Perspectives
Teaching Legal Research and Writing

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Brutal Choices in Curricular Design …

Brutal Choices in Curricular Design… is 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. We wonder if, given today's difficult economic times, there is an increased move to use adjunct instructors rather than full-time faculty in legal writing programs. The two articles that follow focus on adjunct-led programs. We invite comments about adjunct-taught programs for potential publication in the Fall 2012 Perspectives. Please send commentary to Kathryn Mercer *or* Helene Shapo.

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It's Not Purely Academic: Using Practitioners to Increase the Rigor and Practical Learning in Scholarly Writing

By Karen D. Thornton

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We have all heard the now-common refrain from employers: law schools must do more to prepare graduates for practice. In response, some schools have built additional courses into their offerings, such as motion drafting and client interviewing. Though worthwhile, this approach overlooks practical skills that can be developed through an existing graduation requirement. Upper-level writing is a ready-made opportunity for skills training taught by experienced practitioners who can most effectively demonstrate for students what it means to write at the level of a junior associate. At The George Washington University Law School (GW), we have a practitioner-taught scholarly writing course that focuses on the practical application of academic writing and prepares 2L students for the demanding expectations they will face during their summer associateship. Drawn largely from the local alumni pool, our adjunct professors are practitioners who bring their daily work experience to the classroom to prove that writing a seminar paper is more than purely academic, it is a preview of the writing process lawyers execute every day. Further, by providing students personalized feedback on their writing and holding them to the same time management and writing standards expected of associates, these practitioners prepare their students to impress in any professional setting.

When students return from their 2L summer, they tell us how much they appreciate the scholarly writing advantage and the sense of confidence it gave them as summer associates. This past fall, one student reported that, at his firm, offers would not be extended to every summer associate, and it was

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no secret partners were making hiring decisions based on associates' writing skills. The student said he was grateful for the additional year of small-group writing instruction he received in the scholarly writing course and he was sure it contributed to his receiving an offer.

The intense practitioner-supervised scholarly writing process has also increased the rate of student publication. In 2010, Scribes, the American Society of Legal Writers, recognized a GW Law Review member's work as the best note of the year.[1] Sixty-one student notes written during the 2010–2011 academic year were selected for publication in GW's seven journals. Of those seven, four journals are associated with a bar association or law society, which means the students' writing is being read by practitioners. One student note, recently published in a bar association journal, was described by a government lawyer to his colleagues as a must-read.

This paper asserts that in times when curricular resources are spare, a scholarly writing course taught by adjunct faculty dedicated to instilling in their students an appreciation for precision and professionalism makes the most of an existing graduation requirement. We will begin by briefly describing the ABA standard for upper-level writing, then explain how an adjunct-taught scholarly writing course can bring practical learning to the classroom, and finally, address challenges associated with managing an adjunct faculty.

"One Additional Rigorous Writing Experience"

Over 10 years ago, the ABA Board of Governors revised its standards of accreditation to require a minimum of "one additional rigorous writing experience after the first year."[2] The Standards Review Committee took action in response to practitioner complaints about poor law graduate writing skills, acknowledging the upper-level writing requirement was intended, in part, to "support the claim that the Standards' requirements did, in fact, do an adequate job of preparing law graduates to begin the practice of law."[3] In a 2007 article, Kenneth Chestek lamented that the requirement alone is insufficient because law schools do little to ensure rigor in upper-level writing.[4] At some schools, an independently written, lightly supervised paper of 8,000 words is sufficient to meet the graduation standard.

About five years after the adoption of the new requirement at GW, we saw weak student notes, guided only by 3L notes editors, as a missed opportunity and a call to raise our standards. Some faculty members responded to mediocre upper-level writing by questioning the quality of the 1L legal writing course. Those of us who teach Legal Research and Writing recognize, however, that the 1L course is not intended to prepare students to write a scholarly paper. The ABA standards drafters also appreciated this distinction when they noted that a first-year course is not enough; rather, "a substantial writing experience in the first year is fundamental, and … students will benefit from a writing experience beyond the first year."

We have found the best way to ensure a student's upper-level writing experience is rigorous and prepares him to meet practitioner expectations is through a scholarly writing course taught by lawyers who write for a living. When faced with budget constraints, law schools should capitalize on this existing academic requirement and relatively inexpensive labor force as an opportunity to develop practical learning. The next section will describe GW's adjunct-based scholarly writing course and how it fulfills the

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1 According to its website, Scribes' purpose is to "honor legal writers and encourage a 'clear, succinct, and forceful style in legal writing.'" GW student Michael Wagner was honored for his note, *Warrantless Wiretapping, Retroactive Immunity, and the Fifth Amendment*, 78 Geo. Wash. L. Rev. 204 (2009), which was written in fulfillment of the scholarly writing course.

2 The ABA requires all graduates to complete a rigorous writing requirement of no less than 8000 words. Am. Bar. Ass'n Sect. of Legal Educ. & Admissions to the Bar, Standards for Approval of Law Schools 40, Standard 302(a)(i) (2000). For further background on the origins of the ABA upper-level writing requirement, *see* the 1992 McCrate Report, http://www.americanbar.org/groups/legal_education/publications/maccrate.html.

3 Kenneth Chestek, *MacCrate Inaction: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 U. Colo. L. Rev. 115, 123 (2007).

4 Chestek, *supra* note 3, at 119. Chestek examines how various law schools have implemented the ABA's 2001 amendment and whether the added requirement achieved its purpose. He concludes that the amendment had little impact on skills education at law schools and was a "missed opportunity to move schools toward a more practical approach to legal education." *Id.* at 115.

"The scholarly writing course is designed to train students for a legal profession that demands analytic persuasion, concise writing, and strength of character."

ABA's original purpose for adding a "rigorous writing experience" after the first year.

GW's Scholarly Writing Program: Where the Academic Meets the Practical

The scholarly writing course is designed to train students for a legal profession that demands analytic persuasion, concise writing, and strength of character. We employ practitioners who live and breathe these demands on a daily basis; our adjunct faculty members are mostly former journal editors and subject-matter expert practitioners. The students are 2L journal members who are writing a note, in fulfillment of their upper-level writing requirement for graduation. In addition to the Law Review, GW hosts six specialized journals that focus on subjects such as environmental law, intellectual property, and international law.

The newly minted 2L journal member is understandably anxious when tasked to state and prove a thesis in 8,000 words. If on a specialized journal, she likely has had no training in the law within the journal's specialty. The student may be inspired by a sense of autonomy not found in the first-year writing course, but without the skill and focus of a practitioner to guide her through the writing process, the student will likely revert to undergraduate research paper writing habits. Unless students are taught to approach the upper-level writing paper as a practical skills builder, they will miss a unique opportunity to see that a professional never stops improving his writing skills and also to develop a sense of self-reliance and professional confidence.

To make the very most of the upper-level writing requirement, GW's scholarly writing curriculum focuses on writing skills used in practice and offers much-needed direction, interim deadlines, peer review, and individual feedback. The class meets just eight times across the academic year and affords significantly greater independence than the 1L writing course, with less lecture and more collaborative group discussion. However, the lessons that writing is a disciplined process and clear writing is carefully structured remain the cornerstone for instruction; these lessons are just as true in practice as in the academic setting.

The scholarly writing curriculum identifies key milestones in the writing process, and at each milestone the adjunct gathers a small group of no more than 10 students for lecture, peer review, or individual feedback. Our textbook, Jessica Clark and Kristen Murray's Scholarly Writing: Ideas, Examples, and Execution (Carolina Academic Press 2010), presents a chapter on each milestone: thinking, preparing, executing, refining, and publishing.[5] The next section explains how adjunct professors demonstrate that attorneys mirror these academic milestones in the writing they do in practice, and it is followed by a brief summary of student feedback.

The Parallel Stages of Writing

The scholarly writing course prepares students to write for a highly critical audience that seeks a creative perspective, a synthesis of significant research sources, and a practical solution, all packaged in a highly readable style. Without the practitioner's guidance, most students falter at the outset because they have no context for recognizing their audience's needs or interests. For the majority of students, the most difficult stage of the writing process is selecting a topic and crafting a thesis that is both novel and useful to the reader.[6] Without a proper launch, the typical student will revert to descriptive writing.

It is precisely this regression that generates criticism and frustration from seminar professors and journal faculty advisors who review and grade upper-level writing. With practitioner feedback and encouragement at the outset and at each milestone, however, the student can embrace the notion of writing as a process and then progress

[5] Requiring students to use a written text in a scholarly writing course saves teaching time and puts the course on par with substantive courses. Lissa Griffin, *Teaching Upperclass Writing: Everything You Always Wanted to Know but Were Afraid to Ask*, 34 Gonz. L. Rev. 45, 57 (1999).

[6] Eugene Volokh explains that a piece of good scholarly writing presents "a claim that is novel, nonobvious, useful, [and] sound…." Eugene Volokh, *Academic Writing: Law Review Articles, Student Notes, Seminar Papers and Getting on Law Review 9* (3d ed. 2007).

from one stage to the next. The following chart presents the stages of writing a scholarly paper and demonstrates how our adjunct professors translate the academic process into the process by which attorneys approach any writing assignment.

In the Scholarly Writing Course	In the Practice of Law
Find a legal problem that interests you and work with the adjunct professor to identify your audience.	Receive a task from your supervising attorney and make time for thinking about the underlying legal issues.
Formulate a thesis by giving voice to a position heretofore unnoticed or unappreciated and test out your idea in a peer-review meeting.	Establish your "theory of the case."
The adjunct professor sets interim deadlines for an outline, first draft, second draft, and final product.	Consider your caseload and billable hours and plan your schedule.
Meet with a research librarian to learn advanced research techniques and maintain a journal for your reactions as you research.	Conduct research and organize your sources.
Outline your main points and supporting points and include annotated sources. Use the peer- review meeting discussion to identify logic gaps in your outline.	Create a document with organized and annotated bullet points as a progress report for the supervising attorney. Prepare to be grilled on sources and reasoning.
Flesh out your outline into a first draft then meet with the adjunct professor to identify practitioners who can help strengthen sources and arguments. Doubles as a networking opportunity!	Implement criticism and then string the bullet points together into a rough draft and meet with a peer-level colleague to test persuasiveness by evaluating structure, sources, and reasoning.
Exchange drafts within the peer-review group and make revisions for structure, persuasiveness, and reasoning.	Refine the draft by scrubbing for grammar, style, and word choice. Rely on favorite desk reference, e.g. Strunk & White.
Meet individually with the adjunct professor to identify and correct sentence-level weaknesses in the second draft. Adjunct will recommend favorite desk reference.	Polish further to ensure the supervising attorney sees only a perfect final product.
Submit to the adjunct professor for final grade and discuss publishing opportunities.	Submit to the supervising attorney.

In the very first stage, the student meets individually with the practitioner to discuss the student's legal interests and personal strengths. The adjunct guides the student to a hot issue that has fellow practitioners abuzz and also complements the student's interests. This works best when the adjunct practices in the field covered by the journal, but can also succeed in a more general context where the practitioner subscribes to the journal and follows developments in local or federal case law.

The practitioner further engages the student in thinking about how his interests might intersect with current developments in the law and offers a number of secondary sources to familiarize the student with the existing literature. This personalized attention from a member of his audience helps the student understand how to best present his message to the journal reader. To memorialize his expectations, the practitioner distributes a rubric that reflects, among other teaching points, the significance of a carefully honed thesis. From the very outset, the student understands the bases by which the reader will evaluate his paper.

Next, a research librarian takes the student beyond the 1L research methods and introduces the full extent of online databases and shared library catalogs that enable students to delve deeper into legislative history, policy directives,

"In the very first stage, the student meets individually with the practitioner to discuss the student's legal interests and personal strengths."

"The adjunct assigns a research journal to train students to chronicle not only the relevant sources they identify but also their critical reactions."

and legal journals, both domestic and foreign. The practitioner supplements this training with his own lists of favorite blogs and Web-based materials to emphasize that research strategies confined to Google, Lexis, and Westlaw® may be considered incomplete in practice. The practitioner also shares practice-based anecdotes about long days devoted to the research phase to make manifest the value placed on writing that is well-researched and supported.

Once the research is underway, the student needs training in organizing ideas and sources to maintain efficiency and academic integrity. The adjunct assigns a research journal to train students to chronicle not only the relevant sources they identify, but also their critical reactions. This assignment is designed to encourage each student to find his or her voice rather than be tethered to description and paraphrase.[7] Journaling also ensures students maintain the integrity of their sources by providing proper attribution. Adjuncts take this opportunity to discuss professionalism and the extraordinary damage plagiarism can do to a lawyer's credibility and career.

From this research journal, the student builds an outline, which becomes the centerpiece for an adjunct-moderated peer-review meeting. All participants are expected to read and provide impressions on the structure and substance of each other's outline. Being face to face with the audience helps the student achieve a breakthrough in her reasoning, compelling the student to clarify logical connections that may have been muddled. To structure the peer-review meeting, the practitioner distributes suggested questions that are borrowed from our textbook's helpful self-assessment guides.[8] For his part, the practitioner explains that in practice a supervising attorney will likely demand the junior associate outline a strategy for responding to a client issue and then challenge the associate's research, assumptions, and reasoning to strengthen the work product.

The drafting stage follows on the outline and, during this phase, the adjunct distributes handouts identifying common first-draft errors for students to avoid. In practice, supervising attorneys expect junior associates to solve challenges themselves without a flurry of follow-up questions, so these guides train students to be self-reliant. The adjunct also provides personal tips for time management and establishing a disciplined writing schedule, which are lessons learned from years of experience meeting office deadlines.

When the draft is complete, the peer-review group meets and exchanges papers again. This meeting is an opportunity for students to overcome the isolation of the drafting process and recognize their common struggles, such as structural organization, effective transitions, and counter-arguments. To help students refine their analysis, the practitioner plays the role of the skeptical, supervising attorney, and presses the students to sharpen their reasoning orally. In some cases, where a paper falls short on addressing counter-arguments, the adjunct professor can refer the student to a colleague who has practice experience with the student's topic. This unique opportunity will help the student identify gaps requiring additional research, logic flaws that must be more carefully articulated, and concrete examples to bolster the paper's persuasiveness. As a secondary benefit, the meeting may also serve as an employment networking opportunity for the student. Many students have remarked that their note became a great source of conversation during an interview, enabling them to demonstrate expertise and enthusiasm about a topical legal matter.

[7] Professors Elizabeth Fajans and Mary Falk describe their initial disappointment in their students' scholarly writing and ascribe the weak writing to a failure to appreciate the nuances and dialogue in the sources they read. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163, 170 (1993). Professors Fajans and Falk have also written an upper-level writing textbook, Elizabeth Fajans & Mary Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers* (3d ed. 2005).

[8] *See, e.g.*, "Chapter 5 Quiz: Evaluating my Thesis," Jessica Clark & Kristen Murray, *Scholarly Writing: Ideas, Examples, and Execution* 81 (2010).

In the final, individual meeting with the practitioner, the student presents his penultimate draft and the discussion centers on style, sentence-level logic problems, and attention to detail. This polishing phase lends itself to real-time critique where the adjunct may read the draft aloud so the student can hear the flaws. By experiencing the practitioner's reaction to his work, the student learns that in practice his writing will always be scrutinized by a critical reader who demands a flawless product. This meeting will often end on a high note, with the practitioner encouraging the student to dig deep for one, final push toward producing a publishable paper and emphasizing that stamina is a key attribute of any successful, professional writer.

Student Feedback

Anecdotal findings suggest students leave the scholarly writing course better prepared for practice. As summer associates, students experience practitioner demands for thorough research, well-developed analysis, and refined writing. New 3Ls return to tell us how well-prepared they felt because of the planning, writing, and polishing skills they gained from the note-writing process. According to one, "in college, I got by submitting first drafts—scholarly writing taught me how to write multiple drafts to fulfill a partner's expectation for polished writing." Others appreciate that they have a sense of what employers will demand: "I liked that my adjunct always challenged my thinking. He seemed skeptical of my analysis in a way that kept me on my toes and forced me to be clear in my articulation." In addition, students come to recognize the value of the soft skills learned by collaborating and sharing feedback within a peer group: "I appreciated getting input on my note from other members of my peer-review group. Realizing there are always varied perspectives among readers helped me deal with the sometimes contradictory feedback I got from my supervising attorneys this past summer."

Those students whose scholarly papers were selected for publication beam with a special pride that comes from being recognized for a difficult and personal effort: "In my 1L summer, when my boss gave me an assignment, I would spend the first couple hours just panicking and wondering where to begin! After taking scholarly writing and having my note published, I have become so much more efficient. When I got assignments as a summer [associate], I was confident I knew where to start the process and how to structure my writing."

Student feedback is a meaningful measure of how well the scholarly writing course prepares students to work for professional writers. When making curriculum decisions about how to ready students for practice, law schools should take advantage of an available and relatively inexpensive labor force to develop practical learning. The next section will allay concerns that the benefits of an adjunct faculty are outweighed by the costs.

"Student feedback is a meaningful measure of how well the scholarly writing course prepares students to work for professional writers."

Addressing the Challenges of Managing an Adjunct Writing Faculty

Managing the scholarly writing course is not a full-time job. To the contrary, the course largely runs itself because the roster of adjuncts has grown into a collegial network, thanks to a conscious emphasis on communication and shared teaching materials.

The scholarly writing course relies on a team of 35 adjunct faculty members to maintain a student-faculty ratio of approximately 9-to-1. When we hire adjuncts, we first turn to journal faculty advisors and editorial board alumni for recommendations. The positions have become highly sought after among local graduates who were heavily invested in the law school's writing program as fellows and editors. It is not the monetary reward they seek, but the intangible: a sense of giving back to the law school and a chance to shape future professionals. The scholarly writing course rewards the adjuncts in each of these ways, but they also gain from the collaborative sense of community as part of an academic team.

There are two traditional counterarguments to relying on adjunct faculty: the administration can be unduly burdensome for the program coordinator, and students may chafe at the lack of uniformity among professors. We have overcome these concerns by emphasizing the benefits of being part of an academic community and by sharing best practices ideas among the adjunct community members.

"Twice annually, we host lunch meetings to gather the adjuncts and share practice ideas in the style of an informal symposium."

A Sense of Community

The program coordinator is largely a facilitator. The adjuncts are the ones bringing the most valuable teaching material to the classroom. But unless the coordinator reinforces and shares best practices or sets policies to address common issues, such as extension requests, the adjuncts can feel disconnected or isolated.

Twice annually, we host lunch meetings to gather the adjuncts and share practice ideas in the style of an informal symposium. Many are scattered across town but practice within the same field, and enjoy the time to catch up on current career pursuits and build a sense of camaraderie over lunch. In a city of thousands of lawyers, being part of a specialized practice area is like being part of a club where everyone knows your name.

Often we invite a guest, such as a counseling center representative, to give a presentation on identifying students in need, or the writing center coordinator to describe additional writing resources available to students on campus. Individual adjuncts may take turns sharing lesson plan ideas or seeking advice. These meetings are also an opportunity to address consistency in grading by distributing and discussing a rubric.

In addition to these two meetings, we issue monthly best practices bulletins to promote and disseminate teaching ideas and techniques from the experienced adjunct professors or from legal writing conferences and journals. With these multiple layers of communication and connection, we demonstrate our commitment to the adjuncts' professional growth. When they sense they are valued, adjuncts contribute more to their students' development. By building a sense of community among the adjunct professors, the scholarly writing program has become an opportunity for the practitioners, as much as the students, to find satisfaction and enrichment.[9]

Achieving Uniformity

We have found that a new, untrained teacher can be just as effective as an experienced one, if you pair him with a student teaching assistant and enforce consistency with shared lesson plans, assessment tools, and rubric. The journal Science recently published a paper that asserts less experienced instructors can have greater success in producing student learning when they use "deliberate practice," combining experiential learning and ongoing assessments.[10] After all, the value of having an adjunct in the classroom is the unique practice-based perspective she brings and how well she challenges the students to meet her practice-level expectations.

When adjuncts ask their teaching assistants (the 3L note editors) to present testimonials of impressing clients and supervising attorneys with efficient research and outlining skills, the message resonates deeply with impressionable 2Ls. The 3Ls connect their note-writing experience to the writing they did as summer associates. They can speak frankly of the hard work and long hours they devoted to writing and acknowledge that in scholarly writing, as in practice, there are no shortcuts. Employing student voices helps the adjunct overcome any notion that he or she is out of touch with the student experience.

To address student demands for consistency among adjuncts, we use assessment questions from the Clark & Murray textbook to structure the peer-review discussion sessions. For grading purposes, we employ a common rubric, which captures all the elements of the scholarly writing curriculum. The rubric addresses the strength of the thesis idea itself, the structure of the document, and how well it persuades. It further captures matters such as style, and how well the thesis fits within the context of existing literature. For the students, having the adjunct's expectations in writing is like owning the key to unlock their full professional potential.

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9 *See* Chestek, *supra* note 3, at 143.

10 Tushar Rae, *Postdocs Can Be Trained to Be More Effective Than Senior Instructors, Study Finds,* The Chron., May 12, 2011.

Conclusion

In addition to building practical skills, students gain intangible benefits from the disciplined mentoring relationship and individual feedback practitioners provide in the scholarly writing course. The students come to see that discipline breeds freedom—freedom from the anxiety of executing poorly planned writing and the freedom to develop a persuasive voice.[11] The low student-teacher ratio and individual feedback assures students they have a coach in their corner who will condition and develop their sense of patience and attention to detail and help them tap into their personal strengths to overcome initial anxieties.[12] At the end of the year, the satisfaction of completing and even publishing a scholarly paper creates a newfound sense of confidence and empowerment. Students who become lawyers who love language and learning are ultimately stronger and happier throughout their careers.[13] Finding this happiness by embracing a disciplined writing process is a lesson best learned from a practitioner.

[11] Anne Lamott offers that discipline, ironically, can create a sense of liberation. Anne Lamont, *Bird by Bird: Some Instructions on Writing and Life 233*(1995). Interim deadlines, writing groups, and peer review help students create this discipline.

[12] *See* Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (1997), from Terry Phelps' presentation at the Capital Area Legal Writing Conference, The George Washington University Law School, February 2011.

[13] *Id.*

"At the end of the year, the satisfaction of completing and even publishing a scholarly paper creates a newfound sense of confidence and empowerment."

Another **Perspective**

"Changes in the structure of law firm practice over the past several decades have made the informal apprenticeship model, under which new lawyers gained professional competence by working closely on client matters with more experienced lawyers in the firm, almost obsolete. Today, a senior lawyer in a private law firm is less likely to work closely with an associate to draft and redraft a piece of writing for a number of reasons. Although successive redrafts of a document in light of feedback from a supervisor would improve the product as well as contribute to the associate's development as a legal writer, short-term efficiency--for example, meeting a client's need for turnaround--may require that the supervisor take the project away from the associate. Also, given increased competition among law firms and the high cost of legal services of large private firms, deriving in part from high compensation levels of lawyers, law firms may find it difficult to justify to a client charging for time that includes training.

In light of these and other pressures militating against apprenticeship-type training, a law firm may expect new hires to graduate from law school already proficient in many law practice skills, including the skills involved in producing specific types of legal writing that an associate will be called upon to produce in practice. Although law schools in general have increasingly incorporated practice skills into their curricula, an expectation that a new law school graduate will be ready to practice law "right out of the box" is unrealistic. Indeed, preparation for practice is part of the mission of most if not all law schools, but law school faculties and law firms may differ widely on the appropriate nature and extent of that preparation. Although some large firms conduct "boot camps" to introduce certain practice skills to new associates, law firms may be reluctant to invest significant time of senior lawyers that would otherwise be profitable in providing ongoing intensive training in writing. In light of all these circumstances, it is appropriate for law firms to shift some of the burden of teaching, training, and support of certain skills to outside experts."

E. Joan Blum and Kathleen Elliott Vinson, *Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms*, 60 Mercer L. Rev. 761, 765-768 (2009).

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Making Lawyers Out of Law Students: Shifting the Locus of Authority

By Timothy Casey and Kathryn Fehrman

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"Recent critiques of legal education have centered on two main themes: the cost of legal education and the need for curricular reform..."

I. Introduction

This article proceeds in three parts. Recent critiques of legal education have centered on two main themes: the cost of legal education and the need for curricular reform (to teach law students to be lawyers rather than legal theorists). In the first and second sections of this article, we address the call for curricular reform and describe the innovative curricular design of the STEPPS Program at California Western School of Law as an answer to that call. The STEPPS Program, a required second-year course in ethics and skills, provides a unique forum for teaching the knowledge, skills, and values necessary for a successful legal career. In the final section, we focus on the internal values in our students and the connection between the development of internal values and the expression of professional judgment. We explain why it is both difficult and necessary for new professionals to move the locus of authority from external to internal.

II. Sound the Alarm: Reform Legal Education

According to the popular press in 2011, American legal education is currently, once again, exhaling its final breath. Two general themes emerge from these critiques: first, the cost of legal education,[1] and second, the legal education curriculum.[2] In November of 2011, David Segal published in *The New York Times* a scathing critique of legal education in America.[3] Notably, Segal attacked not only the cost of legal education, but also the substance.

> What they [law students] did not get, for all that time and money, [spent on legal education] was much practical training. Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England.[4]

A. A Familiar Refrain

Critiques of the legal education curriculum arrive every few years. Segal's article is neither the only nor the most exhaustive critique of American

[1] *See, e.g.,* William Henderson & Rachel M. Zahorsky, *The Law School Bubble,* ABA J. 30 (January 2012), and Patrick G. Lee, *Law Schools Get Practical,* Wall St. J., July 11, 2011, *available at* http://online.wsj.com/article_email/SB10001424052702304793504576434074172649718-lMyQjAxMTAxMDEwMTExNDEyWj.html (last visited Jan. 19, 2012).

[2] David Segal, *What They Don't Teach Law Students: Lawyering,* N.Y. Times, November 20, 2011, *available at* http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=1 (last visited April 12, 2012); Katherine Mangan, *Law Schools Revamp Their Curricula to Teach Practical Skills, The Chronicle of Higher Education,* February 27, 2011 http://law.wlu.edu/deptimages/news/thirdyearchronicle.pdf (last visited April 12, 2012); Richard Acello, *Law Schools Explore the Benefits of Teaching Ethics in a Clinical Setting,* ABA J. (June 1, 2011), *available at* http://www.abajournal.com/magazine/article/street_smarts1/ (last visited Jan. 19, 2012).

