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How Students' Gratitude for Feedback Can Identify the Right Attitude for Success: Disciplined Optimism

By Anna P. Hemingway

Anna Hemingway is an Associate Professor of Law and Director of Legal Methods at Widener University School of Law in Harrisburg, Pa. She is grateful to Tricia Lontz, her wonderful research assistant, for all of her help with this article.

Students' reactions to feedback intrigue me. Why is it that some students resist, and in fact almost resent, receiving suggestions for improving their work while others are grateful and clamor for more help? I provide the same type and amount of feedback to both groups. I also always take the same approach—I strive for a respectful tone that will point out both strengths and weaknesses in their work and I try to provide them with constructive suggestions on ways to improve, without overwhelming them. Yet when I provide the exact same feedback to these different groups, they receive it with very different attitudes.

The resistant students most often show a lack of interest in the feedback that I provide. If I am conferencing with my students, these are the students who are usually quite passive and not fully engaged in the process. The resistant students never seek clarification, preferring to just nod and tell me all is understood. These students also never talk to me about my written comments; instead they ignore them, and rarely acknowledge the feedback. It appears that these students would almost prefer to not receive any feedback at all.

The students who are grateful behave very differently and seek out more feedback and

support. They are the students who come to conferences prepared with a list of questions. These students are also always pleased to receive written comments, carefully reading each suggestion and seeking clarification when needed. They want extra help and are highly motivated to improve. These students appreciate the feedback and often say two little words to me at the end of class and at the end of conferences—"thank you."

The first time students thanked me for my work I was truly surprised. Why should I be thanked—I was only doing my job. Today when students thank me, I react differently. Instead of being

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Mary A. Hotchkiss, William H. Gates Hall, Box 353020, Seattle, WA, 98195-3020. Phone: 206-616-9333
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surprised, I welcome the thank you, because I now view gratitude as a strong indicator of students' attitudes, motivation, and determination to succeed.

Grateful students say thank you because they see the value in feedback. They have adopted an attitude of disciplined optimism.¹ They work under the impression that they can make a change to improve their performance.² They are not acting under the guise of blind optimism.³ Rather, these students understand the value of owning

¹ See Clate Mask & Scott Martineau, *Conquer the Chaos, How to Grow a Successful Small Business Without Going Crazy* (2010). This book explains how disciplined optimism can help in the world of business. I believe many of the observations made by Mask and Martineau are equally applicable to law students. One study has suggested that defensive pessimism, as opposed to optimism, has been linked to stronger academic performance by law students. See Jason M. Satterfield et al., *Law School Performance Predicted by Explanatory Style*, 15 *Behav. Sci. & L.* 95 (1997). Disciplined optimism, however, is different from optimism and I hypothesize that it is also a strong predictor of law school success. "Optimism is defined as a 'generalized outcome expectancy.' In other words, optimists expect good things to happen." Allison D. Martin & Kevin L. Rand, *The Future's So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 *Duq. L. Rev.* 203, 208 (2010) (citing Michael F. Scheier & Charles S. Carver, *Optimism, Coping, and Health: Assessment and Implications of Generalized Outcome Expectancies*, 4 *Health Psychol.* 219, 219, 223 (1985)). Disciplined optimism combines the positive attitude with hard work. Mask & Martineau, *supra*. It builds upon the Stockdale paradox of having the "faith you will prevail plus discipline to confront the brutal facts." *Id.* at 82.

² "Task-oriented individuals . . . are motivated to attain mastery rather than outperform others. They view tasks in terms of effort rather than ability and failure is seen as diagnostic feedback that can lead to improvement at a later time." Martin, *infra* note 6, at 6 (citing Michael Middleton & Carol Midgley, *Avoiding the Demonstration of Lack of Ability: An Unexplored Aspect of Goal Theory*, 89 *J. Educ. Psychol.* 710–718 (1997)). Martin explains that "[b]ecause of this effort and mastery orientation, task-oriented individuals are not so threatened by failure because failure reflects on their effort rather than their ability. From a self-worth motivation perspective their self-worth is not at stake because their private and public sense of ability is not threatened." *Id.* (citing Martin Covington, *Making the Grade: A Self-Worth Perspective on Motivation and School Reform* (1992)). "[T]ask-oriented individuals choose challenging tasks (reflecting some level of optimism) and are less inclined to worry about performance. . . ." *Id.* (citing Joan Duda, *Motivation in Sport Settings: A Goal Perspective Approach*, in *Motivation in Sport and Exercise* (G.C. Roberts ed., 1992)). Disciplined optimists are task-oriented individuals because they work on the tasks needed to improve their performance. Mask & Martineau, *supra* note 1 at 83.

³ Blind optimism also differs from optimism and disciplined optimism. Blind optimists tend to hold on to false hope. See generally Catherine Gage O'Grady, *Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate*, 30 *Law & Psychol. Rev.* 23 (2006).

their problems and getting to work on removing whatever obstacles are in the way of their success.⁴

Grateful students are thankful for the feedback because they have an enduring belief that they will be successful. At the same time, they are not in denial of their current academic situation. Acting as disciplined optimists, they feel secure in their abilities and they confront the harsh reality of their grades head-on and do what they can to improve.⁵

This attitude is very different from that of resistant students.⁶ Resistant students engage in pessimistic behavior by self-handicapping;⁷ by resisting feedback, they deflect the cause of failure away from their ability and away from causes that may threaten their self-esteem.⁸

⁴ Mask & Martineau, *supra* note 1, at 83. The book explains the three components of disciplined optimism for small businesses. The components include (1) an undying belief that the business will achieve success, (2) confronting the "brutal facts" of the business's current reality; and (3) attacking those facts because the business owner wants to do so, not because of a need to do so. *Id.* Law students should also confront the reality of their academic standing and work on improving their positions because they want, instead of need, to do so.

⁵ See *id.* The book presents the idea that for businesses to survive the business owners must be able to handle the hard times with confidence. *Id.* This concept is applicable to law students. When students are struggling in law school, it would help them to remain confident in their abilities.

⁶ "According to the self-worth theory of motivation, the need to protect one's self-worth arises primarily from a fear of failure and the implications this failure may have for one's private and public sense of ability and subsequent self-worth." Andrew J. Martin et al., *Self-Handicapping and Defensive Pessimism: A Model of Self-Protection from a Longitudinal Perspective*, 28 *Contemp. Educ. Psychol.* 1, 2 (2003). Martin explains psychologist Martin Covington's self-worth theory "that failure holds implications for students' self-worth because failure is interpreted as being indicative of low ability and low ability is equated with a lack of self-worth. Thus, many students go to great lengths to avoid failure or to alter its meaning. Two strategies they can use to do this are self-handicapping and defensive pessimism." *Id.* (citing Martin Covington, *The Motive for Self-Worth, in Research on Motivation in Education* (Raymond Ames & C. Ames eds., 1984) and Martin Covington, *Making the Grade: A Self-Worth Perspective on Motivation and School Reform* (1992)).

⁷ Although the use of defensive pessimism has been found to decrease undergraduate students' academic success, it has been linked to increased success for law students. See generally Satterfield, *supra* note 1. I am not disputing this study. Rather, I am suggesting that when pessimism, not defensive pessimism, is coupled with self-handicapping, students' chances of academic success greatly decrease.

⁸ "Self-handicappers alter the meaning of failure by deflecting its cause away from their ability and on to factors, such as a lack of effort, that are less likely to threaten their self-esteem." Martin, *supra* note 6, at 2–3.

“Grateful students are thankful for the feedback because they have an enduring belief that they will be successful.”

“Pessimistic students view problems as pervasive and unchangeable, whereas disciplined, optimistic students view problems as limited in scope and fixable.”

They do not express gratitude for feedback because to do so would make them more fully engaged in the educational process and open themselves up for blame if they fail.⁹ By ignoring feedback, they try to shield themselves from the pain of their undoubted future failure.¹⁰ They believe their destiny is set.¹¹ A lack of confidence in their abilities causes them to view their academic struggles as permanent. This view of permanence¹² that pessimists generally have translates into a belief that no amount of feedback or suggestions from a professor will make a difference. They think it is best not to try because their efforts will not impact their chances of success.¹³

Pessimistic students view problems as pervasive and unchangeable,¹⁴ whereas disciplined, optimistic students view problems as limited in scope and

fixable.¹⁵ This optimistic outlook is expressed by their gratitude for feedback and instruction. They place a high value on the help they receive because they are confident that the feedback will help them improve their chances for academic success.¹⁶

Students who want to increase their chances of academic success should consider adopting a more appreciative, and thus more optimistic, attitude. Professors can help their students become more grateful and more receptive to feedback by tempering their critical feedback with praise, modeling gratitude, and sharing stories emphasizing the value and benefits of being grateful.

When students read comments about their strengths instead of just their weaknesses, it helps them adopt a more open attitude to critiques and suggestions for improvements. Students tend to value suggestions more, even the critical ones, when they get a sense that the professor is not just telling them how poorly they are doing. By pointing out strengths to students, professors can work to break down student hostility and replace it with confidence. When students read comments such as “This is well done because . . .” they learn they can do good work, are grateful for the encouragement, and are motivated to keep trying.

Gratitude can also be taught to students by modeling it in the classroom. For example, when students point out something a professor overlooked or a mistake a professor made, instead of reacting defensively or becoming embarrassed, the professor could thank the students and explain that the error would not have been caught without their help. This allows the professor to demonstrate how we all benefit when we allow our sense of self-significance to disappear and are open to correcting our mistakes.

Finally, sharing stories of thankfulness about our former students or from our own lives can help our

⁹ *Id.*

¹⁰ Through their actions, self-handicappers build in external, rather than internal, excuses for failure. “Self-handicappers choose impediments or obstacles to successful performance that enable them to deflect the cause of failure away from their competence and on to the acquired impediments. . . . Self-handicapping can take a variety of forms. Typical examples include procrastination, the choice of performance-debilitating circumstances, engaging in little or no practice for upcoming tasks, and the strategic reduction of effort.” Martin, *supra* note 6, at 3 (citing Stephen Berglas & Edward Jones, *Drug Choice as a Self-Handicapping Strategy in Response to Noncontingent Success*, 36 J. Personality & Soc. Psychol., 405–417 (1978)); Raymond L. Higgins & Robert N. Harris, *Strategic Alcohol Use: Drinking to Self-Handicap*, 6 J. Soc. & Clinical Psychol. 191–202 (1988); Diane M. Tice & Roy F. Baumeister, *Self-Esteem, Self-Handicapping, and Self-Presentation: The Strategy of Inadequate Practice*, 58 J. Personality 443–464 (1990)).

¹¹ Uncertain personal control is a factor in self-protecting. Martin, *supra* note 6, at 7 (citing Ted Thompson, *Self-Worth Protection: Review and Implications for the Classroom*, 46 Educ. Rev. 259–274 (1994)). Some psychologists have argued that the “central cause of self-handicapping appears to be some form of induced insecurity about future performances.” *Id.*

¹² See generally, Martin Seligman, *Learned Optimism* (2006). When bad things happen, pessimists tend to view those events as personal, pervasive, and permanent. *Id.* at 48–50.

¹³ “Perceived control is relevant to self-worth motivation in that individuals who feel they have little control over outcomes are increasingly uncertain as to whether they can avoid failure or bring about success and may choose to self-protect in response to this.” See Martin, *supra* note 6, at 8. I am suggesting that one way law students self-protect is by not being grateful for and thus receptive to their professors’ feedback.

¹⁴ Seligman, *supra* note 12.

¹⁵ The belief that problems are fixable gives students the ability to confront their current academic reality and to work on improving. These are two of the components Mask and Martineau list as being needed for disciplined optimism. See Mask & Martineau, *supra* note 1, at 83.

¹⁶ This belief corresponds to the first component Mask and Martineau list as being a crucial attribute for disciplined optimism and the success of small businesses. See *id.* at 84.

students acknowledge and identify gratitude as a positive attribute. Perhaps a story of a particularly grateful former student's success could be shared to help make the benefits of gratitude and optimism more obvious and tangible to students. Professors could also share their own personal experiences, possibly detailing their gratitude to another professor for all of the helpful feedback they received when working on scholarship or on teaching. These stories provide students with examples of how being appreciative of help has benefited others and could suggest to them that gratefulness might benefit them as well.

Providing positive feedback, modeling, and presenting students with examples of how gratitude and disciplined optimism work together can increase students' chances for academic success.¹⁷ By being receptive to feedback, students can start to let go of their fear of criticism and failure. Feedback allows students to grow and gain a mind-set that can ultimately help them achieve their goals.

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¹⁷ In 1994, psychologist Ted Thompson "argued that an important means of remediating self-protective strategies such as self-handicapping is to encourage students to make internal attributions for success." Martin, *supra* note 6, at 7.

“Feedback allows students to grow and gain a mind-set that can ultimately help them achieve their goals.”

Another Perspective

“On July 20, 1969, when we were very small children, our mothers propped us up in front of the television set to watch Neil Armstrong and Buzz Aldrin walk on the moon. At the time, the idea that we could send a tin can many thousands of miles into space to land on what many believed to be green cheese seemed to be an impossible one. For the next several years, we would regularly launch men into the stratosphere to learn what lay beyond. Why? Perhaps it was to beat the Russians in a race that seemed, at the time, to be an indicator of which world power would prevail. Perhaps it was for adventure: because the moon was there. And perhaps, as President Kennedy posited, it was to discover new landscapes, to test our mettle in achieving a truly difficult feat.

But what we achieved through Apollo 13 was perhaps even more profound. In the words of Fred Haise, the mission's lunar module pilot,

[Apollo 13] offers a graphic example and a very dramatic example ... [of] what can happen if you do have ... the right people, the right skill mix, that are trained and they're assembled in this team and they work together under the right leadership. You know, what a miracle can happen. And that's what was the case of Apollo 13.

As law professors, we are really very privileged to work with law students in this thin slice of time, these three or four years, when they are learning the skills they need to represent clients. If we do it well, we may help them reach the moon; if we fall back on tradition, they may never even launch.”

—Lisa T. McElroy & Christine N. Coughlin, *Failure Is Not an Option: An Essay on What Legal Educators Can Learn from NASA's Signature Pedagogies to Improve Student Outcomes*, 75 J. Air L. & Com. 503, 521–22 (2010).

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Designing Research Assignments to Encourage Critical Thinking and Creative Problem-Solving Skills

By Linda Kawaguchi

Linda Kawaguchi is Director of the Chastek Library and Associate Professor of Law at Gonzaga University School of Law in Spokane, Wash. She has worked as a law librarian at the University of Michigan, University of Washington, and University of California, Berkeley (Boalt Hall).

