systems Protection Board (Parts 1200—1299)		
1201 Appendix II amended .....		3143
<i>Proposed Rules:</i>		
290 .....		3410
582 .....		3230
591 .....		772
<b>TITLE 6—DOMESTIC SECURITY</b>		
Chapter I—Department of Homeland Security, Office of the Secretary (Parts 0—99)		
6 Appendix C amended .....		5421
93 Added .....		5371

There are no changes to 5 C.F.R. § 950.101 in the January 2008 LSA.

6. After you have consulted the most recent monthly LSA, use your browser's Back button to return to the Browse the LSA page. At the Browse the LSA page, click **List of CFR Sections Affected Main Page**. This page is located at <www.gpoaccess.gov/lsa/index.html>. Then click **Last Month's List of CFR Parts Affected** in the middle of the page. This step may be unnecessary, depending upon the availability of the most recent LSA.

The screenshot shows the GPO Access website interface. At the top, there is a search bar and navigation tabs for LEGISLATIVE, EXECUTIVE, JUDICIAL, HELP, and ABOUT. Below the navigation is a breadcrumb trail: Home Page > Executive Branch > List of CFR Sections Affected. The main heading is "List of CFR Sections Affected (LSA): Main Page".

The page content includes:

- DESCRIPTION:** The List of CFR Sections Affected lists proposed, new, and amended Federal regulations that have been published in the Federal Register since the most recent revision date of a CFR title. Each LSA issue is cumulative and contains the CFR part and section numbers, a description of its status (e.g., amended, confirmed, revised), and the Federal Register page number where the change(s) may be found. It is published by the Office of the Federal Register, National Archives and Records Administration.
- NOTE:** The LSA is issued monthly; however, on GPO Access, the LSA also contains three supplemental services: the List of CFR Parts Affected Today, Current List of CFR Parts Affected, and Last Month's List of CFR Parts Affected.
- 2007 (Volume 72) Only:**
  - Quick Search (ex: "executive order" AND "12947")
  - List of CFR Parts Affected Today
  - Current List of CFR Parts Affected
  - Last Month's List of CFR Parts Affected
- 1985 through 2007:**
  - Search (1997 forward)
  - Browse (1997 forward)
  - Retrieve a Federal Register page (1995 forward)
  - LSA Compilation (1995-2000)
  - Search Now
- Other Services:**
  - Sign up to freely receive the daily Federal Register Table of Contents via e-mail.
  - Find, review, and submit comments on Federal rules that are open for comment and published in the Federal Register using [regulations.gov](http://regulations.gov)
  - Purchase a subscription to the printed edition of the Federal Register. [Buy a Copy](#)
  - Find issues of the Federal Register (including issues prior to 1994) at a local Federal depository library.

The sidebar on the left contains:

- DATABASE FEATURES:**
  - List of CFR Sections Affected Main Page
  - Browse the LSA
  - Search
  - Search Tips
  - Retrieve a Federal Register Page
  - LSA Compilation, 1995-2000
  - About the List of CFR Sections Affected
- RELATED RESOURCES:**
  - Federal Register
  - Regulations.gov
  - Unified Agenda
  - Code of Federal Regulations
  - Search all Regulatory Applications
  - All NARA Publications
- ABOUT GOVERNMENT:**
  - Open Guide to U.S. Government
  - Acadef Reader

Last Month's  
List of CFR  
Parts Affected

7. Check to see if your CFR part or section has been affected by looking for final rules or proposed rules. If there has been a change, the LSA will refer you to the pages in the *Federal Register* on which the change is published.

The CFR Parts Affected During February table covers changes to 5 C.F.R. § 950.101 from February 1, 2008, through February 29, 2008.

**Last Month's List of CFR Parts Affected**

This page lists only the CFR parts affected by change(s) during the last month. It will be maintained online until publication of the LSA List of CFR Sections Affected for that month.

Updated March 3, 2008

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CFR PARTS AFFECTED DURING FEBRUARY

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3 CFR

Proclamations:	
6067 (See Notice of February 6, 2008).....	7408
1751 (See Notice of February 6, 2008).....	7459
8020.....	8031
Executive Orders:	
13250 (Revoked by 13483).....	8437
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Note that there is a change to 5 C.F.R. § 950 listed as appearing on page 8587. You should examine this page of the 2008 *Federal Register* (volume 73) to confirm the changes.

8. After you have done this, use your browser's Back button to return to the List of CFR Sections Affected (LSA): Main Page. Click **Current List of CFR Parts Affected** in the middle of the page. This page lists only the CFR parts and sections affected by changes during the current month. It is a cumulative list that is updated daily. This page is located at <www.gpoaccess.gov/lsa/curlist.html>.

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This page lists only the CFR parts affected by change(s) since the last monthly issue of the LSA (List of CFR Sections Affected). It is updated daily from changes published in the Federal Register. (Last Month's Cumulative List of CFR Parts Affected will continue to be made available until publication of the LSA.) Though already incorporated in the Current List of CFR Parts Affected, the List of CFR Parts Affected Table is extracted from each issue of the daily Federal Register to assist those monitoring changes on a daily basis.

The information is being made available electronically prior to incorporation in the next monthly issue of the LSA (List of CFR Sections Affected). Other than the Federal Register, no federally-printed counterpart exists for this information and no PDF (Portable Document Format) version is being made available.

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9. If there has been a change to the regulation, the LSA will reference the pages in the *Federal Register* that include these changes.

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## “The Real World”: Creating a Compelling Appellate Brief Assignment Based on a Real-World Case

“By using a real-world problem, our students could step into the shoes of practicing attorneys and gain an appreciation for how social issues are addressed through the law.”

*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 Elizabeth L. Inglehart and Martha Kanter**

*Elizabeth L. Inglehart and Martha Kanter are Clinical Assistant Professors of Law at Northwestern University School of Law in Chicago, Ill.*

### Why Base an Appellate Brief Assignment on a Real-World Case?

Creating an appellate brief problem that is realistic, balanced, and interesting for students to work on is one of the most challenging opportunities facing a legal analysis and writing professor. Developing such a problem is particularly important because many legal writing courses use an appellate brief problem throughout an entire law school semester, usually requiring students to write at least one, and often two, appellate briefs based on the problem, and to argue that case in a moot court.<sup>1</sup>

<sup>1</sup> At Northwestern Law, the second semester of our year-long required legal writing course (Communication and Legal Reasoning or CLR) for first-year law students focuses on written and oral advocacy, primarily on appellate advocacy. Most CLR professors at Northwestern use one appellate advocacy problem for the entire spring semester, and many of us require students to write two briefs in the same case—first writing a brief representing the appellant/petitioner, and then writing a brief in the same appeal representing the appellee/respondent. Each CLR professor’s section finishes the semester by holding a moot court on the same problem, with an equal number of students in the section arguing each side of the appeal to a panel of judges.

Ideas for appellate brief problems can come from many sources, including moot court case books, case materials developed by the National Institute for Trial Advocacy (NITA) or similar organizations, research sources that compile information about current federal circuit or other jurisdictional splits on various legal issues, and ideas from practicing attorneys about unresolved areas of law.<sup>2</sup> Over the years that we have taught at Northwestern School of Law, we have used a number of these methods to find or develop appellate brief assignments and have found them to be productive sources. However, one disadvantage with using some of these sources was that the problems might not involve areas of law that we were interested in exploring.

This past academic year, we decided to find a moot court problem on a topic that we found intellectually engaging and personally interesting, and which we hoped would appeal to our students as well. We also thought that it would be exciting to write briefs for a case that was in litigation. Our hope was that our students would become so engaged with the issue because of its societal relevance that they would (perhaps unwittingly) make a greater effort in the research, analysis, and writing required to produce a brief. By using a real-world problem, our students could step into the shoes of practicing attorneys and gain an appreciation for how social issues are addressed through the law.

This article will provide advice, drawn from our experience, as to how to develop a compelling and effective appellate brief problem based on a real-world case. In Part IA. of the article we discuss useful

<sup>2</sup> For more information on these and other potential sources of ideas for moot court problems, see, e.g., Kathleen A. Portuan Miller, *Creating an Appellate Brief Assignment: A Recipe for Success*, 16 *Perspectives: Teaching Legal Res. & Writing* 165 (2008).

sources for finding a real-world problem. In Part IB, we provide advice on how to assess whether the problem will satisfy your pedagogical goals. In Part IC, we discuss how to ensure that the problem is balanced so that your students can profitably argue either side of the case. In Part ID, we discuss resources that you can use to obtain or help develop documents for the problem, including accessing actual court documents from the case, and communicating with attorneys in the case to obtain additional documents that may not be publicly available. In Part IE, we discuss how to modify the “real” case to make it work as an appellate advocacy problem for a legal writing class, including when and how to create additional documents to fill in any gaps. Part II discusses benefits and challenges that we found in basing an appellate brief problem on a real-world case.

