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How the Mini-Conference Transformed the Wallflower

(and other suggestions for satisfaction-inducing individual conferences)

By Jennifer L. North

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All legal writing professors are well acquainted with conferencing as a fundamental and indispensable component in teaching writing. Though exhausting, conferencing is absolutely my most favorite time of the year. I won't pretend that I am all smiles during these weeks, but if taken as a whole, conferences provide us, as legal writing professors, the best opportunity for instantaneous work satisfaction. What follows are suggestions, in three parts, on making the most of the conference experience for you and your students.

Part I – Pre-Conference Conferences

Conducting individual conferences was my saving grace as a new legal writing adjunct. The classroom was brand-new to me, but one-on-one meetings had always been a strength. As we all know, students can be toughest on legal writing teachers, and new ones at that. But the opportunity to sit down with students face-to-face always renewed their enthusiasm for the project, and my faith in me.

It is therefore no surprise that conferences are frequently reported by students to be some of the most valuable time spent during their legal writing classes. Professors get to witness lights going on all over the place,¹ and students leave the office with much less frustration and much

more confidence than when they came in. By continuing to prepare anew for each semester's round of conferences, I found I could ensure my own continued enthusiasm for my profession and allow myself to see each new student as a unique individual with valuable input for that year's class.

Realizing that I did some of my best work one-on-one, I wondered why I should wait until four or five weeks into the semester to meet with each of my students individually. That is the time frame where the students may have a draft written for a first memo, or may have already turned in a final draft. Either way, the time for grades was near, and the anxiety was on the rise. We were also already knee-deep in fact patterns, rule breakdowns, annotated outlines, local rules, and the dreaded

¹ Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformational Learning Experience*, 45 S. Tex. L. Rev 255, 257 (2004).

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Bluebook. There was no time to learn about my student other than to find out that this person had just written a horribly unorganized memo, or had completely missed the point of the assignment. Confusion clearly did not breed contentment. It was more of a sheriff-outlaw gunfighter standoff. And we all know in that case, only one gets out alive.

A few years ago, I started instituting another mandatory conference into my first-semester syllabus.² This one was to take place no later than the second week of school, and the preparation was minimal for my student and me. Prior to the conference, the students submitted a very short biographical form answering questions on what they had done in college, significant work experience, interests outside the classroom, what area of law they might be interested in, and, finally, whether they had any questions for me. The conferences were only scheduled for 10 minutes, but as far as time-to-value ratio, they far exceeded later conferences that concentrated on our writing projects. Now, that is a hard truth to confront, considering how much time and effort we dedicate to a typical week or two of individual conferences. But the established foundation of knowing my student first as a person, and second as my law student, truly set the desired tone for the rest of the year.

The Mini-Conference, as it was cleverly named, had several advantages, and most of them redounded to me. I will admit I had an ulterior motive for these early meetings. Because I am a fairly reserved person, I have at times been described as hard to read. This was not a compliment. So naturally the primary objective for the individual meeting was for my student to get to know me! In those first few minutes of the semester, I was able to connect with my student in a way that rarely happened after a whole year in my class. This allowed me to present myself in a situation where I knew my own personality would come through, which I was certain, if my students could get to know, they would surely like. It all worked as planned.

Secondary benefits were numerous. I found out fantastically interesting things about my students and discovered common interests. Knowing something about their lives outside of the classroom kept me focused on them as multidimensional beings, and not just the kid with the telltale IM-ing smile during class. In other words, it helped me like them too.

By meeting my students so early, I was easily the first law professor they got to spend time with as they started law school. That's an advantageous position to have, as making a lasting impression on their education is something we all feel so privileged to do.³ Even more altruistically, it introduces the students to the concept of getting to know their other professors much earlier. Often, in larger sections, doctrinal professors have much less ability to meet individually with each of their students.⁴ If the students take the initiative to meet their professors before the last week in the semester when they are in panic mode, it can only be a good thing.

These meetings also allowed me to introduce them to the concept of office hours. It had been my experience that students rarely utilized office hours early in the semester, and by the time they realized what they were for or gathered the courage to come in, we had lost a lot of valuable learning time, but built up a fair amount of frustration. Once they came to my office for the Mini-Conference, I told them there was no excuse that they didn't know where my office was, and so I expected to see them for office hours. It was a good-humored jab, but it was serious too.