Advanced legal research (ALR) courses are unique in that they provide continual and immediate feedback to both students and teachers over the course of the semester. Unlike traditional doctrinal courses, ALR typically employs a variety of teaching methods and students receive multiple forms of assessment. This level of interaction allows teachers to respond quickly when students are struggling with specific concepts or need clarification. The sheer volume of information flowing between students and teachers provides the basis to evaluate, revise, and improve teaching methods and content each semester.

At Gonzaga University School of Law, I co-teach ALR with the associate director of the law library. Like most ALR courses, we begin with a review of fundamental legal structure—the different types of primary authority and the process by which governmental bodies promulgate those laws.

During this initial review it became apparent that students also needed a review on how to approach a research problem, and at an equally remedial level. I was struck by how almost every student immediately began typing when we handed out assignments, as if unable to think without using a computer. Paradoxically, the computers impeded their ability to think.

The next semester I experimented with designing assignments to manipulate students' behavior—for their own good, of course. I wanted them to think creatively instead of being passively led on tangents by a series of clicks; to see legal research as a skill requiring constant active thought and judgment, not a mechanical, rote process; to understand how legal information is generated, gathered, organized, and accessed; to realize the importance of research in solving real-life problems. Lofty goals, I know, but I wanted to prepare students to be effective researchers before unleashing them on the public.

We spent the first two classes providing context on the structure of the legal system and the research process. After the second class we assigned an ungraded, open-ended, practice research project. Their answers were to be in three parts: a thorough preliminary analysis and research plan (to be completed without using a computer before beginning their research); a detailed research journal including specific information for each source consulted, exact searches, and evaluation of sources and results; and a brief analysis of the law advising their clients. This open-ended practice assignment was designed to:

- obtain a base measurement of students' research skills at the start of the semester.
- provide an opportunity to apply the research process without the pressure of being graded.
- observe how students approached a research problem not related to individual sources or type of law.
- use as a vehicle to demonstrate and discuss research techniques.

“Advanced legal research courses are unique in that they provide continual and immediate feedback to both students and teachers over the course of the semester.”

- emphasize the importance of performing a thorough preliminary analysis and formulating a research strategy.
- encourage them to incorporate knowledge from other sources.
- clarify our expectations for the graded research projects.
- build confidence and demonstrate progress over the course of the semester.

We used three different fact patterns, but for purposes of this article I'll analyze lessons learned from two assignments:

- Your client wants to use images of “Woodsy Owl” and “Smokey Bear” on her website but doesn't want to violate any laws by doing so. What advice would you give her?
- Your client has small children and is concerned for their safety because his neighbor (a herpetologist) has a pet Komodo dragon, which she keeps in her backyard. They live in the city of Spokane in the state of Washington.

Students generally took one of two approaches—the “Google approach” (entering keywords in a search engine and clicking promising links), or a conceptual approach (identifying and researching the area of law they believed was applicable, such as intellectual property).¹

The Google approach worked best for the Woodsy Owl/Smokey Bear problem because the characters' names appear in the *United States Code* and the *Code of Federal Regulations*. Entering those terms in a search engine led to the citations, which defined and set forth guidelines for the use of the characters.² But the conceptual

approach was much less efficient. Researching the general topic of intellectual property often meant getting lost in the tangle of federal statutes and cases involving copyright law. Four of the eight students with that fact pattern never found the statutes and regulations that apply to the use of Woodsy Owl and Smokey Bear.

The Komodo dragon problem was the exact opposite. Though “Komodo” is a unique search term, Google was not useful except to find the definition and images of Komodo dragons because they are not mentioned by name in any relevant laws. A more conceptual approach was necessary to locate and apply the relevant laws—considering why Komodo dragons might be prohibited under certain circumstances, which governmental body has the authority and jurisdiction to create provisions, whether Komodo dragons fit the definitions, etc. The *Revised Code of Washington* defines and prohibits owning “potentially dangerous wild animals.” The *Spokane Municipal Code* prohibits “inherently dangerous animals,” including “venomous” reptiles³ if they possess certain characteristics. One student found the

“Students generally took one of two approaches—the ‘Google approach’ (entering keywords in a search engine and clicking promising links), or a conceptual approach. ...”

¹ “The term ‘Smokey Bear’ means the name and character ‘Smokey Bear’ originated by the Forest Service of the United States Department of Agriculture in cooperation with the Association of State Foresters and the Advertising Council.” 16 U.S.C. § 580p(2). 36 C.F.R. Part 271 is entirely dedicated to the licensing and public use of the “Smokey Bear” symbol. 36 C.F.R. Part 272 is similarly dedicated to the licensing and public use of the “Woodsy Owl” symbol. 36 C.F.R. Part 261 contains a listing of the many prohibitions in federal parks, forests, and other public property. A prohibition on unauthorized use of the “Woodsy Owl” and “Smokey Bear” symbols is found in 36 C.F.R. § 261.22. The section prohibits the “[m]anufacture, importation, reproduction, or use” of the symbols beyond that which is allowed in Parts 271 and 272 respectively.

³ Wash. Rev. Code § 16.30.030 states that “A person shall not own, possess, keep, harbor, bring into the state, or have custody or control of a potentially dangerous wild animal,” except those animals in a person's possession prior to the statute. A person is also prohibited from breeding a “potentially dangerous wild animal” under this section. The definition for a “potentially dangerous wild animal” is found in Wash. Rev. Code § 16.30.010, which lists such animals by class, order, family, and species. [Spokane, Wash. Mun. Code § 10.24.100](#) provides a descriptive definition of “inherently dangerous reptiles” by dangerous characteristics and “including, but not limited to” several families of reptiles. The section also defines inherently dangerous animals as including inherently dangerous reptiles. The remainder of article II, chapter 10.24, describes the prohibitions, licensing requirements, and other regulations associated with inherently dangerous animals in Spokane.

¹ Out of 22 students, 19 began their research online (nine started with Google, seven with Westlaw), 14 performed all their research online (three used the Internet exclusively, two used Westlaw exclusively), and only eight consulted any paper sources.

² “[T]he term ‘Woodsy Owl’ means the name and representation of a fanciful owl, who wears slacks (forest green when colored), a belt (brown when colored), and a Robin Hood style hat (forest green when colored) with a feather (red when colored), and who furthers the slogan, ‘Give a Hoot, Don't Pollute’, originated by the Forest Service of the United States Department of Agriculture.” 16 U.S.C. § 580p(1).

“This ‘sink or swim’ approach so early in the semester set the tone for the course and introduced the notion that legal research is a much more complicated, problem-solving activity. ...”

RCW provision but didn’t consult the *Spokane Municipal Code*. More disturbing, several students concluded that their client was without recourse because Komodo dragons were not specifically prohibited by name. The results illustrated the need to emphasize the importance of understanding the structure of legal concepts because problems don’t always come with unique terminology.

This exercise showed how legal research is an inseparable part of problem solving and legal analysis. It also provided invaluable insights about how our students approached research that shaped our teaching from that point forward. Most importantly, instead of lecturing, we used these assignments to frame the research process using concrete, familiar facts. Demonstrating and comparing successful and unsuccessful research methods illustrated how the same approach could be wildly successful in one instance but frustratingly futile in another. Students asked questions, pointed out particularly helpful sources and techniques, and learned from each other.

We also discussed issues as they arose organically, such as the importance of attention to detail and the danger of making assumptions. For example, several students referred to the herpetologist as “he” when the fact pattern clearly stated otherwise. Another student allowed us to foreshadow terms and connectors searching and the cost-effective use of subscription databases. She began her research on Westlaw by entering “woodsy owl” (with no quotation marks) in the databases ALLCASES, USCA, ST-ANN-ALL, CFR, FR, ADC-ACAD, ALR, AMJUR, WTH-IP, and WTH-ENV.⁴ The default Boolean operator in Westlaw is “or,” so searching without quotes returned documents that contained either word (woodsy OR owl).

⁴ This search encompassed all state and federal cases beginning in 1658, *United States Code Annotated*, all annotated state codes, the *Code of Federal Regulations*, the *Federal Register* (beginning in 1981), the administrative codes of 44 states, the First, Second, Third, Fourth, Fifth, Sixth, Federal, and Federal Second series of *American Law Reports*, *American Jurisprudence*, Westlaw Topical Highlights–Intellectual Property (which hasn’t been updated since April 2004), and Westlaw Topical Highlights–Environmental Law.

Students also observed one of the difficulties of performing statutory research online. In the Woodsy Owl/Smokey Bear problem, a search for the citation “16 USC § 580” brought up a section titled “Use of Forest Service appropriations for repair, etc. of equipment; rental of fire control equipment to non-Federal agencies.” Most students reasonably concluded that it was either an incorrect or irrelevant citation, when in fact the applicable section was much further down, not visible on the initial result screen, in subsection 580p.

Both problems demonstrated the importance of carefully reading the facts, considering the jurisdiction and types of authority that might apply, identifying and defining search terms and legal concepts, formulating a research plan, and evaluating and choosing appropriate resources.

This “sink or swim” approach so early in the semester set the tone for the course and introduced the notion that legal research is a much more complicated, problem-solving activity than they may have assumed.

We assigned eight in-class exercises, seven take-home assignments, and two graded research projects before assigning the final project, which counted for 35 percent of their grade. We continued to emphasize issues such as creativity in thinking of search terms and using indexes,⁵ being aware that several types of primary authority might exist for one problem,⁶ carefully reading and correctly applying the facts and the law,⁷ and the importance of recognizing and incorporating information that differed from or contradicted their original analysis.

The final research project was designed as a bookend to the course, emphasizing the same problem-solving skills as the practice research problem. This time

⁵ One student could not find any relevant state statutes for a lemon law problem under “automobiles” in the index. I suggested trying other terms like “motor vehicles” and “lemon laws.”

⁶ Another student found relevant case law but neglected to search for statutes.

⁷ Several students misread the facts for the lemon law problem and incorrectly concluded that the plaintiff did not meet the statutory requirement to pursue the remedy.

though, they had the benefit of what they had learned (hopefully) in the intervening months. I chose the issue of medical marijuana because it is a complex, evolving area of law that can't be answered without a thorough legal analysis of state and federal law involving cases, statutes, regulations, and other administrative material. The sheer volume of information available (which varies widely in scope, authenticity, and reliability) and the ever-changing status in each jurisdiction made medical marijuana an inherently interesting research topic.

The medical marijuana fact pattern included the following narrative:

Nancy Botwin is your client. She would like to establish a business providing medical marijuana to patients who qualify under state law. She is aware that there are federal laws governing the cultivation, distribution, purchase, and sale of marijuana, and that some states have established programs allowing people with certain health problems to use marijuana for medicinal purposes, but she is unsure how federal law interacts with state law. She has given you the attached article from the *New York Times*⁸ regarding the enforcement of federal marijuana laws. She is considering locating her business in one of two states and would like to know which state is most favorable to such an enterprise.

Each student was assigned one of four states (Washington, New Jersey, New Mexico, or Rhode Island) to compare with California. The requirements for the research journal were as follows:

- Preliminary Analysis: Before beginning your research, identify the issues, jurisdictions, governmental bodies that may have authority, types of primary law that may apply, and search terms. Explain how the facts influence your research strategy. Be thoughtful and creative.

⁸ David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. Times, Oct. 19, 2009, at A1, <<http://www.nytimes.com/2009/10/20/us/20cannabis.html>>.

- Search for Secondary Sources: Begin your research in the Index to Legal Periodicals and Books or LegalTrac databases. Describe your exact searches and results.⁹ There are no other restrictions on your research.

- Refine Research Strategy: Evaluate your strategy, modify your search terms, reframe the issues if necessary, and discuss how you plan to alter your approach.¹⁰

- Analysis of Sources/Results: Evaluate sources for authenticity, scope, currency, and functionality. As always, detail successful and unsuccessful steps, and update your research.

The instructions for the memorandum, which was limited to four double-spaced pages, included the following:

- Briefly describe federal law regarding marijuana and how it relates to state law. Cite applicable statutes and other federal activity.
- Discuss the medical marijuana laws of both states. Cite relevant statutes, regulations, guidelines, case law, and any pending activity.
- Advise Ms. Botwin as to exactly what steps she must take to comply with the laws of each state. If one state is more favorable to her situation, explain why.

Conclusion

The contrast between the ungraded practice research project and the final project couldn't have been more striking; it was like they were completely different students. Where the results of the first project were somewhat disheartening in the lack of attention to detail and reading comprehension, lack of imagination, and passive acceptance of whatever information appeared before them, it was evident in the final project that the students

⁹ Students had developed favorite sources, but were not using legal periodical indexes. There were some particularly helpful articles on this topic, so this was a good opportunity for them to use those databases.

¹⁰ This requirement was for those who needed a reminder to take a moment to pause and reflect.

“The sheer volume of information available ... and the ever-changing status in each jurisdiction made medical marijuana an inherently interesting research topic.”

“The contrast between the two projects demonstrated progress in their ability to integrate legal analysis, problem-solving skills, legal research, and application of the law. ...”

were engaged and thinking expansively and creatively. They incorporated knowledge from other courses and personal experience.¹¹ They discussed the jurisdictional issues and types of authority that might apply and consulted a wide variety of print and online sources. They exercised good judgment in explaining their methods and choices, for example, why they preferred paper or online sources for certain research tasks. They moved between sources and formats with confidence—if they found an abstract of an article in a periodical index, they knew where to find the full text elsewhere. They evaluated their results with a critical eye toward authenticity and currency. They actually looked at the content and incorporated their findings to refine their research. Taken as a whole, the level of analysis was thorough and thoughtful. They didn't shy away from the complexities of the problem in addressing the

conflict between state and federal law and comparing the intricacies of state regulations and procedures.

The final research project was especially effective because of the direct relationship to the first practice research project. We clearly defined the goals and process at the outset, and students developed the skills they needed over the course of the semester. The contrast between the two projects demonstrated progress in their ability to integrate legal analysis, problem-solving skills, legal research, and application of the law into a coherent process. It was invaluable to us in assessing the degree to which the students learned the material, and provided the students with visible and dramatic evidence of how their research skills had improved and a well-deserved sense of accomplishment.

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¹¹ Examples included constitutional issues (e.g., the Commerce Clause and preemption), television episodes of *South Park* and *Entourage*, advertisements for medical marijuana in the local independent newspaper, a documentary on MSNBC, attendance at a NORML convention, and friends with medical conditions that qualified for medicinal marijuana prescriptions.