## I. Identifying an Appropriate Real-World Case

### A. Useful Sources for Identifying an Appropriate Case

The proliferation of Web sites and blogs related to interesting legal topics offers numerous places to begin a search for an interesting legal issue wending its way through the courts. For professors with an interest in civil rights litigation, the Web sites of organizations such as legal defense funds are fruitful resources. Many organizations such as the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund, and the Mexican American Legal Defense and Educational Fund have Web sites that describe cases in litigation. Because of our strong interest in civil rights law, we searched for ideas for an appellate brief problem on the Web sites of civil rights organizations that promote gay and lesbian rights, women’s rights, and racial equality.

We located an interesting case on the Web site of Lambda Legal, “a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation,

education and public policy work.”<sup>3</sup> Lambda Legal’s Web site summarized open cases in which Lambda was representing a party.<sup>4</sup> We reviewed each of the summaries and made an initial assessment of whether each might make a good brief problem.

Lambda Legal was currently litigating a case in California state court, *Ellis v. Arriaga*, which involved the scope of gay rights under California state law. Lambda Legal represented the plaintiff, Darrin Ellis. Mr. Ellis had been in a committed relationship with the respondent, David Arriaga. During their relationship, the couple met with an attorney to execute a Declaration of Domestic Partnership under California’s Domestic Partner Rights and Responsibilities Act of 2003, Cal. Fam. Code §§ 297 *et seq.* (“DPA”), which purported to give same-sex couples registered as domestic partners under the DPA the same rights as those provided to married couples. The Declaration of Domestic Partnership allows the couple to register their domestic partnership under the DPA.

Although the couple completed the registration document, unbeknownst to Mr. Ellis his partner never sent the registration to the secretary of state. When the couple terminated their relationship, Mr. Ellis brought a petition for the Dissolution of Domestic Partnership in a California trial court. The respondent moved to dismiss the petition on the grounds that a partnership never existed because the couple had never registered the partnership with the state of California. In response, Mr. Ellis argued that he should be treated as a “putative” domestic partner under Cal. Fam. Code § 2251. The trial court granted the motion to dismiss, holding that Mr. Ellis could not be treated as a putative domestic partner because he and his partner had not registered under the DPA. Lambda

“For professors with an interest in civil rights litigation, the Web sites of organizations such as legal defense funds are fruitful resources.”

<sup>3</sup> See the “About Us” section of Lambda Legal’s Web site at <[www.lambdalegal.org/about-us](http://www.lambdalegal.org/about-us)>.

<sup>4</sup> Lambda Legal’s Web site, found at <[lambdalegal.org](http://lambdalegal.org)>, is well organized. Click **Our Work** on the home page, then click **In Court and Docket (open cases)** to display a short description of each case it is currently litigating.

“In developing our domestic partnership problem, we felt that it was crucial for us to identify and articulate strong arguments for both sides. ...”

Legal appealed that decision on behalf of Mr. Ellis. The issue on appeal was whether the DPA permits same-sex couples who mistakenly believed that they had registered as domestic partners under the DPA to be treated as putative domestic partners under § 2251 of the Family Code, for the purpose of distributing the couple’s community property. Thus, the precise legal issue was one of statutory interpretation: whether domestic partners who had not registered as partners under the DPA could be treated as putative spouses are treated under California law when the relationship terminates.

Given the status of the pleadings, it did not appear that the case would be resolved for several months, which would give our students time to complete their briefs prior to any decision by the appellate court. The case interested us because it involved a controversial civil rights issue but in the context of a legal issue over statutory interpretation. Thus, we had found the best of both worlds.

#### **B. Assessing the Problem in Terms of Teaching Goals**

Despite our interest in the problem, we also needed to determine whether the case could be fashioned into an appellate advocacy problem that would serve our pedagogical goals. Like most legal writing professors, we have a number of pedagogical goals in developing an appellate advocacy problem. We want to structure a problem that gives students practice in arguing both a pure legal issue (that is, an issue requiring students to argue which of opposing or alternative legal rules the appellate court should adopt) and a mixed issue of law and fact. Other important pedagogical goals include giving our students opportunities to develop skills such as: 1) identifying and making types of legal arguments different from the rule- and analogy-based arguments they made first semester, for example arguments based on interpretation of statutory language, and arguments based on other sources of legislative intent such as legislative history or the policy behind a piece of legislation; 2) making arguments as an advocate, which is different from the objective analysis they wrote first semester; and 3) obtaining further practice in legal

research, including new types of legal research such as legislative history research. The *Ellis* problem seemed to satisfy a number of these goals. The problem presented a discrete legal issue which would require the students to use the rules of statutory construction in their analysis. In addition, because the legal issue was a novel one with only one relevant California case on the issue, the students would also have to research the legislative history of the DPA to discern the drafter’s intent.

#### **C. Assessing Whether the Issues Are Balanced So That There Are Good Arguments on Both Sides**

Another important goal in developing our appellate advocacy problem was for the issues presented in the problem to be susceptible of reasonably strong arguments on both sides. In developing our domestic partnership problem, we felt that it was crucial for us to identify and articulate strong arguments for both sides before giving the problem to the students, in order to be sure that the problem was balanced, and so that we could revise the facts if necessary to create a more balanced problem. Therefore, before making a final decision to use the domestic partnership problem with our students, we first made a detailed written outline for ourselves of the arguments that students could make for either party.

Ensuring that an appellate brief problem is balanced is especially important if the professor plans to have each student write a brief for both sides in the same case, as we did. We want our students to have an experience where they feel that they can make strong arguments in both briefs, for both sides, rather than feeling that writing the brief for one side was a lost cause. Balance is also particularly important if your students will argue the problem in moot court. As professors, we would not want to put our students—who, after all, are novice oral advocates—in a situation where the two sides must present oral argument before judges, and one side has much stronger arguments available to them than the other side. Balance in your problem is also important to create fair treatment of all students if, as in some of our colleagues’ CLR sections, students are assigned to represent one side for the entire semester, and each student writes (and rewrites) the brief for only one

side. Ensuring that the problem is balanced thus helps to achieve the pedagogical goal of assigning students to write both sides in the first place—which is to help students to learn, very concretely, that a skilled advocate’s job is to be able to represent either side of a given issue.

#### **D. Using Documents from the Case and Contacting the Attorneys for Additional Documents**

Among the important benefits of using a currently litigated case is access to the underlying documents as well as access to the lawyers who represent the parties. The Lambda Legal Web site included the brief that Lambda Legal filed in the appellate court and provided us with the heart of petitioner Ellis’ arguments. This made our job easier in terms of formulating the petitioner’s arguments.

In addition, we contacted the attorney for Lambda Legal representing the petitioner. The purpose was twofold: to see if she had any objection to our use of the case as part of our class and to see if we could obtain any other documents related to the case that we could not otherwise access. The attorney sent us the transcript of the trial court’s decision, which was not publicly available, and which we used extensively when we created a trial court opinion to give to the students.<sup>5</sup>

#### **E. Professors May Need to Modify the Real-World Case to Create a Workable Problem**

If you use an appellate brief problem from a real-world case you will need to be flexible and creative. Although the *Ellis* case presented an interesting and balanced legal issue, it did have one shortcoming: the case in its real-world form did not contain a fact issue. Because our students work in pairs and act as co-counsel during moot court, it is important to

find a problem with two discrete issues. Moreover, by creating a problem that contains a legal issue and a fact issue, students are asked to draw on different analytical skills to address each. In assessing *Ellis* we quickly concluded that we could create a fact issue: that is, assuming that the appellate court found that the DPA gave same-sex couples the right to be treated as putative domestic partners, did Mr. Ellis satisfy the requirements of California’s putative spouse statute? Under California law, whether a person is a putative spouse depends on a number of factors.

Another potential challenge in developing an appellate brief problem from a real-world case is that the record in the real-world case may not contain all the information about the case or all the types of documents that you want the appellate brief problem to include. In such a situation, you may need to create some of the “missing” documents. This was our situation in dealing with the *Ellis* case. Some of the documents from the proceedings in the California trial court, such as the parties’ affidavits, did not contain the level of factual detail that we wanted our appellate brief problem to include. Moreover, in granting a motion to dismiss the petitioner’s case, the *Ellis* trial court did not issue a written opinion but delivered an oral bench decision, of which we were able to obtain a copy from attorneys at Lambda Legal.

As a consequence, we used the somewhat sketchy available record materials as a starting point from which we wrote a fully developed trial court opinion (from which the appeal in our appellate brief problem was taken). We also created a record for the fact issue by creating affidavits signed by the parties that contained facts relative to the issue of whether Mr. Ellis satisfied the putative spouse statute. We tried to balance the facts so that students could make arguments regardless of which side they were representing. In creating the documents for our problem, we changed all the identifying details (names, etc.) to make it less likely the students could find information about the real case.

“Among the important benefits of using a currently litigated case is access to the underlying documents as well as access to the lawyers who represent the parties.”

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<sup>5</sup> We also looked up the case’s docket and monitored it throughout the semester. We found the trial docket (Superior Court of California, Orange County) for our case online by entering the appellate case docket number at <appellatecases.courtinfo.ca.gov>. From the appeals court Web site, we were able to sign up for an e-mail notification of new developments in the *Ellis* case and were able to order some of the relevant documents directly from the court.