[3] Segal, *supra* note 2. Segal's attack went further than curricular content; he questioned the value of legal scholarship. Because of the inclusion of legal scholarship as part of the "problem" with legal education, Segal's piece received a vociferous and predictable response from the legal academy. Critical posts condemning Segal and his article flourished on Web logs run by distinguished law professors, such as *Brian Leiter's Law School. See, e.g.,* Brian Leiter, "*David Segal's hatchet job on law schools …*" posted November 20, 2011, 5:14 p.m. http://leiterlawschool.typepad.com/leiter/2011/11/another-hatchet-job-on-law-schools.html (last visited Jan. 6, 2011); *see also,* "*Why is the NY Times Turning Out Such Error-Ridden and Ill-Informed Pieces on Law Schools?*" http://leiterlawschool.typepad.com/leiter/2011/11/why-is-the-ny-times-turning-out-such-error-ridden-and-ill-informed-pieces-on-law-schools.html (last visited Jan. 6, 2011). For a more even-handed critique, *see* Orin Kerr, "*What the NYT Article on Law Schools Gets Right*," The Volokh Conspiracy, posted November 20, 2011, 6:40 p.m. http://volokh.com/2011/11/20/what-the-nyt-article-on-law-schools-gets-right/ (last visited Jan. 5, 2011).

[4] Segal, *supra* note 2, at 1.

legal education. In 2007, the Carnegie Report, a two-year investigation into the teaching and learning at American law schools, recommended specific reforms to the legal education curriculum.[5] Specifically, the Carnegie Report championed a focus on the knowledge, skills, and values necessary for professional success. Fifteen years earlier, in 1992, the MacCrate Report defined 10 fundamental lawyering skills and four professional values,[6] and included a vision for a continuum of development throughout a lawyer's career.[7] The entire purpose of the report was to trigger a discussion of the development of skills and values in the profession, and, accordingly, in legal education.[8]

Legal education is slow to change. Both the curriculum and the dominant teaching method have remained constant over the 150 years since Christopher Columbus Langdell introduced the case method at Harvard.[9] The catalog of courses, particularly in the first-year curriculum, reflects antiquated distinctions in the forms of pleading a case. And while clinical legal education programs have proliferated and prospered, the model of a university-based law school delivering instruction through lecture and discussion of cases represents a heavily entrenched paradigm.

The relevant question is not whether legal education faces a controversy, but, rather, whether legal education has reached a Copernican Moment—whether we are on the verge of a paradigm shift.[10] We believe legal education is at just such a moment, and we predict more change in the structure and content of the legal education curriculum in the next 10 years than in the past 50. We do not predict the demise of the case method, nor do we call for the abolition of legal scholarship. We do not foresee more than a de minimis modification of the first-year curriculum. But there will be significant changes in the legal education curriculum, and, frankly, there ought to be. The guiding principle in these changes will be a focus on developing law students' ability to practice law, with an emphasis on the skills and values necessary to succeed. External forces, such as published critiques or economic pressure, can act as a motivation for curricular reform, but the process of change must begin internally, within the faculty.

B. Change? That Sounds Difficult.

At many law schools, the approach to curricular reform assumes a familiar narrative. A small group of energetic faculty observes a need or an opportunity to develop a program in a certain area. They propose to pursue the program by offering courses or providing other opportunities, such as clinics or externship placements, for students to earn credit toward their degree. The dean and the curriculum committee usually approve the program as long as two conditions are met. First, the proposed program must not be too costly (though frequently these programs are developed in response to an identified source of funding). Second, there must be a defensible connection between the program and the student's overall legal education. Notably, two significant questions are almost never addressed. First, what existing programs must be replaced, reduced, or eliminated? And second, how will this program improve the students' overall legal education?

"The relevant question is not whether legal education faces a controversy, but rather, whether legal education has reached a Copernican Moment..."

[5] William M. Sullivan, Anne Colby, Judith W. Wenger, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) [hereinafter, Carnegie Report]; *see also*, Roy Stuckey and Others, *Best Practices for Legal Education: A Vision and a Roadmap* (2007).

[6] *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap,* 1992 ABA Sec. of Legal Educ. & Admission [hereinafter, MacCrate Report].

[7] *Id.* at Part IV.

[8] *Id.* at 131–33. In fact, the MacCrate Report warned against the use of the list of skills and values as a "standard for law school curriculum."

[9] One notable and early storm involved the 1891 split among the faculty at Columbia Law School, eventually leading to the exodus of Dean Theodore Dwight, who, together with other Columbia faculty, founded New York Law School. Dwight and other faculty left in a dispute over teaching methods dictated by Columbia's Board of Trustees. http://www.nyls.edu/about_the_school/mission_and_history/

[10] Thomas Kuhn, *The Structure of Scientific Revolution* (1966). Kuhn describes the process of scientific knowledge as a nonlinear progression. Science progresses with brief periods of immense change, followed by long periods of stagnation. The stagnation, caused by the development of paradigms, stalls scientific discovery because the paradigm prefers the status quo. Thus, Copernicus may have been right, and he may have had ample evidence to prove his theories. But challenging paradigms is fraught with peril.

"The core principle of the STEPPS Program is to teach the knowledge, skills, and values necessary for the ethical practice of law..."

The process of thinking about what students need to learn to become lawyers is not easy. The Carnegie Report suggests we teach "knowledge, skills, and values." These concepts are intertwined, making it difficult to define where and how we teach skills and where and how we teach knowledge. Most doctrinal courses teach students more than just legal rules—they develop skill in modes of thinking, analysis, and synthesis that reach beyond mere acquisition of propositional knowledge. But the connections between knowledge, skills, and values tend to be implicit, understated, or hidden.

For example, many first-year law teachers say they teach students to "think like a lawyer." If we studied their courses, we are confident we would find that they do, by and large, teach more than just a body of factual information. Most first-year courses require students to develop not only critical reading, but also the capacity to analyze, compare, analogize, and distinguish, and to synthesize divergent examples, cases, theories, and policies.[11] Our own experience and conversations with our colleagues confirm that these competencies are exactly what a professor looks for while reading exams at the end of the term. But very few syllabi contain explicit descriptions of these learning objectives. And not enough teachers begin the process of designing their courses with concrete learning objectives as the foundation.

We provide a counterexample, a more intentional commitment to specific learning objectives. Our school, California Western School of Law, engaged in a process that involved changing the mandatory curriculum. In our view, this represents a greater commitment to reform than merely adding elective courses to an existing palette of options.[12] By altering the mandatory curriculum, the faculty had to establish and actuate priorities.[13] They had to understand the role of each course in the student's education, analyze ways to improve existing elements of the curriculum, and exercise judgment in determining the value of particular options. In sum, they made brutal choices.

III. Designing a Program to Meet Student Learning Objectives

A. Overview of the STEPPS Program[14]

In 2006, the faculty at California Western School of Law adopted the STEPPS Program as a replacement for a lecture-based course in Professional Responsibility and a required course in advanced legal skills. The core principle of the STEPPS Program is to teach the knowledge, skills, and values necessary for the ethical practice of law, and to do so by placing the student in the role of attorney. The STEPPS Program is a two-semester, required second-year course combining substantive rules of professional responsibility with practical training in legal skills such as interviewing, counseling, legal research, drafting, and negotiation. The STEPPS Program also covers issues of preventive lawyering, professionalism, career satisfaction, business etiquette, and networking.

The STEPPS Program is designed with reference to both short-term and long-term student learning outcomes. We consider consciously the knowledge, skills, and values we want our students to model in the years after they graduate. We also evaluate the objectives for each class meeting and each assignment, and how the objectives from one assignment fit between the objectives from the previous assignment and the objectives for the next assignment.

We design and redesign a course specifically for second-year law students as part of a sequenced curriculum. The program builds on the knowledge

[11] Many of Bloom's levels of cognitive development are apparent in the legal education curriculum. Benjamin Bloom, *Taxonomy of Educational Objectives* (1956); *see also* Linda B. Nilson, *Teaching at its Best* 17–26 (2d ed. 2003). Bloom's stages proceed as follows: recollection, comprehension, analysis and synthesis, application, and evaluation.

[12] We also note that the faculty discussions and evaluations occurred in 2005, *before* the Carnegie Report and Best Practices were published. Accordingly, although the reforms are consistent with the recommendations of the Carnegie Report, the reforms were not in response to the Carnegie Report.

[13] In addition to our institution, Case Western Reserve University and Washington and Lee School of Law have made changes to the mandatory curriculum. Of course this is not an exhaustive list. We provide examples of institutions that have altered the mandatory curriculum as a point of comparison to institutions that have merely added electives, a process that does not involve making brutal choices.

[14] STEPPS stands for "Skills Training for the Ethical and Preventive Practice and career Satisfaction."

and skills they learned in their first year, and provides them with the knowledge, skills, and values they need for success in their third-year externships and beyond.[15] Two of our full-time skills faculty members also teach in the STEPPS Program. These faculty members are instrumental in maintaining consistency with the skills program's first-year objectives. Likewise, two adjunct professors from our third-year externship program also teach in the STEPPS Program; they assure we prepare students well for their third-year clinical experiences.

B. Placing the Student in the Role of Attorney

The STEPPS Program employs a variety of learning environments and teaching techniques. Our students meet twice each week. One meeting is a large group discussion where we use many familiar teaching techniques: lecture, PowerPoint presentations, small-group discussions, hypothetical fact patterns, film clips, etc. For the second weekly meeting, students are divided into small, simulated law offices, run by attorneys with significant practice experience.[16] The law office meetings are run like weekly meetings in a law firm, with an adjunct professor in the role of partner or supervising attorney and the students in the role of associates.[17] By playing the role of associates, students develop a deeper understanding of the connection between skills and values in the practice of law.

The work in the law offices revolves around a series of simulated cases.[18] We hire professional actors to play the roles of clients, and we develop assignments from the cases to meet a number of learning objectives.[19] Students are responsible for creating, organizing, and maintaining client files, and they submit weekly time sheets and billing reports. Students are expected to wear business attire to their meetings.

Each semester, the student must complete two written projects and two lawyering performances.[20] Every assignment includes a reflective component. The written assignments require a separate essay with a self-assessment of the student's performance. This reflective process is modeled after the corporate protocol of "lessons learned" and the military protocol of "debriefing" after any major task is completed. With respect to assessment, we assign points to reflect the objectives of the course. Thus, a significant number of points are earned through reflection and a demonstration of professionalism.[21]

C. Collegial Teaching

As an added benefit to our faculty and students alike, the adjunct attorneys meet at the beginning of each week to discuss the learning objectives for the week. Although originally designed as a way to keep all of the law offices at the same point in the syllabus, the weekly meetings have taken on a character unique to our prior experience in legal education. The meetings provide a forum for the exchange of ideas

"For the second weekly meeting, students are divided into small, simulated law offices, run by attorneys with significant practice experience."

[15] Most law schools offer clinical opportunities to third-year students. Many offer second-year students clinical experiences; a very few allow first-year students to participate in clinical programs. In most states, the student practice order will limit the availability of clinical opportunities, so it's the state bar (or regulatory authority) that establishes the limits, not the law schools.

[16] Of 19 supervising attorneys, only one has fewer than seven years of experience. Nine have more than 20 years of practice experience. Six have more than 30 years' experience. Almost all are at the partner level, and several are managing partners.

[17] Thanks to our deep applicant pool, we were able to select a group of outstanding members of the local bar to serve as adjunct professors in the STEPPS Program. We don't have to ask our STEPPS adjuncts to play the role of managing partner—in many cases they are actually the managing partners of their firms.

[18] The subject matter of the cases changes from year to year, but stays within a defined subject matter for all of the cases in a given year. Thus, one year the cases focused on property law, another year on a contractual issue, and a third year on an employment problem.

[19] In the first years of the program, students played the role of the client for other students. However, we since identified a number of significant advantages to using actors. Due to the professional nature of the performers, the performances take on a degree of reality that was lacking when students (or faculty) played the role of client. If one were to watch a video of a client interview, it would be difficult to discern whether the client was real or an actor in role. We achieve a high degree of uniformity in the client performances, and we can insert ethical issues into the script without alerting the student. Finally, we ask the actors to provide brief evaluations of the lawyer's performance.

[20] Over the two semesters, the students complete the following projects: 1. legal research and written memorandum, 2. initial client interview, 3. advice letter to client, 4. client counseling session, 5. motion (including declarations and evidentiary exhibits), 6. transactional client interview, 7. negotiation, 8. draft a contract. The performance assignments are video recorded, and, with the aid of the MediaNotes software program, students self-evaluate their performance.

[21] We intentionally separate feedback and grading. With each assignment, the student receives ungraded feedback on the performance. The student will only receive a grade after reviewing and reflecting on the feedback.

about the immediate decisions that must be made in the course. Our conversations provide us with insights into our teaching mission and frequently allow us move nimbly between grandiose theories of cognitive development and mundane details, such as whether to center a footer in a motion template. We share our immediate experiences from the preceding week, and, significantly, we have a chance to listen to other points of view, to reflect on our own decisions, and to improve our own performance from week to week. It's like a master class.

From this master class emerge observations and connections that we might not otherwise make. The next section details one of these deep connections, elaborates on the value we derive from teaching collaboratively in the context of this program, and begins to define one of the basic building blocks to becoming a lawyer: teaching students to think for themselves based upon their own well-defined set of personal values.

"The exercise of sound judgment is integral... To develop the capacity to make decisions, students must first develop a clear sense of themselves and their values."

IV. Primary Learning Outcome: Moving the Locus of Authority from Outside to Inside to Create Decision Makers, and Why Teaching Values is Indispensable

> "Stop this day and night with me and you shall possess the origin of
>
> all poems,
>
> You shall possess the good of the earth and sun, (there are millions
>
> of suns left),
>
> You shall no longer take things at second or third hand, nor look through
>
> the eyes of the dead, nor feed on the spectres in books,
>
> You shall not look through my eyes either, nor take things from me,
>
> You shall listen to all sides and filter them from yourself."[22]

The STEPPS Program focuses upon providing our students with tools to help them ethically and effectively assist their clients. This must be a primary learning objective of legal education. The exercise of sound judgment is integral to the role of lawyer. To develop the capacity to make decisions, students must first develop a clear sense of themselves and their values. Only a strong and clear sense of self will allow students to become ethical and effective decision makers as lawyers. Thus, if we are training students to be lawyers, it is up to us to guide them into individuated intellectual adulthood.[23]

Part A of this section focuses upon the rather obvious need for students to learn to think for themselves. We must train them to look within themselves to find the authority to make decisions. They themselves must become the authority with the answers, not some outside source. They must transfer the locus of authority from outside to inside.

Part B posits that hand in hand with becoming their own locus of authority, students need to clearly perceive their personal and professional values. Without a value system, decision making lacks a foundation.

How do we as teachers regard our goals for these students? How do we design our courses to achieve the objective of guiding a student to become the locus of authority who can provide answers with integrity? We propose some basic course design theory to begin answering these questions.[24]

A. Teaching Students to Think for Themselves

The most difficult threshold our students will cross during their legal education is the journey from being students who ask others to answer their questions, to becoming attorneys who provide the answers themselves.[25] When our students arrive at law school,

[22] Walt Whitman, *Song of Myself*

[23] Individuation means becoming undivided, integrating (developing or recognizing one's own integrity), or "coming to selfhood," or "self-realization." *See generally* Carl Gustav Jung, *Psychological Types* (Princeton University Press 1971) and *Essays on Analytical Psychology* (Princeton University Press 1966).

[24] A good place to start may be with M. Lisa Bradley, *Implementation of Collaborative Assignments*, 19 Perspectives: Teaching Legal Res. & Writing 186–189 (2011); *see also* 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).

[25] *See generally Threshold Concepts Within the Disciplines* (Ray Land et al. eds. 2008); "Reflections" and "Lessons Learned" from our own students overwhelmingly note that it is "frightening" to realize that

they are often cognitively immature. Legal educators often notice that many of our first-year students prefer to look to their professors, the books, and other traditional authorities to provide them with "the answers," rather than piecing together answers for themselves, through careful consideration.

> At its best [education] is a process animated by the urge to search out and explore ideas not as a series of packaged units with neat labels provided by books, but as a continuing exercise in which student and teacher are joined. The student does not "acquire" a process, he participates in it, and cumulatively he becomes aware of meanings and relationships. "Education" eludes easy definition precisely because it is not a 'thing' but a joint venture which may be described but not defined. …
>
> [E]ducation, as a process, is concerned with the mental faculties. It is concerned with doing something to the student by developing his mental powers with a view to releasing and sharpening his critical and creative faculties and invigorating his understanding.[26]

No one is more keenly aware of the need to do "something to the student by developing" his mental faculties than educators who train adult students to become professionals. It helps to have some cognitive development framework by which to measure students' progress as we navigate this process. One simple expression of the stages of cognitive development comes from psychologist William G. Perry.[27] While Perry's research and theory centered upon undergraduate students, the nine stages he addresses are readily identifiable to any teacher who has ever set foot in a law school classroom.[28]

Fundamentally, Perry posits that students often enter new learning situations with simple "black-and-white" perceptions. This is "dualism," which presumes that authorities know and will provide absolute right and wrong answers. From there, students move through stages of "multiplicity" and "relativism," as they progress past blaming authority figures for incompetence, and through the idea that there are really no answers at all.

Finally, students move into the "commitment" stages, where they adapt to this relativistic world by making personal commitments to particular views or answers. As they adapt themselves to making these commitments, they learn to balance the pros and cons of their choices, and find that they will continue to test commitments by embracing them or modifying them as part of a "lifelong activity that paves the road toward wisdom and requires an ever-open mind."[29]

"Finally, students move into the 'commitment' stages where they adapt to this relativist world by making personal commitments to particular views or answers."

Against this backdrop, it is our job to instill in our students the abiding notion that their legal education and the practice of law are not processes of simply downloading knowledge and information into their brains. Rather, we must give them a process in which they must participate, if they are to arrive at commitments and become true decision makers.

As Perry shows us, at higher stages of cognitive development, the student commits to certain viewpoints. The student, rather than another authority figure, becomes the locus of authority. This is, inter alia, decision making. Decision making at this level requires personal choices. In order to make personal choices with integrity, and to test their commitments by weighing the pros and cons of each choice, students must be clearly aware of their own personal values.

A. The Value of Teaching Values

The role of teaching professional values has been at the center of the discussion regarding the reform of

they, and not their teachers or supervisors, will have to be the authority who answers questions. One student phrased it, "Unlike undergraduate school, now I actually have to know what I'm talking about." (1L reflection after writing the second formal memorandum assignment of the year, 2010.) It is interesting to note here that the word "attorney" comes from the French, "atorner" or "to turn to."

[26] Hardy Cross Dillard, *Law and Learning*, 49 Va. L. Rev. 647 (1963).

[27] Nilson, *supra* note 11, at 12–15; William G. Perry, *Forms of Intellectual and Ethical Development in the College Years: A Scheme* (New York: Holt, Rinehart, and Winston 1968); William G. Perry, *Different Worlds in the Same Classroom*, J. Harvard-Danforth Center: On Teaching and Learning 1–17 (May 1985).

[28] Perry Table, Appendix 1.

[29] Nilson, *supra* note 11, at 15.

legal education.[30] For example, the aforementioned MacCrate Report lists four "Fundamental Values" of the profession.[31] Its authors urge law schools to ensure that students see that learning values is equally as important as learning substantive law. However, the connection between decision making and the need for a solid understanding of personal values has been left untouched.[32]

"One of the ways teachers can help students to get out of their own way is for us as teachers to get out of our students' way."

Without an abiding sense of self (personal commitments to certain values, both professional and personal), the plethora of choices and perspectives available to students can be overwhelming. If we do not know what values are important, how do we measure our commitments?

Thus, as we are teaching students to be ethical and effective lawyers, making choices based upon moral values ("proairesis") and deliberation is key.[33] And on a more pragmatic level, a lack of clarity about one's personal and organizational values can lead to low levels of commitment, and often to alienation from one's work.[34]

Sometimes clearly identifying our own values simply ensures that when we make decisions, we are clear as to how our personal values affect those decisions and the process. We can choose whether or not to incorporate values into our decisions, but only if we are aware of what those values are. Sometimes our personal values do not comport with legal precedent or with our clients' values. Being completely aware of the values affecting our decision-making process is crucial to the paradoxical process of choosing our perspectives so that, ultimately, we can get out of our own way.[35]

One of the ways teachers can help students to get out of their own way is for us as teachers to get out of our students' way. Students exploring and investigating on their own is necessary; otherwise the locus of authority is outside. One way of getting students to investigate and explore on their own is to reduce the feeling of the student-teacher hierarchy.[36] Interestingly, there appears to be psychological evidence in zoological research for the idea that reducing hierarchy may result in better student outcomes regarding the shift in locus of authority. For example, researchers in zoological psychology theorize that spider monkeys are more curious than macaques because the spider monkeys' social order has "lax social rules; without a rigid hierarchy and dominant individuals to control others' activities, animals are presumably more free to investigate, seek novelty and explore."[37]

Therefore, on a macro level, it is desirable to design a course atmosphere where students cannot consistently rely upon the didactics of their professors. Students should be in a situation where they must rely more upon their own explorations and their interactions with their fellow students.[38] That way, they learn the feeling of self-reliance and must learn to retrieve and process information on their own if they wish to survive.

Our "stepping back" as teachers furthers both the goal of moving the locus of authority and the goal

[30] *E.g.* Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values,* Pace L. Rev., Paper 507 (2003) (http://digitalcommons.pace.edu/lawrev/507, last accessed 12/31/11).

[31] MacCrate Report, *supra* note 6. The values listed in the MacCrate Report are: competence, bearing responsibility for the quality of justice (promote justice, fairness, and morality; ensure that adequate legal services are provided to those who cannot afford to pay; enhance the capacity of law and legal institutions to do justice); general values of a self-governing profession (make and pursue activities designed to improve the profession; train and prepare new lawyers; rid the profession of bias based on race, religion, ethnic origin, gender, sexual orientation, or disability; rectify the effects of these biases); seek out and take advantage of opportunities to increase knowledge and improve skills; and select and maintain employment that allows the lawyer to develop as a professional and pursue professional and personal goals.

[32] *Id.* The report tends to focus on "professional values," upon which there is some disagreement. *See generally* Pearce, *supra* note 30. Identifying personal values provides the foundation for sound decision making.

[33] Aristotle, *Nichomachean Ethics, Book III*, Secs. 2 and 3, "Choice" and "Deliberation" (Liberal Arts Press 1962).

[34] James M. Kouzes & Barry Z. Posner, *The Leadership Challenge* 50 (Jossey-Bass 2002).

[35] This answers some of the criticism of teaching professional values noted by Pearce, *supra* note 30.

[36] Bradley, *supra* note 24, at 189 ("The professor should be as hands-off as possible, and should not micromanage").

[37] Alexandra Horowitz & Ammon Shea, *Story Time Debunked*, N.Y. Times, December 30, 2011, http://www.nytimes.com/2012/01/01/opinion/sunday/scientific-answers-to-the-mysteries-of-childrens-literature.html?src=me&ref=general (last visited Jan. 4, 2012). *See also, generally*, Rudolf Dreikurs, *Psychology in the Classroom: A Manual for Teachers* 80 (2d ed. 1968).

[38] Bradley, *supra* note 24, at 189.

of shaping and identifying values. Indeed, some educational psychologists posit that because groups are a value-forming agent, values can only be changed in group settings.[39] Further, one of the values we as teachers may consider promoting is collaborative and cooperative learning, which can serve our students throughout their lifetimes and practices.[40] Accordingly, allowing our students to coalesce in order to manage in their own way serves both the goal of self-sufficiency and the goal of discovering values as well.

This sort of "stepping back" is uncomfortable to many who teach. Sometimes the most difficult thing to do is nothing. Our first reaction is, "Well then, why do they need a teacher at all? Am I irrelevant?" Certainly, in reality, we are even more relevant as guides than we are as preachers. Our courses are the mazes through which the student must navigate. It is our job to create the maze that provides the desired learning experiences. It is not easy to set up an atmosphere in which students must navigate their own learning process. But that is precisely what we must do, and what we strive to do in STEPPS.

V. Conclusion

In the STEPPS Program, the knowledge, skills, and values we strive to teach require each student to become his or her own locus of authority. As teachers, we provide the basic tools, and we prepare an environment conducive to learning. We create problems that will require our students to access and process certain information and situations, and arrive at certain results. But we do not pave the way for them. As a matter of fact, we point them to the top of the mountain, hand them a scythe and a lamp, and tell them they must cut and light their own paths for the climb. We are there to assist them to identify landmarks and food. We might even provide respite, encouragement, and a few hints. But in the end, if we are to do the most good, the students themselves must make the climb.

"Our courses are the mazes through which the student must navigate. It is our job to create the maze that provides the desired learning experiences."

[39] Dreikurs, *supra* note 37, at 80.

[40] *See generally* Bradley, *supra* note 24; Thyfault & Fehrman, *supra* note 24.

APPENDIX 1

PERRY'S STAGES OF COGNITIVE DEVELOPMENT

1. DUALITY: Uncertainty doesn't exist. Authorities hold the right answers.
2. MULTIPLICITY (A): Uncertainty exists due to incompetent authorities, OR the instructor is just leading an intellectual exercise.
3. MULTIPLICITY (B): Uncertainty exists only temporarily while authorities seek answers.
4. RELATIVISM (A): Uncertainty is inherent and pervasive, rendering all opinions equal in value.
5. RELATIVISM (B): Relativism is qualified— not for purely factual and special contexts (e.g., moral).
6. COMMITMENT (A): Relativism weakens under qualifications and internal contradictions. Commitment is sought.
7. COMMITMENT (B): Individual makes personal commitment to a certain viewpoint.
8. COMMITMENT (C): The meaning of commitment and its trade-offs are examined.
9. COMMITMENT (D): Making and adjusting commitments becomes a part of the lifelong pursuit of personal growth and wisdom.[1]

[1] Table prepared by: Linda B. Nilson, Teaching at its Best: A Research-Based Resource for College Instructors 13 (2003).

Writing Tips ...

Cite as: Ben Opipari, *Writing Tips ... Run to Write: How Exercise Will Make You a Better Writer*, 20 Perspectives: Teaching Legal Res. & Writing 104 (2012).

Run to Write: How Exercise Will Make You a Better Writer

"Try this: the next time you go out for your midday workout, forget the shower afterwards. Instead, run right to your desk."