Another Perspective

“To navigate the oceans of information (legal and otherwise) currently swamping the legal system, law students must become information literate: able to identify reliable, authentic information from online clutter or misinformation, critically evaluate the information, and then use it effectively. The growth of computers, computerized legal research, and the Internet has increased the importance of teaching students to apply critical thinking skills to both web and fee-based research systems. Law students arrive at law school overly confident in their general research capabilities when in actuality their research skills are poor and they often fail to understand basic research methodologies and tools. Unfortunately, it is likely this situation will only continue to worsen in the next decade. Thus, it becomes incumbent on law school legal research programs to include information literacy skills in their curriculum until students arrive at law school with better general research skills.

Information literacy skills teach students to evaluate information, gauging its authenticity and reliability, and assessing its strengths and weaknesses. The research done by judges and practitioners is increasingly moving from the realm of relatively controlled fee-based legal databases to the wild and dangerous world of information on the Internet making information literacy necessary. In addition, the critical thinking and evaluative skills necessary for information literacy overlap considerably with the skills of expert problem solvers, thus designating legal research education as a problem-solving process.”

—Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. Balt. L. Rev. 173, 220–21 (2010).

"Get Real" Giving Writing Assignments

By **Todd Haugh**

Todd Haugh is currently an Instructor of Legal Analysis, Research, and Communication at DePaul University College of Law in Chicago. In August 2011, he will begin a year-long Supreme Court Fellowship in Washington, D.C. He can be reached at thaugh2@depaul.edu or todddhaugh@gmail.com.

Legal writing professors know that effective teaching means modeling in the classroom the actual demands of law practice. Indeed, for our students to succeed in practice we must create "real-world" scenarios that develop both their skills and confidence. The recent economic downturn has only heightened the demand for newly minted attorneys able to step seamlessly into the practice world, which, in turn, has heightened our obligation to create practice-ready law school graduates.

Creating real-world learning opportunities in the classroom is not always easy, however. Let's be honest: has a senior partner *ever* walked a new associate through the importance of IRAC or explained (correctly) the principles underlying a citation rule? But there are ways to work real-world scenarios with real-world expectations into a legal writing curriculum, thereby preparing students for their new profession in a way that will allow them to find success from the start.

One area that lends itself particularly well to real-world instruction is giving research and writing assignments. Practicing lawyers, even new ones, receive dozens of assignments each week, yet none of them resembles the prepackaged, all-inclusive assignment memos that many of us provide our students. So, let's "get real" and provide

students with an assignment-receiving experience that will truly prepare them for practice.¹

Real Lawyers Give Assignments Orally

The first step in creating real-world assignments is to deliver them orally. With a few exceptions, practicing lawyers dole out assignments verbally, often in a rush and over the phone. By assigning memos and briefs orally, students are given an opportunity to develop listening, note-taking, and critical thinking skills. Students also learn to categorize and prioritize information quickly, a proficiency that holds career-long benefits. To ensure important facts and instructions aren't left out, try prerecording oral assignments and playing them to the class, or even e-mailing the electronic recording. My favorite approach is the rambling partner voice mail—a *truly* real world experience.

Real Lawyers Give Assignments on the Fly

As more students rely on computers and smartphones for note taking, fewer are adept with a pen and paper. But supervising attorneys do not wait for computers to boot up or phone batteries to charge. Encourage students to develop their listening and note-taking skills without the aid of electronics. This discipline gives them practice recording and organizing the critical information necessary to complete

¹ To be sure, not every student is ready to receive assignments in a "real-world" scenario. First-semester 1Ls usually do not have the listening or analytical skills to comprehend a complex oral assignment and formulate meaningful questions. However, most second-semester 1Ls with a memo or two behind them and all upper-level students should be familiar enough with what is expected in a research and writing assignment to quickly organize information and anticipate potential problem areas that require follow-up questions. Regardless of your students' skill level, it is imperative to set them up for a positive experience by discussing expectations and strategies for success prior to giving assignments.

“The first step in creating real-world assignments is to deliver them orally. With a few exceptions, practicing lawyers dole out assignments verbally, often in a rush and over the phone.”

“Resist the urge to lay out every possible scenario that your students may encounter when completing an assignment or to provide instructions in painstaking detail.”

an assignment, whether the assignment is given in the conference room, in the courtroom, or while trailing a partner running for a taxi.

Real Lawyers' Assignments Don't Come with Instruction Manuals

Resist the urge to lay out every possible scenario that your students may encounter when completing an assignment or to provide instructions in painstaking detail. Most attorneys don't provide a comprehensive list of instructions when handing out research assignments; instead, they outline projects for new attorneys in general terms based on the information at hand and expect that the attorneys' research and critical thinking skills will fill in the blanks. While mimicking these slightly vague assignment instructions may cause initial student angst, it has the benefit of forcing students to think beyond simply finding a single "right" answer. Students are challenged to think globally about the issues, even those not explicitly mentioned, and consider what other questions must be answered to complete the assignment. Helping students think about what they don't know—but need to—is key to helping them “own” future work assignments.

Real Lawyers Take Questions ... Once

Giving real-world assignments should not be an exercise in playing “hide the ball.” To ensure students have the necessary tools to succeed, it's essential to allow student follow-up questions. This is also a time to backfill key information students might have missed, such as the relevant jurisdiction or the most logical umbrella and sub-issue hierarchy. I prefer a “you caught the partner in the elevator” session, allowing students to ask a series of questions to the assigning attorney within a finite time period. This informal Q&A, usually held at the beginning of the next class period after an assignment is given (and then right after the assignment as students progress), forces students to organize their thoughts, formulate succinct questions, and weigh what questions must be answered versus those that can be determined independently.

Real Lawyers Don't Do Excuses

Most students have yet to learn that excuses just don't fly in the legal workplace. Help them understand this truism by resisting the urge to bail out students who failed to take good notes, didn't formulate good questions, and didn't buy into the real-world assignment-receiving experience. Better they learn the consequences now than when their livelihood is at stake. If you are feeling particularly charitable (as even the most black-hearted partner is once in a while), you might forward to the class your correspondence with a student asking particularly insightful questions as a way to rehabilitate wayward students. This mimics a typical workplace e-mail chain requiring the recipients to do some critical thinking on their own, as opposed to indulging students' “tell me what I'm missing” pleas.

For more information and readings helpful in preparing students to receive a real-world assignment, please see Mary Barnard Ray, *The Basics of Legal Writing* 145–50 (rev. 1st ed. 2008), and Kay Kavanagh and Paula Nailon, *Excellence in the Workplace: Legal and Life Skills* 103–04 (2007). Each contains great tips for students and practitioners to successfully receive and present information orally, as well as project assignment checklists. And good luck “getting real” with your students. Although a real-world assignment-receiving experience is an adjustment for some students, after their first day on the job, they'll thank you.

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Putting the Emphasis on Process Over Product by Making the First Memo Ungraded

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 Jennifer Cupar

Jennifer Cupar is an Associate Professor at Case Western Reserve University School of Law in Cleveland, Ohio.

If you were to ask me for my least favorite memory of my first year of teaching legal writing and analysis, that would be easy—interim teaching evaluations after my first semester. I dreaded that first set of evaluations. After all, what did I know about teaching at that point? I might have been a good legal writer myself, but I had never translated that skill to the teaching context. Teaching comes naturally to some people, but for most, me included, learning how to do it is a gradual process, based on trial and error. I had always been a good student, too, so I was used to getting nothing but good grades; I was not naive enough to think that I would have all positive evaluations.

For all these reasons, the thought of being evaluated on a skill that I had far from mastered was, to put it mildly, nerve-racking. The evaluations—when I finally brought myself to read them—turned out to be partly helpful and partly not. Many students had made lengthy comments, telling me things

they liked about the course and things they didn't. I put those comments to good use in planning the spring semester; I built on what worked and either revised or threw out altogether what hadn't. But what wasn't so helpful was the arbitrary number that each student assigned my teaching on a scale of 1–5. That “grade” did not tell me anything aside from confirming what I already knew—I had a ways to go to become the professor I wanted to be.

It dawned on me a few years later that this same process was playing out each year when I assigned a grade to my students' first major writing assignment.¹ They were learning new skills that take time to master, and yet I was assigning a number to their work before they had the chance to feel any level of proficiency. Compounding the problem was that the students did not all come to law school with the same background in writing; they were drawing from different levels of experience and writing competence.² And “regardless of the level of writing proficiency that they may have attained before law school, [all were] ... novices entering a new discourse.”³ I was not ready to declare any of them an expert after that first assignment, nor was I ready to declare any of them a failure. Yet, in the world of letter grades, that is exactly what an A or a C signified to them.

¹ Students complete two major writing assignments first semester: a 10–12 page objective office memorandum (“Memo I”) and a 12–15 page objective office memorandum (“Memo II”). They also complete a number of smaller, interim assignments that are not graded.

² J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 *Wash. L. Rev.* 35, 52–53 (1994).

³ *Id.* at 60.

“Teaching comes naturally to some people, but for most, me included, learning how to do it is a gradual process, based on trial and error.”

“ [D]espite the hours I spent commenting on their papers, many students cared far more about the grade than the formative feedback.”

Even worse, despite the hours I spent commenting on their papers, many students cared far more about the grade than the formative feedback. This was the first experience most of them had ever had with a grading curve and the first grade they received in law school. As a result, the importance they attributed to the grade tended to be “out of proportion to its actual significance.”⁴ Given their perceived significance of that first grade in law school, it was no wonder the score my students received overshadowed the more useful feedback I was giving them through my comments.⁵ The grade was therefore undermining one of my most valuable teaching tools.⁶

Frustrated with the situation, I, and one of my colleagues, decided to experiment two years ago with making Memo I ungraded.⁷ We would continue to give them detailed comments on their interim and final drafts and would meet with them in one-on-one conferences throughout the writing

process, thus giving them all of the same feedback we’d always given. In fact, we even decided to tell them the grade they would have received on the assignment since we knew many would still want a sense of how they had performed on the assignment. Thus, the students would get the same grading sheet with the same criteria that we would have given if the memo were recorded for a grade, and their score would be identified on the sheet. But our goal was that, by eliminating any effect that Memo I might have on the final grades in the course, we would take the students’ emphasis off the grade on the assignment and put it instead on the learning process.

While the decision was not quite earthshaking, it was still one that we debated for a long time.⁸ We were both well aware of where students typically put their legal writing course in the law school hierarchy, and the last thing we wanted to do was to give them a reason to take the assignment lightly. We did not want the experiment to set the students back six weeks in their learning curve. We were also concerned that eliminating the grade on Memo I would overemphasize the grade on Memo II—in other words, delay and possibly exacerbate their stress.

But given the many advantages of formative assessment over summative, especially early in a law student’s career, we thought the potential benefits outweighed the negatives.⁹ We hoped that removing the grade from the picture would engage students more in the learning process for the sake of learning rather than for the sake of a good grade. Our expectation was that it would help foster livelier class discussions, allow students

⁴ Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 Santa Clara L. Rev. 93, 129 (2005).

⁵ Many law students were at or near the top of their classes in high school and college and had very little, if any, experience receiving below-average grades. As others have noted, when students receive early grades in legal writing, “[a] poor grade . . . is more likely to discourage a student from trying to master the subject, rather than to motivate her to try to do better. When grades are received early in the semester, a student could easily give up on the course before having a real chance to learn.” *Id.* at 128.

⁶ Anne Enquist, *Critiquing and Evaluating Law Students’ Writing: Advice from Thirty-Five Experts*, 22 Seattle U. L. Rev. 1119, 1129 (1999) (noting that “[legal writing] experts agree that providing written individual feedback on law students’ papers is one of the most important, if not the most important, teaching moment legal writing professors have”).

⁷ We had tried other things to take the emphasis off of the grade for the first memo, including weighted grading. Before we decided to make Memo I ungraded, it was worth 25 out of 100 points first semester whereas Memo II was worth 50 out of 100 points. The students’ second semester scores were also worth twice as much as first semester scores in calculating their final grade in the course. Thus, in terms of their overall grade, Memo I was only worth a little over 8 percent. Nevertheless, we found that, regardless of the number of points allotted for the assignment, students still tended to attribute too much significance to it in terms of how it related to their ultimate success in the course or law school in general. Moreover, “[e]ven weighted grading is not an ideal solution, because it does not do away with the anomalous pattern of giving students grades during the semester.” Jan M. Levine, “*You Can’t Please Everyone, So You’d Better Please Yourself: Directing (or Teaching in) a First-Year Legal Writing Program*,” 29 Val. U. L. Rev. 611, 616–617 (1995).

⁸ Based on the Legal Writing Institute’s 2010 Survey results, it appears to be a decision that relatively few law schools have made. Only 33 of the 186 reporting law schools reported grading between 51–75 percent of major writing assignments whereas 134 reported grading between 76–100 percent. Association of Legal Writing Directors, Legal Writing Institute, *Report of the Annual Legal Writing Survey 2010*, p. 17, <<http://www.lwionline.org/uploads/FileUpload/2010Survey.pdf>> (defining “major writing assignment” as “one that requires a final product equal to or greater than 5 pages”).

⁹ “Formative assessments are especially important for first year students. For many students what is needed is time—time to adjust, grapple with hidden difficulties, and gain an intellectual home—and assistance—feedback that lets them know where they stand and how to move ahead more quickly.” Roy Stuckey & Others, *Best Practices for Legal Education: A Vision and a Road Map* 256 (2007).

to feel more comfortable making innovative arguments, encourage students to collaborate more, and reduce their general level of stress.¹⁰ And, of course, if the experiment was a failure, we knew we could always go back to the traditional method of grading Memo I the following year.

Much as we expected, eliminating the grade on Memo I has had both its positives and negatives. The rest of this article addresses those benefits and drawbacks, and concludes that the benefits outweigh the drawbacks to a sufficient degree that we will continue to use this approach in the future.