“Because we were dealing with a real-world case that was fairly challenging to 1Ls we had to provide the students with sufficient guidance.”

Once we had added the fact issue and created documents to complete the record on appeal, we researched all of the available law as well as the legislative history materials and, as noted above, outlined the arguments that students could make for either party. The problem would not work if the legislative history was inaccessible to our students or if the available case law did not provide meaningful arguments for both petitioner and respondent. By outlining the arguments available to both sides we were able to ensure that the problem was fairly balanced. In addition, this process also helped us to determine whether the problem would be too complex, which would frustrate students.

## II. Benefits and Challenges of Basing a Problem on a Real-World Case

### A. Challenges

#### 1. Teaching Challenges

Because we were dealing with a real-world case that was fairly challenging to 1Ls we had to provide the students with sufficient guidance. We recognized that in order to help our students learn about the legal issues in the case, we would have to understand the California legislative enactment process, become familiar with the types of documents generated in that process, and be able to find the particular documents generated in the enactment of the DPA. Thus, in preparing our appellate problem, we also created some documents that summarized for the students some aspects of the California legislative process, and that gave the students advice about researching California legislative history (and in particular, the history of the DPA, to find relevant legislative statements of intent).<sup>6</sup>

Another challenging aspect of the problem was helping students feel comfortable making arguments based almost solely on statutory interpretation as opposed to relying on analogous cases to make an argument. Most of the students' prior written work in our classes had been structured around analogical reasoning in which they compared and contrasted facts of precedent cases to their issue. Given the scarcity of case law on the *Ellis* legal issue, the students had to order their arguments around the rules of statutory construction applicable to statutory interpretation. Freed from analogical reasoning, some students felt that they were “just making up arguments.” We alleviated this problem by showing our students samples of memoranda and briefs that used the rules of statutory construction in ordering an argument.

The structure of our appellate advocacy class required each student to write one brief on behalf of the petitioner and then switch sides and write a brief for the respondent. Many students, having so fully invested themselves in the petitioner's arguments, voiced concern that they could not possibly come up with convincing arguments on behalf of the respondent. Thus, we had to provide them with guidance in generating arguments once they switched sides. Lambda Legal's brief was available online, but the respondent did not oppose petitioner's appeal and did not submit a brief to the appellate court. Therefore, for purposes of our appellate brief problem, we started from scratch in developing the respondent's best arguments on appeal. Once we generated those arguments we created a document titled “Questions to Consider in Formulating Arguments on Behalf of Respondent,” designed to help the students transition from writing from the petitioner's perspective to writing from the respondent's perspective.

<sup>6</sup> For example, two of the summary documents that we wrote were “Basic Chronology of the Legislative History of the DPA” (listing steps in the chronology and locations where students could find particular relevant legislative history documents) and “The California Legislative Process and the Documents It Generates” (compiling and explaining information that we found in various documents on the free Internet regarding this topic).

These summary documents also pointed the students to some useful online guides that our own research uncovered about researching California legislative history. For example, we pointed the students to: 1) Finding California Legislative History, found at <[www.law.berkeley.edu/library/dynamic/guide.php?guide=general/calLegis](http://www.law.berkeley.edu/library/dynamic/guide.php?guide=general/calLegis)>, 2) Finding California Legislative History, found at <[www.usfca.edu/law\\_library/calleg.html](http://www.usfca.edu/law_library/calleg.html)>, and 3) Overview of Legislative Process, found at <[leginfo.ca.gov/bil2lawx.html](http://leginfo.ca.gov/bil2lawx.html)>.

## 2. Handling Controversial Subject Matter

Many interesting current legal issues involve controversial social and political issues. We knew that selecting a topic involving gay rights might make some students uncomfortable. In the past, we had both steered clear of creating appellate brief problems that might remind a student of a painful experience in his or her past. The *Ellis* case, however, raised a unique legal issue on a more general rather than personal level. Nevertheless, in anticipation that some of our students might be uncomfortable with the subject matter, we strategized ways to address these concerns should they arise. However, no student ever voiced objection to the problem. Part of this may be due to the fact that all of our class discussions primarily focused on support for the various legal arguments of the parties. Our experience was that students applied their analytical skills irrespective of their personal feelings on gay rights.

## 3. Preventing Students from Accessing the Real Briefs of the Real-World Case

Some people hesitate to use real cases as the basis for an appellate brief problem because they are concerned that the students will be able to access the briefs written by the parties in the case. Although we appreciated these concerns, they did not outweigh the many teaching benefits of the *Ellis* problem. Thus, as a safety measure, we instructed students that they could not read or rely on briefs from the underlying case, or the briefs from the relevant cases they were using in their analysis, and that doing so would be an honor code violation. We also familiarized ourselves with those briefs in order to recognize them should they surface in our students' work. Fortunately, our students appeared to follow our rules.

## 4. Risk That the Real Case Will Be Decided While Students Are Writing the Briefs

When we selected the *Ellis* case for our appellate problem we made a calculated guess that the California appellate court would not issue a decision prior to the conclusion of our semester. This prediction was based on our review of the docket for the case. The docket reflected the briefing schedule for the appeal and indicated that we had a few months before the appellate court would decide the case.

The real appeal was decided a few weeks after the term ended. We forwarded the decision to our students.<sup>7</sup> The students found it rewarding to evaluate the appellate court's opinion in light of the careful analysis they had given the issues all semester. And, in fact, the appellate court's opinion did not have nearly the same thorough level of analysis that we saw in our students' work. We were lucky that the *Ellis* case was not decided until after we had completed our work for the semester, but if it had been decided earlier we would simply have "protected" the class from being influenced by the decision by extending our prohibition against reading briefs in this or similar cases to a prohibition against reading the appellate court's opinion.

## 5. Difficulty in Using the Appellate Brief Problem Again if the Appellate Court Decides the Issue

Now that the California court has decided the issue on appeal in *In re Domestic Partnership of Ellis*, we won't be able to use the problem again if we set it in California. The inability to reuse an appellate problem is certainly a factor to consider in deciding to develop a problem based on a real-world case, since professors put a great deal of work into developing appellate problems, and typically hope to reuse them in subsequent academic years. We recognized this risk going in, and determined that on balance, the challenge and excitement of working with this problem outweighed the risk that we would not be able to reuse the problem.

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<sup>7</sup> The decision in the real case, *In re Domestic Partnership of Ellis*, 162 Cal. App. 4th 1000, 76 Cal. Rptr. 3d 401 (Cal. Ct. App. 4th Dist. 2008), was released on May 6, 2008, about six weeks after our students submitted their second brief and about a month after they had their moot court oral arguments. The Court of Appeal reversed the trial court's decision and ruled for Mr. Ellis, holding that under the DPA "a person's reasonable, good faith belief that his or her domestic partnership was validly registered with the California Secretary of State entitles that person to the rights and responsibilities of a registered domestic partner, even if the registration never took place." 162 Cal. App. 4th at 1003, 76 Cal. Rptr. 3d at 402.

Shortly thereafter, on May 15, 2008, in a separate case on a separate but related legal issue, the California Supreme Court in *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008), ruled that barring lesbian and gay couples from marriage violates the state constitution.

“Many interesting current legal issues involve controversial social and political issues. We knew that selecting a topic involving gay rights might make some students uncomfortable.”

“Most importantly, the students felt that they were engaged in the type of work practicing lawyers do rather than working on a contrived legal issue.”

Another alternative to simply “retiring” the problem would be to try to modify it and reset it in another jurisdiction that has a similar statutory scheme of domestic partnership, but has not yet determined the precise issue that was before the court in *Ellis*. In addition to California, other jurisdictions that have some type of domestic partnership or civil union statutes include Connecticut, the District of Columbia, Hawai’i, Maine, New Hampshire, New Jersey, Oregon, Vermont, and Washington.<sup>8</sup>

## B. Benefits

### 1. The Problem Improved the Students’ Skills

The *Ellis* problem achieved an important pedagogical goal of teaching students how to research and write about an issue of statutory interpretation. Over the course of a semester, they became familiar with the legislative history of a statute and learned the rules of statutory construction, and they learned to use those sources to construct a legal argument. Likewise, the problem aptly illustrated for the students the debate as to whether a statute’s plain language or its underlying objectives govern a court’s interpretation of a statute.

The problem also taught the students that the standard of review can help shape arguments on appeal. In the *Ellis* case, the issues involved an appeal from the trial court’s grant of summary judgment to the respondent. One of the petitioner’s best arguments on the issue of whether he could be treated as a putative spouse (the fact issue) was that there were issues of material fact. First-year students, however, typically over-argue and attempt to prove that their client should win the case as a matter of law. The *Ellis* case taught the students that often the best argument is simply convincing the appellate court that the trial court misapplied the standard requiring reversal.