By Ben Opipari

Ben Opipari is the founder of Persuasive Matters, a legal writing consulting firm that offers writing seminars and writing coaching to law firms around the world. He was previously the in-house writing instructor at Howrey LLP, where he was responsible for the development and implementation of a writing curriculum for all Howrey associates. He holds a Ph.D. in English Language and Literature. He can be reached at ben@persuasivematters.com *or* www.persuasivematters.com.

You hear it from all corners that daily exercise staves off all those horrible things that happen to you with the passing of time. But what if I told you that your lunchtime workout benefits you immediately? Even better, it can make you a more productive writer within minutes! This is no snake oil solution. Instead, it's science.

Try this: the next time you go out for your midday workout, forget the shower afterwards. Instead, run right to your desk. Your colleagues will want nothing to do with you, but what they won't know is that you have a tremendous advantage. You are now at your creative peak.

We know about the long-term benefits of exercise: decreased stress, increased muscle tone, reduced rates of dementia, and safeguarding against certain types of cancer. But let's face it: We are a society that craves immediate gratification. And now researchers are discovering that exercise can have more immediate benefits. Your lunchtime workout can make you a better thinker at 1 p.m. And that can mean a more productive writing session.

Of course, writers have known for years that outdoor exercise is the key to inspiration and overcoming writer's block. Many were at their most creative when they were moving. Take William Wordsworth, the Romantic poet. It has been estimated that Wordsworth walked over 186,000 miles in his life. He thought nothing of a 30-mile daily jaunt.

Wordsworth usually composed while walking. Not impressed? Well, he often composed and revised *entire poems* while walking, and he wouldn't write them down until he had completed them in his head. Still not impressed? Then read "Tintern Abbey," a Wordsworth poem firmly entrenched in the literary canon. Try to compose something like this—at 159 lines—in your head while walking. And don't even think about coming inside and committing it to paper until it's ready to be published. According to Adam Sisman, author of the book *The Friendship* about Wordsworth and Samuel Taylor Coleridge, "The whole poem was carried in his mind; not a word of it was written down before they reached Bristol, and not a line altered afterwards."[1]

But for Wordsworth's creative juices to really flow, not just any walk would do. He needed even ground. According to Sisman, "Coleridge liked to compose in walking over uneven ground, or breaking through the straggling branches of a copse-wood; whereas Wordsworth always wrote (if he could) walking up and down a straight gravel walk, or in some spot where the continuity of his verse met with no collateral interruption."[2] Wordsworth would actually keep step to the rhythm of his verse, his head down while he composed aloud. He often walked back and forth along the same route as he mulled over a poem.

Alas, none of us is a Wordsworth or a Coleridge. But intuitively, physically active people know that exercise can make them sharper as they slough through a long day. When we're stressed,

[1] Adam Sisman, *The Friendship: Wordsworth and Coleridge* 250 (2007).

[2] Sisman, *supra* note 1, at 244.

for example, and our brains seem stuck in park, exercise can invigorate us and clear our mind. Mary Goldschmidt, Director of the Writing Program at the College of New Jersey, told me about a recent case of writer's block. "Before I went out on my ride this evening, I intentionally re-read my scattered notes on what I've been trying to write," she explained. "I spent the better part of my 27 miles asking myself, 'What's the ultimate point you're trying to convey?' I came home, ate dinner, and was able to start writing very productively almost immediately." And Joyce Carol Oates wrote once, "The structural problems I set for myself in writing, in a long, snarled, frustrating and sometimes despairing morning of work, for instance, I can usually unsnarl by running in the afternoon."

Even walking can be a boon to creativity. Susan Henderson, author of the 2010 novel *Up From the Blue*, told me that she composes while walking—using the voice memo feature on her iPhone. "For my first draft, I go to the woods and hike for two or three hours," she says. "I'll go with a specific question, scene, or dilemma, and I'll just talk it into the voice memo. I pretend like I am talking on the phone, so when I pass people I pretend to have a conversation on the phone, like 'Hey honey, I'll be home at five.' Then when they pass, I continue composing. But I realize I have to be walking." And acclaimed short story writer Anthony Doerr told me that exercise plays a part in his creative process. "Exercise tends to rinse my brain of lots of detritus. Walking, in particular, helps me sort through problems in my work," he says.

Running has long been a regular part of my writing process. Specifically, it's more a part of my invention stage. Since I'm not an attorney, I don't write briefs. But as a freelance writer, I contribute to the music sections of both the *Washington Post* and *Baltimore Sun*, often in the form of album reviews. A good album review carries a thematic element, some message about the album as a whole. Bad album reviews are little more than a laundry list of what each song is about or what it sounds like. So before I sit down to write the review, I go for a run. And on that run I craft the theme.

If you're reading this, you're probably an attorney. Which means that you might be skeptical of all this anecdotal evidence. Prove it, you say. Turns out there is an abundance of medical science to back up the claim that exercise boosts creativity and higher-order thinking. But first, a brief lesson in neuroscience.

Our brain is a flurry of activity when we exercise. It's awash with the chemicals dopamine, serotonin, and norepinephrine, which all work on the attention system as part of the brew that helps bind the neurons in our brain. It's also filled with brain food, or what Dr. John Ratey, clinical associate professor at Harvard Medical School and author of the book *Spark: The Revolutionary New Science of Exercise and the Brain*, calls "Miracle-Gro for the Brain." To scientists, it's called brain-derived neurotrophic factor, or BDNF. A protein, BDNF acts on neurons in the brain. It facilitates the growth and differentiation of new neurons and supports the survival of existing neurons. Scientists have discovered that BDNF has a direct quantifiable effect on learning and can make you a better thinker.

BDNF, which sits at the synapses in your brain neurons, is released as your blood pumps furiously during exercise. This increased blood flow to the brain also delivers oxygen to remove waste and glucose to deliver energy. This blood flow also creates new blood vessels in your brain. Scientists have discovered that when the oxygen level in the brain increases, so does mental acuity. So, the more you exercise, the better off your brain will be. And if your brain is working efficiently, you'll think better.

Studies have now shown that all of this blood flooding your brain will immediately improve your brainpower. It's so immediate, in fact, that you can even improve cognition while you exercise. So if you want to improve your writing, lace up those running shoes. But first, some rules.

Rule #1: Head for the hills. Or at least the trees. Just get away from the concrete jungle. Nature stokes creativity and strengthens your cognitive powers, according to a 2008 article in

"Turns out there is an abundance of medical science to back up the claim that exercise boosts creativity and higher-order thinking."

Psychological Science entitled "The Cognitive Benefits of Interacting with Nature."[3]

Natural environments are better than urban environments at restoring and improving cognitive functioning, according to the authors. Our attention is divided into two components, involuntary and voluntary attention. With involuntary attention, we focus on interesting stimuli like beautiful sunsets. It doesn't take any extra cognitive ability to pay attention to these things. But voluntary, or directed, attention—also called executive attention—is controlled by active cognitive processes. We use executive attention to "resolve conflict or to suppress distracting stimulation."[4] Like to avoid getting hit by a car.

The authors found that a natural environment, with its beautiful stimuli, gives the directed-attention part of your brain some vacation time, allowing it to replenish. They note that "simple and brief interactions with nature can produce marked increase in cognitive control."[5] This is why, when faced with that midafternoon funk, you should go for a walk or do anything that does not require directed attention, because you don't have to worry about the potentially life-ending distractions of an urban environment.

And resistance training in the hills may not work. Since blood flow seems to affect executive function, weight training won't give you the same effect as aerobic exercise. One 2009 study compared a group who had just completed 30 minutes on the treadmill with a group who had just completed 30 minutes of resistance training. The treadmill group had a shorter response time during a working memory task.[6]

Rule #2: When you get to the hills, run moderately fast for about 30 minutes. To a certain extent, the more pain, the better the gain. There is a correlation between intensity and creativity. So the harder the workout, the better the benefits—depending on when you want the benefit.

One 2007 study demonstrated that the higher the heart rate, the stronger the brain. Intense exercise, the researchers found, has immediate beneficial effects on cognition.[7] They assessed learning performance directly after high-impact anaerobic sprints, low-impact aerobic running, and a period of rest in three separate test groups. Vocabulary learning was 20 percent faster after the high-impact sprints, compared to the other two conditions. The BDNF increase was highest in this group as well.

"But you don't have to wait until after your exercise routine to reap the benefits. Ratey says you can actually learn while you exercise."

But you don't have to wait until after your exercise routine to reap the benefits. Ratey says that you can actually learn while you exercise. And this is where moderation is key: you can't learn while you are sucking wind. So take it easy. It's hard to learn difficult material while exercising at high intensity, since blood is diverted from the prefrontal cortex to the muscles where it's sorely needed. This means that if you're pedaling furiously on the stationary bike, put down your book or turn off your podcast, because this lack of blood flow to the brain hampers executive function. But you *should* grab *War and Peace* right after you hop off the bike: blood shifts back to the brain almost immediately after your workout, which is why the postexercise period is the best time to undertake tasks that involve higher-order thinking.

Similar results have been achieved with college undergraduates who were tested on an executive control task after a 30-minute treadmill session. The researchers found that cognitive processing sped up with the group that exercised. That means that if you're studying for an exam or trying to retain information, the best time might be after exercise, since exercise-induced arousal may facilitate the consolidation of information into long-term memory.[8]

3 Marc G. Berman et al., *The Cognitive Benefits of Interacting With Nature,* 19, Psychological Science, 1207 (2008).

4 Berman, *supra* note 3, at 1208.

5 *Id.*

6 Matthew B. Pontifex et al., *The Effect of Acute Aerobic and Resistance Exercise on Working Memory,* 41, Medicine & Science in Sports & Exercise, 927 (2009).

7 Bernward Winter et al., *High impact running improves learning,* 87, Neurobiology of Learning and Memory, 597 (2009).

8 Kathryn Coles & Philip D. Tomporowski, *Effects of acute exercise on executive processing, short-term and long-term memory,* 26, Journal of Sports Sciences, 333 (2008).

You don't need to put in a lot of miles to gain the cognitive benefit. Most scientists agree that BDNF is not dose-responsive; that is, better fitness levels do not necessarily lead to larger cognitive gains. So exercising until you collapse doesn't mean that you'll be able to solve global warming while running a marathon. And you don't even have to be in shape to reap the benefits: a single 35-minute treadmill session at 60 percent of maximum heart rate (considered moderately intense) increases cognitive function. After just one workout, runners increase their processing speed and cognitive flexibility; that is, they think creatively and problem solve instead of just regurgitating items from memory. According to Dr. Charles Hillman at the University of Illinois, one of the leading researchers in this area, fitness level does not really make a difference, so even someone with no aerobic base who laces up the running shoes for the first time will show an immediate cognitive benefit from a single workout.[9]

Even your kids can reap cognitive benefits from aerobic exercise. In another recent study, kids who worked out on a treadmill for 20 minutes at 60 percent of maximum heart rate showed improved cognitive control and response accuracy. The study's authors say that these results "further support the use of moderate acute exercise as a contributing factor for increasing attention."[10] Do we need a better reason for placing importance on physical education in schools?

I'm sure that some of you hate to run. Not a problem. Studies have been performed with a variety of aerobic activities—running, biking, even walking—so pick anything that elevates your heart rate. Hillman says that even a "moderately intense bout of walking" will help.

Rule #3: You can wait until you catch your breath before being creative. So just how soon after exercising should you begin that task involving higher-order thinking? Most researchers who studied the link between exercise and cognition tested subjects whose heart rates had returned to within 10 percent of pre-exercise levels. But one 2005 study showed that for as long as two hours after you complete a moderate-intensity workout (defined as double your resting heart rate), you can enjoy the residual effects of exercise on cognition. The workout "significantly impacted the creative processes of the participants," said the researchers.[11]

Rule #4: Take the path less traveled. Stimulate your executive attention center by partaking in novel routines as you exercise. Staring at the wall while on the treadmill or running endless laps might not do as much to improve brainpower as will a routine that stimulates the brain. Even running the same route outdoors offers little stimulation. So pick a new route each day—as long as you avoid traffic (see rule #1). Something I do is run for time instead of distance, since it frees me from the shackles of a prescribed route.

Ratey says that the ideal activity "simultaneously taxes the cardiovascular system and the brain" by involving complex motor skills. He even recommends racquet sports like squash, racquetball, or anything that involves skill, fine motor movement, and complex movements, like basketball. The more complex the movements, the better. Ratey is also a fan of yoga, ballet, and gymnastics.[12] The combination of aerobic exercise and complex motor skills is a potent one: while aerobic exercise elevates neurotransmitters, creates new blood vessels, and spawns new cells, complex activities put it all together by strengthening and expanding the neural networks. If you're a runner, try trail running, an activity that combines aerobic exercise, executive attention, and complex motor skills as runners must navigate obstacles and uneven terrain.

Several studies back this assertion. In one, scientists evaluated cognitive function in two

"Studies have been performed with a variety of aerobic activities—running, biking, even walking—so pick anything that elevates your heart rate."

9 Telephone interview (March 17, 2010)

10 C.H. Hillman et al., *The Effect of Acute Treadmill Walking on Cognitive Control and Academic Achievement in Preadolescent Children,* 159, Neuroscience, 1044 (2009).

11 David M. Blanchette et al., *Aerobic Exercise and Cognitive Creativity: Immediate and Residual Effects,* 17, Creativity Research Journal, 257 (2005).

12 Telephone interview (March 10, 2010)

groups, one with elevated heart rates only through aerobic exercise and another with elevated heart rate combined with complex motor challenges. While both groups raised their scores, the group that performed the complex motor challenges scored higher.[13]

Another study found that gym-based aerobics and aerobic dance both enhanced creativity. The latter group scored higher on the creativity measure, a result that caused the authors to question whether "free rather than prescribed exercise is more likely to release the stream of consciousness," since the subjects had greater freedom of movement. The authors said that "it is also possible that running, which has most strikingly led to enhanced moods, would have been a more suitable form of exercise" for the study. This supports the idea that creative and spontaneous aerobic exercise is better than any monotonous or repetitive routine, and it could also explain why those in the aforementioned aerobic dance group scored slightly higher on the creativity test than those in the gym-based aerobics group: they had greater freedom of movement.[14]

Rule #5: You may not need to leave your office. At Grand Valley State University, one professor found that a class full of exercise balls instead of conventional desk chairs improved learning and participation among his students. John Kilbourne and his students said that sitting on these balls sharpened their attention and thinking skills. These balls enhance blood flow and alertness because, among many reasons, you have to keep moving to stay on the ball. His students say that sitting on the balls improves their ability to pay attention, engage in productive discussion, and take notes. "Office 'furniture' like this turns on the fun part of the brain," says Ratey. It's important to note, though, that these findings are purely anecdotal and self-reported, and have not been subject to scientific scrutiny.

Rule #6: Crankiness is no excuse. The above researchers who studied gym-based aerobics and aerobic dance also found that creativity and mood are independent of each other. Besides boosting creativity, a 25-minute workout was enough to increase mood. What the authors found, though, surprised them: while physical exercise enhances creative thinking, the effect seems to be independent of mood changes as well as workout type. In other words, "mood changes did not predict creative performance." So even if you are in a bad mood, you can still be creative. Anecdotally, this would appear to support the idea that depression can also lead to periods of intense creativity, as witnessed by hundreds of years of canonical literature penned by perpetually miserable people.

John Medina, author of *Brain Rules: 12 Principles for Surviving and Thriving at Work, Home, and School*, says that when reviewing data, writing a paper, and responding to emails, he gets on his treadmill—with his laptop rigged to the top—and walks at 1.8 mph. "No real workout here, but I sometimes end up walking miles," he says. The same-day effects of exercise on higher-order thinking mean that as far as the workplace goes, we are way overdressed. "If I had my way, the standard work force 'uniform' would not be a suit and tie, or business skirt and blouse. It would be gym clothes and tennis shoes," says Medina.[15]

Oh, and I thought of this topic while on a run. Really.

"The same-day effects of exercise on higher-order thinking mean that as far as the workplace goes, we are way overdressed."

[13] Henning Budde et al., *Acute coordinative exercise improves attentional performance in adolescents,* 441, Neuroscience Letters, 219 (2008).

[14] Hannan Steinberg et al., *Exercise enhances creativity independently of mood,* 31, British Journal of Sports Medicine, 240 (1997).

[15] Interview (March 5, 2010)

Cite as: JoAnne Sweeny, *Emotional Editing*, 20 Perspectives: Teaching Legal Res. & Writing 109 (2012).

Emotional Editing

By JoAnne Sweeny

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One of the lessons I try to impart on my students is the importance of proofreading. Skilled legal writers must be able to organize their thoughts in a logical manner, advance arguments that have strong foundations in law and fact, and, most importantly, accurately identify when they have failed to do these things. Proofreading is essential for all writers, and it can be particularly difficult to teach.

Students are quite skilled at finding mistakes in other people's writing but not nearly as effective when they are reviewing their own work. When going over my students' work with them in individual conferences, I typically ask students why they focused on one case or what a paragraph is about, and they often tell me they don't know. Almost as often, when my students come to meet with me after receiving my comments on their work, they tell me that they thought the paper was good until they read it again (with my comments), and they now realize how many mistakes they made. The question is, why didn't they recognize these mistakes before they handed the paper in? Why can I see these mistakes but they can't?

The purpose of legal writing classes is to help students become experts in legal writing. As part of that goal, we want our students to be able to evaluate their own work by engaging in metacognition[1]—thinking about how they think—so they can critique the quality of their arguments like experts do. However, I have found that teaching proofreading is one of the hardest things I do.

There is a good reason for this difficulty. Because legal writing professors are, naturally, experts in legal writing, it is challenging for us to teach something that comes relatively effortlessly to us. The Four Stages of Learning, first identified by Gordon Training International, can give us an explanation for why it is difficult for experts to teach something they do so easily.[2]

The first stage of learning is unconscious incompetence: we don't know that we are ignorant of something before we start learning it. Law students often think that legal writing is the same as any other writing they have done. They don't yet know how much learning they will have to do. The second stage is conscious incompetence, where the learner discovers that she does not have the necessary skills yet. It is the most frustrating stage for learners because they have become aware of their lack of ability. The third stage is conscious competence, where the learner now has the skills but is still self-conscious about applying them. The skills have not yet become natural. The final stage is unconscious competence, where the skills have become a natural part of the learner and he can apply them without thinking.

Unfortunately, because legal writing professors are experts in legal writing and are unconsciously competent, it is more difficult for us to put ourselves back in the unconscious incompetence or conscious incompetence stages. For example, research has shown that experts can't describe their reading comprehension strategies, which is described as the "loss of awareness phenomenon" or "paradox of expertise."[3] To combat this problem, I created an emotional editing exercise that helps gauge law students' response to legal writing and helps them see my perspective as a legal writing professor.

"Students are quite skilled at finding mistakes in other people's writing but not nearly as effective when they are reviewing their own work."

[1] Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407, 408 (1987).

[2] http://www.gordontraining.com/free-workplace-articles/learning-a-new-skill-is-easier-said-than-done

[3] Leah Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 BYU Educ. & L. J. 53, 60 (2008) [hereinafter *Paradox*].

"The 'emotional editing' exercise is a legal memorandum similar in style and length to what I assign my students to complete in the fall."

The In-Class Exercise

The "emotional editing" exercise is a legal memorandum similar in style and length to what I assign my students to complete in the fall. The case involves a relatively simple workers' compensation claim and the memo includes all the sections typical of a formal memo.[4] I used this exercise for the last class before their final memoranda were due, a class that is usually not very productive because the students are so distracted with their upcoming assignment.

The first thing this exercise focuses on is giving students a role for examining the document. Instead of having them simply read the "bad memo" and identify all of its mistakes, I tell my students that they are a partner in a law firm, the client will be there in five minutes, and the client needs to know if she has a case. I tell them to read the questions presented, brief answers, and conclusion to see if they can answer the question (they can't). I then give them 20 minutes to read the whole memo to see if they can then tell the client if she has a case (they still can't).

Giving the students a purpose for reading changes their focus dramatically. Instead of reading to spot mistakes—a technical exercise—they read for comprehension and evaluate the writing much like a partner or legal writing professor would. Giving students a purpose for reading automatically makes students read more like experts because experts typically read with a purpose in mind, which affects what parts of a document they focus on.[5] Experts want to know how a document will be used and will even create a purpose if none is given.[6] Research has also shown that students comprehend more when a purpose for the reading is given.[7]

As a result of their reading, the students became very frustrated. So, as the second part of this exercise, instead of asking them what the mistakes were, I asked them how reading the memo made them feel and why. This kind of "emotional editing" has received little academic attention, but there is evidence that in order to properly evaluate writing, we must also engage our "emotional brain" as well as our "thinking brain."[8] When the expert evaluates how persuasive or well-written a document is, she considers, in part, her emotional reaction to the writing. Experts interact with the text instead of just taking the text as true, which is a problem many beginning law students have.[9] Using emotions is a powerful part of that process.

After reading the "bad memo," the students felt confused, frustrated, and even angry. When I asked them why, it became clear that it was because they were focusing on the purpose of the document instead of its technical mistakes. They needed to tell the client something and, because of the way the memo was written, they knew they couldn't, which was very frustrating for them. Getting in touch with these feelings while reading was a new experience for them and I told them to pay attention to their feelings when reading their own work.

The Benefits of Emotional Editing

The emotional editing exercise has two main benefits. First, the exercise shows that students can put themselves in the role of an attorney and doing so does affect the way they read a document. Even though we tell students the purpose of legal memoranda, for many novice legal writers, the document remains rather academic, especially if they are accustomed to writing essays from their undergraduate education. This exercise shows them the purpose of the legal memo by forcing them, under strict time constraints, to use the memo for its intended purpose—advising a client.

Second, the emotional reaction students experience while reading the "bad memo" puts them in touch

4 Thanks to Teri McMurtry-Chubb for the workers' compensation problem upon which this exercise was based.

5 Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 Iowa L. Rev. 139, 150–51 (1997).

6 Christensen, *Paradox*, *supra* note 3, at 70–71.

7 James F. Stratman, *When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection*, 34 Discourse Processes 57, 84 (2002). *See also* Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 Seattle U. L. Rev. 603, 614 (2007) [hereinafter *Legal Reading*].

8 Robin Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*, Chapman University Law Research Paper No. 11-31 at 3 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889756.

9 Christensen, *Legal Reading*, *supra* note 7, at 629.

with the emotional part of their brains, which is essential for good evaluating. In fact, students appear to judge the memo's quality instead of just reading it, and their feelings guide their impressions of the writing and the substance of the memo. In short, they read more like experts, which should make them better editors. The feelings they experience when reading the "bad memo" echo my own experience when reading poorly written work and would certainly be shared by a partner in a law firm. The ability to tap into these perceptions can make a large difference for students when they read their own work.

A third, lesser benefit to this exercise is that it is fun for the students, despite their frustration with the writing. They enjoy playing the role of "partner" and reading someone else's work for a change. Using this exercise during the last class before their final memos were due was particularly useful because it kept the students focused and occupied despite their preoccupation with their own memos.

The Downsides of Emotional Editing

The major pitfall of this exercise is how long it takes. The students spend almost half an hour reading the memo and class discussion can double that time. This means that the exercise may take an entire class session that could be used for other things. However, I believe that having the students read the document in class instead of before class is essential. The time constraint adds to the verisimilitude of legal practice and heightens the students' emotions as they read. It is also useful for them to read the "bad memo" in class so that I can gauge their reactions as they read it.

The second potential detriment to this exercise is the possibility that students will not be able to duplicate the same emotional reactions to their own work and, even if they do, those feelings will not translate to useful editing skills. It may be easy for students to simply revert to technical editing instead of focusing on the big picture of their document and, without monitoring their progress, it is difficult to know whether this exercise will have a long-term impact on the way they read their own work. However, I believe that this exercise is a first step in making students aware of the purpose of their memoranda and showing them how frustrating editing can be if the writer does not keep that purpose in mind. Even giving students a small glimpse of what I go through when I read their papers has been eye-opening for them.

"The feelings they experience when reading the 'bad memo' echo my own experience when reading poorly written work..."

Another **Perspective**

"Writing centers are premised on the idea that individualized instruction is an effective way of teaching writing. Put simply, writing centers provide writing instruction through trained student/peer tutors who meet one-on-one with students who are working on writing projects. Conferencing is well-documented as an effective method for writing instruction generally, and writing centers are a formal mechanism in which peer conferences can take place. Writers bring works-in-progress to the writing center, at any stage of development. They do not drop off their papers for mechanical upgrades, like a car owner at a garage: The author of the paper works with the tutor to improve and strengthen both the paper and the writer. Because of this individualized instruction, students often say they learn more at writing center appointments than they do in class."

Kristen E. Murray, *Peer Tutoring and the Law School Writing Center: Theory and Practice,* 17 Legal Writing: J. Legal Writing Inst. 161, 163-64 (2011).

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"Be the Ball": *Caddyshack*'s Ultimate Legal Writing Tip

"At some level, everyone knows or should know that the 'ball' of legal writing is one's intended audience."

By John D. Schunk

John D. Schunk teaches legal writing at Santa Clara University School of Law in California.

> *"I'm going to give you a little advice. There's a force in the universe that makes things happen; all you have to do is get in touch with it. Stop thinking ... let things happen ... and be ... the ball."*
>
> —Ty Webb speaking to Danny Noonan in *Caddyshack*

Popular movies often contain bits of wisdom woven into the dialogue. For some people, the *Godfather* movies overflow with advice.[1] While not as popular as *The Godfather I* or *II*, many people will recognize portions of the dialogue from *Caddyshack*.

The quoted dialogue above comes from the character Ty Webb, played by Chevy Chase, as he is trying to help a young caddy, Danny Noonan, improve his golf putting. Essentially, Ty Webb is advising Danny Noonan to stop thinking so much about all the technical swing advice he has received and, instead, to focus on imagining himself as being the golf ball as a way of improving.

This general idea from *Caddyshack* can help students and lawyers improve their legal writing. If they can identify what is the "force in the [legal writing] universe that makes all things happen," essentially what is the "ball" of legal writing, then everything else will make sense.

What is the "ball" of legal writing?

At some level, everyone knows or should know that the "ball" of legal writing is one's intended audience. Understanding one's audience is the "force in the universe that makes all things happen."