Benefits

Student Satisfaction

Student reaction to making Memo I ungraded has been positive. In rough draft conferences, both my colleague and I have had many students tell us that they appreciate the opportunity to practice the new skills they are learning without the threat of a grade hanging over them. Perhaps for the reasons discussed below, it also appears that students are more satisfied with the legal writing course than in previous years.¹¹

The results of an informal, anonymous survey that we have administered the last two years confirm that nearly all students view the decision not to grade Memo I positively. In the survey, we asked students to evaluate whether making Memo I ungraded was “extremely useful,” “useful,” or “not

useful.” Over 87 percent of the students responded that it was either “extremely useful” or “useful.”¹²

Their comments echo much of what we heard from them in conferences and are consistent with many of our expectations. Those who marked “extremely useful” said that eliminating the grade “took a lot of pressure off” and that “[i]t was more than a little comforting to have experience before a graded assignment.” One student noted that he/she “felt more comfortable sharing ideas in class” because the assignment was ungraded. The most common theme for those students who marked “useful” was that they appreciated having less pressure on their first assignment, but that it “put[] more pressure on the second memo because it is worth such a large part of [the] grade.”¹³ Those few students who believed the assignment was “not useful” mostly felt that they did not take the assignment as seriously as if it had been graded. For example, one noted, “[h]aving [the] assignment graded but weighted less would have allowed us to work harder on it and learn more.” Another seemed more concerned about his/her classmates’ lack of work effort than his/her own: “I felt that some students didn’t work hard on the paper because it wasn’t graded.”

More Engaging Class Discussions and Group Cohesion

Eliminating the letter grade on Memo I has made class discussions about the assignment livelier and more engaging. Students now feel comfortable using class time to delve deep into the analysis on the issues because they have no concerns about “giving points away” by sharing their ideas and arguments with their classmates. When the assignment was graded, the students’ belief that they could inadvertently help another student to get a higher grade by sharing a good idea tended to counteract whatever encouragement

“Eliminating the letter grade on Memo I has made class discussions about the assignment livelier and more engaging.”

¹⁰ Those schools that have dropped letter grades altogether cite similar reasons for doing so. Martha Neil, *Harvard Law Drops Letter Grades*, ABA Journal, Sept. 30, 2008, <http://www.abajournal.com/news/article/harvard_law_drops_letter_grades> (explaining that Harvard’s decision to eliminate letter grades was “intended to encourage innovation and strengthen intellectual life”); Isaac Arnsdorf, *At Harvard Law, New Competition for Yale*, Yale Daily News, Sept. 30, 2008, <<http://www.yaledailynews.com/news/2008/sep/30/at-harvard-law-new-competition-for-yale>> (“Yale has touted its honors/pass/low-pass/fail system as a way to encourage academic risks and dissuade cutthroat competition.”).

¹¹ See John D. Schunk, *Can Legal Writing Programs Benefit from Evaluating Student Writing Using Single-Submission, Semester-Ending, Standardized, Performance-Type Assignments?*, 29 Hamline L. Rev. 308, 321 (2006) (reporting that student satisfaction with legal writing course increased demonstrably when program began grading only a semester-ending assignment and making all interim assignments ungraded).

¹² Out of 65 total respondents from my classes over the last two years, 29 marked “extremely useful,” 28 marked “useful,” and eight marked “not useful.” The results from my colleague’s classes are similar.

¹³ Several of these students also remarked that they were glad the memo was ungraded as they were drafting it, but that they wished it was for a grade once they saw they would have received a good grade.

“Moreover, as the students were more engaged in the learning process, I, too, became more enthusiastic, which in turn, made my teaching more effective.”

I gave them to participate in class. Taking the grade out of the equation has gotten students excited about collaborating on the analysis and interested in hearing multiple viewpoints.¹⁴

An unexpected benefit has been that the same type of unfettered dialogue now continues even into the class discussions on later assignments that are graded.¹⁵ Students have discovered that, by sharing their ideas, they gain a greater understanding of the issues. They realize that figuring out how to articulate their arguments in a way that the class understands forces them to begin working through their analysis, and that the feedback they receive from the professor and their classmates helps them to see the strengths and flaws in their arguments. Moreover, they can see that sharing ideas does not have the negative effect on their grade that they had anticipated. They know where their paper would have fallen on the curve, and often the students who contribute the most to class discussions receive a high “score” on the assignment.

Professor as Mentor and Coach

One of the roles of a legal writing professor is mentor and coach.¹⁶ Most years, a sizeable percentage of the class viewed me in that light, but it was not until I began making Memo I ungraded that I felt as if the entire class understood that I

was there as much to help them as I was to be the “expert” who graded their final drafts. They saw me as someone who respected them as learners and who was interested in their development as lawyers, not simply someone who would label them as a “good” or “bad” writer. Moreover, as the students were more engaged in the learning process, I, too, became more enthusiastic, which in turn, made my teaching more effective.¹⁷

More Creativity

Some students saw the ungraded nature of the assignment as an opportunity to be more creative in their analysis. Without concern about receiving a low grade, they felt freer to make innovative arguments that went beyond the obvious or the arguments we had discussed in class. Both years, I’ve had several students tell me that they only included a unique argument or used a specific structure on Memo I so they could get my feedback on whether it worked. They knew they were taking a risk and told me they would have used a more conventional approach if the assignment had been for a grade. Of course, they found out that not all of the creative arguments were ones they should have included in the final draft, but that was a valuable learning experience in and of itself.¹⁸ In future assignments, they could then make a more informed decision about whether including a novel argument was worth the potential downside.

Drawbacks

Less Student Effort

It did not take long for me to notice that a small number of students (two or three each year) did not take the assignment as seriously as I would have liked. At the rough draft stage—about 10

¹⁴ This experience is consistent with the results of a study performed at the Mayo Medical School that measured the effect of using a pass-fail grading system in the first year on such things as students’ perceived stress and group cohesion. Starting with the class of 2006, the school began using a pass-fail system for first-year courses, a change from the traditional 5-interval grading system it had been using. In comparing students from the class of 2005 (who were subject to the 5-interval grading system) with students from the class of 2006, the study showed that students subject to the pass-fail system had greater group cohesiveness. Daniel E. Rohe et al., *The Benefits of Pass-Fail Grading on Stress, Mood, and Group Cohesion in Medical Students*, Mayo Clinic Proceedings (Nov. 2006), <<http://www.mayoclinicproceedings.com/content/81/11/1443.full>>; see also Margolis & DeJarnatt, *supra* note 4, at 127 (noting that students “are more open to collaborative learning” when no grade is involved on an assignment).

¹⁵ This, too, is consistent with the results of the Mayo Medical School study. The researchers found that the benefits of the pass-fail system in the first year (greater group cohesion, less perceived stress, and better mood) continued to the end of the second year of medical school, even though the second year courses were graded on the traditional 5-interval system. Rohe et al., *supra* note 14.

¹⁶ Rideout & Ramsfield, *supra* note 2, at 52–53.

¹⁷ Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. Rev. 879, 911–12 (1997) (“Enthusiasm for the subject and respect for the students can make a critical difference in the effectiveness of teaching. Thus, we should design our instruction to provide students formative, rather than evaluative, feedback. This means avoiding graded assignment while students are still learning ... but providing constructive critique.”).

¹⁸ This has been one of the benefits of telling the students the grade they would have received on the assignment; students get a better sense of how an ineffective innovative approach could affect their final grade.

days before the assignment was due—they were significantly behind where students typically were at that point. They had done little, if any, analysis beyond what we talked about in class. In conferences, it was evident that some had not even read the cases.

The negative side effects of their procrastination persisted all year long. Essentially, their failure to put any effort into the project put them six weeks behind where they otherwise would have been. It also meant that I was unable to identify areas where they needed to focus—I could not tell if the problems in their final draft of Memo I were the result of a lack of effort or the result of a failure to understand a critical skill. Unfortunately, these same students also learned to put their writing assignments on the back burner to all of their work, and it was hard for them to adjust their priorities when they started working on the graded assignments.

For the vast majority of the students, though, I perceived at most a negligible difference in the amount of work they put into the assignment from the effort former students exercised in past years.¹⁹ Most students are self-motivated enough to know that, if they do not put the time and effort into the assignment that they would have if it were for a grade, they will not gain the skills they need to do well on Memo II. And, of course, I frequently reiterated that point in class. Moreover, with Memo I being the first assignment in law school, most want to turn in a product that they are proud of and that will hopefully impress the professor. Finally, knowing they will see the grade they would have gotten on the assignment has been motivation enough for most to take it seriously.²⁰

More Weight on Memo II

By eliminating the grade on Memo I, Memo II is now worth more points and constitutes the majority of the grade for first semester.²¹ As some student survey responses indicate, this creates a lot of pressure for students to do well on the assignment.²² To the extent that students are more stressed about Memo II now than they were in the past when Memo I was also graded, however, I have not perceived it, nor does their stress manifest itself in class or during student conferences. Presumably, the fact that the students have had extensive feedback on their performance on Memo I reduces their anxiety to some degree.²³ Finally, because delayed grading is more consistent with the way other first-year courses operate, students do not resent the increased importance of the grade on Memo II.²⁴

Conclusion

So, while eliminating the grade on Memo I is not without its drawbacks, the benefits have far exceeded them. Increased dialogue during class sessions, more collaboration among students, and positive perception about the professor's role as coach and mentor have all contributed to making students more engaged in the learning process, and this, in turn, eases their adjustment to law school. Moreover, it is a relatively simple way for a legal research and writing program to make the shift from product to process.

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“Finally, because delayed grading is more consistent with the way other first-year courses operate, students do not resent the increased importance of the grade on Memo II.”

¹⁹ Many reported in their conferences that they put just as much time into the assignment as they would have if it were for a grade.

²⁰ Other schools that use delayed grading report similar results in student motivation for individual ungraded assignments. Margolis & DeJarnatt, *supra* note 4, at 129. Unlike Temple University School of Law's legal writing course, the subject of Margolis and DeJarnatt's article, we have not made the move to delayed grading during second semester largely because of the fear that the effect of many of these motivating factors will have worn off to some degree at that point.

²¹ The grade for first semester is now comprised of points for Memo II, citation exercises, research exercises, and participation.

²² See *supra* note 12 and accompanying text.

²³ This, of course, is one of many reasons why using more formative assessment in doctrinal first-year courses would benefit students.

²⁴ See Margolis & DeJarnatt, *supra* note 4, at 130.

Implementation of Collaborative Assignments

By M. Lisa Bradley

M. Lisa Bradley is an Assistant Professor of Legal Research and Writing at Gonzaga School of Law in Spokane, Wash.

I. Introduction

One of the primary goals of law school, if not the primary goal, is to prepare students for the practice of law.¹ Introducing students to the dynamics of a law firm within the classroom is an easy and stimulating way to help prepare them for practice. In an attempt to incorporate more of the social context of the law firm into the classroom, a curriculum based on collaborative projects can be designed for both legal writing courses and for skills labs that are independent of legal writing courses.² The following is a course description that suggests such a model. The description was prepared as part of a panel presentation for the 2010 Society of American Law Teachers (SALT) Teaching Conference.³ The

¹ Recent studies consistently criticize legal education for failing to prepare students for the practice of law in three necessary core competencies: legal analysis, skills development, and professionalism. See generally Joseph Hnylka, Assist. Prof., Legal Writing, Nova Southeastern University of Law, presentation at SALT Teaching Conference (Dec. 10–11, 2010).

² Many law schools have incorporated skills labs into the first-year curriculum. For example, Gonzaga Law School now requires first-year students to take two such labs: a two-credit litigation skills and professionalism lab in the fall and a two-credit transactional skills and professionalism lab in the spring. Both labs have students demonstrating various skills through collaborative assignments. For further reading on collaborative assignments in law school, see Roberta K. Thyfault & Kathryn Fehrman, *Interactive Group Learning in the Legal Writing Classroom: An International Primer on Student Collaboration and Cooperation in Large Classrooms*, 3 J. Marshall L.J. 135 (2009).

³ Camille Lamar, Joseph Hnylka, Kevin Shelley & M. Lisa Bradley, SALT Teaching Conference, *Putting Theory into Practice: Re-Structuring the Legal Writing Curriculum to Reflect the Realities of the Law Firm Collaborative Writing Model* (Dec. 10–11, 2010).

presentation discussed the pedagogy of collaborative learning assignments as they relate to the law firm model, followed by this course description, which focuses on collaborative, skill-oriented exercises.

The course description involves both large- and small-scale collaborative efforts. It starts out with a large-scale exercise in the form of an in-class client interview and is followed by a small-scale exercise in which groups of two to four students perform a post-interview assessment. The exercises then progress through the life of a case/action with follow-up client contact, an objective office memorandum, an opinion letter, a demand letter, a complaint, an answer, and discovery, and conclude with a trial brief. The description is designed to be modified as needed, depending on the number of credit hours of the course.⁴ Included are selected readings on each aspect of litigation or practice.

The activities suggested are based on a midsized law firm model, including time management, the use of time sheets, team meetings, and peer editing. It ends with a metacognitive exercise where students reflect on their collaborative experiences by answering specific questions.

II. Course Description

Client Interview

The client interview is the initial assignment. It is a great opportunity to provide a large-scale collaborative experience if conducted in the classroom. Find someone to play the role of the client and brief him or her on the facts

⁴ For instance, the instructor could eliminate any number of assignments and concentrate on just a few or add a step: demand letter, trial brief, appellate brief. The credit hours of the class will dictate the number of litigation steps that can realistically be assigned.

“Introducing students to the dynamics of a law firm within the classroom is an easy and stimulating way to help prepare them for practice.”

of the problem.⁵ Then have the individual visit the class during class hours. He or she should explain his or her problem to the class and answer questions from the class. The goals and benefits are numerous and include the following:

Fact gathering: Students are introduced to the case through the client, modeling a more realistic law firm scenario. They will need to formulate relevant questions to ensure they have the facts needed to proceed to research the case. By structuring it as a large-scale collaborative experience, the entire class benefits from hearing other students' questions and the respective answers. It provides more information than a small group experience would provide. In addition, it is more efficient in that the time needed for follow-up contact with the client is greatly reduced.⁶

Discuss costs, fees, and retainer agreement: Students could cover some preliminary aspects of cost with the client. Students would need to come into the interview with some understanding of these aspects.⁷

Instructor's role: The instructor may need to monitor the dissemination of information to ensure all relevant facts are disclosed and that students stay on track when questioning.⁸

Post-Interview Assessment

The post-interview assessment could be either a large- or small-scale endeavor. Either discuss the client's problem and research strategy as a class or break up into small groups and have each group discuss them independently. Regardless, during the post-interview meeting, small groups should meet to assign research tasks within the group. Goals include forming a research strategy, formulating additional questions after reflection, case calendaring, a time management discussion,⁹ and assigning research tasks within each group.¹⁰

Objective Office Memorandum

Students should be assigned the task of researching the problem, in preparation of an objective office memorandum.¹¹ How each group assigns tasks is up to each group.¹² If there is more than one possible legal issue, each issue could be tasked out. Or one student could be responsible for the actual writing of the memorandum based on other students' summaries of the law on each issue.¹³ Peer editing could be an ongoing process depending on how the students assign tasks.