Overall, when I met my students individually early in the semester, I found that I was much more patient with them later on, and felt more invested in helping them move toward their goals. I worked more intensely to think of how to reach them and incorporated more ideas on ways to present the material. As for my students, I found that they were much more upbeat about my class and were more open to the "process." They had more trust in what I asked them to do, and obstacles to learning that had been present in prior classes seemed to diminish. I

“Confusion clearly did not breed contentment. It was more of a sheriff-outlaw gunfighter standoff. And we all know in that case, only one gets out alive.”

² Yikes. More work?!

³ Wellford-Slocum, *supra* at 291.

⁴ *Id.* at 271.

had many more encouraging moments and began to receive much more widespread positive feedback from students regarding their experiences.

Adding in an extra round of conferences, right in the beginning of the fall semester, may initially sound like a formula for early-onset exhaustion. You will have barely addressed case briefs and the American legal system before you dedicate several hours to what is essentially “ice-breaking” time, which may arguably be better suited for a Friday afternoon mixer. But if you have a tendency to disappear in those types of crowds like I do, I submit to you that time spent getting to know your students, before you have to grade them, will work wonders for your spirit and their enthusiasm. I encourage you to incorporate the Mini-Conference into your curriculum, and I guarantee the rewards will more than compensate you for the overtime.

Part II – Prepare for Conference – For the Professor

Now, law school cannot be all fun and games and chitchat, so the conduct of later conferences must be focused and structured. Taking some time to prepare yourself and your students for these conferences will allow you to squeeze as much value out of the conference as possible.

As noted, most students report conferences as being one of the best experiences about their legal writing classes. In conferences the learning experience is enhanced, and concepts are more readily established in their permanent legal analysis framework. But conferences are also exhausting. As the professor, you must be present for each student and be actively listening for problems in his or her legal analysis. Then you must be ready to propose solutions or strategies to combat those weaknesses and do so within a very short period of time.⁵ All of this takes an enormous amount of mental energy.

Planning your conference schedule

Taking this energy depletion factor into account, make sure to plan breaks between conferences—

and I don’t mean just a night’s sleep. I once worked with a very dedicated legal writing professor who started conferences at 7 a.m. on Monday and literally met with students every half hour until 7 p.m. There may have been a very short break for lunch, but other than that, he never fell behind schedule. As you can see, his conferences were complete by Tuesday. I don’t recommend that approach, especially since my recovery time from something like that would take me the rest of the week. What I do recommend though is determining how many conferences you want to do in a row (I usually do three or four) and then schedule in a 15- or 30-minute break. The stress you save yourself from a more rigid schedule will not just be helpful to you, but to your students as well. They will be getting you at your best, no matter if they are the first or last student to meet with you that week.

Professor as Coach

Strive to foster a mentoring or coaching relationship with your students.⁶ Build a collaborative working alliance to become a “capable and trustworthy ally.”⁷ Model for them future relationships they will have with their colleagues and clients.⁸ It’s easy to fall into an adversarial relationship as soon as the professor returns graded projects. If you have incorporated the Mini-Conference into your curriculum, this stage will go much more easily, and your students will have more reason to trust your evaluation.

Keep students active by asking open questions

Encourage students to take the lead in conference. Don’t allow them to be passive and think this is their own private class. In order for them to improve, they must take responsibility for their own learning. Practicing verbal communication is also a vital component to their education. By promoting self-sufficiency and independence, you will help your students improve, and your impact as a teacher will be more transformative.

“[M]ost students report conferences as being one of the best experiences about their legal writing classes. ... But conferences are also exhausting.”

⁵ [Id. at 282.](#)

⁶ [Id. at 293.](#)

⁷ [Id. at 298.](#)

⁸ [Id. at 264.](#)

In conducting the conference, remember the verbal, and even more so, the nonverbal actions that are conducive to creating a positive learning environment.⁹ Think about the physical arrangement of the conference area¹⁰ as well as your physical interaction with the student (modeling/mirroring behavior that validates concerns and feelings). Many professors like to meet with their students at a round table rather than across a desk. This is one example of shaping the physical environment so your student is most open to hearing constructive criticism.

Verbally, try not to dominate the conversation.¹¹ Ask open questions for the students to explain their choices.¹² Ask them to provide examples of how to improve sentences or transitions from point to point. Ask them about their choices of authorities. Ask them to reconstruct portions of their writing to be more concise, or be more logical in the flow of information. The key is to make them do the work. The more they have to put their own thought process into words, the more revealing weaknesses become to them, and the easier it is for you to diagnose problem areas.¹³ It also allows students to begin the process of self-evaluation,¹⁴ which is ultimately one of the most important skills we want them to gain from our classes.