Even the United States government knows this. When offering advice on writing in plain English or plain language, federal agencies always identify knowing your audience as the most important step in writing effectively. Among government agencies, the Securities and Exchange Commission probably published this advice first in 1998. "Knowing your audience is the most important step in assuring that your document is understandable to your current or prospective investors."[2] More generally, the United States government also has issued plain language guidelines. These guidelines begin by urging writers to think about their audience.[3] "The first rule of plain language is: *write for your audience*. Use language your audience knows and feels comfortable with. Take your audience's current level of knowledge into account. ... Make sure you know who your audience is–don't guess or assume."[4] The guidelines explain and emphasize the importance of this point. "The best way to grab and hold someone's attention is to figure out who they are and what they want to know. Put yourself in their shoes; it will give you a new perspective."[5]

[1] For examples of this, go to the Facebook page "Everything I need to know in life I learned from the Godfather," *available* at http://www.facebook.com/group.php?gid=2218436465#!/group.php?gid=2218436465&v=info.

[2] A Plain English Handbook: *How to create clear SEC disclosure documents* 9 (August 1998), *available* at http://www.sec.gov/pdf/handbook.pdf.

[3] Federal Plain Language Guidelines 6 (March 2011), *available* at http://www.plainlanguage.gov/howto/guidelines/bigdoc/fullbigdoc.pdf.

[4] Id.

[5] *Id.* at 7.

The point about being able to place yourself in the shoes of your audience was recently identified and emphasized in a speech by Supreme Court Justice Antonin Scalia. At the end of a speech about legal writing, he tried to describe what makes someone a writing genius. "I think there is writing genius as well, which consists primarily, I think, of the ability to place one's self in the shoes of one's audience–to assume only what they assume, to anticipate what they anticipate, to explain what they need explained, to think what they must be thinking, to feel what they must be feeling."[6]

Identifying and understanding your audience is not a new idea. The famous attorney John W. Davis articulated this idea in a speech in 1940.[7] In introducing his ten rules for arguing an appeal, he began by comparing a fish with a fisherman:

> "[S]upposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on fly casting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers and all the other tiresome stuff that fisherman talk about, if the fish could be induced to give his views on the most effective methods of approach. For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end."[8]

Smart business people know this idea,[9] but based on this foundational idea, Davis identified his first rule for appellate attorneys seeking to persuade a court to accept their argument. "At the head of the list I place, where it belongs, the cardinal rule of all, namely: (1) Change places (in your imagination of course) with the Court."[10] This advice, if followed, helps you draft a better appellate brief. "If the places were reversed and you sat were they do, think what it is you would want first to know about the case."[11] This approach shapes the entire presentation of a good legal argument.

Do Legal Writing Teachers Help Students Learn about the Fish or Act as Fishermen?

The ideas expressed so far probably seem obvious or mundane to many, but they serve as a basis to critique how one should teach or might improve the teaching of legal writing.

Take a moment and review many of the popular legal writing textbooks currently on the market and see what students can learn about one type of intended audience–a judge. In preparing to write this article, I reviewed a variety of popular legal writing textbooks[12] and this is what I found. These textbooks discussed the concept of "audience," but the discussion frequently was limited to less than one page of a 500–700 page textbook. Only one textbook even made a cursory attempt to suggest what a trial judge's workload might be like and how that might affect how to draft a persuasive document.[13] One textbook tried to summarize the characteristics of a law-trained reader over six pages.[14]

Essentially, most, if not all, legal writing textbooks currently on the market serve as "fishermen" rather than educating legal writing students by letting any of the "fish" speak for themselves.

"Identifying and understanding your audience is not a new idea. The famous attorney John W. Davis articulated this idea in a speech in 1940."

6 Scribes Award for Scalia (Full Pt 2) 6:10-6:38, *available at* http://www.youtube.com/watch?v=RdZSSO3mF3s.

7 John W. Davis was the Democratic presidential nominee in 1924. He also served as Solictor General of the United States and eventually founded the law firm now known as Davis Polk & Wardell. He argued 140 cases before the United States Supreme Court.

8 John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940).

9 For example, many businesses conduct and even pay their potential customers to attend focus groups where the businesses can learn more about their "fish." *See, e.g.,* USA Today, Buick wants to know how they really feel, 3B (July 20, 2010), *available at* http://www.www.istockanalyst.com/article/viewiStockNews/articleid/4323414.

10 *See* John W. Davis, *supra* note 8 at 896.

11 *Id.*

12 The textbooks I review included the following: Veda R. Charrow, Myra K. Erhardt, and Robert P. Charrow, *Clear & Effective Legal Writing* (4th ed. 2007); Michael D. Murry and Christy H. DeSanctis, *Legal Writing and Analysis* (2009); Linda H. Edwards, *Legal Writing and Analysis* (3d ed. 2011); Helene S. Shapo, Marilyn Walter, and Elizabeth Fajan, *Writing and Analysis in the Law* (5th ed. 2008); Charles R. Calleros, *Legal Method and Writing* (6th ed. 2011); Laurel Currie Oates, and Anne Enquist, *The Legal Writing Handbook–Analysis, Research, and Writing* (5th ed. 2010).

13 *See* Oates and Enquist, *supra* note 12 at 263-64.

14 *See* Edwards, *supra* note 12 at 71-77.

"[J]udges tell us quite a bit about what they want from lawyers, and student can benefit from reading and hearing what they have to say..."

While very important, almost all current legal writing textbooks focus almost exclusively on the techniques one uses once one identifies and understands their intended audience.

Helping Students Listen to the Fish

When law students write advocacy documents, the fish they seek to catch are judges. Helping law students learn more about their intended audience can only help them when they leave their law school's required legal writing courses and have to be self-sufficient.[15] Students with a better understanding of judges will have a better chance of adapting the techniques they learned in a legal writing course to specific needs of a particular client or case in practice.

Collectively and individually, judges tell us quite a bit about what they want from lawyers, and students can benefit from reading and hearing what they have to say rather than receiving a quick summary from their legal writing teacher. Think about the available information.

Court Rules–Collectively, judges use portions of court rules to remind attorneys how to communicate effectively with their audience. For example, Federal Rule of Appellate Procedure 28(d) reminds attorneys writing appellate briefs to use names or descriptions of people rather than generic words like appellant and appellee.[16] Court rules also remind attorneys that they do not have to use the maximum number of pages allowed for a brief or memorandum of points and authorities. "Although Civil L.R. 7-4(b) limits briefs to 25 pages of text, counsel should not consider this a minimum as well as a maximum limit. Briefs with less than 25 pages of text may be excessive in length for the nature of the issue addressed."[17]

Court Decisions–Sprinkled among all the reported decisions in the United States are a few that expressly tell lawyers what not to do. Often written in the context of an appeal poorly briefed by an attorney, these decisions use the attorney's work product as a cautionary tale. Two lengthy, but relatively recent, opinions illustrating this type of communication from judges include *In re S.C.*, 41 Cal. Rptr. 3d 453 (Ct. App. 2006) and *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962 (Utah 2007). One can also find advice from judges in the footnotes to judicial opinions. Courts really don't care for a party's "name in **BOLD-FACED CAPITAL LETTERS**" or writing "numbers both as text and numerals."[18] In addition, courts really don't like the excessive use of acronyms like those often used by attorneys litigating environmental issues.[19]

Survey Data–Judges also tell lawyers what they want them to do through survey data. Occasionally, someone asks judges some questions about what they like and don't like. Their answers can help shape how lawyers write their documents. One can see this in articles like *Common Knowledge About Appellate Briefs: True or False?*,[20] *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*,[21] and *How Judges, Practitioners, and Legal*

[15] After all, "the ultimate goal [of a legal writing program] should be to make each student self-sufficient, able to independently analyze, research, synthesize, and communicate each new problem." ABA Section of Legal Educ. & Admissions to the Bar, *Sourcebook on Legal Writing Programs* 8 (1997). The second edition of the Sourcebook phrases it a little differently. In the end, the students "should be able to analyze, research and write about a legal issue presented to them, and they should also be able to continue the process of learning about the law without the surpport of the LRW classroom and professor." BA Section of Legal Educ. & Admissions to the Bar, *Sourcebook on Legal Writing Programs* 11–12 (2d ed. 2006).

[16] *See* Fed. R. App. P. 28(d). "(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms 'appellant' and 'appellee.' To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as 'the employee,' 'the injured person,' 'the taxpayer,' 'the ship,' 'the stevedore.'"

[17] Commentary to Civil Local Rule 7-4(b) for the United States District Court for the Northern District of California, *available at* http://www.cand.uscourts.gov/localrules.

[18] *United States v. Snider*, 976 F.2d 1249, 1250 n.1 (9th Cir. 1992).

[19] *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 839 n.1 (9th Cir. 2007) (mocking the tendency of environmental lawyers to use acronyms like NEPA, ROD, BLM, FEIS, CBM, RMP, APDs, and SEIS rather than ordinary English).

[20] David Lewis, *Common Knowledge about Appellate Briefs: True or False?*, 6 J. App. Prac. & Process 331 (2004).

[21] Charles A. Bird and Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. App. Prac. & Process 141 (2002).

Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study.[22]

Articles–Occasionally, some judges write books or articles giving advice to legal writers. While books are long, one could include short articles in assigned readings for students.[23] Some of them contain a great deal of humor.[24]

Blog Postings–More recently, judges also share information through writings posted on the Internet. For example, those seeking brief writing tips from a variety of judges could visit the blog *How Appealing*.[25] It makes available a series of e-mail interviews with judges called *20 Questions for the Appellate Judge*.[26] In this series of twenty-one interviews, each judge is asked and answers at least one question about how attorneys can write better briefs.

Workload Statistics–Beyond hearing directly from judges, one can learn a great deal about the audience of judges by looking at their caseload statistics. How one writes an appellate brief might be influence by understanding a judge's workload. For example, the most recent case load statistics show that each authorized judge on the Ninth Circuit[27] is responsible annually for an average of 202 appeals terminated on the merits.[28] Since appellate judges usually hear appeals in panels of three judges, the average Ninth Circuit judges has to consider the merits of 606 appeals every year. That works out to slightly over twelve appeals every week even if the judge takes only two weeks of vacation. Essentially, an attorney reasonably can expect a Ninth Circuit judge will only have a few hours to read the briefs, prepare for oral argument, participate in oral argument, and draft an opinion in his client's appeal. If you know your intended audience has so little time to devote to your client's case, how would you write and argue it? Understanding your audience at this level should help shape how one writes for it.

Legal writing textbooks might improve by including information about how judges read and evaluate legal writing, what judges find persuasive, and statistical information on judicial workloads at both the trial and appellate levels. Armed with this kind of information, students will know what will likely work well for the judicial reader. When asked to play the role of a judge, students frequently identify what some people have concluded are indicators of great legal writing: "streamlined introductions, fact sections that are more persuasive than argumentative, varied sentence structure, liberal use of examples and analogies, clean transitions between points, eye-pleasing formatting, and smooth integration of authorities."[29]

Armed with more information about their intended audience, legal writers also would be in a better position to apply Rule No. 6 from George Orwell's famous essay *Politics and the English Language*.[30] After identifying five very specific rules for improving writing,[31] he finishes with Rule No. 6—"Break any of these rules sooner than say anything outright barbarous." No one can follow Orwell's Rule 6 without a complete understanding of their audience.

"Beyond hearing directly from judges, one can learn a great deal about the audience of judges by looking at their caseload statistics."

[22] Susan Hanley Kosse and David T. ButleRichie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study,* 53 J. Legal Educ. 80 (2003).

[23] *See, e.g.,* Jim Regnier, *Appellate Briefing: A Judicial Perspective,* 11 Persps.: Teaching Legal Res. & Writing 72 (Winter 2003); Harry Pregerson and Suzianne Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench,* 38 Sw. U. L. Rev. 221 (2008).

[24] *See, e.g.,* Alex Kozinski, *The Wrong Stuff,* 1992 BYU L. Rev. 325 (1992).

[25] http://howappealing.law.com.

[26] http://howappealing.law.com/20q.

[27] 28 U.S.C. § 44 (2006) (authorizing 28 judges for the Ninth Circuit).

[28] Office of Judges Programs, Statistics Division, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics,* March 31, 2010, Table B-5. U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2010, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/B05Mar10.pdf.

[29] *Ask the Author: Interview with Ross Guberman,* SCOTUSblog (Mar. 24, 2011, 4:37 a.m.), http://www.scotusblog.com/2011/03/ask-the-author-interview-with-ross-guberman/.

[30] George Orwell, *Politics and the English Language in George Orwell: Essays* 954, 966 (Alfred A. Knopf 2002).

[31] These rules were "1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print. 2. Never use a long word where a short one will do. 3. If it is possible to cut a word out, always cut it out. 4. Never use the passive where you can use the active. 5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent." Id.

"Introducing and using more information from and about judges might change the role of the legal writing teacher a little."

Introducing and using more information from and about judges might change the role of the legal writing teacher a little. Using these types of materials in a legal writing class would require legal writing teachers to reduce their role as a "fisherman" slightly. It may also require a legal writing teacher to become more of a guide helping students hear the correct message from the "fish."

A modest change like this would reduce the methodological differences between legal writing courses and most first-year doctrinal courses in law school. The textbooks used in a typical first-year doctrinal course such as torts, contracts, criminal law, or property, contains primarily court decisions and statutes. Essentially, students learn the law by reading materials written by those individuals making the law. The teachers in these courses basically guide the students through the material to help make sure the students see and eventually understand the right concepts and rules. Most legal writing textbooks mirror the format of hornbooks or secondary sources on a particular subject. They tell the students what to do, rather than having the students work on figuring out what to do.

"Just be the ball, be the ball, be the ball. You're not being the ball Danny."

—Ty Webb critiquing Danny Noonan's putting in *Caddyshack*

At the end of the academic year, when you're grading a stack of papers and you learn that all of them did not turn out great, you might find yourself frustrated much like Ty Webb was with Danny. For whatever reason, you know you taught them certain things in class. More accurately, you know you told them certain things in class. At this point, one can engage in at least one type of self-criticism. Was I a fisherman teaching them to fish, or was I helping them learn about the fish?[32] Did I tell my students to be the ball, or did I help them learn about the ball?

In the end, for a good writer, the metaphorical ball is their intended audience, and that is the force[33] that helps anyone navigate the legal writing universe.

[32] At the same time, one doesn't want the students to end up like Luca Brasi in *The Godfather*. As many of you will remember, Tessio received Luca Brasi's bulletproof vest, delivered with a fish inside. "Sonny: What the hell is this? Clemenza: It's a Sicilian message. It means Luca Brasi sleeps with the fishes." *The Godfather* (1972).

[33] Once a student identifies and learns about this force, the student needs to trust what they have learned, much like Luke Skywalker had to do. ""Use the Force Luke, let go Luke ... Luke trust me." —Obi-Wan Kenobi to Luke Skywalker, *Star Wars: Episode IV–A New Hope* (1977).

Another **Perspective**

"For most law students, legal concepts are not only unfamiliar, but they may be antithetical to many things the students have learned before. Using popular culture is simply another effective tool to breach that barrier. If students are able to connect to the material in a way that they might not have otherwise, at the very least, it may open a door to a level of comprehension that was not there before. More pragmatically, the two greatest hurdles in the classroom are connecting to students and keeping them engaged. What better way to overcome these difficulties than to break out Hulu? The psychology certainly shows it works and the student response is usually positive. Besides, it gives me an excuse to watch movie clips while also making me a better teacher. Should we not strive to make our classrooms the optimal spot for learning? If so, we need to make the shift toward popular-culture supplements, particularly in their visual forms. When it comes to legal education, we must remember Dorothy's words: 'We're not in Kansas anymore.'"

Victoria S. Salzmann, Here's Hulu: How Popular Culture Helps Teach a New Generation of Lawyers, 42 McGeorge L. Rev. 297, 318 (2011).

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Opening Class with Panache, Professionalism Pointers, and a Pinch of Humor

By Almas Khan

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Multivariable Calculus. The very title of my first class as a college freshman invited repulsion. The course description was no more enticing, referring to such abstruse concepts as optimization; vector fields, curl, and divergence; and Green's theorem. This seemingly inauspicious list of topics led me to envision sessions taught by a professor preoccupied with demonstrating complex proofs beyond my ken, and I entered the classroom on the first day ardently wishing that it was the last.

At precisely 10 a.m., the professor leapt from behind the lectern and proclaimed: "Let's begin with some fun facts!" Multivariable calculus—fun? Now I was perplexed, but for a different reason than I had anticipated. As the semester progressed and the professor continued to showcase "fun facts," which were often fascinating practical applications of the assigned theoretical topics for the day, he helped demystify the subject for me. Indeed, I became as infatuated with multivariable calculus as the professor, poring over proofs with lights ablaze at 3 a.m., and The Beatles chiding me with "I Should Have Known Better" over the radio.

Many of us legal writing professors hope to instill a similar passion for legal writing in our students. And while few of them will likely undergo an epiphany like mine during their legal writing courses, I have found that opening class with the legal equivalent of "fun facts" about the subjects to be covered that day captures students' attention,[1] especially for intimidating topics or topics that may appear irrelevant to a first-year legal writing student with the same frame of mind I had about multivariable calculus before taking the class.

While teaching introductory legal writing, I have tested various materials as openers, which can be humorous but should serve a substantial pedagogical purpose, such as inculcating professionalism before students enroll in a legal ethics course. My openers are frequently extracts from judicial opinions, as other law professors have catalogued cases in which courts reprimanded attorneys for their unprofessionalism.[2] However, surveys, videos, and newspaper articles have proven equally fruitful, and I accordingly cite a multitude of sources for openers under the 10 headings below, which reflect subjects taught in a typical first-year legal writing course. Readers inclined to seek other sources for openers may browse the Internet or consult a reference guide,[3] as this article provides only a sampler from the universe of instructive materials.

The Importance of Legal Writing

This self-evident proposition to legal writing professors may bounce, Teflon-like, off first-year law students habituated by crime procedurals to believe that rousing courtroom oratory wins most cases. To underscore written communication's preeminence in the age of the so-called vanishing trial[4]—and, I might

> "...I have found that opening class with the legal equivalent of 'fun facts' about the subjects to be covered that day captures the students' attention."

[1] A "prime's" ability to instigate interest in information that follows has been analyzed in the legal context. *See, e.g.,* Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 Or. L. Rev. 1, 4 (2010), available at http://ssrn.com/abstract=1604150.

[2] Wendy B. Davis, *Consequences of Ineffective Writing,* 8 Persp. 97 (2000); Judith Fisher, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers,* 331 Suffolk U. L. Rev. 1 (1997); Judith D. Fisher, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories,* 9 Scribes J. of Legal Writing 77 (2003–04).

[3] Mary Whisner, *When Judges Scold Lawyers,* 95 Law Libr. J. 557 (2004).

[4] Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. of Empirical Legal Stud. 459, (2004). *See generally* Edward D. Re, *Increased Importance of Legal Writing in the Era of "The Vanishing Trial,"* 21 Touro L. Rev. 665 (2005).

add, job market[5]—I project tabulated attorney survey results and advertisements for legal employment in the first class. Two notable survey sources are the *After the JD* report, a national study of legal careers,[6] and a *Journal of Legal Education* article summarizing findings from a survey of Chicago lawyers.[7]

While legal employment advertisements may not abound nowadays as the legal sector retrenches, it should be relatively easy to locate advertisements soliciting attorneys with excellent writing skills;[8] contrarily, applicants with subpar writing skills may not obtain employment.[9] Clients pay dearly—sometimes too dearly[10]—for legal documents, obligating attorneys to produce meticulously researched and written compositions.

"To demonstrate the consequences of neglecting to update research, I play an O.J. Simpson trial clip in which Judge Lance Ito chastised prosecutor Marcia Clark for not 'Shephardizing'..."

Legal Research

In 2007, research by ThomsonWest found that 45 percent of a first-year attorney's time is expended in legal research, while 30 percent of a second- or third-year attorney's time is devoted to legal research.[11] A 2006-07 survey of law firm partners found that while "research skills do not help associates make partner ... bad research skills can derail their careers."[12] Inadequate legal research subjects attorneys to malpractice judgments, as they are hampered from making informed decisions on their clients' behalf.[13] Moreover, courts have levied substantial penalties against attorneys who failed to conduct thorough legal research—$80,000 in liquidated damages in one recent Family and Medical Leave Act case[14] and public shaming in an insurance case.[15]

To demonstrate the consequences of neglecting to update research, I play an O.J. Simpson trial clip in which Judge Lance Ito chastised prosecutor Marcia Clark for not "Shephardizing" after the judge's student clerks uncovered relevant cases Clark had apparently not encountered during her research.[16] Deficient legal research by both parties has even culminated in erroneous court rulings, inciting judicial ire,[17] especially since these decisions, if published, may be binding in future cases.[18] Other harms from woefully unsupported cases include justice delayed

5 *See* Ameet Sachdev, *Law School Tuition Hikes Spark Talk of Bubble,* Chi. Tribune, Apr. 27, 2010, http://articles.chicagotribune.com/2010-04-27/business/ct-biz-0427-chicago-law-students--20100427_1_law-school-law-firms-national-law-journal (noting that many large law firms have been hemorrhaging positions and, according to a law school dean, are unlikely to ever embark on the hiring sprees of years past).

6 Ronit Dinovitzer, *et al.*, *After the JD: First Results of a National Study of Legal Careers 81 (2004)*, *available at* http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf (ranking legal writing as the most useful nonclinical course in law school, based on a survey of 3,905 recent law school graduates).

7 Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence,* 43 J. of Legal Educ. 469, 490 (1993) (reporting that surveyed hiring partners at Chicago law firms generally expected new associates to arrive as competent writers).

8 *See, e.g.,* Joseph Kimble, *The Best Test of a New Lawyer's Writing,* 89 Mich. B.J. 40, (2010), *available at* http://ssrn.com/abstract=1727689 (analyzing employment advertisements in a recent Michigan Lawyers Weekly issue and finding that 10 of the 26 sought candidates with excellent writing abilities while only 3 of the 26 cited strong academic credentials as a desired qualification).

9 Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 218 (2d ed. 2006) (excerpting a corporate employer's letter to a law school lamenting that a poor writing sample torpedoed some student applicants' hiring prospects).

10 *See, e.g.,* Jordan Weissmann, Federal Judge Slashes Wilmer's Fees—Again, Mar. 2, 2009, http://www.law.com/jsp/article.jsp?id=1202428681477 (citing a case in which a law firm billed its client approximately $4,000 per page for four briefs before a court-ordered fee reduction).

11 Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys,* 101 Law Libr. J. 297, 301 (2009).

12 *Id.* at 305.

13 *See, e.g., Smith v. Lewis,* 13 Cal. 3d 349, 360 (1975).

14 *Brown v. Nutrition Mgmt. Servs. Co.,* No. 06-2034, 2009 WL 281118, at *3 (E.D. Pa. Jan. 21, 2009).

15 *Nw. Nat'l Ins. Co. v. Guthrie,* No. 90 C 04050, 1990 WL 205945, at *2 (N.D. Ill. Dec. 3, 1990). The head of the litigation department at the defendants' firm was asked to write to the court after the firm neglected to cite cases discussing an applicable exception to a rule. *Id.* Similarly, a court ordered an attorney to submit for publication an article explaining why his asserted discovery objections were legally unfounded. *St. Paul Reinsurance Co. v. Commercial Fin. Corp.,* 198 F.R.D. 508, 511 (N.D. Iowa 2000).

16 *If You Forget to Shepardize, Don't Do It in Front of a National Audience,* Legal Writing Prof Blog (Sept. 25, 2008), http://lawprofessors.typepad.com/legalwriting/2008/09/if-you-forget-t.html. Reporters are rife with opinions underscoring the importance of using citators. *See, e.g., Glassalum Eng'g v. Ontario Ltd.,* 487 So. 2d 87, 88 (Fla. Dist. Ct. App. 1986).

17 *See, e.g., Massey v. Prince George's County,* 918 F. Supp. 905, 906 (D. Md. 1996).

18 *Tyler v. State,* 47 P.3d 1095, 1108 (Alaska Ct. App. 2001).

for litigants with meritorious claims[19] and an undermining of public confidence in the judiciary.[20]

Legal Analysis

Numerous cases emphasize the integrality of sound legal analysis to effective lawyering, and space regrettably permits me to only discuss three hilarious favorites with a serious underlying message here: that attorneys overlook defective legal analysis at their own peril and their clients' and the public's expense.[21] The first case, a breach of contract action, arose when a boy who lost a spelling bee for misspelling a word claimed that contest officials violated contest rules by allowing the winner to compete, and accordingly defeat him. The court nearly sanctioned the attorney for filing a suit bereft of "causation and common sense."[22]

In a more recent bankruptcy case, the judge denied the "Defendant's Motion to Discharge Response to Plaintiff's Response to Defendant's Response Opposing Objection to Discharge" based on its incomprehensibility, writing that the court was unable to "determine the substance, if any, of the Defendant's legal argument" or "ascertain the relief that the Defendant is requesting"; [23] judges have refused to be mind readers or do counsel's work, expecting a comprehensible presentation of arguments.[24] Finally, a classic opinion stresses the significance of devising compelling analogies and distinctions.[25] It reads in full: "The appellant has attempted to distinguish the factual situation in this case from that in Renfroe [citation omitted]. He didn't. We couldn't. Affirmed. Costs to appellee."[26]

Legal Citations

Students often express an aversion to learning The Bluebook[27] ("won't my paralegal do that for me?"), but examples of attorneys chastised—and occasionally fined—by judges pique class interest in the subject. In one case, an appellate court fined a law firm $750 for incorrect citations and missing pincites in its "laissez-faire" brief,[28] while a single incorrect case citation cost an attorney $100 in a more recent case.[29] Another judge ordered parties to resubmit dispositive motions, "which must include thorough legal analyses of their positions with relevant case law and properly bluebooked case citations."[30]

Legal Writing Style

While the Plain English movement pioneered by David Mellinkoff has existed for nearly half a century,[31] needless jargon continues to permeate legal discourse;[32] a former student informed me that his firm used obfuscatory prose to confound nonlegal readers. Additionally, law students often read landmark opinions composed in an antiquated

"Students often express an aversion to learning The Bluebook... but examples of attorneys chastised... by judges pique class interest in the subject."

[19] *Pierotti v. Torian,* 96 Cal. Rptr. 2d 553, 566 (Ct. App. 2000).

[20] *Schutts v. Bentley Nev. Corp.,* 966 F. Supp. 1549, 1566 (D. Nev. 1997).

[21] *See Pierotti,* 96 Cal. Rptr. 2d at 566 (estimating the cost of processing an average civil appeal in California as nearly $6,000 in 1992 and conjecturing that costs had risen since then).