“Goals include forming a research strategy, formulating additional questions after reflection, case calendaring, a time management discussion, and assigning research tasks. ...”

⁵ Options include an upper-class law student, research assistant, work study student, or undergraduate drama student.

⁶ An instructor could eliminate the live client interview step by providing a set of written facts for the students.

⁷ An instructor could assign research on hourly rates for attorneys in the community regarding a specific area of law. The hourly rates may greatly differ depending on the size of the firm. Possible retainer agreements could also be researched and discussed, which could lead to a separate review and discussion of possible professional responsibility rules.

⁸ Selected readings on client interviews include Helene S. Shapo et al., *Writing and Analysis in the Law* 297–317 (5th ed. 2008); Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy and Style* 71–75 (6th ed. 2009); Karen Barton et al., *Valuing What Clients Think: Standardizing Clients and the Assessment of Communicative Competence*, 13 *Clinical L. Rev.* 1 (2006); Linda F. Smith, *Was It Good for You Too? Conversation Analysis of Two Interviews*, 96 *Ky. L.J.* 579 (2007–2008); Linda F. Smith, *Always Judged—Case Study of an Interview Using Conversation Analysis*, 16 *Clinical L. Rev.* 423 (2010); Susan L. Turley, “*To See Between*”: *Interviewing as a Legal Research Tool*, 7 *J. Ass’n Legal Writing Directors* 283 (2010).

⁹ See Camille Lamar, Assist. Prof., *Legal Writing*, Nova Southeastern University of Law, presentation at SALT Teaching Conference (Dec. 10–11, 2010).

¹⁰ See Kevin Shelley, Assoc. Prof., *Legal Research and Writing*, Gonzaga University School of Law, presentation at SALT Teaching Conference (Dec. 10–11, 2010).

¹¹ Selected readings on drafting objective office memoranda include Shapo et al., *supra* note 8, at 143–91; Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 149–211 (4th ed. 2006); Kristen Konrad Robbins-Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* 215–26 (2009); Laurel Currie Oates & Anne Enquist, *Just Memos* (2d ed. 2007).

¹² Possible sources for assigned readings on collaborative assignments include Catherine Gage O’Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 *Clinical L. Rev.* 485 (1998); Clifford S. Zimmerman, “*Thinking Beyond My Own Interpretation*”: *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 *Ariz. St. L.J.* 957 (1999). For an article listing additional sources on collaborative learning see Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography*, 5 *J. Ass’n Legal Writing Directors* 133 (2008).

¹³ Peer editing should be included when the end product is a written document.

“In the real world, it is often necessary for the attorney to contact the client to obtain more facts, once preliminary research into the relevant law has been performed. ...”

Follow-Up Client Contact

In the real world, it is often necessary for the attorney to contact the client to obtain more facts, once preliminary research into the relevant law has been performed and before the attorney can render a legal opinion or give legal advice. If the instructor deems this necessary, additional information could be provided to the class as a whole or the client could revisit the class for a second interview. If the client does come back, this may be a more realistic time to address costs, fees, and a retainer agreement. The student now has a better idea of the law and all that this infers regarding time, effort, and options. This is also a good time to discuss options and remedies with the client. Costs will most likely depend on which options the client chooses.

Opinion/Advice Letter

The instructor may want to assign a written opinion or advice letter based on the office memorandum. Selected readings on these types of letters should be assigned prior to such an assignment.¹⁴ In addition, readings on the format of business letters can be assigned and examples distributed to the class. Many students have never written a formal business letter.¹⁵ Again, students will need to decide how to delegate work on the letter within the small group, including peer review.

Demand Letter

A written demand letter is a good small group exercise. It forces the group to transition from an objective perspective necessary for the office memorandum or opinion letter to a persuasive tone.¹⁶

¹⁴ Selected readings on opinion and advice letters include Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 359–74 (4th ed. 2006); Charles R. Calleros, *Legal Method and Writing* 507–20 (5th ed. 2006); Neumann, *supra* note 8, at 267–71.

¹⁵ For examples and rules on formal business letters see Deborah E. Bouchoux, *Aspen Handbook for Legal Writers: A Practical Reference* (2d ed. 2009); Bryan A. Garner, *The Redbook: A Manual on Legal Style* (2d ed. 2006).

¹⁶ Selected readings on demand letters include Calleros, *supra* note 14, at 521–35; Neumann, *supra* note 8, at 273–78.

Complaint/Answer

Drafting a complaint and answer¹⁷ can provide a good exercise in researching court rules¹⁸ and local forms.¹⁹ Options include dividing the class so that half drafts the complaint and half drafts the answer. If there is limited time, the complaint and answer could be provided to the students. Another option is to include service on the opposing party, which could involve researching court rules.

Discovery

Discovery provides a myriad of options including the drafting of interrogatories, conducting depositions, service of process, scheduling, motions to compel, and client preparation. Court rules can once again be added to the assignment or relevant rules can be provided to the students by the instructor.²⁰

Motions

Motions could include motions in limine, to dismiss, for injunctions, for protective orders, or for summary judgment. Assignments could include drafting motions,²¹ orders, notices, affidavits,²²

¹⁷ Selected readings on complaints and answers include Calleros, *supra* note 14, at 297–317; Elizabeth Fajans et al., *Writing for Law Practice* 33–102 (2d ed. 2010).

¹⁸ Selected readings on researching court rules include Christina L. Kunz et al., *The Process of Legal Research* 378–98 (7th ed. 2008); Laurel Currie Oates & Anne Enquist, *Just Research* 215–44 (2d ed. 2009).

¹⁹ Most legal databases provide ample forms for practitioners, both generic and specific to particular jurisdictions. A short review or first exposure to these databases and forms could occur during class by the instructor, a Westlaw or LexisNexis representative, or law librarian. A selected reading on locating forms is found in Oates & Enquist, *supra* note 18, at 267–77.

²⁰ An option is to have each group depose one witness. A law student from each group could be assigned the role of witness, which provides the added exercise of role playing. Articles discussing the benefits of role playing in law school are Mary Marsh Zulack, *Rediscovering Client Decisionmaking: The Impact of Role-Playing*, 1 *Clinical L. Rev.* 593 (1995); Ann Juergens & Angela McCaffrey, *Roleplays as Rehearsals for “Doing the Right Thing”—Adding Practice in Professional Values to Moldovan and United States Legal Education*, 28 *Wash. U. J.L. & Pol’y* 141 (2008).

²¹ Selected readings on motions include Fajans et al., *supra* note 17; Shapo et al., *supra* note 8, at 377–93.

²² Selected readings on drafting affidavits include Fajans et al., *supra* note 17; Stacy Caplow, *Putting the “I” in Writing: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 *Legal Writing* 249 (2008).

and trial briefs,²³ either in support or opposition.

III. Other Considerations

Simplify the Legal Issue

The simpler, the better. Let the students concentrate on the collaborative process necessary to implement relevant procedural rules and skills in the actual practice of law. Single issue problems allow students to focus on the goals of the course rather than the time and effort needed to research and write a complex brief. This also reduces the time students devote to briefs if assigned.²⁴

Number of Graded Assignments

Grades, understandably, can be the single most angst-causing aspect of collaborative projects for both students and instructors alike. Collaborative projects entail one group grade or the collaborative aspect of the endeavor is lost and students may become competitive within the group. When deciding which assignments to grade, the instructor has numerous options. One possibility is to have three graded assignments among nongraded assignments if the instructor has the time.²⁵ The graded assignments could include the following:

Opinion/Advice Letter: The opinion letter is the direct result of the objective office memorandum, so grading this assignment also involves aspects of the office memo including correct research, objective tone, formal business letter format, and writing skills. (25 percent of final grade)

Demand Letter: The demand letter would involve grading persuasive skills as well as correct research and writing skills. (25 percent of final grade)

Trial Brief: A trial brief assignment could be complex or simple. It could include the drafting of affidavits, motion, notice, order, and trial brief (memorandum in support or opposition) or just the brief itself. If just the brief is assigned, the instructor could provide the appropriate pleadings, depending on the motion. If it is a motion to dismiss based on subject matter jurisdiction or statute of limitation, only the complaint and answer may be necessary. If the issue goes beyond the initial pleadings, additional affidavits, depositions, and exhibits could be provided to the students. (50 percent of final grade)

If these three assignments are graded, there is no need for formal nongraded critiques. The first two steps work up to the trial brief, so the comments/edits/grades on the two letters would lead to corrections on the trial brief.

Consultations

Prior to handing in the brief, the instructor may want to schedule a meeting with each group to discuss the brief and the collaborative process so far.

Hands-Off

The idea is to make the students assign workload within the group and adjust as the semester progresses. The instructor should be as hands-off as possible and should not micromanage. Make this clear in the initial instructions or syllabus. It is very important to set the rules and expectations up front about not entertaining complaints or micromanaging. (Some exceptions may exist: a student quits law school, becomes ill, or is nonresponsive.)

The Students Self-Select Group

If students self-select their groups, it may reduce the probability of animosity within the group. It also may eliminate instructor blame if a low group grade is

“The simpler, the better. Let the students concentrate on the collaborative process necessary to implement relevant procedural rules and skills in the actual practice of law.”

²³ Selected readings on drafting trial briefs include Oates & Enquist, *supra* note 14, at 379–439; Calleros, *supra* note 14, at 381–407; Neumann, *supra* note 8, at 341–75; John C. Dernbach et al., *A Practical Guide to Legal Writing and Legal Method* 235–304 (3d ed. 2007). Selected readings on persuasive writing include Robbins-Tiscione, *supra* note 11, at 137–211, 229–55; Neumann, *supra* note 8, at 305–27; Richard K. Neumann Jr. & Sheila Simon, *Legal Writing* 205–24 (2008); Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 179–204 (2d ed. 2006).

²⁴ Simple single issue problems could include covenants not to compete in employment contracts; premises liability; procedural issues such as subject matter jurisdiction, venue, or statute of limitation; choice of law; or any single prong of a multipronged test. Lack of subject matter jurisdiction sets up a good 12(b)(6) motion, eliminating the need, if necessary, to save time on discovery.

²⁵ For a discussion on assessing students, see Hnylka, *supra* note 1.

“Engaging students in a metacognitive exercise will enable them to become better ‘self-learners’ through assessment of their thoughts and skill sets. ...”

perceived to be due to a particular student. The professor may need to add a student to a group. Quite often, there is an odd person out.

Disclosure of Information

Releasing documents and information on an as-needed basis could actually make it fun for the students. For instance, give the petitioners and respondents a slightly different set of facts, as relayed by their respective clients. Then have the petitioner groups draft the complaint and serve it on the respondents before requiring the respondents to draft an answer. Release certain facts to the respondents only through the deposition of a witness for the petitioner.

Each group could be required to depose one witness/party from the other side or to draft one set of interrogatories for the adverse party.

Ethics

The course can easily be designed to introduce and incorporate rules of professional responsibility throughout the various steps of litigation. Depending on the credit hours of the course, instructors could simply point out relevant rules, discuss the rules in class, or create facts and exercises that include research of specific rules.²⁶

Billing

Important aspects of the law firm model include time management, time sheets, and budget concerns. The instructor may want to establish a budget and have groups keep track of their time and bill from it.

Final Metacognitive Assignment

At the end of the course, each student could hand in a completed metacognitive exercise that reflects upon and answers a set of questions on the collaborative experience.²⁷ Engaging students in a metacognitive exercise will enable

them to become better “self-learners” through assessment of their thoughts and skill sets, including critical thinking, problem solving, and efficiency.²⁸ Suggested questions could range from the specific to the more general.²⁹ This exercise also provides ample feedback for the instructor in designing future courses.

Litigation Calendar

The instructor may need to set the case calendar for the students to ensure the instructor receives the graded assignments in a timely manner. The instructor could suggest completion dates for ungraded assignments, with firm due dates for graded assignments:

Client interview to be held _____
Initial research finished by _____
Follow-up client interview on _____
Advice/opinion letter due _____
Demand letter due _____
Bill sent to client by _____
Complaint/answer by _____
Deposition to be held by _____
Trial brief due _____
Metacognitive exercise and final bill due _____

IV. Summary

By incorporating the collaborative process into the classroom, all three core competencies³⁰ can be covered and assessed in an efficient and stimulating manner. Engaging in group legal analysis can expand students’ analytical abilities beyond what is possible when processing solo.

²⁸ See generally, *id.* Metacognitive learning is broken into two basic components: knowledge of cognition and control of cognition. See *id.*

²⁹ For examples of questions see *id.*; see also Camille Lamar, Assist. Prof., Legal Writing, Nova Southeastern University of Law, presentation at the Rocky Mountain Legal Writing Conference, *Incorporating Metacognitive Assessment Techniques into the Legal Writing Classroom* (Mar. 19–20, 2010).

³⁰ See Hnylka, *supra* note 1.

²⁶ A chapter on researching rules of professional conduct is found in Kunz et al., *supra* note 18, at 400–17. A chapter on ethics in legal writing and advocacy is found in Calleros, *supra* note 14, at 317–24.

²⁷ For an article on metacognitive learning theory, see Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 *Widener L. Rev.* 33 (2006).

The collaborative process also enables students to further develop the multitude of skills found necessary in the practice of law.³¹

Finally, professionalism can be learned both by practice and observation. The necessity of knowing the rules of ethics in addition to the personal growth inherent in the development of personal ethics can be developed when working within specific group dynamics.³²

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³¹ *Id.*

³² *Id.*

“The collaborative process also enables students to further develop the multitude of skills found necessary in the practice of law.”

Another Perspective

“What would an ideal law school curriculum look like? If we could train future lawyers any way we wanted, what would we do?”

No doubt all of us have a few ideas about things we would do differently if we ran the world. But truly to think in a new way is a hard thing to do. Most of us have been teaching long enough to be constrained in our thinking by the orthodoxy of legal education. In other words, most of us, unconsciously if not consciously, think in terms of the constraints that we accept as inherent in the current structure of legal education. And even if there are things we would like to change, I think it is fair to say that many of us are invested in our present ways of teaching law students and are, therefore, resistant to change.

Dare I say that we must ‘think outside the box’ and stop justifying current practice simply because ‘that’s the way it’s always been done’? Those exhortations are so trite and overused that I can feel my own eyes rolling as I suggest them. And yet, their very triteness reflects the kernel of truth that they hold. These are, in fact, the very things we must do.

The classic story of ‘thinking outside the box,’ and one that many of you have probably already heard, is the story of Federal Express. Fred Smith, the founder of Federal Express, submitted his business proposal as a term paper for a class at Yale. His paper proposed creating an overnight delivery service using a central hub where packages would pass through during the day and be funneled out overnight. His idea was to simplify the logistics of routing packages and create cost savings by centralizing operations.