Finally, and most importantly, the students learned to analyze both sides of a legal issue. By the end of the semester, students who so firmly felt that the

petitioner should win on appeal become strong advocates for the respondent. The students expressed surprise that they were able to create convincing arguments once they switched sides. Thus, although we often teach students in appellate advocacy to anticipate the other side’s arguments and rebut them, here we took the process one step further and pushed the students to truly stand in the shoes of their opponent. As practicing attorneys in our former life, we tried to impress upon our students that forcing them to switch sides was a luxury that practice would, for ethical reasons, never afford them.

### 2. Students Get the Opportunity to Do Work Approximating That of Experienced Lawyers

Any of the challenges noted above were far outweighed by the benefits of using a real-world case. Most importantly, the students felt that they were engaged in the type of work practicing lawyers do rather than working on a contrived legal issue. The issues presented by *Ellis* were topical, relevant, and had no easy answers. We repeatedly reiterated to our students that issues with no readily apparent answer will arise in legal practice. By working through the *Ellis* problem in our class, our students gained some confidence in their abilities to handle a difficult and novel legal issue.

Because the issue of gay rights was topical it seemed to hold the students’ interest regardless of their personal views on the subject matter. Although appellate problems based on circuit splits, for instance, may engage students intellectually, our problem seemed to engage students not only on an intellectual level but on a personal level as well.

The students also learned to make legal arguments irrespective of their personal views on an issue. Many current issues in civil rights revolve around notions of fairness and morality. The *Ellis* case gave students the opportunity to translate these broader concepts into specific and convincing legal arguments.

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<sup>8</sup> See the Lambda Legal Web site at <[www.lambdalegal.org/our-work/states](http://www.lambdalegal.org/our-work/states)>.

## What Attorneys Can Learn from Children’s Literature, and Other Lessons in Style

By Benjamin R. Opipari

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U.S. Supreme Court Justice Potter Stewart, when asked to define pornography, famously said that it was hard to define, “but I know it when I see it.” The same can be said for rhetorical style. Because of its nebulous nature, some teachers shy away from the teaching of style. Instead, they teach Rules. Some useful (commas, semicolons), others made up (split infinitives, beginning a sentence with *and* or *but*). Brock Haussamen, in *Revising the Rules: Traditional Grammar and Modern Linguistics*, writes that rules like the split infinitive and final position prepositions have achieved “grim fame” because “the errors are exceptionally easy to spot. Finding them requires almost no knowledge of grammar; one need only scan the word order to find a word between *to* and a verb, or a concluding preposition. For those over the decades who have worried that their grip on grammar is not what it should be, these are two rules that have been easy to grasp and easy to wield.”<sup>1</sup> What Haussamen is saying is that teaching grammar and punctuation is a safe proposition: violations of the rules are easy to spot and are easy to teach. Teaching style, on the other hand, is hard.

Style, or *elocutio*, is one of the five canons of classical rhetoric. Writers have defined it in many ways. Swift, for instance, called it “proper words in

proper places.” The Greeks thought that good style evolves when the writer takes the thoughts collected by invention and puts them into words so that they can be delivered orally. John Henry Newman had probably the most appropriate definition for this discussion: “Style is a thinking out into language.” Both the Greeks and Newman speak to what I consider the golden rule about good style: it is euphonic and natural sounding. It just sounds good.

Style is not ornamentation or the artificial gussying up of language. This was never the definition intended by the Greeks. With style, according to Edward P.J. Corbett and Robert J. Connors in *Classical Rhetoric for the Modern Student*, “[M]atter must be fitted to the form, and form to the matter. ... It is another of ... the means of arousing the appropriate emotional response in the audience and of the means of establishing the proper ethical image.”<sup>2</sup> It is easy to see, then, that style should be of foremost importance to the legal writer.

A writer’s goal should be to project a unique personality. We recognize the best writers without ever looking at the name on the cover. Samuel Taylor Coleridge said that the test of perfect style was “its untranslatable-ness in words of the same language without injury to the meaning.” Coleridge means that with perfect style the writer’s words are so unique that they can be written no other way. And it’s not because the writer knows how to use commas; it’s because she has style. Unfortunately, many people consider the mark of good writing to be the ability to avoid split infinitives and end prepositions and the ability to use a comma properly. But impeccable grammar and good writing are not necessarily related: slavish devotion

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<sup>1</sup> Brock Haussamen, *Revising the Rules: Traditional Grammar and Modern Linguistics* 138 (2000).

<sup>2</sup> Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 338 (4th ed. 1999).

“Varying your sentence length, of course, involves mixing up the distance between the periods. Periods are those elements of punctuation that create pauses.”

to Rules can still yield atrocious writing. Teachers of writing in all disciplines—legal or otherwise—must understand that good pedagogy is as much about what you can do as a writer as it is about what you are not “allowed” to do.

In her essay “On Style,” Emily Hiestand writes that stylish prose is “language written with attention to texture and tone, imagery, music, and the resonance between words.” She says that “Language is not a conveyor belt trundling a cargo or something else called ‘the idea’ but is itself integral to the idea. . . . Idiom, cadence, and the leanness or languor of language all work connotatively to communicate, often as strongly as an overt message.”<sup>3</sup> Hiestand’s definition is one of my favorites, but it’s important to add that we can break down style into two categories: variety and symmetry, two seemingly oppositional categories that work together to produce stylish writing.

In *Perrine’s Sound and Sense: An Introduction to Poetry*, Thomas R. Arp and Greg Johnson say that all art consists of “giving structure to two elements: repetition and variation.” They continue:

All things we enjoy greatly and lastingly have these two elements. We enjoy the sea endlessly because it is always the same yet always different. We enjoy a baseball game because it contains the same complex combination of pattern and variation. . . . We like the familiar, we like variety, but we like them combined. If we get too much sameness, the result is monotony and tedium; if we get too much variety, the result is bewilderment and confusion.<sup>4</sup>

In the context of legal writing, then, style involves an ideal combination of these two elements.

Variety, for example, is important when constructing sentences. Most grammarians advocate a sentence length between 20 and 25

words. I will not quibble with this rule. But when people run sentences through computer programs and algorithms to gauge readability, much like accountants crunch numbers, I am troubled.

We should instead trust something far simpler: our ear. Length should not always be the primary determinant as to whether the sentence makes sense, because I have seen incoherent 10-word sentences and 100-word sentences of literary artistry. The writer who relies too heavily on readability programs will produce, not surprisingly, robotic prose without freshness and variety. And without variety, the reader becomes bored. Furthermore, telling students to follow the word rule can stifle creativity and expression. Using a computer to assess readability lets the writer off the hook when it comes to revision, and there is no substitute for the ear as the ultimate arbiter of coherence. In short, sentence length should be secondary to clarity. Use common sense, not a formula that looks like the quadratic equation.

Varying your sentence length, of course, involves mixing up the distance between the periods. Periods are those elements of punctuation that create pauses. However, other marks of punctuation—the comma, semicolon, and colon—also create pauses, and good writers count these marks as well when they consider variety. Thus, to avoid choppy writing, sometimes it’s more about the pauses than the periods. Richard Lanham, in his book *Revising Prose*, advocates that writers should write out each sentence on a sheet of paper and mark off its rhythmic units with a slash. For example, read the following fragment aloud: “One of the factors that limits and warps the development of a theory of composition and style . . .” You probably sound like a chugging steam engine—not good. Lanham divides the fragment into beats:

One of the factors/  
that limits and warps/  
the development of a theory/  
of composition and style . . .

This sentence also reminds me of a steam engine: “At least three legal concepts govern how an accused infringer bound by a permanent injunction related to a patent that has been declared invalid in a later

<sup>3</sup> Emily Hiestand, “On Style” in *Telling True Stories* 198, 199 (2007).

<sup>4</sup> Thomas R. Arp & Greg Johnson, *Perrine’s Sound and Sense: An Introduction to Poetry* 172 (2002).

proceeding may attempt to avoid injunction enforcement.” Breaking it into rhythms, we have

At least three legal concepts/  
govern how an accused infringer/  
bound by a permanent injunction/  
related to a patent/  
that has been declared invalid/  
in a later proceeding/  
may attempt to avoid injunction enforcement/

When revising this sentence, the writer would be wise to scrap it entirely and rewrite from scratch, breaking it up into two sentences.

Another way to achieve variety is to scatter short sentences throughout your writing. From an argumentative standpoint, short sentences are more emphatic. But like any stylistic device, overuse blunts their effectiveness and also creates choppy sentences. Used effectively, they create a dramatic impact, even a punch in the gut, especially at the end of a paragraph. Witness this paragraph from Ariel Levy’s article “The Lonesome Trail,” a profile of Cindy McCain in a recent issue of the *New Yorker*:

Many of McCain’s friends noted that after graduation she took a low-paying job as a special-education teacher at Agua Fria High School, near Phoenix, rather than a more lucrative position at her father’s company. McCain, too, frequently refers to his wife’s teaching background. She worked at Agua Fria for just one year.<sup>5</sup>

Levy’s paragraph is rhetorical brilliance. It is unquestionably argumentative. We know her position, even though she never explicitly states it: she is critical of the fact that most people overstate Cindy McCain’s teaching experience. Yet there is not one word of criticism here. The brevity of the last sentence carries the weight of the entire point. Such a short sentence, yet so much meaning. Levy’s end point is reinforced by the contrast between the long opening sentence and the final short one.