[22] *McDonald v. John P. Scripps Newspaper,* 210 Cal. App. 3d 100, 102 (Ct. App. 1989). The complete opinion is well worth perusing as a pleasant diversion from grading papers, as is a more famous opinion by disgraced former federal judge Samuel Kent, *Bradshaw v. Unity Marine Corp.,* 147 F. Supp. 2d 668 (S.D. Tex. 2001) (describing the court's independent romp through a maritime case after reviewing counsel's atrocious submissions). *See also* Brenda Sapino Jeffreys, *Former Judge Samuel B. Kent Sentenced to 33 Months in Prison,* Texas Lawyer (May 11, 2009), http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202430610099&slreturn=1&hbxlogin=1.

[23] *In re King,* No. *05-56485-C,* 2006 WL 581256, at *1 (Bankr. W.D. Tex. Feb. 21, 2006). The order is famous for its Billy Madison footnote, which quotes from the movie: "Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul." *Id.* n.1.

[24] *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1980).

[25] *Denny v. Radar Indus., Inc.,* 184 N.W.2d 289 (Mich. Ct. App. 1970).

[26] *Id.* at 290.

[27] *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

[28] *Hurlbert v. Gordon,* 824 P.2d 1238, 1245–46 (Wash. Ct. App. 1992).

[29] *Espitia v. Fouche,* No. 2007AP1963, 2008 WL 4058057, at *3 n.5 (Ct. App. Sept. 3, 2008).

[30] *Capital Yacht Club v. Vessel AVIVA,* No. 04-0357, 2006 WL 2792679, at *2 n.5 (D.D.C. Sept. 27, 2006).

[31] David Mellinkoff's influential *Language of the Law* was published in 1963.

[32] *Ind. Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.,* 513 F.3d 652, 658 (7th Cir. 2008).

style and imitate the judges who drafted those opinions. Other students perceive that style in writing is a mere nicety or abhor the revision process.

However, once they see an apparently irate judge's redlining of a denied motion and the judge's order that the chastened attorney "personally hand deliver" the notated motion and attendant order to his client,[33] they appreciate my thorough virtual redlining of their papers.[34] Other cases in which judges excoriated attorneys for not carefully editing their submissions[35] or filing verbose documents with more volume than efficacy[36] vividly illustrate that writing style is not the metaphorical cherry atop the ice cream. Unfortunately, judges,[37] legislators,[38] and contract drafters[39] are not immune from committing stylistic errors with possibly grave ramifications.

"Unfortunately, judges, legislators, and contract drafters are not immune from committing stylistic errors with possibly grave ramifications."

Ethics in Advocacy

Overzealous or unscrupulous lawyers who violate ethical codes governing attorney conduct may endanger their clients' causes and their professional reputations; judges have sternly rebuked and often even sanctioned counsel for misstating facts from the record,[40] mischaracterizing precedents,[41] failing to cite controlling directly adverse authority,[42] and plagiarizing,[43] among a host of other ethical infractions.[44]

Briefs

Legal briefs can be anything but brief, and writing them can induce ennui at times, so to inject some levity into the discussion of briefs and highlight that writing them can be a creative venture, I project a "rapping reply brief" by a jazz musician who won his appellate case as a pro se litigant.[45] Conversely, and less amusingly, a federal judge found a lawyer's trial brief so abysmal that he ordered the lawyer to show cause why Rule 11 sanctions should not be imposed and to bring a supervisor to court "to discuss the poor qualify of [the] brief in terms of content, organization," and the omission of necessary issues.[46]

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[33] *Nault v. Evangelical Lutheran Good Samaritan Foundation,* No. 6:09-cv-1229-Orl-31GJK (M.D. Fla. Sept. 15, 2009), available at http://www.abanet.org/litigation/litigationnews/top_stories/docs/nault%20v.%20evangelical%20lutheran.pdf.

[34] I use the "track changes" feature in Microsoft Word to grade papers.

[35] *See, e.g., United States v. Devine,* 787 F.2d 1086, 1089 (7th Cir. 1986) (noting the irony of expecting a judge to "dutifully comb" through a submission ostensibly not worth the author's time to revise).

[36] *See, e.g., Politico v. Promus Hotels, Inc.,* 184 F.R.D. 232, 234 (E.D.N.Y. 1999). The court recommended that the plaintiff's attorney study William Strunk, Jr. and E.B. White's *The Elements of Style* (3d ed. 1979). *Politico*, 184 F.R.D. at 234. In one extreme case, the plaintiff's 4,000 pages of complaints and related documents warranted his suit's dismissal. *Gordon v. Green,* 602 F.2d 743, 744 (5th Cir. 1979). More humorously, in a 1596 English case, the court ordered the prolix plaintiff to be paraded around Westminster Hall with his head exposed through the stack of his swollen submission. *Mylward v. Weldon*, available at http://www.languageandlaw.org/TEXTS/CASES/MILWARD.HTM.

[37] *See, e.g.,* Tresa Baldas, *Judge Forgot to Put 'Not Guilty' on Verdict Form,* The National Law Journal (Apr. 24, 2009), http://www.law.com/jsp/article.jsp?id=1202430176316.

[38] *See, e.g.,* Andrew DeMillo, *Error in Arkansas Law Lets Toddlers Wed*, AOLNews, Aug. 18, 2007, http://news.aol.com/story/_a/error-in-arkansas-law-lets-toddlers-wed/20070818040909990001?ncid=NWS00010000000001; Tom Jackman, *Dropped 'at' in Va. Law Yields Acquittal in School Bus Case*, Wash. Post, Nov. 30, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/30/AR2010113004624.html?hpid=newswell; Editorial, *Amtrak, All Boxed In,* L.A. Times, Dec. 26, 2009, http://www.latimes.com/news/opinion/editorials/la-ed-amtrak26-2009dec26,0,7450529.story.

[39] *See, e.g.,* Ian Austen, *The Comma That Costs 1 Million Dollars (Canadian)*, N.Y. Times, Oct. 25, 2006, http://www.nytimes.com/2006/10/25/business/worldbusiness/25comma.html.

[40] *See, e.g., Avitia v. Metro. Club of Chicago, Inc.,* 49 F.3d 1219, 1224 (7th Cir. 1995).

[41] *See, e.g., Precision Specialty Metals, Inc. v. United States,* 315 F.3d 1346, 1347 (Fed. Cir. 2003).

[42] *See, e.g., In re Thonert,* 733 N.E.2d 932, 934 (Ind. 2000).

[43] *See, e.g., Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Laine,* 642 N.W.2d 296, 300 (Iowa 2002).

[44] For example, an attorney was disbarred for, in part, yelling at a law clerk, *In re Moity,* 320 F. App'x 224, 249–50 (5th Cir. 2009), and, in another case, fined for impugning a judge in a blog posting, John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. Times, Sept. 12, 2009, http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=1&hp.

[45] *Royal v. Royal,* No. 08-AP-1082 (Wis. Ct. App. 2008); Ryan J. Foley, *Rap Brief Hits Right Note With Judges,* JSOnline, Jan. 25, 2009, http://www.jsonline.com/news/wisconsin/38306479.html.

[46] *Hernandez v. N.Y. City Law Dept. Corp. Counsel,* 1997 WL 27047, at *14 n.11 (S.D.N.Y. 1997). In another case, the court castigated both parties' briefs (resubmitted after the court's initial rejection) for frustrating instead of facilitating the court's discovery of the truth and fined each party's counsel $1,000. *Latram Corp. v. Cambridge Wire Cloth Co.,* 919 F.2d 1579, 1584–85 (Fed. Cir. 1990).

Noncompliance with appellate rules may merit another deleterious judicial response—dismissal.[47] Typographical shenanigans to evade page limitations particularly vex judges.[48] One judge reduced an attorney's requested fees by $154,000 for "slip-shod submissions,"[49] emphasizing that documents submitted to a court should be professional products. If they fail to meet this standard, suspension may be warranted; one attorney was suspended for at least six months after filing incomprehensible briefs over a seven-year period.[50]

Oral Argument

Most students understand oral argument's crucial role in advocacy,[51] but their apprehension about public speaking may impede their eloquence. To boost my class's confidence, I play a short clip from an appalling oral argument in a Seventh Circuit criminal case.[52]

Untimely Submissions

I enforce a stringent policy on late legal writing submissions, as courts can be draconian in their response to attorneys who flout filing deadlines. To justify my policy, I cite a case in which a client may have lost $1 million when its firm filed a motion one minute late after being stymied by Southern California traffic.[53]

Computer failure is another proffered excuse that judges have unsympathetically rejected.[54] And if the applicable statute of limitations has expired in the interim, an attorney may face a malpractice claim[55] or disciplinary proceedings.[56]

Miscellaneous Sources

The "sushi memo,"[57] a mockery of the traditional legal memorandum, is a light-hearted source, as is a motion to compel an attorney to drop his accent.[58] Finally, Chief Justice John Roberts's recent tribute to Justice Ruth Bader Ginsburg's work ethic and precise legal writing[59] reminds students that even the finest legal writers continuously strive to refine their craft. Indeed, self-improvement may help attorneys avoid court-ordered enrollment in (horror of horrors!) a remedial legal writing class.[60]

"Indeed, self-improvement may help attorneys avoid court-ordered enrollment in (horror of horrors!) a remedial legal writing class."

[47] *See, e.g.*, *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 12 (1st Cir. 1996).

[48] *See, e.g.*, *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640–41 (2d Cir. 1995) (threatening the defense attorney with sanctions).

[49] Debra Cassens Weiss, *Irate Judge Blasts Typos and Errors in Filing, Slashes Fees by $154K*, ABA Journal, Oct. 8, 2008, http://www.abajournal.com/news/article/irate_judge_blasts_typos_and_errors_in_filing_slashes_fees_by_154k/.

[50] *In re Shepperson*, 674 A.2d 1273, 1274–75 (Vt. 1994).

[51] Students unconvinced of oral argument's importance may be directed to the following article: Joseph W. Hatchett & Robert J. Telfer III, *The Importance of Appellate Oral Argument*, 33 Stetson L. Rev. 139, 141 (2003).

[52] Oral Argument, *United States v. Johnson*, No. 04-2732 (7th Cir. Mar. 2, 2005), http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-2732&submit=showdkt&yr=04&num=2732.

[53] Peter Lattman, *Firm's Late Motion Filing (By a Minute) Proves Costly*, Wall Street Journal, Jan. 9, 2008, at B9.

[54] *See, e.g.*, *Martinelli v. Farm-Rite, Inc.*, 785 A.2d 33, 33 (N.J. Super. Ct. App. Div. 2001). Defense counsel claimed that his computer diary had failed to pick up the 30-day time frame in which to appeal an arbitration award. *Id.*

[55] *See, e.g.*, *Kohler v. Woolen, Brown & Hawkins*, 304 N.E.2d 677, 681 (Ill. App. Ct. 1973).

[56] *See, e.g.*, *Hansen v. State Bar*, 587 P.2d 1156, 1156 (Cal. 1979).

[57] Memorandum from Kimberly Arena to Kelley D. Parker (July 9, 2003), http://graphics1.snopes.com/legal/info/sushi.pdf.

[58] Kashmir Hill, *Don't Mess With Texas Blokes, Above the Law* (Dec. 8, 2009, 11:15 AM), http://abovethelaw.com/2009/12/dont-mess-with-texas-blokes/.

[59] Robert Barnes, *Ginsburg Gives No Hint of Giving Up the Bench*, Wash. Post, Apr. 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/11/AR2009041102297.html?hpid=topnews.

[60] *See, e.g.*, *In re Hawkins*, 502 N.W.2d 770, 772 (Minn. 1993).

Book Review ...

Cite as: Tracy Turner, *Book Review ... Teaching Ourselves and Our Students to Embrace Challenge: A Review of Mindset: The New Psychology of Success*, 20 Perspectives: Teaching Legal Res. & Writing 122 (2012).

Teaching Ourselves and Our Students to Embrace Challenge: A Review of *Mindset: The New Psychology of Success*

By Tracy Turner

Tracy Turner is the Director of the Legal Analysis, Writing, and Skills Program and Professor of Legal Analysis, Writing, and Skills at Southwestern Law School in Los Angeles, Calif.

"Her research links success to attitudes towards challenge, and ultimately, to our underlying beliefs about how intelligence and skill are acquired."

In *Mindset: The New Psychology of Success*, developmental psychologist Carol Dweck brings years of scientific research to the masses. Her research links success to attitudes toward challenge and, ultimately, to our underlying beliefs about how intelligence and skill are acquired.

Can intelligence and skill be acquired through effort? Prior to reading Dweck's book, I would have thought the answer was obvious. Certainly, I would have claimed to believe in the value of effort. And I also would have assumed that most others do too. Dweck's research, however, shows that the belief in the power of effort is not so prevalent. In fact, even those of us who would outwardly claim that effort matters might not fully connect with this belief psychologically. Dweck illustrates a true belief in the power of effort and proves its incredible results.

In one experiment, Dweck presented preschool-age children with an array of puzzles of varying degrees of difficulty. Children could choose which puzzle they wanted to tackle. Many children chose to redo the same puzzle over and over again. Other children, however, kept moving on to new and more difficult puzzles. One such child remarked, "I'm dying to figure them out!" Dweck interviewed the children and found that those who chose to redo the same puzzle generally believed that intelligence was a fixed trait, whereas the children who kept tackling new puzzles believed that intelligence was attained through effort.

After years of similar research, Dweck identifies and explores the dichotomy that her study of the preschoolers revealed: the fixed mindset versus the growth mindset. As I read her book, I was struck by the elusiveness of the growth mindset. As I read about the true challenge-lovers, I realized I was not in their ranks. My first reaction when faced with a difficult task at work was to moan rather than celebrate. And when I read about the failure-accepters, I realized I was not really with them either. I viewed my failures as something to mourn rather than as an opportunity to learn. Finally, I had to confess my secret belief that I could do little to help the student or two at the bottom of the class. By the time I closed the book, I knew I was not as growth oriented as I could be.

Dweck's book was nothing less than life altering for me. I began to see new opportunities for my students and myself. The growth mindset has become my guiding principle in all aspects of my life—my work, my family, and my teaching. Here I will focus on how it has changed my teaching.

Identifying the Fixed Mindset in Our Students

If you have ever heard any of the following statements by a student, you have encountered the fixed mindset at its worst:

- I am a bad writer. There's not much hope for me in this course.
- I will never be as smart as my classmates, so why try?
- What do I have to do to pass this course?
- Can you tell me whether this is what you want?
- I did the best I could, so there is no reason for me to review my exam/my paper after the fact.
- I wish my professor would stop trying to hide the ball. If only she would just tell me what she wants!
- Nothing I do is ever good enough.
- I can't do this! I am going to fail.

If any of these sound somewhat familiar, you should read on.

Understanding the Consequences of the Fixed Mindset

Dweck's research reveals the following ill effects of a fixed mindset: (1) a tendency to blame the teacher for bad grades; (2) an inability to learn from feedback; (3) a desire to cheat; (4) continued failure; and (5) depression. Not only were the fixed mindset subjects she studied more often depressed than the growth mindset subjects, but they were also more likely to do nothing to address their condition. Whereas growth mindset students met increasing depression with increasing resolve, fixed mindset students became less likely to turn in assignments as their depression deepened.

Fighting the Fixed Mindset

If I were to list the top five problems I would like to fix in my students, the list would closely match Dweck's list of the ill effects of the fixed mindset. Thankfully, *Mindset* does not merely bemoan the fixed mindset; it inspires change. Dweck proves that just as intelligence and skill are not necessarily fixed, so too with mindsets. We can teach the growth mindset to our students and ourselves. Dweck's book has prompted me to systematically instill and reinforce a growth mindset in my students. I will share some examples below. While none of these ideas are particularly revolutionary, together they represent a pedagogy that has made my teaching simultaneously more successful and more fulfilling.

The First Battle: Embracing the Growth Mindset

The first step in teaching my students the growth mindset was to embrace the growth mindset myself. As I closed the Dweck book, I placed myself somewhere in the middle of the fixed-to-growth spectrum. I confessed to myself that I needed to shed the belief that I could not help my bottom students succeed. Dweck's book helped me. She shares stories of exceptional teachers who motivated the most negatively labeled children to achieve truly phenomenal accomplishments primarily by believing in their ability to learn. For example, a grammar school teacher taught underprivileged second graders who had been labeled "learning-disabled," even "retarded," by their former teachers to read Shakespeare by year's end. After reading this teacher's story, I knew that I could not continue to view *any* of my law school students as unteachable. So, the first step for me was to drop the excuses. I now fully believe in my students' ability to learn and accept their failures as failures in my teaching. And I try to approach these failures true to the growth mindset by using them as learning opportunities. I strive to understand the impediments my students face and to reflect more on my teaching techniques.

Teaching Students About Dweck's Research

Dweck's research proved that a small dose of the growth mindset can go a long way. Dweck developed a workshop that used eight sessions to teach students that the brain is not fixed but grows in response to learning. Workshop teachers showed students images of brain cell growth. Discussions reinforced the images by encouraging students to recognize their ability to learn. Dweck tested her workshop by measuring its effect on student learning and found that students who participated in the workshop showed greater improvement in learning objectives than those in a control group, who took only a more traditional study-skills workshop.

After recognizing that signs of the fixed mindset were prevalent in my students, I decided that I needed to develop my own version of Dweck's workshop. I now recommend Dweck's book to my students and devote a short amount of class time to talking about it. I time this discussion with my return of their first graded assignment. I suspect that many students dismiss the discussion as too touchy-feely, but others have told me that they valued the discussion. Moreover, even if I cannot convince students to adopt the growth mindset, my devotion of class time to the topic demonstrates my commitment to their personal development—an equally valuable result.

Convincing Students That They Can Succeed

Realistically, I have to accept that I will not change student mindsets overnight. So, my more modest goal is to at least influence their belief in their ability to succeed in my class. After reading Dweck's book, I have committed myself to incorporating motivation into my class planning. Here are some of the ideas I have implemented:

"If I were to list the top five problems I would like to fix in my students, the list would closely match Dwecks' list..."

"She offers a mantra: challenge and nurture. Students need to have early opportunities to fail and then learn from their mistakes."

- I share a few of my personal experiences with failure in legal writing and how I overcame them.
- I preview their stages of learning throughout the course so that they will understand that learning is more of a process than a result.
- I reassure them that every year I have students who move from below the mean to above the mean.
- I comment on their progress at various stages throughout the course, both as a group and individually (e.g., I tell them that even just understanding how to read and understand cases is a huge victory).
- I invite students who have shown progress to share the methods that worked for them, anonymously at their option.

Teaching Students How to Succeed (The Magic Mix of Challenge and Nurture)

A section of Dweck's book examines exceptional teachers. She offers a mantra: challenge and nurture. Students need to have early opportunities to fail and then to learn from their mistakes. Challenge, therefore, is a necessary component of good teaching. Equally important, however, is a commitment to teaching students how to meet the challenge. As I began to strive to understand the impediments to my students' learning, I began to understand that I was too focused on teaching the "what" and not sufficiently focused on teaching the "how." I now know that teaching the attributes of good writing is meaningless unless I also instruct students on the methods they can use to attain the high bar I set for them. I have challenged myself to identify a process for every task, from reading a fact file to checking for typos. Here are some examples:

- When presenting a sample of a written product, I talk to them about my thought process as I wrote the sample—why I chose one case over another, how I found the quotes I wanted to include, my outlining process, and so on.
- I repeatedly model how to read and dissect a case. We read some cases together line by line, with highlighters and case charts at hand.
- I advise them to read a fact file once before beginning research to guide their case selection and again when writing a memo or brief to find helpful quotations and details.
- My syllabus provides weekly suggestions on the specific tasks they should complete on long-term projects.
- I talk to them about how to use my teaching materials. For example, I do not just provide a checklist but I talk to them about when and how they should use the checklist. I give them some examples to demonstrate how they can personalize the checklist to reflect their own strengths and weaknesses.
- I talk to them about the process of writing, including how to organize their research before outlining or drafting, when and why to refer back to cases as they draft different portions of their memo or brief, and how to allocate their time.
- I have TA workshops to present students with practical tips for keeping themselves organized and on task.
- I maximize opportunities for feedback by breaking down assignments into smaller tasks. For example, before a complete draft of a memo or brief is due, I require students to turn in an analysis of a key case, a research-organization chart, one rule paragraph and one application paragraph, an outline, a personalized self-editing checklist, written answers to important questions, and similar small assignments. I provide some form of feedback on all of these assignments, even if it is only group-wide feedback or feedback on a few samples.
- I keep folders on each student with their prior work so that I can refer to their prior work during office hours when necessary. I also use the folders to comment on their progress in my feedback on assignments.
- At the end of many class sessions, I review the key points I hoped they would learn from the exercise or discussion we engaged in.
- If I notice a student engaging in self-defeating behavior, such as declining to participate in class discussion or exercises, handing in assignments late, or coming to class late repeatedly, I force myself to approach the student and discuss my observations.

Refocusing Feedback on Process Rather Than Result

Dweck's book also prompted me to take a close look at my commenting. I had already been moving toward more instruction in my commenting and away from merely identifying problems or attaching labels. However, after reading Dweck's book, I started asking myself if my comments were reinforcing a growth mindset in my students. I quickly realized that even detailed, instructive comments could send the wrong message. Feedback that focuses on the result (e.g., "inadequate explanation of this case" or "this topic sentence is not helpful because it does not state a lesson about the law") reinforces the fixed mindset's belief that failure is unchangeable. I now aim for comments that identify what the student can do to improve (e.g., "reread this case and try to incorporate more of the court's logic in your explanation" or "try to craft a new topic sentence that pulls an important lesson from the cases you discuss in the paragraph") rather than phrasing comments in terms of what is wrong with their current draft. Of course, in the time crunch of reviewing drafts, it is easy to revert back to results-oriented feedback. Even after three years of consciously thinking about making my comments more process oriented, I still slip occasionally, but at least I am fighting the good fight. And, slowly, I am finding the process-oriented comments are becoming more natural and easy.

I also aim to comment on any progress, no matter how small, and to include an action plan for the student. For example, I might write, "Try rereading these cases and incorporating more of the courts' reasoning in your explanations. Then come see me with at least one redrafted paragraph so that we can make sure you are understanding the level of detail that is needed." Or, "I think you need to spend some more time thinking about how all of these cases fit together. Take some time to reread and rethink. Then come see me with a research-organization chart or outline so that we can discuss your new insights."

The Wrap-Up

I mentioned earlier in this review that Dweck's book has made my teaching both more effective and more fulfilling. Here's my evidence.

First, I am reaching students in new and exciting ways. I have always worked hard for my students, and most have shown appreciation in their evaluations of me. However, I am moved to tears by some of the comments I now receive: "Professor Turner has taught me not just how to be a better writer, but how to be a better person," "she pushed us to do our best," and "it has been an amazing year of growth toward becoming stellar and ethical lawyers."

Second, I enjoy teaching more now than ever before. I find it enormously fulfilling to focus on underperforming students and help diagnose and correct what is going wrong in their learning process. I love the creative process of developing solutions that work.

Third, I have seen more progress in my students' performance. My curve has been affected—I cannot justify as many low grades at the end of the year as I could in the past. And, since working the growth mindset into my teaching, I have seen at least one student each year move from C-range or lower in the fall to a B+ or higher in the spring. Oh, I still have a student or two each year that stays right at the grade she started with. But, instead of bemoaning the lack of foundational skills among entering students or feeling defeated, I now see these challenges as exciting opportunities to learn and am reinvigorated by them.

So, my thanks to Carol Dweck, should this article ever pass her way, and my hearty recommendation to all teachers to pick up the book and change your mindset.

"I find it enormously fulfilling to focus on underperforming students and help diagnose and correct what is going wrong..."

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Mentoring Matters: Teaching Law Students the Value of the Mentoring Relationship

By Cheryl E. Zuckerman

Cheryl E. Zuckerman is a Visiting Lecturer at the University of Miami School of Law in Miami, Fla.

> "*Those who need mentoring the most are the ones who are reluctant to reach out and take advantage of the opportunity. Mentoring cannot be forced, but a good match can be a highly effective and rewarding relationship, with the mentors often getting the most out of it.*"
>
> —John W. Kozyak, Esq.[1]

I teach Legal Communication and Research Skills, a course designed to prepare first-year law students for the demands of contemporary legal practice. During the third week of school, I invited a second-year law student to speak with my class. The student spoke candidly about the course. He told my students about the importance of learning the practical skills embodied within the curriculum. After taking questions for approximately 10 minutes, he put his name and email address on the whiteboard and told my students that he would be happy to speak with them anytime regarding concerns that they may have about the course or law school in general. Both he and I encouraged my students to reach out to him. Surprisingly, notwithstanding several nudges, less than a handful of my 38 students actually took the time to contact him. I was shocked. I realized that my students did not comprehend the importance of the mentor-mentee relationship. They did not appreciate the inherent value of the second-year law student's offer to provide helpful advice, without judgment, bias, or competition. They did not understand that the right mentor could change the direction of their legal careers and their lives.

Lawyers should strive to have at least one professional mentor during the course of their careers. I have several mentors and treasure the unique relationship I have with each one of them. One relationship is more than 12 years old and is still rewarding. Another relationship is less than six months old and has been very informative and fun at the same time. Regardless of the length of the relationships, in addition to providing career advice, my mentors have continually stressed the importance of achieving the appropriate work/life balance. I know that the value of the feedback and advice that my mentors have provided me throughout my career is immeasurable. I make a point of telling this to my students in class.

For example, I tell my students that during my first week of practice, my opposing counsel, a senior partner at a reputable firm, bullied me because I was fresh out of law school. I then tell my students how a partner at my firm helped me resolve the issue effectively and gracefully. I also tell them that after four years of practicing general complex commercial litigation, I made the decision to specialize in employment law. My mentor, a senior partner in my firm who hired me upon my law school graduation, selflessly helped me achieve that goal.

A mentor can be invaluable to a junior attorney. Mentors not only provide advice about substantive and procedural legal matters, but also assist junior attorneys with social and professional development. In other words, in addition to explaining the procedural mechanism for admitting documents into evidence, a mentor can provide guidance regarding how to deal with difficult partners and clients. A mentor can also provide advice regarding how to network, how to generate business, what area of law to specialize in, and how to effectively

"Mentors not only provide advice about substantive and procedural legal matters, but also assist junior attorneys with social and professional development."