Smith earned a C on the paper. But I think we all know how the story turned out when he finally put his idea to the test!

And probably many of you are familiar with the story that business consultants like to tell to show that doing things the way they have always been done is not necessarily a good reason for continuing a practice today. This is the story of the person who always cuts both ends off the roast before cooking it. When asked why, the answer is, ‘That’s the way we’ve always done it.’ A few inquiries reveal that it had always been done that way because grandma had to cut the ends off the roast to get it to fit in her pan, something the current generation did not have to do.”

—Amy E. Sloan, *Erasing the Lines: Integrating the Law School Curriculum*, 1 J. Ass’n Legal Writing Directors 3, 10–11 (2002).

Teaching the Holding/Dictum Distinction

By **Judith M. Stinson**

Judith M. Stinson is a Clinical Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University in Tempe.

The distinction between holding and dictum has received a fair amount of scholarly attention, but much less in legal education. “Every lawyer thinks he knows what [dictum] means, yet few lawyers think much more about it.”¹ Those of us who teach legal writing are in a prime position to rectify this problem.

An Overview of the Holding/Dictum Distinction

The holding/dictum distinction has been debated for decades.² There is no universal agreement on the definitions for these terms, but most typically “holding” is defined as that portion of a legal opinion that is “necessary to the result.”³ Dictum, on the other hand, is anything that is not a holding.⁴ Some question this distinction because, at least arguably, a case’s “holding” is always dependent upon the reader and future circumstances.⁵

¹ *Dictum Revisited*, 4 *Stan. L. Rev.* 509, 509 (1952). This article is adapted from a longer article I wrote. If you would like to see this issue addressed in more detail, see Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 *Brook. L. Rev.* 219 (2010).

² See, e.g., Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 1, 25 (1989); *Dictum Revisited*, *supra* note 1, at 509; Michael C. Dorf, *Dicta and Article III*, 142 *U. Penn. L. Rev.* 1997, 1998 (1994); Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 *N.Y.U. L. Rev.* 383, 385–86 (1964); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *Yale L.J.* 161 (1930); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 *N.Y.U. L. Rev.* 1249, 1263 (2006).

³ See, e.g., Kent Greenawalt, *Reflections on Holding and Dictum*, 39 *J. Legal Educ.* 431, 435 (1989); Dorf, *supra* note 2, at 2003.

⁴ See, e.g., Leval, *supra* note 2, at 1257. Many argue that a case’s holding should be limited to its facts plus outcome; others argue that a case’s rationale should also be included. See, e.g., Alexander, *supra* note 2, at 29–30; Dorf, *supra* note 2, at 2024.

⁵ See, e.g., Teresa Godwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 *St. Louis U. L.J.* 353 (1985).

Despite these issues, our system of stare decisis relies on determinate holdings. Therefore, it is important for lawyers to be able to identify a case’s holding and, as a corollary, identify its dicta.

Knowing the distinction is important because when lawyers (and judges) can’t distinguish a case’s holding from its dicta, injustice can occur. For example, a criminal defendant was procedurally barred from pursuing a federal habeas corpus petition because the federal district court treated dicta from several previous cases as holdings.⁶ The defendant had appealed his conviction to the state court of appeals, but the federal court, relying on dicta, held that habeas relief was barred because he had not appealed to the state supreme court.⁷ That dicta was based on a state statute that had been amended almost 20 years earlier.⁸ Yet the court relied on that dicta and elevated it to a holding—without seeming to notice that it was not binding and that it was in fact an inaccurate statement of the law. Just as the judge read dicta as a holding, it appears that the defendant’s attorney failed to notice and raise the courts’ error, and his client paid the price.⁹

How Can Lawyers (and Law Students) Learn to Distinguish Between Holding and Dictum?

There are several ways lawyers and law students can learn to distinguish between holding and dictum. First, they can learn in practice from senior lawyers and judges by way of modeling. After seeing the

⁶ *Stern v. Schriro*, No. CV 06-16-TUC-DCB, 2007 WL 201235 (D. Ariz. Jan. 24, 2007).

⁷ *Id.* at *6.

⁸ 1974 *Ariz. Laws*, Ch. 7, § 3 (codified as amended at *Ariz. Rev. Stat. Ann.* § 13-4031 (1977)); amended by 1989 *Ariz. Laws*, Ch. 58, § 1 (codified as amended at *Ariz. Rev. Stat. Ann.* § 12-120.21(A)(1)).

⁹ To complicate the problem, oft-repeated dicta from previous cases becomes binding once a court adopts it as a holding. *Stern* was a trial court decision; when an appellate court adopts dicta, though, lawyers can argue the decision is incorrect but lower courts are bound by that new holding.

“Knowing the distinction is important because when lawyers (and judges) can’t distinguish a case’s holding from its dicta, injustice can occur.”

distinction being made clearly, newer lawyers ought to be better themselves at making the distinction. The problem with this approach is that most lawyers and judges are not making the distinction clearly. Perhaps they see a tactical advantage in keeping the distinction muddy. Or perhaps even senior lawyers and judges have difficulty distinguishing between holding and dictum. In either event, newer lawyers are unlikely to learn about the distinction from other lawyers and judges.

Second, they can learn from books (in law school or in practice) about the distinction. Practice aids, study aids, casebooks, and legal writing texts devote some time, although not a substantial amount, to the distinction. The problem with this method is that reading about a skill is not as helpful as practicing a skill, especially practicing it with feedback.

Third—and this is the best option—we can teach them in law school.¹⁰ Furthermore, although the distinction can and should be taught throughout law school, this is a more difficult task in casebook courses because casebooks typically edit out dicta. Unless the professor is willing to create her own materials for the course, casebook courses present a more limited opportunity to address this distinction.

Legal writing courses, though, are in a perfect position to actually teach students the difference between holding and dictum. This is true because 1) we have more control over our materials and assignments; and 2) in our courses, we force students to do more than just think about legal analysis—we teach them to communicate that analysis in writing. That process provides a unique opportunity to teach the holding/dictum distinction.

How much time do we actually spend *teaching* the difference between holding and dictum? We

tell students about the difference, but not much space is generally devoted to the topic in texts, and likely not much time is devoted in class. More significantly, rather than simply telling students about the holding/dictum distinction, we ought to make them *apply* that distinction.

How Can Legal Writing Professors Teach the Holding/Dictum Distinction?

We are most likely to actually teach students how to distinguish between holding and dictum if we assign problems that force them to identify dicta and to use it properly. If we create assignments where some cases have helpful (or potentially harmful) dicta, students will have a chance to 1) identify the dicta; and 2) use the dicta to argue persuasively for a result that helps their case.

Here are six steps that can help us teach the distinction:

1. Talk about the distinction. Assign readings. Raise it in class discussion. Get students thinking about this as an important topic.
2. Find cases with dicta and don't edit it out. This step shouldn't be difficult because most judicial opinions include plenty of dicta.
3. Craft an assignment where the dictum from a precedent case is relevant; if it was the case's holding, the issue would be resolved.
4. Let the students struggle some with the distinction (on a first draft or an outline). Even if you have already talked about the distinction, chances are a large percentage of students will fail to identify that the relevant language is dictum.
5. Discuss the distinction again in class or in individual conferences, where students can be asked directly whether the language they are relying on is the case's (binding) holding or merely (persuasive) dictum.
6. Discuss how lawyers can properly use dicta to argue for a rule. Dictum, especially by a higher court, can be persuasive! But when using dictum to persuade, students must work harder. Simply quoting some key language and citing the case that contained the dictum is not enough. Students

“More significantly, rather than simply telling students about the holding/dictum distinction, we ought to make them *apply* that distinction.”

¹⁰ Judge Leval, senior judge on the U.S. Court of Appeals for the Second Circuit, believes that the single best cure for the blurred distinction between holding and dictum is legal education. We should spend more time in law schools having students actually apply the distinction.

“This exercise would provide students with the opportunity to distinguish between holding and dictum and to properly use the dictum.”

need to explain why the rule they propose (and that the dictum suggests) is sound and the court should adopt it. In short, students can't treat dictum like a binding case holding. And finally, they are obligated to disclose that the statement is dictum.¹¹

The following concrete case example might help. In *NLRB v. Mackay Radio & Tel. Co.*,¹² the Supreme Court upheld an order by the National Labor Relations Board that required the employer to reinstate employees after a strike.¹³ Yet the Court stated, in dictum, the general proposition that employers did not have to reinstate striking employees following a strike.¹⁴ Although that statement was not “necessary to the decision,” a number of courts, including the

Supreme Court itself, have repeatedly framed this dictum as the holding of *Mackay Radio*.¹⁵

As a simple closed-universe problem, students could be given *Mackay Radio* (and perhaps a later case claiming that the dictum was *Mackay Radio*'s holding) and instructed to draft a short memo or motion addressing whether an employer had an obligation to reinstate a striking employee. This exercise would provide students with the opportunity to distinguish between holding and dictum and to properly use the dictum.

Conclusion

Dicta can be used effectively. But the first step is for students—our future lawyers and judges—to identify that the language they are relying on is dicta. We can help teach them both how to identify it and how to properly use it.

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¹¹ *The Bluebook: A Uniform System of Citation* R. 10.6.1(a), at 100 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). That rule states: “When a case is cited for a proposition that is not the single, clear holding of a majority of the court (e.g., alternative holding; by implication; *dictum*; dissenting opinion; plurality opinion; holding unclear), indicate that fact parenthetically.” *Id.* (emphasis added).

¹² 304 U.S. 333 (1938).

¹³ *Id.* at 336, 348, 351.

¹⁴ *Id.* at 345–46, 347.

¹⁵ See, e.g., *Trans World Airline, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 433 (1989).

Another Perspective

“What about Supreme Court dicta? Some who would agree with my point as applied to the inferior courts would assert that things are different when it comes to the Supreme Court. It is sometimes argued that the lower courts must treat the dicta of the Supreme Court as controlling. Various reasons are given: Great respect is owed to the Supreme Court; it always sits en banc, assuring that all of its Justices have participated in whatever it decides; its small docket means it will not likely hear enough cases to cover any area of law by its holdings.

I certainly agree that great respect is owed to the Supreme Court. It is indisputably supreme among courts. By the same token, however, it is but a court. It may make law only in the ways in which a court may make law. Its constitutional function is to adjudicate. Its holdings are without doubt the law of the land. Its dicta? Anything the Supreme Court says should be considered with care; nonetheless, there is a significant difference between statements about the law, which courts should consider with care and respect, and utterances which have the force of binding law. The Supreme Court's dicta are not law. The issues so addressed remain unadjudicated. When an inferior court has such an issue before it, it may not treat the Supreme Court's dictum as dispositive. It must adjudicate.

I am not counseling disrespect for a higher court, least of all the Supreme Court. I am saying only that a lower court has a constitutional responsibility to decide the case in accordance with law. Dictum is not law. The court must decide a previously undecided question.”

—Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1274–75 (2006).

Teaching a Master Class on Legislation to First-Year Legal Writing Students

By Almas Khan

Almas Khan is an Assistant Professor of Law at the University of La Verne College of Law in Ontario, Calif.

At many law schools, legal writing courses fill in the interstices of the first-year curriculum, covering basics about the law that doctrinal professors discuss ad hoc, if at all. A number of these topics require only a brief exposition, but I have found that legislation is one of the subjects necessitating a more probing approach. As enacted law continues to supplant common law, law schools are increasingly incorporating a course on legislation into the first-year curriculum,¹ but this trend is not universal, and many law students take legislation in the second semester of their first year. Yet these students must often parse statutes for doctrinal and legal writing courses in their first semester of law school, and without an elementary understanding of how legislation is interpreted, students are apt to misconstrue statutes.

Accordingly, in the fall semester, I try to reserve a two-hour legal writing class for legislation, devoting the first half of class to an introductory lecture replete with visual aids and case illustrations and the second half of class to an interactive exercise with an ambiguous statute. I divide the lecture into four parts: the weight of statutory authority, the enactment process, theories of statutory interpretation, and statutory interpretation in legal practice. In preparing my lecture notes, I track the course's legal writing text, *Writing and Analysis*

in the Law,² and supplement my explanations with references to legislation casebooks.³

After a humorous example of a poorly drafted statute instigates student interest in the lecture,⁴ I remind the class that statutes are subordinate to constitutions at the federal and state levels, listing the following sources of law by order of authority: the federal constitution, federal statutes and treaties, federal executive orders and administrative regulations, state constitutions, state statutes, state administrative regulations, and municipal enactments. From there, I simplify the bicameralism and presentment process for a federal bill and indicate where legislative history is produced, noting that bills are generated in a legislative chamber, placed before the chamber, referred to the appropriate committee and subcommittee, placed on the calendar (for the House of Representatives), brought to the floor for consideration (including debate, amendment, and voting), reconciled in the Conference Committee, and presented to the president for signing.⁵

After refreshing students' memories about how statutes originate, I succinctly discuss the two major theories of statutory interpretation—

² Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* (5th ed. 2008).

³ See, e.g., William N. Eskridge Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* (4th ed. 2007); John F. Manning & Matthew C. Stephenson, *Legislation and Regulation* (2010); William D. Popkin, *Materials on Legislation, Political Language and the Political Process* (5th ed. 2009).

⁴ See, e.g., Andrew DeMillo, *Error in Ark. Law Allows Kids to Marry*, Aug. 18, 2007, <<http://redsea1.websitetoolbox.com/post?id=2095758&goto=nextnewest>>.

⁵ The Schoolhouse Rock video "I'm Just a Bill" elicits fond memories of grade school and can be supplemented with more "serious" visual aids depicting the legislative process.

¹ Molly Davis, *Law School Revises First Year Courses*, The Emory Wheel, Apr. 1, 2010, <<http://www.emorywheel.com/detail.php?n=28266>>. Legislation is often a mandatory course for first-year law students, though it is sometimes offered as an elective during the second semester of the first year.

“As enacted law continues to supplant common law, law schools are increasingly incorporating a course on legislation into the first-year curriculum. ...”