Be on the alert for obstacles to learning

Students are only starting to build their own frameworks for legal analysis. A big problem we encounter is we forget how it is we know what we know.¹⁵ In order to truly access that information, we have to take time to either recall how we gained our knowledge or reconstruct how someone would gain that knowledge. Think about the building blocks; we take these things for granted until we

are really conscious of thinking through the process. It's helpful to remind them that the writing process is "messy, recursive, convoluted, and uneven."¹⁶ Tell them to get comfortable with being uncomfortable.¹⁷ You may have to repeat this several times before they accept this reality.

Watch for students who seem more interested in proving you are wrong than in being open to learning.¹⁸ Here again, usually the best approach is to ask questions, which helps them to hear their own analysis. Allow students to have some power to present their points, and acknowledge if their concerns are valid. Give options on paths to take for improvement. Give feedback in the role of the reader—how will an experienced attorney react to the document?¹⁹ As a professor, you represent this expert legal reader, and so the potential disagreement with you personally is deflected to the neutral audience. This helps them to have perspective on the goal and not on protecting their pride.

A common complaint is that the student spent so much time on the project, but that the grade hardly reflects that effort. This is probably true, so try to disassociate the idea that effort equals an A. The goal is to produce a quality document. This usually does require hard work, but the quality of that work is what matters, not the amount of time working on it. I like to remind students of my goal for them—and that is the long-term goal of being competent legal researchers and writers by the end of the year, not just the end of the semester, or even on each individual project. This is also a good time to remind them of the necessary but messy process of learning to write.

Beware, too, of the very passive student, who appears to understand but has no questions. This student is most likely confused beyond belief and

“The key is to make them do the work. The more they have to put their own thought process into words, the more revealing weaknesses become to them, and the easier it is for you to diagnose problem areas.”

⁹ [Id. at 301-04.](#)

¹⁰ [Id. at 304.](#)

¹¹ [Id. at 275.](#)

¹² [Id. at 206.](#)

¹³ [Id. at 267.](#)

¹⁴ [See id. at 312.](#)

¹⁵ [Id. at 274-75.](#)

¹⁶ [Id. at 288.](#)

¹⁷ [See id. at 289](#) (students must “tolerate ambiguity and uncertainty”).

¹⁸ [Id. at 339-40.](#)

¹⁹ [Id. at 323.](#)

“Conferences are a good time to gauge where they are emotionally. Showing empathy or understanding can go a long way toward easing their fears and opening the door to learning.”

is just counting the minutes until he can escape the meeting. Another, more unpleasant, scenario is that this student is very angry with you and is counting the minutes until he can bad-mouth you to his fellow law students. Either way you need to get this student talking and taking notes. A new teacher or a tired teacher may have a tendency to miss these signs. The tried-and-true technique of asking open questions can help you discover the source of the confusion, or diffuse the hostility.

Student anxiety frequently inhibits the learning process. Conferences are a good time to gauge where they are emotionally. Showing empathy or understanding can go a long way toward easing their fears and opening the door to learning. Validate concerns, but move to concrete solutions to help them feel like they have control over their own learning.

Set concrete goals when you conclude the conference

In concluding the conference, help the student set a few specific goals for the rewrite or future assignments. Using an office memorandum checklist or rubric can help students maintain focus in particular areas when determining where to use their time. Even if the conference did not go that well, leaving students with a task they feel confident about accomplishing will enable them to think more positively as they go out the door.²⁰

Part III – Prepare for Conference – For the Student

Making students aware of the plan for the conference avoids wasted effort on your part if they come unprepared,²¹ and allows the most educational value to be gained in a restricted amount of time.²² In order to inform the student on what to expect from the conference, and what I expect of them, I provide

them with the following information as a handout in class or simply posted on our TWEN® Discussion page.

You are responsible for the conduct of the conference, just as you are in charge of your own education. Learning to write is a skill, and the process is interactive. You cannot be a passive observer in conference. Because the professor has spent several hours in class and on your written work providing feedback so far this semester, do not expect the professor to give you a private tutorial repeating information you’ve already heard. Actively listening to students and working to identify solutions for weaknesses during conference is demanding for the professor. As part of your learning process, you must also actively participate by practicing to communicate your legal analysis. Ask your own questions, provide thoughtful input, and gain deeper understanding by being prepared to focus on the assignment. Don’t forget to take notes.