[1] John W. Kozyak, Esq. is a founding partner of Kozyak Tropin & Throckmorton, P.A. in Miami, Florida. He is also the founder of the Kozyak Minority Mentoring Foundation, which provides assistance to minorities interested in pursuing legal careers, mentoring programs, and networking opportunities. The Foundation finds experienced lawyers and judges to mentor students throughout Florida.

manage caseloads. Regardless of how smart, hardworking, or dedicated a first-year attorney may be, experience plays a major role in becoming an effective advocate and a successful attorney. Input from experienced mentors can provide junior attorneys with the guidance they need. It can also limit the frustration and anxiety that often accompany the first few years of legal practice.

The social nature of the practice of law is critical. Being a mentee is an element of being a well-rounded lawyer that students must embrace while in law school. Practicing law is more than research, writing, motion practice, and being a zealous advocate. In order to effectively practice law, a junior associate should also know when to seek advice and how to get it. But finding the right mentor is tricky. Even if a law firm has a formal mentoring program, the match may not be a good fit. Indeed, most successful mentor-mentee relationships occur organically and develop at judicial receptions, bar functions, after a knock on a door to ask a question, or simply when an attorney is placed on a trial team or assigned to work on a multi-lawyer transactional deal. It does not matter where the mentor falls within the hierarchy of the firm. It does not matter whether the mentor is another associate, a senior partner, a professor, or a judge. What matters is that the junior attorney trusts the mentor, the relationship is easy, and the connection is genuine and reciprocal. Although most mentor-mentee relationships are informal, the relationship must be treated with respect. New attorneys must be committed to the relationship. They must understand the value of someone else's time.

Through role-playing, hypotheticals, and recitation of real-life examples, we can show our students that mentoring matters. We can tell them the story of the junior associate whose client calls, emails, and sends text messages late at night and over the weekend. We can tell them the story of the mid-level associate who is stuck in a career slump and looking for inventive ways to generate business. We can tell them the story of the senior associate who simply wants to leave the big firm to work in the public sector. What do these stories have in common? They are all realistic and can be resolved through the thoughtful advice of a mentor.

Law students should understand that the mentor-mentee relationship is circular; one day the mentee becomes the mentor. I tell my students about how I became a mentor and helped junior associates deal with, among other things, noncommunicative partners, the annual review process, and the procedural aspects of the practice of law. I tell my students that to be well-rounded, practice-ready, and effective advocates, they need to understand the value of the mentoring relationship and the social aspect of the practice of law. During the course of the semester, I sense a shift in their understanding and the development of our own mentor-mentee relationship. In my view, legal writing professors should discuss the mentor-mentee relationship as soon and as often as possible to help our students get ready for the demands of contemporary legal practice. As their mentors, we owe that to them.

"Law students should understand that the mentor-mentee relationship is circular; one day the mentee becomes the mentor."

Teachable Moments ...

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How Do You Update the Code of Federal Regulations Using FDsys?

by Patrick J. Charles

Patrick J. Charles is Associate Director and Assistant Professor of Law at Gonzaga University School of Law Chastek Library in Spokane, Wash.

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

After demonstrating how to update the CFR on GPO Access to scores of students, I decided to create an illustrated research guide with sequential screen shots and step-by-step how-to instructions, which was published in 2009 in *Perspectives*.[2] In March 2012, the Government Printing Office shut down GPO Access and migrated over to the Federal Digital System (FDsys).

Basing a research guide on screen shots has its risks and rewards. One risk is that the changing nature of the Web means the screen shots will become outdated. On the other hand, users are rewarded with a visually attractive guide that illustrates a fairly dry procedure. The key to the longevity of the guide is pairing clear narrative with the screen shots. My hope is that the illustrated research guide provides useful assistance to law students, summer associates, and attorneys who need to update the CFR.

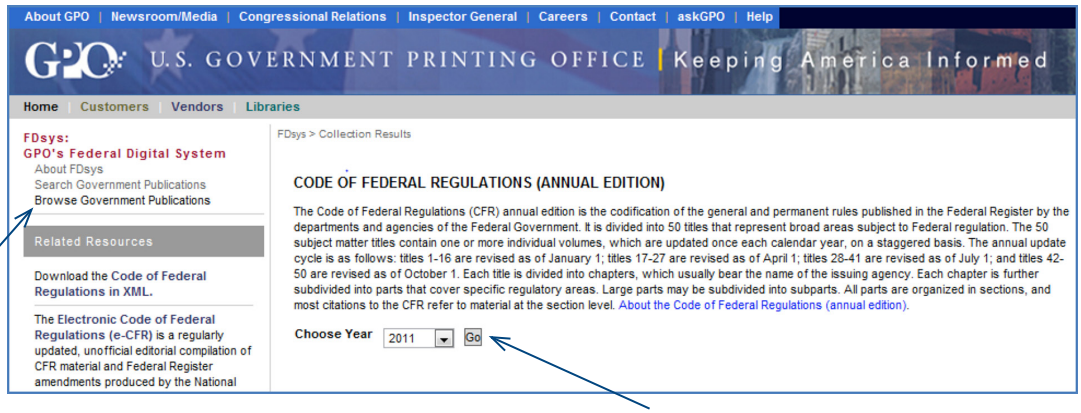
A Guide to Updating the CFR Using FDsys

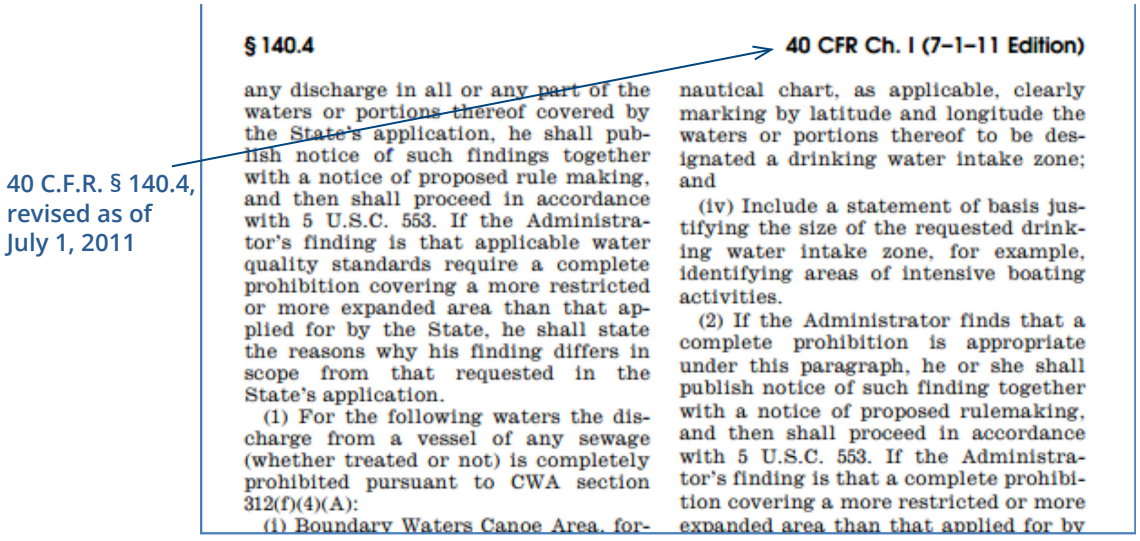
The CFR contains the final rules and regulations promulgated by federal administrative agencies. The CFR is published annually in four quarterly installments. Titles 1 through 16 are updated on January 1 of each year, titles 17 through 27 on April 1, titles 28 through 41 on July 1, and titles 42 through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

[1] Lydia Potthoff, Teachable Moments … "*How Do You Update the Code of Federal Regulations?*" 5 Perspectives: Teaching Legal Res. & Writing 28 (1996).

[2] Patrick J. Charles, Teachable Moments … "*How Do You Update the Code of Federal Regulations Using GPO Access?*" 17 Perspectives: Teaching Legal Res. & Writing 119 (2009).

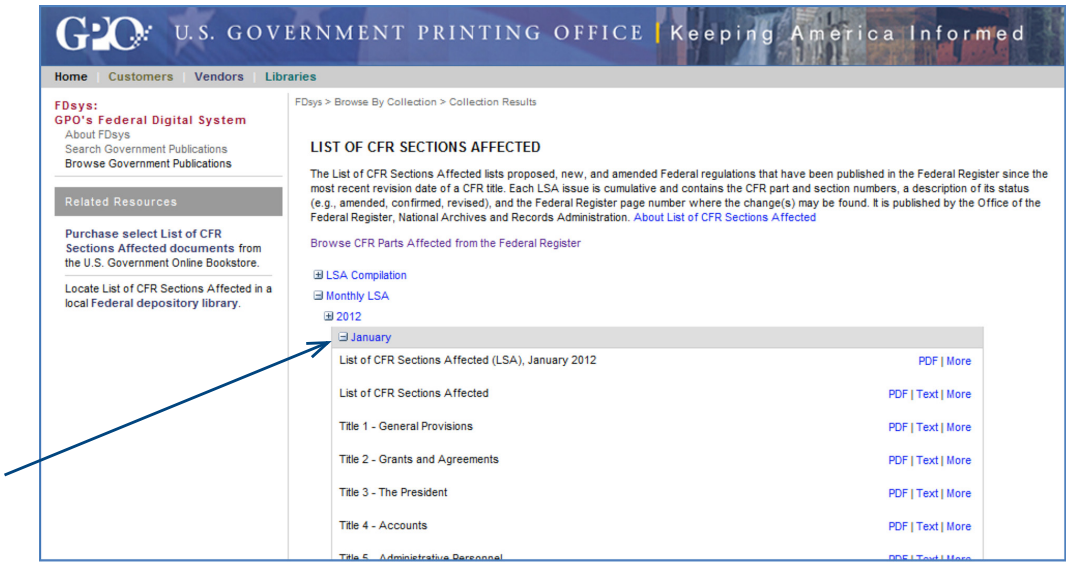
1. Retrieve your section in the most recent version of the CFR using **Browse Government Publications** on FDsys. For purposes of this guide, we are focusing on 40 C.F.R. § 140.4. Note the date this section was last revised. The revision date is included at the top of each page of the CFR in parentheses after the citation information. You can view PDFs of the most recent version of the CFR on the FDsys site at: http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR.





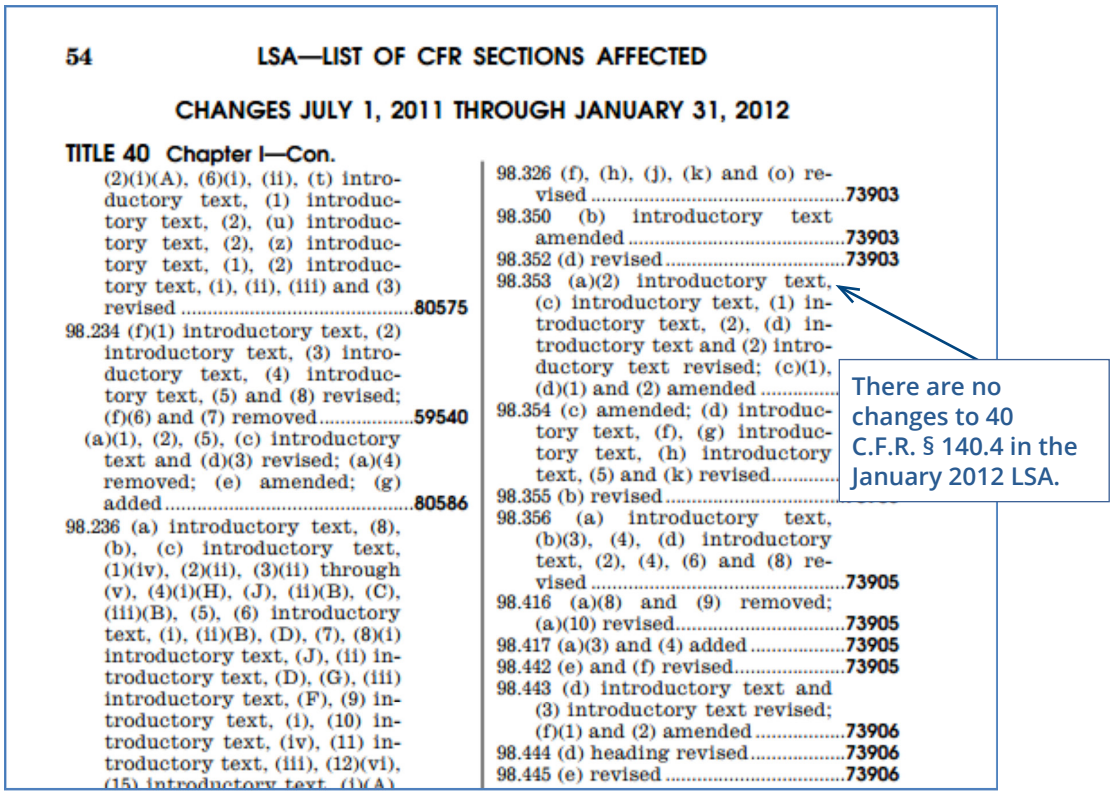
2. At the main page, click **List of CFR Sections Affected** in the right column to display the main page for the LSA.

3. At this page, click **Monthly LSA** for the most recent year. You can either click the entire month's LSA or you can click the relevant title. Click the most recent month listed, e.g., **January** and title **40**.



4. Consult the most recent monthly **List of CFR Sections Affected** to see if your CFR part or section is listed. Click either the PDF or TEXT options.

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



54 LSA—LIST OF CFR SECTIONS AFFECTED

CHANGES JULY 1, 2011 THROUGH JANUARY 31, 2012

TITLE 40 Chapter I—Con.

(2)(i)(A), (6)(i), (ii), (t) introductory text, (1) introductory text, (2), (u) introductory text, (2), (z) introductory text, (1), (2) introductory text, (i), (ii), (iii) and (3) revised 80575

98.234 (f)(1) introductory text, (2) introductory text, (3) introductory text, (4) introductory text, (5) and (8) revised; (f)(6) and (7) removed 59540

(a)(1), (2), (5), (c) introductory text and (d)(3) revised; (a)(4) removed; (e) amended; (g) added 80586

98.236 (a) introductory text, (8), (b), (c) introductory text, (1)(iv), (2)(ii), (3)(ii) through (v), (4)(i)(H), (J), (ii)(B), (C), (iii)(B), (5), (6) introductory text, (i), (ii)(B), (D), (7), (8)(i) introductory text, (J), (ii) introductory text, (D), (G), (iii) introductory text, (F), (9) introductory text, (i), (10) introductory text, (iv), (11) introductory text, (iii), (12)(vi), (15) introductory text, (i)(A)

98.326 (f), (h), (j), (k) and (o) revised 73903

98.350 (b) introductory text amended 73903

98.352 (d) revised 73903

98.353 (a)(2) introductory text, (c) introductory text, (1) introductory text, (2), (d) introductory text and (2) introductory text revised; (c)(1), (d)(1) and (2) amended .....

98.354 (c) amended; (d) introductory text, (f), (g) introductory text, (h) introductory text, (5) and (k) revised .....

98.355 (b) revised .....

98.356 (a) introductory text, (b)(3), (4), (d) introductory text, (2), (4), (6) and (8) revised 73905

98.416 (a)(8) and (9) removed; (a)(10) revised 73905

98.417 (a)(3) and (4) added 73905

98.442 (e) and (f) revised 73905

98.443 (d) introductory text and (3) introductory text revised; (f)(1) and (2) amended 73906

98.444 (d) heading revised 73906

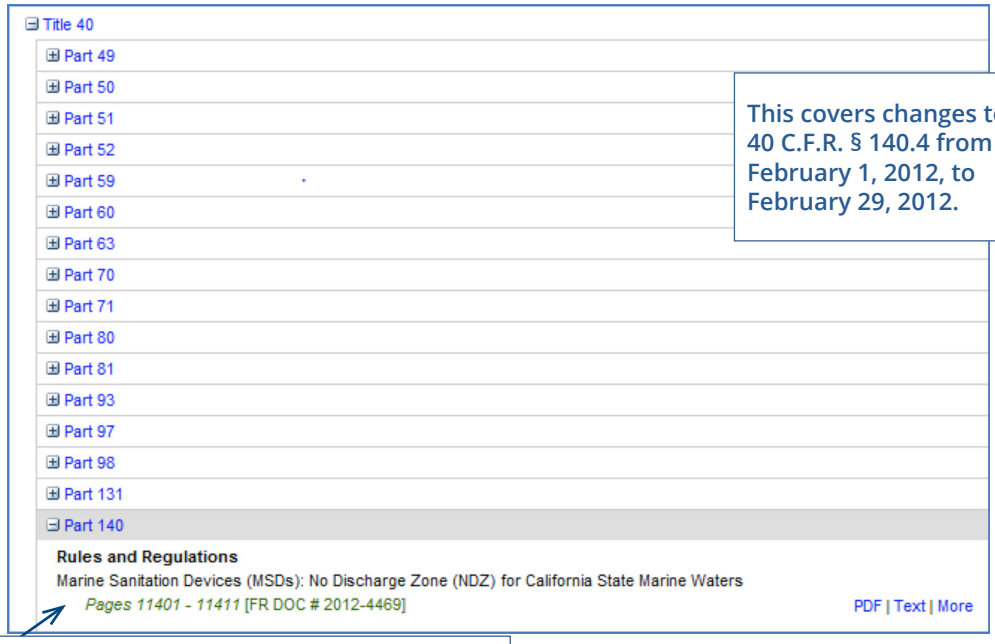
98.445 (e) revised 73906

There are no changes to 40 C.F.R. § 140.4 in the January 2012 LSA.

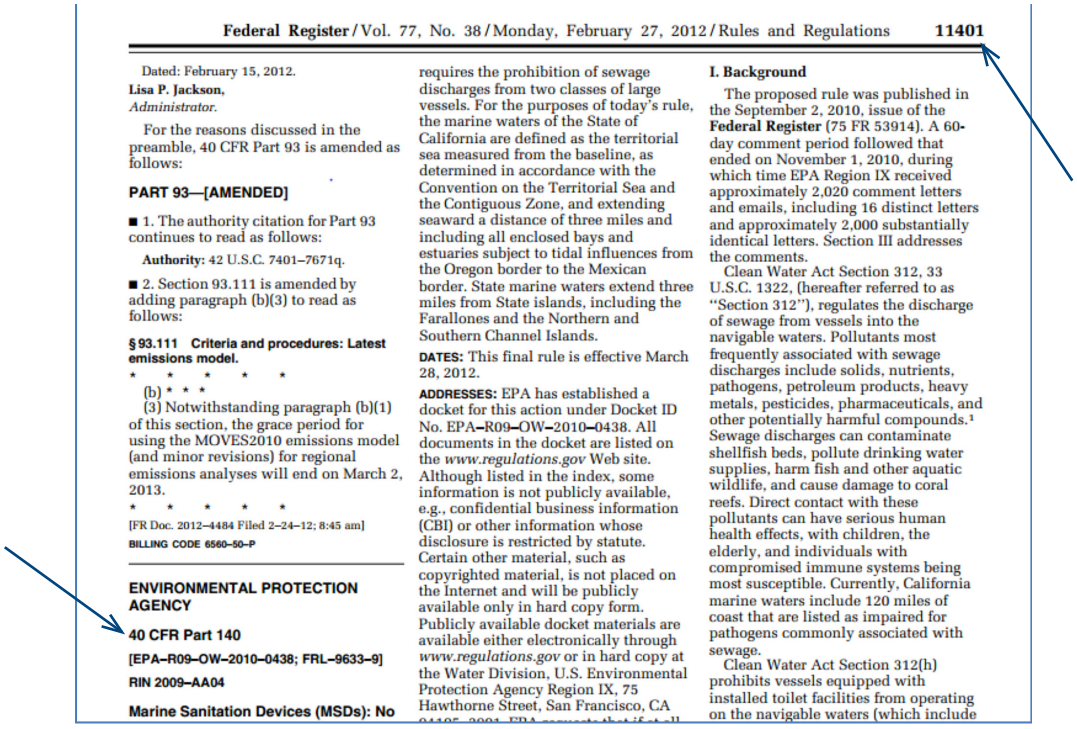
Recall that 40 C.F.R. § 140.4 was current to July 1, 2011. This January 2012 LSA covers changes to title 40 of the CFR from July 1, 2011, through January 31, 2012.

6. After you have consulted the most recent monthly LSA, return to **the List of CFR Section Affected** page and click the **Browse the CFR Parts Affected from the Federal Register** link. In the pull-down menu, you can select either the **Latest Month** or **Choose Date Range** options.

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



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



Federal Register / Vol. 77, No. 38 / Monday, February 27, 2012 / Rules and Regulations 11401

Dated: February 15, 2012.
Lisa P. Jackson,
Administrator.

For the reasons discussed in the preamble, 40 CFR Part 93 is amended as follows:

PART 93—[AMENDED]

■ 1. The authority citation for Part 93 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

■ 2. Section 93.111 is amended by adding paragraph (b)(3) to read as follows:

§ 93.111 Criteria and procedures: Latest emissions model.

* * * * *

(b) * * *

(3) Notwithstanding paragraph (b)(1) of this section, the grace period for using the MOVES2010 emissions model (and minor revisions) for regional emissions analyses will end on March 2, 2013.

* * * * *

[FR Doc. 2012–4484 Filed 2–24–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 140

[EPA–R09–OW–2010–0438; FRL–9633–9]

RIN 2009–AA04

Marine Sanitation Devices (MSDs): No requires the prohibition of sewage discharges from two classes of large vessels. For the purposes of today's rule, the marine waters of the State of California are defined as the territorial sea measured from the baseline, as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone, and extending seaward a distance of three miles and including all enclosed bays and estuaries subject to tidal influences from the Oregon border to the Mexican border. State marine waters extend three miles from State islands, including the Farallones and the Northern and Southern Channel Islands.

DATES: This final rule is effective March 28, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R09–OW–2010–0438. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Water Division, U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA

I. Background

The proposed rule was published in the September 2, 2010, issue of the **Federal Register** (75 FR 53914). A 60-day comment period followed that ended on November 1, 2010, during which time EPA Region IX received approximately 2,020 comment letters and emails, including 16 distinct letters and approximately 2,000 substantially identical letters. Section III addresses the comments.

Clean Water Act Section 312, 33 U.S.C. 1322, (hereafter referred to as "Section 312"), regulates the discharge of sewage from vessels into the navigable waters. Pollutants most frequently associated with sewage discharges include solids, nutrients, pathogens, petroleum products, heavy metals, pesticides, pharmaceuticals, and other potentially harmful compounds.[1] Sewage discharges can contaminate shellfish beds, pollute drinking water supplies, harm fish and other aquatic wildlife, and cause damage to coral reefs. Direct contact with these pollutants can have serious human health effects, with children, the elderly, and individuals with compromised immune systems being most susceptible. Currently, California marine waters include 120 miles of coast that are listed as impaired for pathogens commonly associated with sewage.

Clean Water Act Section 312(h) prohibits vessels equipped with installed toilet facilities from operating on the navigable waters (which include

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To receive *Perspectives* by e-mail, sign up at <west.thomson.com/journal/perspectives>. Authors are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. The *Perspectives* Author's Guide and Style Sheet are posted at <west.thomson.com/signup/newsletters/perspectives/perstyle.aspx>.

Perspectives: Teaching Legal Research and Writing | Vol. 20 | Nos. 2 and 3 | Winter/Spring 2012

Cite as: Kristen E. Murray, *Legal Writing Missteps: Ethics and Professionalism in the First-Year Legal Research and Writing Classroom*, 20 Perspectives: Teaching Legal Res. & Writing 134 (2012).

Legal Writing Missteps: Ethics and Professionalism in the First-Year Legal Research and Writing Classroom[1]

"[A] lot of legal writing-related mistakes and errors in judgment draw a great deal of media scrutiny and attention – attention that spreads quickly in a digital environment."

By Kristen E. Murray

Kristen E. Murray is an Associate Professor of Law at Temple University, Beasley School of Law in Philadelphia, Pa.

These days, a lot of legal writing-related mistakes and errors in judgment draw a great deal of media scrutiny and attention—attention that spreads quickly in a digital environment. For example, in 2006, an attorney made legal headlines when his auto-spellcheck program changed the phrase "sua sponte" to "sea sponge" each of the five times he used the phrase in his brief.[2] News feeds and blogs are quick to react when one of these sensational stories emerges; the blog *Above the Law* celebrates instances of judicial chastisements with its "Benchslaps" category, pointing to "smackdowns" issued from the bench.[3]

Legal writing professors have long recognized these as teaching moments, usually in the form of cautionary tales shared with students. I have traditionally brought these examples into the classroom as they have occurred—I often refer to them as "current events" or "breaking news" in legal research and writing. I have saved some of the more humorous and memorable examples for my lessons on the importance of editing and proofreading, under the theory that seeing the mistakes of others in action underscores the importance of seemingly technical tasks.

More and more, as a community, the legal writing professorate has recognized the importance of integrating ethics and professionalism into the legal writing classroom; indeed in some instances, it is impossible to separate these concepts.[4] Notable reports have concluded that there are certain core values that lawyers should possess, including: 1) provision of competent representation; 2) striving to promote justice, fairness, and morality; 3) striving to improve the profession; and 4) professional self-development.[5] The *Carnegie Report* found that law schools, while very good at teaching students to think like lawyers, failed to adequately equip students with the ethical and social skills necessary to enter practice.[6] Although the ABA requires law

1 Thanks to Peter Smyth for his able research assistance on this article and Andrea Agathoklis and Ellie Margolis for reviewing drafts.

2 Mike McKee, *Solo's Errant Spell-Check Causes 'Sea Sponge' Invasion* (Mar. 2, 2006), available at www.law.com/jsp/article.jsp?id=1141207513219.

3 *Above the Law*, http://abovethelaw.com/benchslaps/ (last visited Aug. 28, 2011).

4 *See generally, e.g.,* Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 Touro L. Rev. 427 (2005) [hereinafter Fostering Respect for Our Students] (advocating for the inclusion of ethics and professionalism in first-year legal writing courses and discussing why legal writing courses are particularly well suited to forming law students' conceptions of proper lawyerly conduct); David S. Walker, *Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 U. Tol. L. Rev. 421 (2009) (discussing the need for increased instruction in ethics and professionalism, and describing Drake Law School's ethics and professionalism program for first-year students).