“The myriad strategies I use to teach legislation—traditional lecture, visual aids, oral arguments, and small group and large group discussions—help capture students’ attention.”

purposivism and textualism—and move into the most pragmatic portion of the lecture: construing statutes, particularly for an assigned legal memorandum or brief. To help students identify the issues implicated by a given statute, in light of their hypothetical problem’s facts, I encourage the creation of statutory briefs paralleling case briefs, though in a more rigidly outlined form. Students can then determine what level of interpretive depth is required for a specific provision. I introduce three primary tools for statutory interpretation: internal aids, extrinsic evidence, and canons of construction. I reference two internal aids: the statute’s single plain meaning (dictionary or technical definition) and its context (title, preamble or statement of policy, date of enactment, other sections, and structure). I focus on legislative history as the predominant form of extrinsic evidence used when intrinsic aids provide no definitive interpretive resolution, describing four major sources from which legislative intent can be gleaned: predecessor statutes, committee reports, hearings and floor debates, and post-enactment legislative action (such as statements or legislation) or inaction.

Canons of construction complete the lecture portion of class, and I underscore that the canons are often used when legislative history is scant, but that they are similarly employed to gauge legislative intent, assuming that legislators drafted a statute with knowledge of certain verbal patterns and substantive presumptions. Students are cautioned that because the canons may yield inconclusive or even contradictory results,⁶ statute-specific internal and external aids should be relied upon when possible; the canons tend to function as tiebreakers and are ordinarily not dispositive in isolation.

I classify canons into three categories—textual, substantive, and deferential—and describe the most frequently cited canons in each category. Students have typically encountered the four following textual canons, which are facially neutral, in their doctrinal courses: *ejusdem*

generis (of the same kind), *expressio unius* (express mention of one thing excludes all others), *in pari materia* (on the same matter), and *surplusage* (giving effect to each word). More controversial are the three substantive canons I discuss: the rule of lenity for ambiguous statutes in criminal cases, the “Charming Betsy” canon of not construing a national statute to conflict with international law, and interpretation in light of fundamental values. I close the lecture with two deference canons recognizing that courts are not the exclusive interpreters of law—deference to administrative interpretations⁷ and the doctrine of constitutional avoidance⁸—and observe that interpretive techniques diminish in relevance as courts authoritatively construe statutes.

After this primer on statutory construction, I divide students into small groups and disseminate an ambiguous statute whose meaning a case has hinged on and related legislative history materials, if the court scrutinized those in reaching its decision. Students utilize internal and external aids, as well as canons of construction, to advocate for the interpretation urged by the plaintiff or defendant, and they deliver miniature oral arguments supporting their position, after which I collate their contentions on the board. An animated colloquy about the statute follows, and I poll students about their decision as hypothetical judges before revealing the court’s ruling and reasoning at the end of class.

The myriad strategies I use to teach legislation—traditional lecture, visual aids, oral arguments, and small group and large group discussions—help capture students’ attention. This approach also facilitates learning. After the two-hour session, students have a better understanding of statutory construction techniques that will help them excel in writing assignments, doctrinal courses, and throughout their careers.

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⁶ See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521–35 (1960).

⁷ See *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁸ This doctrine prevents a court from ascribing an ill motive to a coordinate government branch.

Son of a Preacher Man—What Homiletics Can Teach Us About Oral Advocacy

By Jan M. Baker

Jan M. Baker is a Legal Writing Instructor at the University of South Carolina School of Law in Columbia.

*The only one who could ever reach me was the son of a preacher man.*¹

We can debate whether Dusty Springfield or Aretha Franklin sang it best, but there is no debating that preacher men—and their sons, apparently—move us. In the last few years, I have enjoyed the unusual good fortune of having two former clergy members in my first-year legal writing classes. It was not until I completed this past year with the second of my theology-trained students that I noticed one key skill these two students had in common—a mastery of oral advocacy.

Upon further reflection, I settled on the belief that their homiletical training set these two apart from other first-year students in terms of oral argument delivery. Homiletics is simply defined as the “art of preaching.”² But homiletics goes beyond the presentation of theology and enfolds skills that we all preach about in legal writing: research, storytelling, organization, rhetoric, persuasion, and advocacy.

Ask any congregant what makes a good sermon, and you are likely to hear that the best sermons are those that grip our attention, challenge us to reflect, and invite us to consider a change for the good. However, before the patient congregants hear the sermon, the pastor has taken great care to research, organize, and practice the sermon so that the point

of the homily floats from the pulpit to the pew and blankets its intended audience with such subtle persuasiveness that we nod along in agreement and appreciation. Preachers and lawyers alike must “choose the words that best translate their message and arrange them in the most persuasive order.”³

In the case of my two students, each delivered a first-year oral argument that had all the makings of a good sermon. In addition to demonstrating exceptional organization and mastery of the substantive material, both had mastered the delivery. Both had mastered the use of the pause to allow their points to settle on the minds of the panel members or to enter a second of careful reflection before answering a question. Both had mastered the art of storytelling to engage the judges from the first “may it please the court” to the final “thank you.” Both had mastered the use of appropriate body language and employed well-timed hand motions to emphasize points in a directive but not distracting manner. Both had mastered the art of lingering eye contact, sweeping their eyes to meet those of every member of the judicial panel and engaging each judge individually.⁴

After observing oral arguments from these two students, I realized that a homiletical approach to oral advocacy can put judicial doubts to rest and help allay judicial aggression.⁵ For example, one of my two students argued the complex issue of whether a defendant in a strict products liability

“Preachers and lawyers alike must ‘choose the words that best translate their message and arrange them in the most persuasive order.’”

¹ Aretha Franklin, *Son of a Preacher Man*, on *The Girl’s in Love with You* (Atlantic Records 1970); Dusty Springfield, *Son of a Preacher Man*, on *Dusty in Memphis* (4 Men with Beards 1969).

² *Webster’s Third New International Dictionary* 1083 (2002).

³ Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 *Yale L.J.* 763, 823 (1995).

⁴ See Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 139–206 (2008) (discussing 61 points for effective oral advocacy, including “the pause”).

⁵ *Id.* at 140 (noting that oral argument is an opportunity to “lay ... judicial doubts to rest”).

“He continued with a retelling of the facts so compelling that all of the judges on the panel just nodded along, without interruption.”

action could raise comparative negligence as an affirmative defense. The student represented the not-so-pitiful plaintiff, who became injured when his truck, which he exited while it was parked but still running, rolled onto him when he got out of it to open his farm gate. The student began his argument by explaining that the plaintiff was not a negligent or reckless vehicle operator, but simply a “hard-working farmer without a remote-controlled gate.” He continued with a retelling of the facts so compelling that all of the judges on the panel just nodded along, without interruption.

Later, in the heart of the legal argument, one judge tried to get the student to concede that because the underlying theories of comparative negligence and strict products liability are similar, the defendant

should be allowed to assert comparative negligence as a defense. Unshaken, the student patiently and politely counseled the court, responding that merging the two tort theories would be, at best, a short-lived “marriage of convenience.” The student further emphasized his point by noting, in a pastoral tone, that while apples and oranges are both fruits, they do not taste the same and are not often paired together. The judges nodded a silent “amen.”

The next time I have students struggling with oral advocacy, I might suggest that they visit a pew for a lesson in delivery. Who knows, they might even pick up something more meaningful.

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Additional Resources

Mark Osler, *Two Preachers, A Trial Lawyer, and Aristotle*, 29 *Relig. & Educ.* 78–89 (2002) (the experiences of an attorney and two ministers teaching oral advocacy at Baylor Law School)

G. Robert Jacks, *Just Say the Word! Writing for the Ear* (1996) (a workbook for preachers that focuses on using and telling stories that hold an audience)

Steven A. Beebe & Susan J. Beebe, *Public Speaking: An Audience-Centered Approach* (7th ed. 2008) (lessons learned from great speakers)

Calvin Miller, *Preaching: The Art of Narrative Exposition* (2006) (insights on compelling storytelling)

Legal Research and Writing Resources: Recent Publications

Cite as: Barbara Bintliff, *Legal Research and Writing Resources: Recent Publications*, 19 *Perspectives: Teaching Legal Res. & Writing* 199 (2011).

Compiled by Barbara Bintliff

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

Erika Abner & Shelley Kierstead, *A Preliminary Exploration of the Elements of Expert Performance in Legal Writing*, 16 *Legal Writing* 363–408 (2010).

The article provides a framework for further analysis into the “increasingly sophisticated writing competencies” of lawyers over the course of their careers. *Id.* at 363. The authors conducted focus group research to examine the role of expert performance in legal writing and compare their findings to current expertise theory. The authors then provide suggestions about altering current teaching and legal writing methods to better foster the development of writing expertise in law students.

E. Joan Blum, *Massachusetts Legal Research*, 2010 [Durham, NC: Carolina Academic Press, 217 p.].

The guide provides numerous examples of both Massachusetts and federal law to aid law students, practitioners, and paralegals throughout the entire legal research process, both for online and print media. The guide also includes information about locating and using a variety of primary sources and using citators to revise research, as well as how to effectively utilize secondary sources when beginning a research project. Appendixes explain appropriate citation form and how to conduct text searches in online databases.

Randy Cauthen, *Black Letters: An Ethnography of a Beginning Legal Writing Course*, 2010 [Cresskill, NJ: Hampton Press, 278 p.].

“This detailed ethnographic study of the issues of power, interpretation, and identity involved in becoming a lawyer follows six students through a year-long legal writing course.” Abstract. The study applies theoretical concepts developed by Mikhail Bakhtin for investigating relations between social and personal facets of human development and feminist theory concepts to analyze the relationships formed between the students themselves, the students and the legal texts, and the students and their future clients.

Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 *J. Ass’n Legal Writing Directors* 1–35 (2010).

“This article focuses on the question of whether appellate judges are actually influenced by the stories of the litigants who appear before them.” *Id.* at 3. The author stresses the strength and persuasiveness of an emotional appeal created by couching logical arguments in the form of a story. Research and analysis support the effectiveness of story-form argumentation with appellate judges, and the author concludes that stories are considered more persuasive by judges and more experienced lawyers than by recent law school graduates. The author then explores the implications of that discrepancy for law professors teaching persuasive techniques.

Scott Childs, North Carolina Legal Research, 2010 [Durham, NC: Carolina Academic Press, 232 p.].

The book provides law students and other practitioners of law a foundation for conducting legal research specific to North Carolina. The author details basic legal research skills as well as an overview of researching North Carolina administrative law, case law, statutes, and other secondary sources.

Stephanie Davidson, *Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars*, 102 Law Libr. J. 561–579 (2010).

The author discusses the methods employed by legal scholars in conducting legal research and addresses the “gaps between models of legal research and actual research practices” to provide librarians with a better understanding of current legal research practices. Abstract.

Johanna K.P. Dennis, *Ensuring a Multicultural Educational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 Tex. Wesleyan L. Rev. 613–644 (2010).

The article suggests exploring the multicultural aspects of today’s legal practice in the legal writing classroom. “By examining eight different law schools, the Author discusses current efforts in each law school that impact the educational experience, the shortfalls in these efforts, the need for first-year integration of multicultural topics, and how an educator in the legal academy can ensure that her students receive a well-rounded multicultural educational experience.” *Id.* at 614.

Robert A. Emery, *The Official Bulletin, 1917–1919: A Proto-Federal Register*, 102 Law Libr. J. 441–448 (2010).

The article examines the role of the *Official Bulletin* as a forerunner of the *Federal Register*. The article explores the *Official Bulletin*’s unique combination of news accounts, official agency reports, and war propaganda materials.

Engendering Hope in the Legal Writing Classroom: Pedagogy, Curriculum, and Attitude (Proceedings of the First “Colonial Frontier” Legal Writing Conference), 48 Duq. L. Rev. 199–558 (2010).

Articles include:

Jamie R. Abrams, *A Synergistic Pedagogical Approach to First-Year Teaching*, 48 Duq. L. Rev. 423–453 (2010).

The article describes how a first-year writing course client simulation, which involved various skills components such as complaint drafting and negotiation, created hope in law students. The simulation wove a fact pattern through the first-year fall curriculum and utilized integrated teaching methods to achieve desired objectives. The article outlines the methodology for the particular curricular innovation and encourages proactive pedagogical technique in the classroom.

Christine Pedigo Bartholomew & Johanna Oreskovic, *Normalizing Trepidation and Anxiety*, 48 Duq. L. Rev. 349–383 (2010).

The article contrasts the decreasingly rigorous law school experience with the increasingly competitive and rigorous practice of law. As a result of the discrepancy, the article contends that many young associates lack the requisite skills required for practice. To bridge the gap, the authors suggest implementing hope theory in legal research and writing curriculum. They provide “five ‘best practices’ for LRW courses: 1) teaching the importance of feedback as constructive criticism; 2) creating comfort with ambiguity and malleability; 3) determining where to start a project; 4) determining where and when to stop; and 5) coping successfully with timelines.” *Id.* at 372.

Ted Becker, *If I Had a Hammer: Can Shepardizing, Synthesis, and Other Tools of Legal Writing Help Build Hope for Law Students?*, 48 Duq. L. Rev. 325–347 (2010).

The author intends to complement the many existing teaching practices with a different approach to bringing relevance to research and writing instruction, focusing on “connections” between legal tools and physical tools with which the students are familiar.

Barbara J. Brunner, *Before They Even Start: Hope and Incoming 1Ls*, 48 Duq. L. Rev. 473–498 (2010).

The author suggests a variety of activities—from reading legal novels and visiting a law library to watching legal dramas on television—for newly admitted law students to pursue during the summer before their 1L year. The author “hope[s] that the most self-confident and most substantively prepared incoming 1Ls will find challenging activities on this list that will increase their hope for engaging in law studies in a way that will prove truly enjoyable for them, and that the less self-confident and less substantively prepared students will also find things on this list that will allow them to increase their skills in a way that will, very early in their first semester, show them that their hope of succeeding in law school was also well justified.” *Id.* at 493.

Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 Duq. L. Rev. 273–324 (2010).

Starting with the assumption of a dehumanizing and disheartening nature of legal education, the article suggests the “systematic use of a comprehensive non-legal example during the crucial first weeks of a

legal writing course” to promote confidence and hopefulness within first-year law students. *Id.* at 275. The article provides a history of the use of nonlegal examples as pedagogical educational tools and discusses recent developments in adult learning theory and positive psychology. The article also describes an in-class exercise “developed to introduce fundamental legal concepts ... in an easily accessible, non-legal context.” *Id.* at 276.

Terri L. Enns, *Students Critiquing Novice Writing: Building Hope by Building Bridges*, 48 Duq. L. Rev. 403–422 (2010).

“This paper focuses on the role of hope in the legal writing classroom, and provides an in-class critiquing exercise that can have a positive impact on the students’ sense of hope during that difficult first experience as a legal writer.” *Id.* at 404. The author outlines an activity designed to help students better understand appropriate goal-setting and assessment while also developing a trusting relationship between the students and the legal writing professor.