A few general questions to get you started planning the course your conference should take:

Do you understand all the professor’s comments on your written work? Sometimes students think they understand the comments, but it’s important to be sure you confirm your understanding for your own learning process. The professor should also be made aware of comments that are not clear and given the opportunity to provide clarity.

Do you think there are contradictions or conflicts within the comments? Have you read them very carefully and still think they are contradictory? Ask your professor to explain the distinctions.

- How can you make improvements based on the comments—not only to the specific thing the professor has marked, but is there a lesson you could carry over into other parts of the memo? If the lesson can’t be carried over, do you understand why not?
- Do you understand the writing process? Can you reproduce this process on your own? Where do you start?

²⁰ See [id.](#) at 269.

²¹ [Id.](#) at 332.

²² [Id.](#) at 283.

- Can you brief a case with your issue in mind? Can you break down a rule? Do you know how to choose cases to support your points?
- Can you produce an annotated outline? Do you understand how to organize main points and incorporate minor points?
- Do you understand the purpose of each section of the memo? Do you understand what goes into each portion of the memo?
- Do you understand what you should be doing during the editing process? Did you refer to the *Redbook* for any style, grammar, or punctuation questions? Do you understand how to use the *Bluebook*? Can you see any patterns to how to use the *Bluebook*? Do you understand the purpose and use of the Local Rules?

Conclusion

Since conferences demand such an enormous amount of time and effort during the semester, it makes sense to do some planning to make the most of that individual time with your students. It is tempting to jettison preparation, since conferences usually follow a harrowing grading whirlwind, and recovering from that is generally the first thought on our minds. But you needn't wait until after grading to get in the right frame of mind—you can take a few minutes during class to discuss with your students what to expect at conference and what their responsibilities are. Provide them with information like the items above that will shift the conduct of the conference to them. While you are wrapped up in grading for the next week or so, the students have time to take charge and make a conference plan of their own. It's never too early to gently prod them into self-reliance. Here's to many happy conferences!

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“While you are wrapped up in grading for the next week or so, the students have time to take charge and make a conference plan of their own. It's never too early to gently prod them into self-reliance.”

Another Perspective

“... a poor legal writing grade most often results from problems ... in two distinct areas that should be analyzed separately: (1) the writing process, and (2) the resulting substance of the student's writing. To maximize the post-grade conference's value as a teaching opportunity, the legal writing professor should therefore organize the post-grade conference as a review of these two distinct areas in which students can falter. Instead of focusing on point deductions and marginalia, the conference should first deconstruct the writing process through a student interview and then deconstruct the student's written product.”

Cassandra L. Hill & Katherine T. Vukadin, *Now I See: Redefining the Post-Grade Student Conference as Process and Substance Assessment*, 54 *Howard L. J.* 1, 4 (2010).

Cite as: Rosa Kim, *Lightening the Cognitive Load: Maximizing Learning in the Legal Writing Classroom*, 21 Perspectives: Teaching Legal Res. & Writing 101 (2013).

Lightening the Cognitive Load: Maximizing Learning in the Legal Writing Classroom¹

By Rosa Kim

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In recent decades, educators have been examining the ways in which cognition and instruction are connected, so that teaching, and therefore learning, can be more effective.² The findings of cognitive scientists and educational psychologists on how people learn are fascinating and informative for teachers at all levels. The legal academy has been relatively slow to examine these findings, as the goal of a law school education seems attenuated from such matters of basic science, and because there is an assumption that law students should have figured out how to learn by the time they get to law school. Some of the key findings indicate, however, that understanding the principles should inform how law teachers teach, and how students can maximize their learning in the law classroom.

The traditional first-year law school curriculum is designed to impart a great deal of new information, in addition to exposing students to a new way to think. Combined with the abundance of technological tools and distractions for present-day law students, who are “digital natives,”³ the likely

result for many students is a clear case of cognitive overload. Moreover, the processing of information in a multitasking context tends to be more superficial, thus impeding the students’ ability to engage in in-depth analysis.⁴ Since the first-year curriculum is not likely to change drastically and technology is not going anywhere, the challenge for law teachers is twofold: help manage the cognitive overload in the classroom by using techniques and tools that maximize learning, and help students become aware of their learning so that they can achieve the levels of learning required in law school and as lawyers.

Legal Writing Classroom

A basic concept of cognitive science is that the human brain has limitations in learning and retaining new information. The “working memory” is only capable of holding four to seven pieces of information at the same time, and acts as a bottleneck that channels all new information processed in the brain.⁵ While we have a vast capacity to retain information that has already passed through the working-memory channel to the long-term memory, new information taxes the working memory and can result in cognitive overload when too many pieces are competing for the limited space.