5 Robert MacCrate, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—an Educational Continuum,* ABA Sec. Legal Educ. & Admiss. Bar (1992) [hereinafter MacCrate Report] (selected excerpts available at http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html). The Carnegie Report, published in 2007, again identified the need for an integrated curriculum that provides for "(1) [t]he teaching of legal doctrine and analysis, which provides for the basis for professional growth; (2) [i]ntroduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and (3) a theoretical and practical emphasis on inculcation of the identity, values and dispositions consonant with the fundamental purposes of the legal profession." William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* 194 (Jossey-Bass 2007) (referred to as the "Carnegie Report" because it was undertaken by the Carnegie Foundation for the Advancement of Teaching) [hereinafter Carnegie Report].

6 Carnegie Report, *supra* note 5, at 187.

students to take a professional responsibility course,[7] and many professors incorporate a discussion of ethics and professional conduct in other courses,[8] these concepts are rarely integrated across the curriculum as key components of a law student's academic experience.[9] Complaints about the state of professionalism in the legal community have not been directed only at law schools. Indeed, even the Supreme Court has lamented the state of legal professionalism for some time.[10]

Professor Melissa Weresh has argued that the best time to begin teaching law students civility is not in an upper-level course, signifying to students that professionalism is a secondary pursuit that is ancillary to law practice, but rather in the first-year legal research and writing course, when law students are enthusiastic about learning what it means to be a lawyer and when students are in the best possible position to incorporate ethical and professional obligations into their "analytical and productive framework."[11] One commentator has observed that, in practice, a lawyer's character is judged by the things she does day to day.[12] As such, because a lawyer's day is largely composed of the production of written work, Weresh urges that law students be introduced to legal ethics at the same time they are introduced to the fundamentals of legal writing.[13]

The idea of introducing ethics in the first-year legal research and writing course has been criticized both because it would burden already overworked legal writing faculty and because some believe that formal introduction to rules of ethics is unnecessary. Following the MacCrate Report, critics argued that, while implementation of the skills and values recommended during law school would benefit students and practitioners, the cost to include additional instruction[14] and the fear that time would be taken away from other courses were prohibitive.[15] Weresh responded by pointing out that legal research and writing and ethics and professionalism are the only law school requirements specifically enumerated in the ABA Standards for Accreditation.[16] She argues that this indicates a priority established by the ABA, and that few could contend that the values and skills identified by the MacCrate and Carnegie reports should not be addressed in the context of legal education wherever possible.[17] Moreover, ethics and professionalism are already implicit in parts

"…Weresh urges that law students be introduced to legal ethics at the same time they are introduced to the fundamentals of legal writing."

7 ABA Standard 302, Interpretation 302–9.

8 *Fostering Respect for Our Students, supra* note 4, at 427.

9 *See* Donna C. Chin, et al, *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing,* 51 Rutgers L. Rev. 889, 889 (1999) (arguing that law school courses tend to focus on objective logic rather than professionalism).

10 Chief Justice Warren E. Burger criticized the competence of lawyers and American law schools at the ABA Annual Meeting in 1978, prompting a commission on how to improve lawyer training that would produce responsible lawyers. *Fostering Respect for Our Students, supra* note 4, at 423 n. 8. Chief Justice Burger again criticized the conduct of lawyers "in and out of the courtroom" in his law review article published in 1993. Chin, *supra* note 9, at 890 (quoting Warren E. Burger, *The Decline of Professionalism,* 61 Tenn. L. Rev. 1, 5–6 (1993)).

11 *Fostering Respect for Our Students, supra* note 4, at 438–41. *See also* Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning,* 6 J. Legal Writing Inst. 1, 20–21 (2000) (discussing how the process of writing facilitates learning because it pushes students to analogize and synthesize previous knowledge with new knowledge).

12 Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, The Elite Law School, and the Moral Formation of the Novice Attorney,* 82 Minn. L. Rev. 705, 711 (1998).

13 *Fostering Respect for Our Students, supra* note 4, at 444. Chin gives several examples of instances where lawyers have been sanctioned for discourteous writing, including uncivil language used in court documents and letters sent between opposing counsel. Chin, *supra* note 9, at 892–95. Of particular note was an affirmation by the United States Court of Appeals for the First Circuit where the court upheld a ruling by a district court that disbarred an attorney in part for attacking the court and opposing counsel in his pleadings. Chin, *supra* note 9, at 893–94. Upon hearing of the attorney's misconduct, the appellate court affirmed the district court's ruling and in turn disbarred the attorney from practice before the First Circuit, adding salt to the wound. *In re Cordova-Gonzalez,* 996 F.2d 1334 (1st Cir. 1993).

14 *Fostering Respect for Our Students, supra* note 4, at 433–34 (discussing objections raised by Dean John J. Costonis in his critique, *The MacCrate Report: Of Loaves, Fishes and the Future of American Legal Education,* 43 J. Legal Educ. 157 (1993)).

15 *See* Melissa H. Weresh, *An Integrated Approach to Teaching Ethics and Professionalism,* The Professional Lawyer, Aug. 2007, at 25, 28 [hereinafter *An Integrated Approach*] (addressing concerns raised by Drake Law School's adjustment of first-year students' schedules to accommodate Drake's trial practicum where first-year students attend an actual jury trial during their second semester).

16 *Fostering Respect for Our Students, supra* note 4, at 434; ABA Standard 302(a).

17 *Fostering Respect for Our Students, supra* note 4, at 434

"Thus, this spring, I introduced an exercise I called 'Legal Writing Missteps' to my first-year legal research and writing students."

of legal writing instruction and it would be a short step to round out the inclusion of the essential skills and values recommended by the reports.[18]

With all this in mind, this year I decided to try to use practical stories about "legal writing gone bad" to bring a discussion of ethics and professionalism into the first-year course in a thoughtful, meaningful way. Thus, this spring, I introduced an exercise I called "Legal Writing Missteps" to my first-year legal research and writing students.

My goals for this exercise were three-fold: (1) to give students more opportunity for general Internet research; (2) to bring a discussion of ethics and professionalism in legal writing into the first-year course; and (3) to engage the full class in discussion of these issues via an online forum, to include those students who tended to be less vocal during class.

The instructions for the exercise were fairly simple. I provided students with a single-page handout about the assignment.[19] In it, I described the exercise as follows:

> This semester, one of the themes of the course will be ethics, professionalism, and legal writing. Thus, over the course of the semester we will be having an ongoing online discussion about these topics, and then discuss them together in class later in the semester.
>
> You are required to find and share what I have styled as a legal writing "misstep," by which I mean a story in which someone's legal writing brought about some sort of reaction or consequences from an audience—for example, a judge, a client, or the popular press.

The instructions further explained that the students would be required to write a post that (1) summarized the story, (2) provided a link to the source material, if possible, and (3) offered some commentary about the story. Each story had to be unique.[20] The items were to be posted to the discussion board I set up on the class Blackboard site.[21] Each student had to also comment on at least *two* of their classmates' stories, and monitor the comments to their own posts to see if any warranted a response.

Students put their posts up over the course of the semester. As one might expect, several students got their posts up immediately following our discussion of the assignment, some trickled in over the course of the semester, and there was a surge close to the deadline, after I started reminding them of the deadline during class. There was ample time between the posting deadline and our scheduled in-class discussion for late posters to participate fully in the online discussion forum.

The online discussion was robust on a few posts and topics but skimpier on others; eventually, though, each post had a comment thread associated with it. A few of the posts touched on the same themes and ideas, and I was glad to see the students making cross-references to other items that they or their classmates had posted. I participated in a few of the threads, to ask a question or point them to relevant information when someone had posed a question. I also tracked the discussions for fodder for our discussion in class.

During one of our last class meetings of the semester, we had an in-class discussion about the posts and the ramifications of the "mistakes" that the practicing lawyers had made. I first asked the students to divide the missteps into various categories; after some negotiation, we ultimately settled on three: small typos with

[18] *Id.* at 434–36. Professor Weresh has written a supplemental text entitled *Legal Writing: Ethical and Professional Considerations* that is organized by specific type of document, e.g., predictive memoranda or appellate brief, and points out ethical and professional considerations that are related to legal writing. Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (LexisNexis 2006).

[19] A copy of the handout is available upon request.

[20] I noted in the instructions that this should give students an incentive to post their "missteps" sooner rather than later, so they would have more choices available.

[21] Blackboard is the course management software we use at Temple Law (http://www.blackboard.com/). The assignment could be executed using any course Web page that includes a threaded discussion forum or message board.

(potentially) huge consequences, bad lawyering, and problems with plagiarism and attribution.

Most of the students' submissions (16 of my 29 students) fell into the first category: typographical errors that had legal consequences, drew admonishment from judges, or both. These included some things that received a lot of attention when they occurred, such as the $2,000,000 comma typo[22] and a challenge positing that the Texas constitutional amendment banning gay marriage actually banned all marriage.[23] Most of our discussion centered on the consequences of these mistakes, and we had an interesting conversation (with some disagreement) as to when these types of mistakes should have consequences and when they should not. Even after I introduced some of the concepts covered in the relevant rules of professional responsibility, some students felt that absurdity and common sense should prevail while others held tightly to the notion that a lawyer should be held to an extremely high standard for the work product they put out.

Eleven students submitted missteps that fell into the category of "bad lawyering"—legal writing-related strategic mistakes or erroneous actions taken by lawyers. These included stories of a lawyer who submitted a brief that was 4,000 words over the court's word limit—and lied about it[24]—and a lawyer who insulted the court in his written motion.[25] When we discussed these cases in class, students seemed less forgiving of these mistakes because they were either poorly thought out or so obvious that they could and should have been avoided.

Finally, two students found examples criticizing lawyers for plagiarizing the work of others—one case where a lawyer used substantial portions of a law review article (17 of 19 pages) in a brief submitted to a court[26] and another where a company that failed to obtain the patent it sought filed a lawsuit against the lawyer it had hired to obtain the patent because the lawyer used language from a rival scientist's patent application.[27] I thought it was important to consider this category of "missteps" separately because plagiarism is an issue that vexed many of my students. As one student observed in the discussion forum, "I find it interesting that there seems to be a significant division in opinion between academia and practicing professionals regarding plagiarism." In class, we discussed the nuances of what constitutes "plagiarism" in practice, including a discussion of using prior work product, boilerplate, or forms as part of one's legal writing work product.

In general, our discussion of these categories was reasoned, thoughtful, and provocative, with some easy agreement and several points of contention about what conduct does and should violate professional norms. The discussion also stretched to cover topics I had not anticipated; these can be demonstrated through two other noteworthy moments in our discussion. The first involved the use of humor in lawyering, which we included in the "writing-related bad lawyering" category.[28] In our discussion, the students were

"Most of the students' submissions... fell into the first category: typographical errors that had legal consequences..."

[22] Grant Robertson, *Comma Quirk Irks Rogers,* The Globe and Mail (Aug. 06, 2006, 11:30 p.m.), http://www.theglobeandmail.com/report-on-business/article838561.ece (noting that comma placement allowed contract to be interpreted to allow for cancellation based on one year's notice rather than a five-year contractual commitment).

[23] Dave Montgomery, *Texas' Gay Marriage Ban May Have Banned All Marriages,* Fort Worth Star-Telegram (Nov. 18, 2009), http://www.mcclatchydc.com/2009/11/18/79112/texas-gay-marriage-ban-may-have.html.

[24] Order, *Abner v. Scott Memorial Hospital* (Mar. 9, 2011, available at http://sbmblog.typepad.com/files/6111pmcb.pdf (last visited Aug. 28, 2011).

[25] PRACTICE TIP: Referring to Judges on Your Panel as "Ass Clowns" Does Not Maximize Chance of Success, Lowering the Bar (Oct. 27, 2010), http://www.loweringthebar.net/2010/10/practice-tip-referring-to-judges-on-your-panel-as-ass-clowns-does-not-maximize-chance-of-success.html.

[26] Debra Cassens Weiss, *Iowa Lawyer Reprimanded for Plagiarizing Bankruptcy Brief,* ABA Journal (Oct .18, 2010, 7:41 a.m.), http://www.abajournal.com/news/article/iowa_lawyer_reprimanded_for_plagiarizing_bankruptcy_brief/.

[27] Debra Cassens Weiss, *Suit Claims Patent Denied Because of Plagiarism by Ropes & Gray Partner,* ABA Journal (Mar. 25, 2010 8:51 a.m.), http://www.abajournal.com/news/article/suit_claims_patent_denied_because_of_plagiarism_by_ropes_gray_partner/.

[28] These instances of humor included quoting from the movie *The Hangover* in an opening brief (http://www.thecocklebur.com/criminal-law/worst-opening-of-a-legal-brief-ever) and advice about when and how to use humor in lawyering (http://www.slaw.ca/2009/08/19/humour-and-legal-advocacy-use-it-with-care/).

able to set benchmarks as for what was definitely unacceptable, but had trouble drawing a line with respect to when humor might be permissible, or even useful. Some students were dogmatic in their approach, deeming it "always unprofessional" and/or "not worth the risk." Others thought that context and the relationship among the participants in the legal matter might allow for some form of humor.[29]

"The students were able to find a variety of examples that appeared in many different sources; the ethics and professionalism discussions were fresh, interesting, and thought provoking..."

We also had an in-depth discussion of one case in particular. In this case, a death row inmate whose lawyers missed the deadline to file a notice of appeal because the original lawyers working on the case left the firm and neither the court nor the mail clerks seemed to know that other lawyers had taken over the pro bono case.[30] The students were especially troubled by the grave consequences that seemed to follow what amounted to an in-house clerical mistake. Some seemed surprised that the situation could present itself in the first place; others seemed more cynical and focused on the fact that this was human nature but that fairness should ultimately prevail.

We eventually voted on which was the "worst" kind of mistake. Fourteen students thought that the "bad lawyering" mistakes were the most egregious, eleven voted for the plagiarism-like mistakes, and three voted for the typographical errors category. These results surprised me somewhat—I thought the students would be more affected by the consequences that attached to simple writing/editing errors because those issues would hit closer to home. However, some students seemed reluctant to have to pick a category and thought they were all offensive in equal measure.

All in all, I deemed the exercise a success. The students were able to find a variety of examples that appeared in many different sources; the ethics and professionalism discussions were fresh, interesting, and thought provoking; and, ultimately, every student had a voice in the discussion—even those who were less vocal in class had their opinions recorded in the discussion forum. Thus, I met all of my goals for this assignment.

Still, I might make two small changes when I use this exercise next year. First, I may ask the students to post their contributions over a shorter period of time (two to three weeks instead of over the course of most of the semester); I think the compressed time frame will make the in-class discussion ever richer, because early posters will not have to think back several months to when they did their research. Second, I will assign a basic reading on professional rules and ethics as a backdrop for our in-class discussion, rather than simply introducing these concepts in class.[31]

There are other ways one might integrate a similar exercise into the class. One option I considered is having a weekly (or per class) posting, with reference in each class to the new issue that had been presented. Ultimately, I concluded that with 29 students, and the potential for long, engaging discussions about each presentation, I should not spend the time to open each class with this topic; it was better saved for a single discussion at the end of the semester. This model might work, though, in smaller classes or classes that meet more frequently.[32] This could also work as an exercise that is completed in class from start to finish. A professor could introduce the exercise, ask the students to

[29] Sample comments from the discussion board included "I personally would not mind humor in legal advocacy as long as it is not inappropriate. There are definitely other people in the profession who also probably would encourage the use of humor; we've read some case opinions where judges clearly are having fun writing his/her opinions and I think this should be encouraged." and "It seems like an unnecessary risk to attempt to use humor in a courtroom, when you do not know how receptive the audience will be."

[30] David Lat, *Sullivan & Cromwell's Mailroom of Death: A Law Firm's Error Could Cost a Man His Life*, Above the Law (Aug. 3, 2010, 4:43 p.m.), http://abovethelaw.com/2010/08/sullivan-cromwells-mailroom-of-death/

[31] I considered doing it this year, but decided to focus on the exercise itself before adding any other requirements.

[32] My class met twice a week for 50 minutes per meeting.

do the research in class, and then share the results with the class (or in pairs or small groups to start, to ensure that the goal of full class participation is met). This version might allow for a more robust discussion of the first goal—use of search terms—which was but a small part of the discussions we had both on the discussion board and in my class.

This is, of course, one small way to bring a discussion of ethics and professionalism into a first-year legal research and writing course, focused on one small slice of what it means to be an ethical and professional lawyer. What I learned firsthand is that Professor Weresh is correct: first-year students are both interested in and ready to discuss these issues. Rather than laughing or cringing at the misfortunes of others, my students were able to look critically at these experiences and think about their implications for the lawyers and clients involved and for the profession generally. The benefits to the students far outweighed the small burden I took on in developing and executing the exercise. I encourage others to look for ways to integrate these topics into the first-year research and writing course, in ways both large and small.

"This is, of course, one small way to bring a discussion of ethics and professionalism into a first-year legal research and writing course..."

Another **Perspective**

"Judges *can* be quite clever when they scold incompetent lawyers. I think, for example, of the case when an appellate judge explained that the court of appeals would not examine issues that were not raised in the brief with the colorful metaphor of pigs sniffing for truffles. Many of us can find some amusement in a well-turned phrase (particularly if we are not on the receiving end of the barb). Reading these cases, we might experience a bit of schadenfreude--being happy at the misfortune of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we *could*, very easily, have made that very same mistake. And then we wonder: did the judge have to be so very clever in pointing out the lawyer's incompetence? Was the shaming necessary?

Since finding cases where judges scold lawyers for incompetent research or writing is a recurring reference question, I thought I would explore some techniques for the quest. Along the way, I will share some quotations that will give you a good start the next time you are asked this question--or the next time you want to liven up one of your own presentations with some vivid examples."

Mary Whisner, *When Judges Scold Lawyers*, 96 Law Libr. J. 557, 558 (2004).

Writing Tips ...

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Teaching Law Students Practical Advocacy

"This strategy begins by recognizing that the readers you are trying to persuade have two essential characteristics: they are skeptical and risk-adverse."

By Stephen V. Armstrong and Timothy P. Terrell

Tim Terrell is Professor of Law at Emory University School of Law in Atlanta. Steve Armstrong is the principal of Armstrong Talent Development, which provides consulting services and training programs to law firms. Both have conducted many programs on legal writing for law firms, bar associations, and federal and state judges. Together, they are the authors of Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing (3d ed. 2008), and are regular contributors to the Writing Tips column.

Practitioners regularly criticize law schools for failing to prepare their graduates to practice law. We will step into that crossfire hesitantly, and only to a limited extent. Among the ways in which new lawyers could be better prepared to practice, one in particular continues to bother us: they do not know how to construct arguments that persuade in the real world. In this nonacademic place, a simple syllogism seldom carries the day. Facts, law, principles, and values interact in complex ways; the other side is likely to have an argument that is almost as strong as yours; and a judge or arbiter may be just as concerned with the consequences of a decision as with its technical correctness. As a result, IRAC and the other classic methods of legal analysis are, by themselves, seldom enough to persuade a knowledgeable legal reader.

Novice lawyers usually sense a chasm between a technically correct analysis and a persuasive argument, but lack tools to build a bridge across it. Once they have exhausted the standard law school methods of analysis, all that seems left is hyperbole, repetition, and attacks against their opponents' motives, all of which do nothing except damage their credibility.

Many law school writing instructors tackle this problem by teaching rhetoric as well as legal analysis, introducing their students to a repertoire of persuasive strategies (the "ethos-logos-pathos" framework, for example, which we employ as well[1]). Among these strategies, one is especially useful for showing students how to argue rationally, even when no argument is a clear winner and when their readers worry not only about what the law says, but also about fuzzier and more pragmatic questions: Is this the "right" thing to do? Is a definitive decision really necessary? Can a compromise be reached? Could there be consequences you're not telling them about?

This strategy begins by recognizing that the readers you are trying to persuade have two essential characteristics: they are skeptical and risk-averse. Rather than obligingly falling into line with your reasoning, nodding along with you, they are more likely probing energetically: "What's the problem here? Why should I accept that? Prove it. But what if ... ?" This means that your argument should be more jujitsu than brute force. You will persuade not by wielding your logic like a club, but by anticipating readers' doubts and turning them to your advantage. Hence, good advocates are adept at organizing arguments so that they dispose of the reader's reasonably suspicious questions even before they are fully articulated in the reader's mind.

To implement this strategy, a useful guide is the model of persuasion proposed by the logician and rhetorician Stephen Toulmin,[2] which we will adapt here for our purposes rather than copy faithfully. It arises from an exploration of the kinds of support for a proposition that a reader will accept as rational, not from traditional logic's obsession with the proposition's certainty.

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1 *Thinking Like a Writer*, Chapter 12

2 *The Uses of Argument* (Cambridge University Press, 1958). We have also drawn on *An Introduction to Reasoning* (Macmillan, 1979), in which Toulmin substitutes "grounds" for "data." Several relatively recent articles have discussed the use of Toulmin's model in legal writing programs. *See*, for example, Kritsen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom,* 50 Washburn L.J. 319 (2011), and Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument,* 44. J. Leg. Educ. 566 (1994).

Toulmin's approach, corresponding to readers' underlying worries, involves two steps. The first step addresses readers' skepticism, the second addresses their aversion to risk. But these two categories should not be taken as rigidly separate from each other. Instead, they overlap and interact: readers are skeptical, in part, because they are risk-averse, and they are risk-averse, in part, because they are skeptical. Hence, what follows is simply a practical structure for organizing the elements of a thorough argument to address both concerns, without worrying too much about the difference between them.

First, to confront skepticism, you must establish your basic credibility. You have to demonstrate that there is an unresolved problem or issue worth addressing. Your argument then requires, in Toulmin's terminology:

- A "claim" (within the context of the problem or issue, of course), which is the conclusion for which you are arguing
- "Grounds" or "data," which are the facts that support your claim
- A "warrant," which is the principle or rule on the basis of which you are asserting that the data support the claim
- "Backing," which anchors the warrant in some form of authority that the reader will accept as valid

Second, to address readers' risk-aversion, you should enhance your credibility by adding reasonableness and pragmatism, as necessary. Again in Toulmin's terminology, sometimes you will have to provide:

- A "qualifier," which modifies the strength of your claim from "certainly" to "usually" or "probably"
- An "exception," a circumstance you have to acknowledge in which the "warrant" you are relying on does not hold
- The pragmatic consequences of acting or failing to act as you request (consequences do not fit neatly into Toulmin's model, but they are too important an element to ignore)
- An acknowledgement, but rejection, of the other side's position (this element is often implicit in the other Toulmin categories, but sometimes needs to be confronted separately and directly)

The best way to appreciate Toulmin's model is to attach his elements to the sequence of questions with which the naturally dubious and anxious reader will confront your argument. Below is a very simple example, adapted from one of Toulmin's.

> Skepticism: Establish that you have a credible argument.
>
> 1. (Context) Is there a problem here about which I should care? Why?
>
>   Although Jane has been incarcerated by immigration officials as if she were an alien, …
>
> 2. (Claim) OK, so what are you arguing?
>
>   … she is a U.S. citizen and should therefore be immediately released.
>
> 3. (Grounds or data) So you say, but why should I believe you?
>
>   Jane was born in the U.S., as proven by her birth certificate, ...
>
> 4. (Warrant) Why does that prove your argument? How is that data relevant?
>
>   … and birth in the U.S. automatically confers U.S. citizenship …
>
> 5. (Backing) On what authority does that proposition rest?
>
>   … under Section 301 of the Immigration and Nationality Act. (8 U.S.C. § 1401).

Sometimes, the warrant and backing will leave a reader still skeptical: "Yeah, but does that law really make sense? Will I be doing the right thing in a principled way?" In those cases, the backing can go on to include the principle that is the reason for the law's existence:

> The United States has a proud history of revitalizing itself through controlled

"First, to confront skepticism, you must establish your basic credibility. You must demonstrate that there is an unresolved problem or issue worth addressing."

immigration, and the grant of citizenship to those born here is a pillar of that tradition. [3]

Risk-aversion: Demonstrate that the action you request is reasonable and safe.

"Hence, your persuasiveness may ultimately rest on how you deal with the proposition's potential weaknesses and the attacks that might be launched against it."

Often, the "warrant" on which you base your argument—that is, the proposition that explains why your data support your claim or conclusion—may not be a slam-dunk certainty. Hence, your persuasiveness may ultimately rest on how you deal with the proposition's potential weaknesses and with the attacks that might be launched against it.

Let's return to Jane. You no doubt noticed a flaw in the argument as it now stands. The core proposition—that is, the warrant that connects the fact the she was born in the U.S. to the claim that she is a U.S. citizen—is that birth in the U.S. automatically confers citizenship. But the question isn't whether Jane was a citizen at birth; it's whether she is a citizen now. If the warrant had been shaped to deal with Jane's current citizenship, we would have had to qualify it: "Those born in the U.S. automatically become U.S. citizens and, almost always, remain citizens for their lifetime." Or "If a person was born in the U.S., she is almost certainly a U.S. citizen."

Instead, the argument will deal with the potential problem in another way. Here, Toulmin's concepts of "qualifiers" and "exceptions" come into play.

6. (Qualifier) Are people born in the United States always U.S. citizens?

   The qualifier is already lurking in the reader's head; instead of making it explicit, the argument both alludes to and disposes of it in the next step.

7. (Exception) How can I be sure there isn't some other reason Jane is no longer a U.S. citizen?

   Although Jane has lived much of her life in the Republic of Desertania, became a Desertanian citizen, and served in its armed forces, she nevertheless remains a U.S. citizen unless she announced her intention to renounce citizenship or Desertania was engaged in hostilities with the U.S. when she served in its military. Neither is the case.

Those sentences would be supported, of course, by a citation to the Immigration and Naturalization Act—that is, by another "warrant."

You may have noticed, however, another weakness in the argument as it now stands. The initial claim had two parts: Jane is a U.S. citizen, and Jane should be released immediately. So far, we have dealt with only the first. Is it safe to assume the second follows inevitably? Circumstances are seldom so simple. Let's assume that the government is arguing, or might argue, that it needs more time to check the facts about Jane's citizenship and that, in the meantime, she should stay in custody to remove the risk that she will flee.

To confront that counter-argument and reassure the reader that releasing Jane immediately isn't too risky, we need data of a different kind, data that go to the consequences of acting or not acting. From here on, Toulmin's terminology becomes less useful. But the basic strategy—to predict and answer your reader's questions—remains just as important:

8. (Consequences) Even if your argument holds water, should I really do what you ask? Is there a safer or less radical solution?

   Jane is employed and may lose her job if not released immediately.

   And finally:

9. (The other side) What about your opponents' argument? Don't they have a point?