Julia Glencer et al., *The Fruits of Hope: Student Evaluations*, 48 Duq. L. Rev. 233–272 (2010).

“[T]here has been widely-held belief that when students evaluate legal writing teachers, the result is poorer or lower scores on evaluations than those received by the teachers of doctrinal or casebook courses.” *Id.* at 234. In response to this perception, the authors explain negative factors resulting in low evaluations and suggest curricular elements and teaching methods to improve evaluation ratings, based on Martin and Rand’s five principles of engendering hope among students.

Sherri Lee Keene, *It Was the Best of Practice, It Was the Worst of Practice: Moving Successfully from the Courtroom to the Classroom*, 48 Duq. L. Rev. 533–558 (2010).

The author argues that “[e]xperienced practitioners bring to the classroom a wealth of knowledge and insight about the practice of law,” but that making the transition from practicing law to teaching law elicits its own set of challenges. *Id.* at 533. One of the main dilemmas faced by those making the transition is being able to connect and communicate with students and to accurately assess student abilities. The author provides recommendations to enhance student engagement and to facilitate better communication between students and the professor, focused on when the professor is transitioning from practice to teaching.

Allison D. Martin & Kevin L. Rand, *The Future’s So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 Duq. L. Rev. 203–231 (2010).

“[T]his article offers suggestions on how legal educators can create a hopeful learning environment and concludes that instilling hope in law students should be an aim of every legal educator.” *Id.* at 204. It includes sections that explain why hope is important and discusses the five principles of engendering hope.

Karin Mika, *Would You Say That to Your Children? Enhancing Learning Through Improved Communication*, 48 Duq. L. Rev. 499–511 (2010).

The author advises teachers to incorporate a variety of communication techniques in their teaching style to encourage student involvement and to address the needs of today’s students. The techniques range from simply saying please to not lumping all students together into a generalized statement for fear of demoralizing those who did not exhibit the behavior being critiqued.

Mary-Beth Moylan & Stephanie Thompson, *Enduring Hope? A Study of Looping in Law School*, 48 Duq. L. Rev. 455–471 (2010).

Looping “requires a teacher to ‘loop’ with a class through more than one grade level” to provide continuity, to facilitate better teacher-student relationships, and to provide an incentive to resolving conflicts. *Id.* at 455. The author “explores the history and benefits of looping and discusses [the] idea that it could have a place in legal skills education.” *Id.*

Exemplary Legal Writing 2009, 13 Green Bag 2d 249 (2010).

This is a brief, unannotated list of articles, books, briefs, opinions (including concurrences and dissents), and other writing types considered “exemplary” by the editors of the *Green Bag*.

Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 Legal Writing 223–311 (2010).

By administering a set of three surveys to first-year law students over the first eight weeks of legal writing instruction, the authors examine the disparities found between the law students’ perceived level of readiness and their actual writing ability and chronicle the frustrations experienced by the students in the legal writing classroom. The authors detail their four main findings and suggest teaching methods “to recognize and embrace the [students’] role as novices in the legal writing discourse community and to actively move themselves forward in their learning.” *Id.* at 227.

Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. Ass’n Legal Writing Directors 37–61 (2010).

The article examines the role and effectiveness of stories and storytelling in legal practice. The author describes her own experience teaching narrative theory and practice, and encourages its widespread use in law school

curriculum to create “empowered, reflective, and socially responsible” members of the legal profession. *Id.* at 41.

Deborah K. Hackerson, *Access to Justice Starts in the Library: The Importance of Competent Research Skills and Free/Low-Cost Research Resources*, 62 *Me. L. Rev.* 473–486 (2010).

“Access to justice includes access to information.” *Id.* at 475. The article explains the imperative role that “competent and cost-effective legal research” instruction fulfills in ensuring that law students are able to represent all types of clients and to perform all types of legal work, including pro bono and public service work. *Id.* at 474. The author stresses the “importance of the continued development of free and low-cost resources that will support law students, lawyers, and the general public in performing cost-effective legal research.” *Id.* at 475.

Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 *J. Ass’n Legal Writing Directors* 63–86 (2010).

The author addresses the growing discourse about Applied Legal Storytelling and the feelings of unease and ethical concerns that it provokes. By examining three stories, the author highlights three ethical principles for storytelling: don’t lie; remember your other ethical duties; and the story may enhance, but not replace, legal analysis.

Frederick B. Jonassen, *On-Line Legal Research Workshops*, 22 *St. Thomas L. Rev.* 470–503 (2010).

The article discusses the creation of a student workshop specializing in online and electronic resource research skills, and the inherent differences that may exist between electronic research training and traditional print legal research training. The author then describes an electronic workshop he is currently developing, the student reactions he has received about it, and the changes he plans to make to it based upon those student reactions.

Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 *J. Ass’n Legal Writing Directors* 87–122 (2010).

“This article explores one content-driven, context-specific way that typography might be used in legal briefs: to reinforce, complement, and independently create narrative meanings.” *Id.* at 89. The article describes how letter shapes, fonts, line spacing, and other typographical choices can positively or negatively impact the reader experience.

Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 *St. Thomas L. Rev.* 1–49 (2010).

The author argues that the current legal fiction scholarship is of an entirely new discourse and does not build upon the existing work of fictions that satisfy Lon Fuller’s classic definition of legal fiction. The author then analyzes empirical legal errors, discredited legal regimes, and complex statutory schemes to illustrate the differences between old and new legal fiction scholarship as well as evaluate the constitutive power of legal fictions.

Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 *Clinical L. Rev.* 285–388 (2010).

Clinics by their nature require students to use advanced legal writing skills. Yet, typically, students are ill-equipped to create usable, professional work, much to the frustration of clinicians. The author addresses the phenomenon of “transfer of learning,” wherein students are unable to recognize situations calling for the use of their legal writing skills, and “propose[s] a comprehensive pedagogy for teaching and supervising legal writing in clinic.” Abstract.

The Legal Writing Institute: Celebrating 25 Years of Teaching and Scholarship (Symposium), 16 *Legal Writing* 411–638 (2010). Articles include:

Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 *Legal Writing* 521–563 (2010).

The authors discuss the nature of the “third generation” of legal writing scholarship, a scholarship that better integrates and engages professional lives and communities, with rhetoric as the discipline’s core concept. Emphasizing the interaction between readers and writers in legal writing through rhetorically effective texts can create meaning, form professional communities, and encourage stimulating and often provocative scholarship between disciplines. However, the authors indicate a variety of concerns in this approach that may accompany the implementation of rhetoric in legal scholarship, such as the risk of fragmenting the discipline, subjecting scholarship to criticism that is too theoretical (especially for those who are not sufficiently grounded in rhetorical theory), and possibly stifling community-building efforts through criticism.

Carol McCrehan Parker, *The Signature Pedagogy of Legal Writing*, 16 *Legal Writing* 463–474 (2010).

The author describes the hallmarks of the signature pedagogy of legal writing as “authentic tasks of an appropriate level of difficulty, undertaken within a collaborative setting guided by a more advanced learner, by way of an iterative process that includes frequent feedback and revision.” *Id.* at 466. She explores the theoretical underpinnings of the pedagogy of legal writing and asserts that it contains features from composition theory and cognitivist and constructivist learning theories,

and supports her argument with research in the acquisition of expertise.

Marilyn R. Walter, “*Writing as Conversation*”: *Using Peer Review to Teach Legal Writing*, 16 *Legal Writing* 411–418 (2010).

The author suggests using peer review to better integrate the experiences of reading the work of good writers and receiving feedback in the classroom. She focuses initially on helping students learn to edit and become good colleagues, and provides a list of broad questions for the professor to pose to help guide students in their peer review.

The Legal Writing Institute: Celebrating 25 Years of Teaching and Scholarship (Symposium), 61 *Mercer L. Rev.* 705–1014 (2010). Articles include:

M.H. Sam Jacobson, *The Curse of Tradition in the Law School Classroom: What Casebook Professors Can Learn from Those Professors Who Teach Legal Writing*, 61 *Mercer L. Rev.* 899–923 (2010).

The article provides some of the many valuable insights that those teaching legal writing have acquired from years of teaching in the trenches, most notably the problems created by blindly following tradition without any critical inquiry into its purpose (explained in the context of a “ham butt problem”). *Id.* The author addresses the concerns presented and provides materials and suggestions to encourage better student engagement in the classroom.

J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: The View from Within*, 61 *Mercer L. Rev.* 705–745 (2010).

The authors argue to include a discursive identity, i.e., an identity originating from and shaped by legal contexts, within a social view of legal writing. Building a discursive identity is fraught with conflict and resistance for many students. The authors advise legal writing professors to be aware

and be prepared to aid students in overcoming the challenges they face when creating their new lawyerly writing identity.

Robert M. Linz, *Colorado Legal Research*, 2010 [Durham, NC: Carolina Academic Press, 195 p.].

This book provides a comprehensive overview on how to conduct legal research in Colorado. It provides explanations of primary sources and secondary sources, as well as practice materials. It also evaluates a wide variety of print and online legal resources with visuals of each medium to assist the researcher.

Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 *J. Legal Educ.* 65–105 (2010).

The article explains the purpose and practice of footnoting in academic legal writing, and suggests that current footnoting in legal writing may be superfluous and may only contribute to visual clutter on the page. The author then puts forth a series of stylistic rules that would enhance an article's readability rather than restrict it.

Steven Robert Miller, *United Nations Databases and Web Sites for Legal Research and Education*, 54 *Res Gestae* 12–20 (Oct. 2010).

The United Nations websites and databases contain vast amounts of relevant information, and the author states that it is essential that legal research education instruct students to effectively navigate these online resources. The article includes information on important electronic sources, including major research tools, the U.N. reference library, and the United Nations Treaty Series collection.

Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 *Okla. City U. L. Rev.* 267–338 (2010).

The author posits that law schools are “failing to expose students to the tribal justice systems” and are not “adequately preparing students to practice in today's legal arena.” *Id.* at 269. Ignoring tribal

justice systems not only shortchanges a law student's educational experience, but it also “marginalizes an entire culture.” *Id.* The author suggests using the legal writing classroom to introduce students to tribal courts and the issues unique to them.

Stephen K. Phillips, *A Legal Research Guide to HIPAA*, 3 *J. Health & Life Sci. L.* 134–184 (2010).

The guide provides thorough annotations and explanations of the intricacies of major provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) statute and other related laws, such as the Health Information Technology for Economic and Clinical Health (HITECH) Act and the Genetic Information Nondiscrimination Act of 2008 (GINA). It also includes information about other related sources, such as applicable regulations, case law, and online sources.

Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 *Legal Writing* 65–116 (2010).

“This [a]rticle ... explores, theorizes, and explains how to write more persuasively by incorporating rhythm, flow, and tone into text.” *Id.* at 67. The author provides an overview of the psychology and scientific bases underpinning the relevance of rhythm, flow, and tone in attracting readers; examines the writings of famous authors for their “musilanguage” components; and advises legal writing professors to supplement IRAC instruction with musilanguage components to make legal writing more persuasive.

J. Christopher Rideout, *Penumbra Thinking Revisited: Metaphor in Legal Argumentation*, 7 *J. Ass'n Legal Writing Directors* 155–191 (2010).

The article provides guidance for mastering the use of metaphors and the penumbra metaphor in legal arguments. The article begins by explaining the classical forms of metaphor before moving toward a discussion about the penumbra metaphor and how it can strengthen legal argumentation.

Ken Strutin, Solitary Confinement, LLRX.com, Aug. 10, 2010 (available online at <<http://www.llrx.com/features/solitaryconfinement.htm>>).

This research guide of selected resources represents “current research and thinking about the physical, psychological and legal implications of isolation as punishment, and the policy issues behind continuing this practice in the light of national and international standards and human rights declarations.” Introduction.

Susan L. Turley, “*To See Between*”: *Interviewing as a Legal Research Tool*, 7 J. Ass’n Legal Writing Directors 283–309 (2010).

Former reporter Susan L. Turley explains that conducting oral interviews is a powerful, yet vastly underused, legal research tool. Using the “Three P’s of Preparation,” *id.* at 299, (prepare professionally, physically, and psychologically), Turley provides suggestions for perfecting the interview, from conducting it to concluding it. Additionally, she discusses why the legal practice seems to favor print sources over actual people for research purposes.

Victoria L. VanZandt, *Creating Assessment Plans for Introductory Legal Research and Writing Courses*, 16 Legal Writing 313–361 (2010).

“This [a]rticle addresses the recommendation for the development of plans for assessing student learning outcomes and specifically focuses on introductory LRW courses.” *Id.* at 317. The author provides information on using assessments in formal assessment planning, including in the creation of assessment plans. She concludes that the use of assessment plans in first-year legal research and writing courses will improve both teaching and learning in the first-year curriculum.

Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 Phoenix L. Rev. 1–38 (2009).

The authors argue that first-year legal writing courses do not adequately prepare students for legal practice, and that most programs would benefit from a restructured curriculum designed to emulate modern practice. “Although legal-writing programs have increasingly gained recognition as an essential part of a first-year program, those gains have also led the field to turn inward, developing writing programs from an academic perspective instead of from a practice perspective. This article presses for change in that trend.” *Id.* at 3–4.

Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. Ass’n Legal Writing Directors 229–246 (2010).

“[T]his article considers the distinction between scholarly and practical approaches to the ethics of narrative.” *Id.* at 231. The article provides an overview of different instruction methods for teaching narrative skills and legal ethics in a variety of global contexts, and explores “ways in which programs of legal education can uncover the lost narrative.” *Id.*

Mary Whisner, *Enact Locally*, 102 Law Libr. J. 497–506 (2010).

The author “discusses the wide range of topics that can be covered by local law, and encourages law librarians to think about it both when researching and when teaching the process of legal research.” Abstract. The author includes examples of the importance of local legislation to illustrate the significance of local law.

Caroline Young, *Medico-Legal Research Using Evidence-Based Medicine*, 102 *Law Libr. J.* 449–477 (2010).

The article provides guidance in finding and evaluating medical information within the framework of evidence-based medicine, i.e., “the use of the current best evidence when making decisions about the care of individual patients.” *Id.* at 450. The author defines evidence-based medicine, provides a guide for how to locate and select a variety of different bibliographic databases, explains how to apply evidence-based methods to the medical research process, and describes reliable electronic and print sources for evidence-based medicine research.

New Editions

Morris L. Cohen & Kent C. Olson, *Legal Research in a Nutshell*, 10th ed., 2010 [St. Paul, MN: West/Thomson Reuters, 499 p.]

Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization*, 5th ed., 2010 [New York, NY: Aspen Publishers, 461 p.]

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