<sup>5</sup> Ariel Levy, *The Lonesome Trail*, *New Yorker*, Sept. 15, 2008, at 56.

In fact, she drives her point home by ordering her sentences in the paragraph from long to short. Had she written, “McCain, too, frequently refers to his wife’s teaching background, even though she worked at Agua Fria for just one year,” her rhetorical power would have evaporated.

In another example, notice the author’s emphasis at the end of this paragraph. So simple, and yet so powerful:

In the end, though, this story, like so many others before it, is not just a story about sex or a story about hypocrisy. It is a story about how power corrupts, or about how power destroys judgment. Powerful people like Spitzer seem to come to think of themselves as untouchable, as somehow entitled to indulge themselves in this way. What Spitzer is, though, is much simpler than that. He is an idiot.<sup>6</sup>

Emphasis in the form of concision demonstrates confidence and control, traits necessary to win over your audience in an argument. Look, for example, at Hollywood stars of the 20th century who exude confidence, control, and power. Robert DeNiro, Al Pacino, Clint Eastwood, John Wayne, Paul Newman, and Bette Davis are just a few. Their characters are not blathering, verbose fools. They speak few words, but these few words create trust and confidence in their audience. They make a point, refuse to dwell, and move on. They do not repeat themselves. Argumentative writers with an abundance of ethos exhibit the same confidence, control, and power through concise writing. They confidently state a point once, state it well, and continue. We follow those with confidence because they exude credibility. So be Clint Eastwood, not Ben Stiller. If you repeat the same point over and over, you’ll sound like you don’t believe your argument. The more you explain yourself, the less authoritative you appear.

<sup>6</sup> Bill Emmott, *Spitzer, Hypocrite and Idiot, Must Resign*, March 11, 2008, <[newsweek.washingtonpost.com/postglobal/bill\\_emmott/2008/03/spitzer\\_must\\_resign.html](http://newsweek.washingtonpost.com/postglobal/bill_emmott/2008/03/spitzer_must_resign.html)>.

“Emphasis in the form of concision demonstrates confidence and control, traits necessary to win over your audience in an argument.”

“As readers, we expect to know quickly what the subject is and what the subject is doing. If we have to wait, we get impatient.”

Good writers recognize when their sentences are too long. However, sometimes instead of rewriting, they get nervous and start inserting commas in an effort to slow the momentum. This usually makes things worse. Consider this unwieldy thing from Robert Kaplan in his essay “What Rumsfeld Got Right” in a recent issue of the *Atlantic*:

No firm believer in democratic transformation, he probably assumed, as did many other people at the time, that any new regime in Baghdad, even a military one, would be a dramatic improvement, in strategic terms for the U.S. and in human-rights terms for the Iraqis.<sup>7</sup>

Too many commas, too many clauses, too many misreadings. This sentence is best broken into two sentences. One version, using a short first sentence, would emphasize that he is no firm believer:

Rumsfeld was no firm believer in democratic transformation. He probably assumed, as did many other people at the time, that any new regime in Baghdad, even a military one, would be a dramatic improvement, in strategic terms for the U.S. and in human-rights terms for the Iraqis.

But I can probably do one better:

Rumsfeld was no firm believer in democratic transformation. Like many other people at the time, he probably assumed that any new regime in Baghdad, even a military one, would be a dramatic improvement in both strategic terms for the U.S. and in human-rights terms for the Iraqis.

Writing critics today advocate varying sentence length and style. Sentences are often too long because they are verbose; most novice writers create long sentences that can be halved with no loss of meaning. We can embrace long sentences when they can no longer be trimmed, when they are taut and full of muscle. And yet long sentences can be difficult to understand. It's often the distance

between the subject and the verb that hinders comprehension more than sentence length. In fact, even a short sentence can be challenging if there is too much distance.

As readers, we expect to know quickly what the subject is and what the subject is doing. If we have to wait, we get impatient. With too much separation between the subject and verb, the subject drops out of our short-term memory and we start over. Because the most important words in a sentence are the subject and verb, writers should put them as close together as possible. This is, after all, why short sentences are so emphatic: the subject and verb are usually next to each other. Consider this sentence:

Company X's provision of promotional materials where Smith directed customers to use the patented procedure, along with Smith's admission that it promoted and sold infringing columns to its customers with the knowledge that its customers would load the column in a manner that infringed Company X patent, proved overwhelming.

In this case, the writer probably recognized the enormous distance between the subject and the verb, so she added commas to surround the dependent clause in hopes that the pauses would aid in clarity. In theory, this is a wise idea. But there's a problem: dependent clauses by definition are subordinate, so the information contained in them is of secondary importance. Thus, the writer may have unintentionally given less emphasis to the part of the compound subject that actually deserves equal emphasis.

We encounter this stylistic problem in all types of sentences. Sometimes, even short sentences can be hard to understand:

The distribution of poems, posters, and pamphlets that the Chinese government finds political is illegal.

As a writer, your choice of verbs affects the clarity of your sentence. Most writing experts caution against using the verb to be. Jack Hart, in his book *A Writer's Coach: The Complete Guide to Writing Strategies That Work*, writes, “Linking verbs defy the whole

<sup>7</sup> Robert D. Kaplan, *What Rumsfeld Got Right*, *Atlantic*, July/August 2008, at 64.

idea of a verb. At their roots, they're mere definitions. They can convey opinion. But they can't convey action. . . . Because they lack action, linking verbs work like a sea anchor on a sailboat, crippling something that should be sleek and speedy."<sup>8</sup>

Verbs should be expressive and concrete, and the verb *to be* merely expresses a state of existence. The best genre for vivid verbs is children's literature. The verbs in these stories allow the reader to envision the action in the same manner that the writer intends. The job of a children's author, after all, is to build the beginning reader's vocabulary, and these authors don't do this with *am*, *is*, *are*, *was*, and *were*. And they don't use *run* when they can use *scamper*. I discovered this when reading one night to our five-year-old daughter. For example, in this passage from *Forest Fire!* by Mary Ann Fraser, the reader is in the middle of the fire:

With the elk gone, a ground squirrel ventured from his burrow. Cautiously he scampered across the brown matted pine needles. Settling on a log, he sunned in one of the few shafts of light that found its way through the dense tree branches. Suddenly a gust of wind ripped through the trees. There was a sound of splintering wood. The ground squirrel leaped out of the way just as a lodgepole pine, killed by bark beetles, fell to the ground.

The verbs in this sentence convey pure action: *ventured*, *scampered*, *settling*, *sunned*, *found*, *ripped*, *was*, *leaped*, *killed*, *fell*. Only one *to be* verb in the bunch. But to see the power of Fraser's words better, I'll rewrite it in a much less interesting way:

With the elk gone, a ground squirrel left his burrow. Cautiously he ran across the brown matted pine needles. After choosing a log, he lay in one of the few shafts of light that found its way through the dense tree branches. Suddenly he heard a gust of wind in the trees. There was a sound of splintering wood. The ground squirrel jumped out of the way just as

a lodgepole pine, killed by bark beetles, fell to the ground.

Action-filled verbs are critical to the persuasive narrative in the statement of facts. Good verbs are subtly persuasive. For example, what Senator Larry Craig—he of the “wide stance” in the Minneapolis bathroom—termed his “glancing” into the bathroom stall, the government actually termed “looking” into the stall. A “glance” is quick, but a “look” implies something more deliberate, a meaning that suits the government's case. But beware of verbs that sound too overbearing. A judge might have balked had the government used a verb like “leered” or “glared.” In a recent case, an attorney used the phrase “in a recent letter, you complained that . . .” in a communication to opposing counsel. No one likes to be called a complainer, and using this verb instead of a simple “said” was too strong and could have angered the reader.

As I mentioned earlier, understanding good style means reframing how you perceive style: it's not what it looks like, but what it sounds like. Good writing has rhythm, or a recognizable pattern of sounds through time. Take, for example, Caesar's, “I came, I saw, I conquered.” The repetition of *I*, the alternate use of *c*, and the similarities of the initial vowels all create rhythm. Caesar did not speak English, of course. But he did say *veni, vidi, vici*, a phrase more euphonic than its English translation anyway.

Style-conscious writers take the time to listen to their words, to hear how the words roll off the tongue and create pleasure in the reader. The sounds on the page contribute to the stylistic power of their piece. This is why writers should read everything they write—everything—out loud. They'll catch repetition, awkwardly worded sentences, long sentences, fragments, and other examples of poor sentence construction. But they'll also catch tongue twisters and awkward sound combinations. For example, read this aloud: “The pact affected union workers directly connected with the election of the new leader.” Most readers are distracted by repetition of the *-ect* sound.

“Style-conscious writers take the time to listen to their words, to hear how the words roll off the tongue and create pleasure in the reader.”