   Although immigration officials have not yet received a certified copy of Jane's birth certificate, to incarcerate her while that document is in transit is unreasonable given the risk to her employment. (And here comes an "exception" to be disposed of:) Incarceration would be justified in this case only if Jane were a flight risk. Immigration officials cannot demonstrate that she is. In fact, she is tied to this city by her family and her job.

[3] Some readers will note that the difference between the two forms of backing in this example roughly corresponds to David Hume's familiar distinction between "is" and "ought." *See* David Hume, *A Treatise of Human Nature,* Book III, Part 1, Section 1 (1739).

Toulmin's model works not only for small-scale passages, such as the one we have used here because of space limitations, but also for large-scale arguments such as an entire brief. Whatever the scale, the model has the virtue of flexibility. Depending on the circumstances, some of its elements can be emphasized, de-emphasized, combined, or dropped altogether.

Here is another example:

> Because of the number of parties before the court and the number of potentially dispositive motions now pending *(Data)*, the court should stay discovery pending the entry of a discovery plan *(Claim)*, as it is empowered to do by Rules 16 and 26(f) of the Federal Rules of Civil Procedure *(Backing for the warrant, which will be stated later as a principle of case management)*. The 12 parties to this case have made duplicative discovery demands upon each other, often requesting that different search terms be used to search huge electronic databases, when the same terms would be equally effective for all parties. To compound matters, they have already filed 17 discovery motions, although the case is only three months old *(This is more data to back up the conclusory data in the paragraph's opening clause; it leads directly to the warrant below)*.
>
> As many courts have recognized, "the key to avoiding excessive costs and delay is early and stringent judicial management of the case" *(Warrant)*. In a case of this magnitude involving so many lawyers, and in a district where judicial resources are already strained to the limit, the role of case management is especially important. Without such management, this case is likely to degenerate into chaos, with the parties taking discovery in inconsistent and duplicative ways *(Further backing for the warrant's application to this situation, and a look at the consequences of not acting)*.
>
> At the moment, only discovery on the jurisdictional issues should be allowed to proceed, because these issues involve a limited number of parties and cannot be rendered moot by the court's decisions on the motions before it *(A limitation of the claim, to make it more reasonable)*.

Experienced advocates are so accustomed to dealing with the questions we have described, and to providing the kinds of support for their arguments that Toulmin defines, that they need no prompting. Most students, however, are not that far removed from the high school debate approach to argument (or, for that matter, the school-yard approach). For them, Toulmin's structure can be a useful guide for their first steps towards more effective, practical advocacy.

"Toulmin's model works not only for small-scale passages, such as the one we have used here..., but also for large-scale arguments such as an entire brief."

Another **Perspective**

"Legal research underpins almost everything that is done in law. Traditionally, legal research includes finding a form, locating a rule, identifying a statute, gaining background information on a regulation, and using law books and legal databases in almost any way. The prevailing paradigms, as contained in "textbooks," are the fodder of legal research. Through research, we clarify and verify the "laws, theories, and application" of a subject-specialty paradigm to understand their effects on our situation. Legal research is our scientific experimentation; law libraries were, after all, Langdell's laboratories of the law. As law changes through the revolutions described by Kuhn, as the paradigms of the various fields of law expand, legal research responds with a revolution of its own. Where once we researched in a set of common textbooks, most notably the digests, we now search the universe of information. Its effect on our context is marked."

Barbara Bintliff, *Context and Legal Research, Symposium on Legal Information and the Development of American Law: Further Thinking About the Thoughts of Robert C. Berring*, 99 Law Libr. J. 249, 257 (2007).

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Incorporating Environmental Law into First-Year Research and Writing*

"With a focus on environmental law, the course would naturally require students to delve into the intricacies of a regulatory regime..."

By Royal C. Gardner

Royal C. Gardner is Interim Dean at Stetson University College of Law in Tampa, Fla., where he is also Professor of Law and Director of the Institute for Biodiversity Law and Policy.

"Are you crazy?"

That was a colleague's good-natured response to the news that I had decided to volunteer to add a new course to my teaching package: Research and Writing II, Stetson's first-year, second-semester written and oral advocacy course. The move, to be sure, was a bit unorthodox. A professor whose traditional teaching interests are in environmental law, I typically teach upper-level courses, including a Wetland Law and Policy Seminar. But I had not descended into madness; this was a calculated decision. I wanted to have the experience of working closely with first-year students and to reinvigorate my teaching by engaging with my Legal Skills colleagues who highly value learning, assessment, and pedagogy. Ultimately, I found teaching Research and Writing II to be a richly rewarding experience for me and (I hope) for my students.

Why teach advocacy in an environmental law context?

In March 2010, I proposed to the Director of Legal Research and Writing and the Associate Dean for Academics that I offer a section of Research and Writing II, with a slight twist: I would cover the same writing and oral advocacy skills as other sections, but with an environmental law focus. The point was not to try to teach a mini environmental law course; rather, I intended to incorporate environmental issues into the traditional trial memorandum, appellate brief, and oral argument assignments while staying focused on the same learning outcomes that had been set for all other sections of the Research and Writing II course.

The benefits of such a specialized course, in my view, were many. First, I have long advocated (groused?) at faculty meetings that first-year students need greater exposure to regulations. With a focus on environmental law, the course would naturally require students to delve into the intricacies of a regulatory regime and force students to grapple with administrative law concepts more than they might otherwise.[1] Second, I thought that such a course could bolster the reputation of our environmental law program by increasing our environmental-related offerings in the first-year curriculum.

I assumed that students would probably appreciate the opportunity to have some say in their course assignments in the first year, thereby increasing their motivation to learn. Interested students would be assigned to the course via lottery (if demand exceeded space). Moreover, by getting a taste of environmental law, the students would be in a better position to decide whether they should focus on environmental law electives later in their law school career. In addition, I would have the opportunity to get to know and advise students interested in environmental law during their first year.

Finally, I expected that such a course would benefit my teaching. I am not a stranger to teaching advocacy; I have coached many moot court teams and, along with Darby Dickerson, cofounded

* I greatly appreciate the very helpful comments that Kirsten Davis provided on a draft of this article. Moreover, I thank Stetson's Legal Skills faculty—especially Linda Anderson, Brooke Bowman, Kirsten Davis, Jason Palmer, and Stephanie Vaughan—for their advice and guidance during the semester.

[1] Our regular legal research and writing curriculum introduces students to regulations and administrative law research, but I intended to provide a greater focus in my course.

the Stetson International Environmental Moot Court Competition. Since 1996, I have written the problem and typically prepared the bench memorial for that moot, which now has regional rounds throughout the world.[2] Nevertheless, I knew that I would certainly learn a lot about teaching writing and advocacy skills through collaborating with my Legal Skills colleagues, and this experience would help me when I teach my upper-level Wetland Law and Policy Seminar.

Although I was slightly nervous about a new course preparation, I had the support of our very experienced Legal Skills faculty.[3] Their insight and guidance proved invaluable throughout the semester.

Pitching the course to students

In Fall 2010, the Registrar announced to full-time, first-year students that we would be offering "Research and Writing II—Environmental Law" in the spring. The course description stated:

> *This section of Research and Writing II covers the same oral and written persuasion competencies as all other sections of R&W II, but the doctrine used to teach those competencies will be intentionally focused on environmental law. Although this is not an environmental law course, students who are interested in learning persuasive oral and written analysis and communication skills in the context of environmental law and who have an interest in pursuing future courses in environmental law are encouraged to apply for the lottery selection process.*

Thirty-four students bid for the course, and the Registrar selected 16 students via a lottery.[4]

Structuring the course

I relied heavily on (and consulted frequently with) my Legal Skills colleagues in developing course content. For example, to demonstrate the use and differences between ethos, pathos, and logos, one of my colleagues opens his Research and Writing II course by asking his students to read Martin Luther King Jr.'s letter from the Birmingham Jail.[5] I decided to assign my students Al Gore's Nobel Laureate speech[6] and a Sarah Palin op-ed on climate change[7] for the same purpose. While the Gore and Palin pieces had different messages, both employed ethos, pathos, and logos in an attempt to persuade their audiences.

Because much of my research is on wetland law and policy,[8] the problems I developed for the standard trial memorandum and appellate brief involved swamps and marshes. For the summary judgment memo, the students had to argue about whether an environmental restoration company had standing to contest the U.S. Army Corps of Engineers' issuance of a Clean Water Act permit to allow wetlands to be filled to construct low-income housing. The exercise called on the students to dig into recently issued regulations on compensatory mitigation (projects that offset impacts to aquatic resources). For the appellate brief, the students had to wrestle with a procedural statute (the National Environmental Policy Act), agency regulations, agency guidance documents, and court cases in the context of a proposed highway project.

One unique assignment introduced students to rulemaking advocacy by requiring them to write

"While both the Gore and Palin pieces had different messages, both employed ethos, pathos, and logos in an attempt to persuade their audiences."

2 The 2011–2012 problem involves liability related to a nuclear accident and a default on sovereign debt. Teams from Africa, Asia, Australia, Europe, North America, and South America will come to Stetson for the International Finals in March 2012. *See* www.law.stetson.edu/international/iemcc/ for more details.

3 Stetson has 10 dedicated full-time faculty members who teach Legal Research and Writing.

4 To ensure balance among the other Research and Writing II classes, the Registrar selected up to two students from other sections.

5 *See* Mark DeForrest, *Introducing Persuasive Legal Argument via The Letter from a Birmingham City Jail,* 15 Legal Writing: J. Legal Writing Inst. 109 (2009) for a comprehensive discussion about employing the letter in a legal writing course.

6 Al Gore, Nobel Lecture (Dec. 10, 2007), *available* at http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/gore-lecture_en.html.

7 Sarah Palin, Op-Ed., *Sarah Palin on the Politicization of the Copenhagen Climate Conference,* Wash. Post, Dec. 9, 2009, at A27, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/08/AR2009120803402.html.

8 For example, I recently wrote *Lawyers, Swamps, and Money: U.S. Wetland Law, Policy, and Politics,* published by Island Press.

"After reading a brief article on how to write effective comments in a notice-and-comment rulemaking, the students drafted comment letters for the Forest Service."

a public comment in response to a proposed regulation. In early January 2011, the U.S. Forest Service published a notice in the *Federal Register* to solicit public comments for a proposed rule that implements the Community Forest and Open Space Conservation Program (CFP) authorized by the Food, Conservation, and Energy Act of 2008.[9] The CFP is a grant program that provides funds for local and tribal governments and nonprofit organizations to purchase fee-simple titles to land to be used as community forests.

After reading a brief article on how to write effective comments in a notice-and-comment rulemaking,[10] the students drafted comment letters for the Forest Service. Some students focused on enforcement of grant conditions; they discussed whether spot checks by the Forest Service were sufficient to verify that property acquired under the CFP had not been sold or converted to non-forest uses and whether inspections could be done by volunteer groups. Other students provided comments on the type of entities eligible for the CFP (advocating that the final rule allow low-profit limited liability corporations to participate), and the type of forests that should be covered (advocating that the agency should clarify that coastal mangroves should be part of the program). Several students raised the question of carbon sequestration credits. The Forest Service is part of the Department of Agriculture, and other agencies within the Department of Agriculture have addressed the issue of whether government-funded conservation projects may produce marketable environmental credits for landowners.[11] The students recommended that the Forest Service clarify this point with respect to the CFP as well.

The comment letters went through several stages of review. First, the students were divided into small groups and conducted peer edits in class. I then provided comments on a revised draft. Finally, I provided comments on their final draft (which was graded). I then encouraged the students to submit their comments electronically to the Forest Service, which several students did. The Forest Service completed its rulemaking in October 2011, publishing its final rule in the *Federal Register*.[12] In the preamble accompanying the final rule, the agency explained how it considered the public comments it received. Even though the course had long since ended, the students eagerly scoured the *Federal Register* to see whether they were able to influence the Forest Service to modify its proposed regulation or provide at least some clarifications in the preamble.[13]

Because I have found in other courses that students enjoy hearing from practicing attorneys, I arranged for one of my former students to speak with the class. He is a 12-year veteran of the U.S. Department of Justice's Environmental and Natural Resources Division who represents the United States in environmental litigation. He visited with the students via Skype, and he emphasized the importance of research and writing in his job. He noted that effective advocates understand

9 76 Fed. Reg. 744 (Jan. 6, 2011).

10 Richard G. Stoll, *Effective Written Comments in Informal Rulemaking,* Admin. & Reg. L. News, Summer 2007, at 15. For more information about advocacy in the rulemaking context, *see* Richard G. Stoll, *Effective EPA Advocacy: Advancing and Protecting Your Client's Interests in the Decision-Making Process* (2011).

11 *E.g.*, 7 C.F.R. § 1410.63(c)(8) (2011) (addressing environmental credits in the Conservation Reserve Program); 7 C.F.R. § 1466.36 (2011) (addressing environmental credits in the Environmental Quality Incentives Program); 7 C.F.R. § 1467.20(b) (2011) (addressing environmental credits in the Wetlands Reserve Program).

12 76 Fed. Reg. 65,121 (Oct. 20, 2011) (to be codified at 36 C.F.R. pt. 230).

13 The Forest Service noted that commenters asked for clarifications regarding the definition of "forest lands" and questioned whether this included mangrove forests, a specific point raised by my students. *Id.* at 65,127. The agency responded by amending the definition. *Id.* The agency also noted the students' questions about the relationship of the CFP and environmental credits, but declined to address the issue in the CFP regulation:

> *Comment:* Once created, community forests could sell environmental credits to help defray longer term operation and maintenance costs.
> *Response:* The buying and selling of environmental credits is an evolving practice and may be subject to regulation by other Federal or State agencies. All community forest projects would need to be compliant with those regulations and the CFP regulation; therefore, no change made to the final rule.

Id. at 65,126.

the importance of clarity and the need to explain complex concepts in a straightforward manner.

Field trips are another tool I have incorporated into my other courses (partly for pedagogical purposes and partly for selfish reasons—I just need to get out of the office sometimes). Accordingly, I invited my Research and Writing students, along with other students interested in environmental law, to go on a weekend camping trip in Everglades National Park. A park ranger led us on a three-hour canoe and kayak trip where the students learned firsthand about the challenges of protecting fragile ecosystems. While the trip was fun, it also gave me the opportunity to interact with the students on a more personal basis.

Brave RW2 Teaching Assistant (with alligator in background)

Outcomes and lessons learned

Teaching a group of motivated students is always an invigorating experience—as is a new teaching prep. My Research and Writing students were particularly motivated because they were self-selecting; they had a choice about whether to take this particular section, unlike all of their other first-year courses. Furthermore, they were motivated because they were interested in the subject matter used to develop their analytical skills. As one student noted in the class evaluations, the best thing about the course was the "opportunity to gain experience with legal writing in the field I want to practice in."

The course also accomplished my objective of introducing more administrative law to first-year students. To the uninitiated, administrative legal concepts can seem boring. But one way to make them relevant, and even exciting, to students is to have the students engage with the agencies. One student evaluation observed that the best part of the course was the "way the things we were doing seemed like 'real' lawyering. We could actually send in our comment letters to the agency." The students enthusiastically embraced the opportunity to work on a project that was not a hypothetical.[14] The rulemaking advocacy portion of the course permitted them to attempt to influence policy.

As a result of this course, I was able to help and advise students at an earlier stage of their law school career, with tangible results. For example, I served as a reference for students applying for internships with agencies working on environmental issues, such as the Southwest Florida Water Management District and the New York Attorney General's office, and could speak in great detail about the students' analytical and writing strengths. (Both students were selected.) Another student was chosen to be a Biodiversity Fellow for Stetson's Institute for Biodiversity Law and Policy. Five students applied for and were selected to serve as student editors of the *Journal of International Wildlife Law and Policy*.

My experience with teaching Research and Writing has also caused me to modify how I structure my Wetland Law and Policy Seminar. For example, rather than focus exclusively on doctrine, I have incorporated writing exercises into the class, including peer review—in small groups and by the entire class—of the introductory sections of the students' papers. I will also be using a more specific grading rubric for the seminar papers and providing it to the students early in the writing process. This sets clear expectations about the finished product and is routinely done in the Research and Writing classes. Providing discrete learning outcomes to the students—telling them

> "One student evaluation observed that the best part of the course was the 'way the things we were doing seemed like real lawyering. We could actually send in our comment letters…"

[14] Of course, I enjoyed the good fortune of the Forest Service issuing a relatively accessible proposed rule that coincided with my planned syllabus. I had been fervently reviewing the *Federal Register* at www.federalregister.gov each day looking for such a notice, and I was prepared to go forward with a hypothetical based on an already completed rulemaking had the Forest Service not been so accommodating.

what they should be learning—can allow them to better understand where they are succeeding and struggling, and where to focus their efforts.

Finally, an added benefit was the greater appreciation I developed for the Legal Research and Writing program. Providing detailed, individualized feedback in a timely manner can be time-consuming, but it is critical to the students' advancement. Graded assignments during the course of the semester can similarly be challenging, and some students who earn low grades may become discouraged. Some students naturally focus on the immediate (the grade), rather than the long term (the comments designed to improve one's analysis and writing). Yet having multiple graded assignments is much fairer to the students than the typical one-shot, end-of the-semester exam in most doctrinal courses. I also saw firsthand the advantages of a coordinated program, which includes a framework for the sharing of information and teaching techniques in a collegial manner. Other subject areas would do well to emulate this model.

"I saw firsthand the advantages of a coordinated program, which includes the framework for the sharing of information and teaching techniques in a collegial manner."

Based on student feedback, we decided to offer Research and Writing II with an environmental law focus again this spring, as well as expanding our curriculum to include sections with a focus on international law and elder law. First-year students enthusiastically bid for the opportunity to learn advocacy skills in their area of interest. Experienced members of our Legal Research and Writing faculty will teach all three sections,[15] and I look forward to comparing notes with them.

***

In summer 2011, I accepted the position of interim dean (thus prompting the "are you crazy" question again). While I am delighted to assist Stetson in this transition, the downside is that my schedule will not permit me to teach this year. I do look forward, however, to returning to the classroom soon—and I especially look forward to teaching Research and Writing again.

[15] Lance Long will teach the section with the environmental law focus, Kirsten Davis has the section with the elder law focus, and Jason Palmer has the section with the international law focus.

Another **Perspective**

"At the end of orientation one August, an anxious first-year student pulled me aside and admitted, "I don't know anything about doing legal research." I had to smile as I assured him that legal research was one of the skills he would learn in my class. A few years later that student was offered a prestigious clerkship with the Florida Supreme Court.

When I began law school, I was no better off than this student. I thought my goal was to master — and memorize — every case, statute, and rule I would need to practice law. I would put all this knowledge into a magic briefcase. Then when a client came to see me with a problem, I would reach into my magic briefcase and pull out the obvious answer! I was wrong. First, no one could ever memorize enough law to make my magic briefcase work; one visit to the library shows how naive I was. Second, most legal questions do not have obvious answers. If the answers were obvious, clients would not be willing to pay much for a lawyer's services. Instead of memorizing cases that would solve easy problems, I learned that researching, analyzing, and writing about the law occurs as a complex, interwoven process. That process — not magic — is the practice of law. In all your law school classes you will learn analysis. In classes devoted to legal research and writing, you will get to weave analysis into research and writing and learn to practice law."

Suzanne E. Rowe, Legal Research, *Legal Writing, and Legal Analysis: Putting Law School Into Practice,* 29 Stetson L. Rev. 1193, 1193-1194 (2000).

From the Editor: Many Perspectives Later...

After 12 years, 330 articles and just under 2100 pages, I am stepping down as Editor of *Perspectives*: *Teaching Legal Research and Writing*. It's been a good run but it's time for a new perspective.

I had the good fortune to follow in the footsteps of Frank Houdek, the superb editor of Volumes 3-8. I believe my successor, Elizabeth (Beth) Edinger, has Frank's excellent judgment and gentle editorial touch as well as fresh ideas and boundless energy.

When Steven M. Barkan launched *Perspectives* in 1992, his goal was to provide a balanced forum that encouraged collaboration among teachers of legal research and legal writing, whether librarians or law teachers. Over time, this forum has grown as legal research and writing teachers recognize the role of collaboration in the professional formation of our students. Collaborations in the legal research and writing community abound. LRW teachers collaborate with one another. Librarians and writing teachers collaborate. Writing teachers collaborate with teachers of substantive courses, and with clinicians and the bar. Librarians' collaborations have evolved from librarians teaching one-shot research sessions to being embedded in 1L and upper-level courses. And librarians collaborate with one another while teaching graded research courses. *Perspectives*' role in fostering collaboration is alive and well.

Over the years *Perspectives* has changed its look and format. For instance, headers evolved from teal to turquoise to royal blue. More significantly, *Perspectives* moved to an electronic-only format in 2010, enabling us to embed live links in articles. Individual articles as well as the full run of *Perspectives* are available in PDF at <west.thomson.com/journal/perspectives>.

Twenty-two individuals have served with distinction on the *Perspectives* editorial board since 1992. I want to thank the board members I served with, along with the board members for Volumes 1 through 8.

***Perspectives* Editors and Board Members, 1992-2012**

Steven M. Barkan, founder, editor, v. 1-2
Frank G. Houdek, editor, v.3-8, board member, v. 1-15
Mary A. Hotchkiss, editor, v. 9-20

Barbara A. Bintliff, v. 3-19
Ellen M. Callinan, v.1-9
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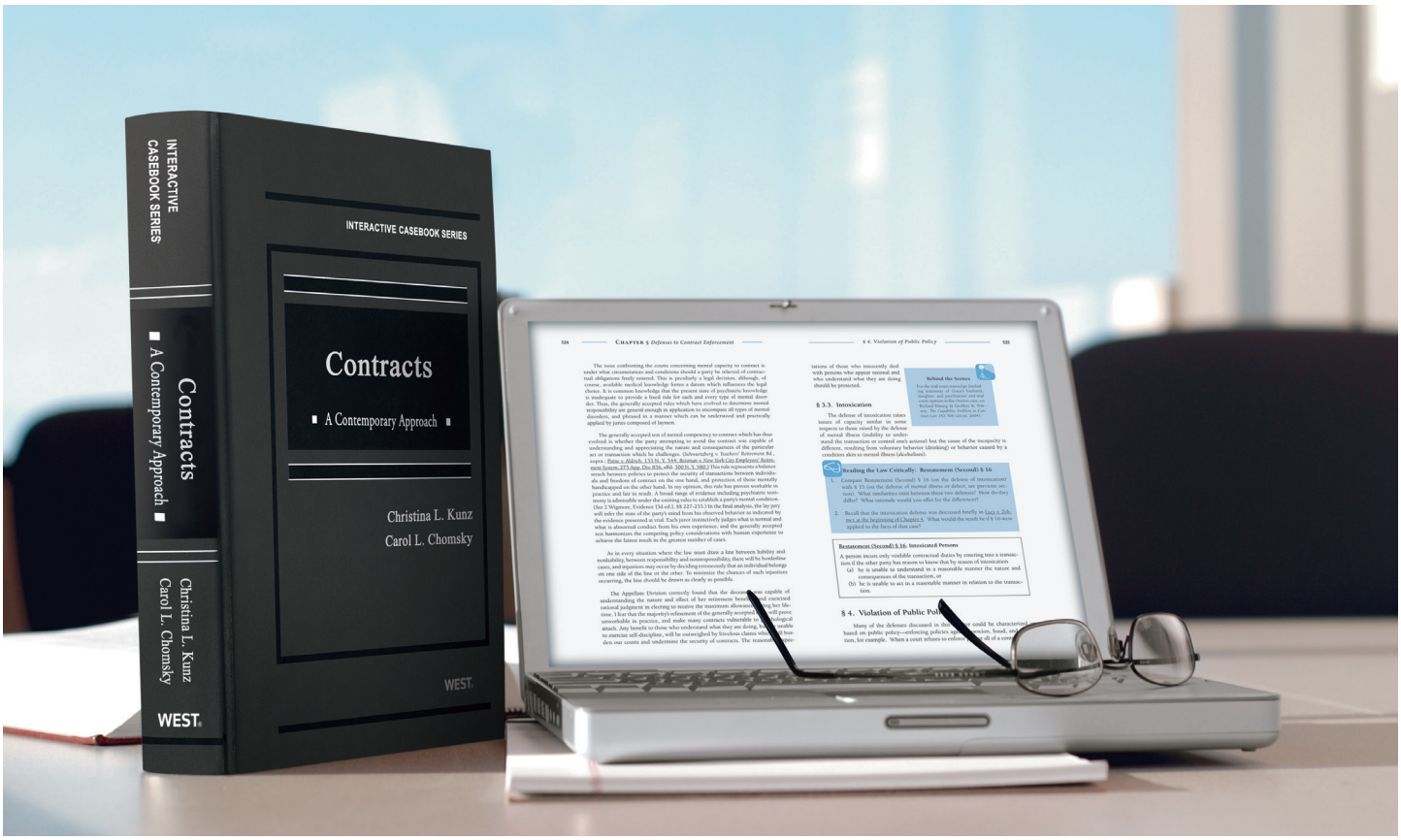
Helene S. Shapo, v. 1-current
Christopher Simoni, v 1-9
Louis J. Sirico, Jr., v. 4-15
Craig T. Smith, v. 10-current
Kay M. Todd, v. 3-current
Victoria K. Trotta, v. 1-2

In addition, Perspectives has had the support of many Thomson Reuters West employees, including Anne Ellis, Melissa Hanson, Bill Lindberg, Brenda Anderson, Anne Kelley Conklin, and the sharp-eyed Ann Laughlin. Megan Anderson and Laura Kruse have recently joined the team. From the start, West Publishing (now Thomson Reuters) has published Perspectives as a service to the legal community.

Over the past twelve years, submissions have come from all corners of the U.S. and from abroad. While many authors teach in law school settings, *Perspectives* has also published articles by academic support specialists, law firm librarians, state or county or court librarians, judges, court administrators, writing consultants, assessment specialists, clinical teachers, career services professionals, and non-law faculty. As teachers and readers, we benefit from exposure to these multiple perspectives on teaching.

Finally, I want to thank our loyal readers. Before I joined the *Perspectives* editorial board in 2000, I was one of them, and now I rejoin their ranks. My goal was to continue providing a relevant, practical, reader-friendly forum for our community. Along the way, I've made my share of mistakes. The past few years have brought a series of personal challenges. I am grateful for the patience and forgiveness extended to me. I step away from *Perspectives* knowing that it is in good hands.

—Mary A. Hotchkiss, University of Washington School of Law



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