<sup>8</sup> Jack Hart, *A Writer's Coach: The Complete Guide to Writing Strategies That Work* 80 (2006).

“One way of achieving balance is through antithesis, the use of parallel structure to emphasize contrast. In antithesis, the balance is in the sentence structure, not the syllables.”

As Corbett and Connors say, “The sentence that is difficult to enunciate is often a grammatically or rhetorically defective sentence.”<sup>9</sup>

Professional writers can learn a great deal from poetry regarding the impact that sounds have on the reader. Many poetic techniques can be an aid in persuasion. In *Approaching Poetry*, Peter Schakel and Jack Ridl write of the attempts that have been made “to associate individual vowel and consonant sounds with specific feelings or meanings: low vowels with power or gloominess; the nasal consonants (*m, n, ng*) with warm, positive associations (*mother*); *sn* with usually unpleasant things (*snake, sneer*); and *st* with strong, stable, energetic things.”<sup>10</sup> Pharmaceutical companies certainly do this, using sounds to their advantage when devising product names. They create names filled with vowels that keep the mouth open, a position associated with excitement or happiness. Think, for instance, of *Viagra* or *Allegra*.

Other techniques like alliteration can work for the legal writer, so long as they are not overused. A legal brief should not look like verse. Either assonance (repetition of vowels) or consonance (repetition of consonants) can be pleasing to the ear. They contribute to meaning by emphasizing the words in which the repetition appears and by strengthening the connection between these words. Alliteration is not the sole domain of poets. For instance, in *Profiles in Courage*, John F. Kennedy wrote, “Already American vessels had been searched, seized and sunk.”<sup>11</sup> The alliteration in the verbs adds urgency to Kennedy’s message by emphasizing the action.

Euphony is also the defining characteristic of nursery rhymes and children’s songs. In these cases, the iambic beat (stressed-unstressed pattern) aids in memory. We all know the line “Twinkle twinkle little star,” but try singing it this way: “Little star, twinkle twinkle.” Or this: “Twinkle, little star,

twinkle.” As you can see, rearranging the words alters the beat, making the phrase much less memorable (and much less fun). The latter two versions are no longer iambic, and the small change renders them unwieldy.

Besides variety, though, readers also like symmetry and consistent patterns. Proper balance in a sentence makes it more readable and natural sounding. Writers have a variety of ways to create balance in their sentences. Because we subvocalize (that voice in our head when we read silently), balance can come in the form of syllables as well as words.

One way of achieving balance is through antithesis, the use of parallel structure to emphasize contrast. In antithesis, the balance is in the sentence structure, not the syllables. John F. Kennedy once said, “United there is little we cannot do in a host of cooperative ventures. Divided, there is little we can do—for we dare not meet a powerful challenge at odds and split asunder.” There is antithesis in Kennedy’s words between *united* and *divided* and *little we cannot do* and *little we can do*. In his classic work *Rasselas*, Samuel Johnson wrote, “Marriage has many pains, but celibacy has no pleasures.”<sup>12</sup> Antithetical clauses roll off the tongue and leave the reader with a sense of finality.

When two grammatical elements are equal in structure and in length, this is known as isocolon. They make for phrases that resonate in the reader’s mind, which is why isocolons can be found in advertising slogans:

It takes a licking, but it keeps on ticking (Timex)  
I’m a Pepper, he’s a Pepper, she’s a Pepper, we’re  
a Pepper, wouldn’t you like to be a Pepper, too?  
(Dr. Pepper)

Isocolons have also been used in literary exploits:

The louder he talked of his honor, the faster we  
counted our spoons. (Ralph Waldo Emerson,  
*The Conduct of Life*)<sup>13</sup>

<sup>9</sup> Corbett & Connors, *supra* note 2, at 363.

<sup>10</sup> Peter Schakel & Jack Ridl, *Approaching Poetry* 119 (1997).

<sup>11</sup> John F. Kennedy, *Profiles in Courage* 176 (2003).

<sup>12</sup> Samuel Johnson, *Rasselas, Prince of Abyssinia* 76 (2007).

<sup>13</sup> Ralph Waldo Emerson, *The Conduct of Life* 211 (AMS Press 1968) (1860).

Understandably, some readers fret at the prospect of isocolons in legal writing, especially when presented with advertising jingles and impressionist writers as examples. But isocolons, given their repetition and structure, are naturally euphonic. Read Emerson's quote aloud: the rhythm makes his words almost lyrical. This is one of the reasons why Emerson is so often quoted. Sure, the transcendental content of his writings is useful, but few writers approach his grace. Isocolons make it much more likely that what you write will be memorable, and that's a good thing for any lawyer whose brief is only a small part of a judge's weekly readings.

In a strict sense, you can also achieve balance by constructing sentences that contain clauses with an equal number of syllables. This can be done in two ways: with two clauses of equal length (*The police looked for the suspects, but they were nowhere to be found*), or with an opening and closing clause of equal length. Jack Hart gives us this example from a story in the *Washington Post*: "Sirhan Sirhan, who wrenched aside the 1970s with the force that history gives only to political assassins, wants to go home." In this sentence, the dependent clause in the middle is bookended by two phrases that each contain four syllables. The subordinate clause, in Hart's words, "acts like a fulcrum by supporting the parallel elements at the end."<sup>14</sup>

Ernest Hemingway told George Plimpton that he rewrote the ending to *A Farewell to Arms* 39 times for the simple reason that he "wanted to get the words right." While no attorney has the time to rewrite anything 39 times, Hemingway's point still applies: achieving a mastery of style involves revision, which often can mean rewriting. Within the confines of time, writers must be willing to rewrite something until it sounds good. But good style is paradoxical: it is often about ensuring that the reader does not recognize it. In other words, good prose writers do not draw attention to their style. Once the audience becomes consciously aware of a writer's stylistic techniques (*I love that*

*alliteration!*), they become sidetracked, focused more on technique than content. In the seamless and stylistic world that Emily Hiestand describes, style is integral to the writer's idea, helping to usher it off the page and into the reader's consciousness. Excessive alliteration, or an abundance of short sentences, will draw attention from the idea being posited to the words themselves on the page—an idea that only New Critics could love.

Judges read a lot. A whole lot. And I can't imagine that archaic and formulaic writing is a welcome proposition to anyone who reads as much as they do. Attorneys, then, should focus on prose that is engaging and lively.

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“Ernest Hemingway told George Plimpton that he rewrote the ending to *A Farewell to Arms* 39 times for the simple reason that he ‘wanted to get the words right.’”

## 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](http://west.thomson.com/newsletters/perspectives).

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<sup>14</sup> Hart, *supra* note 8, at 133.

### Compiled by Barbara Bintliff

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Ted Becker & Rachel Croskery-Roberts, *Avoiding Common Problems in Using Teaching Assistants: Hard Lessons Learned from Peer Teaching Theory and Experience*, 13 *Legal Writing* 269–312 (2007).

Examines the role of legal writing teaching assistants, discussing both the benefits to be gained by using TAs and the potential pitfalls that are inherent in the process. The article is organized into three parts: an overview of surveys relating to the use of TAs and the extent to which TAs are used; the benefits of using TAs in the classroom; and the problems associated with using TAs, including a discussion of how such problems may be avoided.

Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-percolation After Rapanos*, 15 *Va. J. Soc. Pol’y & L.* 299–354 (2008).

Using the *Rapanos* case (*Rapanos v. United States*, 126 S. Ct. 2208 (2006)), in which the Court dealt with the issue of determining what are “navigable waters” in the context of the Clean Water Act, 33 U.S.C.A. § 1362(7) (West 2005)) as a case study, the author discusses the problem with plurality opinions: that they may be precedential or may amount to little or nothing. This six-part article examines the role of precedent in law; provides a general background on *Rapanos* and the controversy surrounding its interpretation; and offers an introduction to the then-existing doctrine’s ability “to assist jurists and others who are wrangling with precedents laden by pluralities.”

Abstract. It uses *Rapanos* as an illustration of the difficulty of extracting precedent from opinions rife with concurrences; explains “the potential effect of pluralities on the percolation of legal issues”; and describes “the judicial motives associated with concurrences.” *Id.* at 304. (Note: the authors, writing as Berkolow, are: Melissa M. Berry, Donald J. Kochan, and Matthew Parlow, all from Chapman University School of Law.)

Ruth Bird, *Law of the Pacific Islands: A Guide to Web Based Resources*, LLRX.com, July 31, 2008 (available online at <[www.llrx.com/features/pacific.htm](http://www.llrx.com/features/pacific.htm)>).

“Ruth Bird’s guide is expertly updated by Dianne Thompson and Anna Matich, each of whom possesses comprehensive legal research expertise on this topical area. Editor’s note: This article is an update to the *Law of the Pacific Islands: A Guide to Web Based Resources*, (published October 16, 2000 and April 15, 2002).” Publisher.

Nancy Carol Carter, *American Indian Water Rights: Law and Research*, 27 *Legal Reference Services Q.* No. 1, 2008, 1–48.

The article explains U.S. water law briefly, identifies the legal basis of Indian reserved water rights, and presents case studies illustrating tribal efforts to secure water rights, many of which have been the object of dispute for decades. Research considerations and a selected, annotated bibliography are included.

Barbara Chernow, *Beyond the Internet: Successful Research Strategies*, 2007 [Lanham, MD: Bernan, 138 p.]

Chernow provides a guide to research that highlights the limitations of the Internet. Her book is a philosophy of research and learning that points to the depth of what is available only in print, and the benefits of research in print that simply can’t be matched online. While acknowledging the usefulness of Internet research, Chernow illustrates how students can improve their research experience by learning how to supplement online findings with those available in traditional and archival print sources.

Leslie Larkin Cooney, *Giving Millennials a Leg-Up: How to Avoid the “If I Knew Then What I Know Now” Syndrome*, 96 Ky. L.J. 505–525 (2007–2008).

Offers the theory that “Millennials,” the generation born since 1981, are increasingly hands-on learners who may stand to learn the most through clinical education. Using a clinical approach can benefit this generation by teaching them using a method to which they will best adapt and from which they will gain the most effective education.

Cara Cunningham & Michelle Streicher, *The Methodology of Persuasion: A Process-Based Approach to Persuasive Writing*, 13 Legal Writing 159–205 (2007).

Examines the teaching of persuasive writing and the challenges associated with such a curriculum. The article discusses both the limitations of a “learn by example” approach to teaching persuasive writing, and the method developed by the authors for teaching it.

Diana Donahoe, TeachingLaw.com, 2007 [Waltham, MA: Aspen Publishers]

TeachingLaw.com is an online, interactive book platform for legal research, writing, and citation that includes course management capabilities for assignment creation and distribution. The author is professor and chair of Legal Research and Writing at Georgetown University Law Center. TeachingLaw.com integrates a course of law into an interactive, electronic format and paperless classroom experience, providing professors with all the content and resources they need to teach and manage their course. Above all, its online platform gives professors an innovative way to engage their students in class by utilizing multimedia examples, interactive exercises, and self-assessments. Publisher.

George D. Gopen, *CCISSR: The Perfect Way to Teach Legal Writing*, 13 Legal Writing 315–330 (2007).

Gopen’s keynote address offers suggestions for ways to teach legal writing that move away from traditional methods, the latter often used from the time students are small children. He suggests emphasizing the

interaction between good writing and legal thinking, rather than teaching writing in a vacuum. He introduces a new teaching method to accomplish this: Color Coding for the Interpretation of Syntactic and Substantive Relationships (CCISSR), which uses colors to highlight, differentiate, and answer essential questions about a piece of writing.

Sanford N. Greenberg, *Legal Research Training: Preparing Students for a Rapidly Changing Research Environment*, 13 Legal Writing 241–268 (2007).

Based on results from a survey of practicing attorneys, the author explores the quandary presented by an increasingly Internet-based research approach. Weighs the merits of teaching students to research in print, as contrasted with today’s tech-savvy students who may see printed materials as obsolete.

Kenney F. Hegland, *Introduction to the Study and Practice of Law in a Nutshell*, 5th ed., 2008 [St. Paul, MN: Thomson West, 462 p.]

“Like other introductory books, [this book] covers reading and briefing cases, preparing for class, outlining and study groups, and taking exams. Exercises are included so that [the reader] can apply what [has been] learned. In addition to these essentials, the book focuses on what is often elusive: legal analysis, why courts follow precedent, how cases are applied and distinguished, and how ambiguous language is interpreted.”  
Publisher.

Gerald F. Hess, *Collaborative Course Design: Not My Course, Not Their Course, but Our Course*, 47 Washburn L.J. 367–387 (2008).

Explores the idea that students in higher education should play a larger role in crafting their own education. This four-part article discusses empirical research on the topic, summarizes literature on effective syllabi, explores examples of student participation in course design at various levels of higher education, and analyzes how and when such collaborative efforts should be employed.

Marci Hoffman & Mary Rumsey, *International and Foreign Legal Research: A Coursebook*, 2008 [Leiden, The Netherlands: Martinus Nijhoff Publishers, approx. 324 p.]

“[E]mphasizes legal research strategies applicable across the landscape of research sources. Topics covered in the book range from a general chapter on basic concepts to five chapters on particular subjects of international law. Each major aspect of research, such as using periodical indexes, is treated once in depth. Elsewhere in the book, other sections refer readers to that in-depth treatment, while adding information specific to the topic being discussed. A companion website is also made available to help users of the book stay up-to-date on new sources and strategies.” Publisher.

Dennis R. Honabach, *Responding to “Educating Lawyers”: An Heretical Essay in Support of Abolishing Teaching Evaluations*, 39 U. Tol. L. Rev. 311–322 (2008).

Honabach proposes eliminating the use of teaching evaluations because they do not help law professors become better instructors. Such evaluations may be biased and do not necessarily reflect a professor’s actual ability, may ask the wrong questions, and overlook numerous elements that make up a student’s experience. The author argues that the focus of evaluating a teacher should be on the students’ learning, not the instructor’s instruction.

H. Kumar Percy Jayasuriya & Melanie Oberlin, *Admiralty and Maritime Law Articles Published in Non-Maritime Law Journals* (2007), 39 J. Mar. L. & Com. 229–273 (2008).

A survey of admiralty and maritime law articles published in 2007. “Highlights of this year’s scholarship include discussion of limitation of liability, piracy, ocean management, jurisdiction, fisheries regulation, marine environmental regulation, ship-discharge, pilotage, and sovereign immunity in admiralty. One significant theme was the increasing impact of the United Nations Convention on the Law of the Sea, and the effect of the ongoing refusal of the U.S. to ratify the convention.” *Id.* at 229.

Anne Joseph, *Potential Pitfalls in Conducting Empirical Legal Research*, 32 Am. Indian L. Rev. 42–59 (2007–2008).

Examines the benefits and the drawbacks to using empirical research in the law. The author notes that empirical research can help “to answer some positive questions, and it can help us support various normative and public policy arguments, but empirical work doesn’t answer the normative inquiries.” *Id.* at 43.

Laurie C. Kadoch, *The Third Paradigm: Bringing Legal Writing “Out of the Box” and into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine*, 13 Legal Writing 55–77 (2007).

Kadoch argues that legal writing can serve as a much-needed bridge between the theory taught in law school and the practice of law.

Dennis C. Kim-Prieto, *En la Tierra del Ciego, el Tuerto es Rey: Problems with Current English-Spanish Legal Dictionaries, and Notes Toward a Critical Comparative Legal Lexicography*, 100 Law Libr. J. 251–278 (2008).

“In the past ten years more than thirty English-Spanish legal dictionaries have been published. In reaction to the wide variation in the quality of these dictionaries, this article attempts to articulate the beginnings of a rubric for the evaluation of English-Spanish legal dictionaries, borrowing from Bryan Garner’s work with legal dictionaries, then turning to the literature evaluating bilingual dictionaries and bilingual legal dictionaries. The article concludes with an annotated bibliography of major titles in this narrow, but increasingly significant, field.” *Id.* at 251.

Chunyu Kit & Tak Ming Wong, *Comparative Evaluation of Online Machine Translation Systems with Legal Texts*, 100 Law Libr. J. 299–321 (2008).

“The authors discuss both the proper use of available online machine translation (MT) technologies for law library users and their comparative evaluation of the performance of a number of representative online MT systems in translating legal texts from various languages into English. They evaluated a large-scale corpus of legal texts by means of BLEU/NIST scoring, a de facto standard way of exercising translation-quality evaluation in

the field of MT in recent years and a method that provides an objective view of the suitability of these systems for legal translation in different language pairs.” *Id.* at 299. The objective of the article was to explore which translation technology worked best with which word pairs. Systems examined include Babel Fish, Google, PROMT, WorldLingo, and Systran. Strengths and weaknesses of each are included.

Michael J. Madison, *Writing to Learn Law and Writing in Law: An Intellectual Property Illustration*, 52 St. Louis U. L.J. 823–841 (2008).

Examines the theory that legal writing in law school may be more effective if used as a means to teach students to practice like a lawyer, rather than simply teaching them to think like a lawyer. This theory is one component of the “writing across the curriculum” movement in legal writing education. *Id.* at 825.

Matthew Mantel, *Congressional Investigations: A Bibliography*, 100 Law Libr. J. 323–361 (2008).

“Mantel provides a selected, annotated bibliography on the topic of congressional investigations. He also includes a short history of these types of investigations and a discussion of the major issues raised by these investigations.” *Id.* at 323.

Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age (Donald A. Giannella Memorial Lecture)*, 53 Vill. L. Rev. 1–45 (2008).

Using Kansas law as an illustration, the author explores precedent, law reports, and digital technologies. He describes the problem of analyzing legal precedent, necessary in order to adhere to the consistency that we seek in our judicial system, in light of the increasing digital publishing of legal opinions. Martin posits that “the operation of precedent is dependent upon and therefore inescapably affected by the information dissemination, storage and retrieval systems available to judges, lawyers and others who would seek to gather case law bearing on a particular issue. This article examines that connection.” *Id.* at 8–9.

Deborah B. McGregor & Cynthia M. Adams, *The International Lawyer’s Guide to Legal Analysis and Communication in the United States*, 2008 [Waltham, MA: Aspen Publishers, approx. 464 p.]

McGregor and Adams present a guide designed to teach international lawyers about analysis and communication within the U.S. legal system. Topics covered include a basic introduction to the U.S. legal system, legal analysis of the common law, the anatomy of a case, practical guidance for success in both legal practice and the classroom, pitfalls associated with plagiarism, legal drafting, statutory interpretation, and an overview of citation rules. Also included are examples and exercises and a glossary of legal terms.

John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. Tol. L. Rev. 323–352 (2008).

“A promising opportunity to strengthen the professionalism of lawyers now exists in an unlikely vehicle: the concept of emotional intelligence. Without great cost or even restructuring the standard law school curriculum, it can be easily incorporated into legal education.” *Id.* at 325.

Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 Legal Writing 207–240 (2007).

Moscato argues that clinical instruction is essential to a law school education, so that students are better prepared with the skills they will need to practice. The article argues that such skills should be taught as part of the first-year curriculum, though it may have to be done at the expense of legal writing instruction because students resent being diverted from their doctrinal learning.

Mitchell Nathanson, *Dismantling the “Other”: Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality*, 13 Legal Writing 79–112 (2007).

Nathanson explores the phenomenon by which legal writing professors are classified apart from the rest of the law school faculty, and the idea that this professional grouping is arbitrary and irrational.

Richard K. Neumann Jr. & Sheila Simon, *Legal Writing*, 2008 [Waltham, MA: Aspen Publishers, approx. 432 p.]

Neumann and Simon present a textbook for basic legal writing courses that is designed to be student-friendly. It is a guide to the CREAC formula, and includes step-by-step guidance in its short chapters. The content covers office memos, motion memos, and appellate briefs. Further, it is supplemented by an interactive Web site to enhance the student experience and a detailed teacher's manual to improve that of the instructor.

Sabrina I. Pacifici, *Competitive Intelligence: A Selective Resource Guide*, LLRX.com, June 1, 2008 (available online at <[www.llrx.com/features/ciguide.htm](http://www.llrx.com/features/ciguide.htm)>).

This "revised and updated pathfinder focuses on leveraging selected reliable, focused, free and low cost sites and sources to effectively profile and monitor companies, markets, countries, people, and issues. This guide is a 'best of list' of web and database products, services and tools, as well [as] links to reliable sources produced by governments, academia, NGOs, the media and various publishers." Publisher.

*Radical Proposals to Reform Legal Pedagogy* Symposium, 43 Harv. C.R.-C.L. L. Rev. 595–650 (2008).

Erwin Chemerinsky, *Rethinking Legal Education*, 43 Harv. C.R.-C.L. L. Rev. 595–598 (2008).

Examines changes being made in legal education, emphasizing the need for increased clinical education to prepare students for the actual practice of law.

Beth D. Cohen, *Legal Learning for Life: Legal Immersion Fluency Education (LIFE)*, 43 Harv. C.R.-C.L. L. Rev. 605–609 (2008).

Advocates an immersion method for legal education, similar to language programs designed to teach students a foreign language, placing students directly in the legal community including through volunteer work, clinical work, externships, court visits, and shadowing practitioners into and throughout their legal education.

"Ambassadors" would tailor a program that best suits students' individual needs, expectations, and aspirations before the students embark on the legal immersion fluency education program (or LIFE). *Id.* at 605–606. The author concludes that "students immersed in the law will have their views challenged and will come away with a better understanding of themselves and others. Once students have successfully completed the LIFE program of study, they will be able to attend to the real tasks of lawyering in a more holistic and humanistic way, and they will feel at home in the world of lawyering." *Id.* at 608.

Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 Neb. L. Rev. 895–954 (2008).

Examines the pros and cons of new procedural rule Federal Rule of Appellate Procedure (FRAP) 32.1, which permits the "citation of all nonprecedential opinions issued on or after January 1, 2007." *Id.* at 900. Discusses the history of the rule, the language and potential interaction of the rule with local rules, and next steps to be taken regarding the use of nonprecedential opinions.

Lisa Smith-Butler, *Cost Effective Legal Research Redux: How to Avoid Becoming the Accidental Tourist, Lost in Cyberspace*, 9 Fla. Coastal L. Rev. 293–346 (2008).

"To assist law students with evaluating legal web sites containing primary and secondary sources of law, this article reviews certain free Internet sites pertaining to primary sources of federal and state law as well as secondary sources." *Id.* at 298.

Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 *Legal Writing* 113–157 (2007).

Laments the deterioration of manners and work ethic among today's students, and emphasizes the need for an enhanced sense of professionalism. "This Article suggests

some concrete ways to teach civility—one component of professionalism—to law students.” *Id.* at 117.

Lee J. Strang & Bryce G. Poole, *The Historical (In)accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. Rev. 969–1031 (2008).

The authors examine the evidence that Justice Brandeis used to support his claim that the Supreme Court had applied a two-tiered standard for determining *stare decisis* of constitutional issues for more than 70 years, and then evaluate the authentic historical practice of the Court. “As a careful analysis of the Court’s precedents reveals, the Court did not utilize the two-tiered standard—at least, not until Justice Brandeis and the New Deal Court embraced it. Instead, the authors show that the authentic historical practice of the Supreme Court was to treat precedents involving constitutional interpretation the same as other types of precedents.” *Id.* at 969.

Ken Strutin, *Criminal Justice Resources: Sex Offender Residency Restrictions*, LLRX.com, July 20, 2008 (available online at <[www.llrx.com/features/sexoffenderresidency.htm](http://www.llrx.com/features/sexoffenderresidency.htm)>).

“Ken Strutin’s guide collects recent court decisions, research papers and reports that have addressed the efficacy of exclusionary zoning laws and the impact of these restrictions on sex offenders reentering their communities.” Publisher.

Susan E. Thrower, *Teaching Legal Writing Through Subject-Matter Specialties: A Reconceptation of Writing Across the Curriculum*, 13 Legal Writing 3–53 (2007).

Discusses the merits of “writing across the curriculum,” that is, having students engage in legal writing that is tied to the material in theoretical courses. Thrower advocates tailoring the subject matter of legal writing courses not just to doctrinal subjects, but more specifically to a subject in which the student has expressed an interest. Legal writing courses in this model would explore the nuances of one area of legal practice

throughout, rather than jumping from, for example, civil procedure to criminal law.

Jonathan Uffelman, Note, *Hamlet Was a Law Student: A “Dramatic” Look at Emotion’s Effect on Analogical Reasoning*, 96 Geo. L.J. 1725–1774 (2008).

Using Hamlet as a vehicle for exploring issues of legal reasoning and emotion, the author examines the interaction of such reasoning and emotion in the law, and why emotion may play an important role in judicial decision making.

Nancy Ver Steegh, *Annual Survey of Periodical Literature*, 41 Fam. L.Q. 907–946 (2008).

A survey of law review articles in the field of family law scholarship, highlighting areas that are currently “hot topics.” Subjects included are adoption, alimony/maintenance, alternative dispute resolution, assisted conception, attorneys and professional responsibility, bankruptcy, child abuse and termination of parental rights, child custody and parenting time, child support, children’s rights, cohabitation, domestic violence, evidence, families and society, marriage, paternity, premarital agreements, property division, tax issues, and torts.

Charles M. Yablon, *Failed Lawyers and the Sources of Satire*, 15 Geo. Mason L. Rev. 775–805 (2008).

Offers the suggestion that a failed legal career may serve as excellent fodder for satire. Making fun of the legal profession in written works may be more interesting and a more fitting job for those who are not suited to the razor-sharp legal argument.

Deborah Zalesne, with David Nadvorney, *Integrating Academic Skills into First Year Curricula: Using Wood v. Lucy, Lady Duff-Gordon to Teach the Role of Facts in Legal Reasoning*, 28 Pace L. Rev. 271–296 (2008).

Acknowledging that there is a need to teach more practice-oriented skills in law school, rather than solely doctrinal material, the authors focus in part one of the article on the importance of teaching fact identification and fact analysis. In the

second part of the article, the *Wood v. Lucy, Lady Duff-Gordon* case is examined, and part three “sets forth concrete ways the *Lady Duff-Gordon* case can be used to teach the skills of fact identification and fact analysis.” *Id.* at 276.

Marcus P. Zillman, Guide to Financial Sources on the Internet, LLRX.com, August 23, 2008 (available online at <[www.llrx.com/features/financialsources.htm](http://www.llrx.com/features/financialsources.htm)>).

“Zillman’s guide is a bibliography of ... well vetted, reliable sites [free and low-fee based internet services] for researchers, focused on the following topics: Corporate Conference Calls Resources, Financial Sources, Financial Sources Search Engines, and Venture Capital Sources.” Publisher.

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# Perspectives

Teaching Legal Research and Writing

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