There is little doubt that law school learning taxes the working memory and stretches its limits. Even if some students are able to take in the new information, the ability to process complex concepts is compromised when the working memory is overtaxed.⁶ The digital native law student’s working memory is not just taxed by property, torts, contracts,

¹ This article has been adapted from a presentation the author gave with Suffolk colleague Shailini George, entitled *Assessing, Engaging, Entertaining: Can There Be Too Much of a Good Thing?* at the LWI Biennial Conference, Desert Springs, California, in June, 2012.

² See, e.g., Richard E. Mayer, *Cognitive Theory and the Design of Multimedia Instruction: An Example of the Two-Way Street Between Cognition and Instruction*, *New Directions for Teaching and Learning*, 89 *New Directions for Teaching and Learning* 55 (Spring 2002); Richard E. Mayer, *Cognition and Instruction: Their Historic Meeting within Educational Psychology*, 84 (4) *J. Educ. Psychol.* 405 (1992).

³ The term “digital native” was coined by Barbara Iverson, a professor of new media at Columbia College, Chicago, and quoted in Natalie Y. Moore, *Rule of Thumbs: Love in the Time of Texting*, *The Wash. Post B1* (Sept. 16, 2007). “Digital natives” are individuals born after 1980 who have access to and skills to use digital technology. Urs Gasser & John Palfrey, *Mastering Multitasking*, *Educational Leadership: Literacy* 2.0 15 (March 2009).

⁴ *Id.* at 17.

⁵ See Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 *B.U. J. Sci. & Tech. L.* 39 (Winter 2008).

⁶ See *id.*; M. H. Sam Jacobson, *Paying Attention or Fatally Distracted? Concentration, Memory, and Multi-Tasking in a Multi-Media World*, 16 *Legal Writing: J. Legal Writing Inst.* 419 (2010).

“[T]here is an assumption that law students should have figured out how to learn by the time they get to law school.”

and CREAC, but in another significant way. The student must control and manage the deluge of information available through a variety of electronic and digital media and tools, a sort of “multimedia multitasking.” According to cognitive theorists, such multitaskers are likely to lack the ability to focus deeply and engage in complex analysis.⁷ Multitasking, namely doing more than one thing at a time, actually means that the person is task switching.⁸ The research is clear that task switching results in loss of time and attention, and negatively affects the ability to learn complex information.

The digital native student in the legal writing classroom is a multitasker by definition—typing, texting, checking e-mail, surfing the Internet, listening (we hope), and processing. There is no doubt that these students are forced to exercise more discipline to ward off distraction. Professors can limit the use of technology in the classroom, but the reason for doing so should focus primarily on the harm it does to learning, not that it is annoying and disrespectful to the professor, which it definitely can be.

What can legal writing teachers do to help manage cognitive overload in the classroom and help students learn at a deeper level so that they can be effective lawyers? Knowing that new information must compete for limited working-memory space, the way we impart information to our students should include teaching techniques that reduce cognitive load and promote effective learning. There are two simple guidelines that can help accomplish this important goal; while

they are not novel ideas, revisiting them in light of their connection to cognitive load is surprisingly instructive. First, when teaching a new concept, relate new information to data that is already learned and stored in the long-term memory.⁹ Making connections to information that does not have to compete for space in the working memory helps the information “stick” better. Because information is organized in the long-term memory by “schema,” or clusters of information, the working memory can handle more information that is added to existing schemas.¹⁰

Teaching a new skill or idea as a variation of one already taught is an approach that lends itself easily to the first-year legal writing curriculum, in which students typically learn to draft an objective memorandum during the fall semester, then a persuasive memorandum in the spring. When teaching how to draft a rule persuasively, for example, the professor can have students focus first on an objective statement of a rule from the fall memo fact pattern, which the students know very well, then devise a new scenario, such as one party filing a trial motion, that requires framing the rule persuasively. By relating the new skill of persuasive rule formulation to familiar information that is previously mastered, the professor is imparting new information while helping to manage the students’ cognitive load.¹¹

The second guideline for promoting learning while reducing cognitive load is to be thoughtful about how and when to use multimedia tools for teaching. While there are findings that confirm the effectiveness of multimedia teaching, the research suggests that people process complex concepts more readily if they receive information both

“The research is clear that task switching results in loss of time and attention, and negatively affects the ability to learn complex information.”

⁷ See Claudia Wallis, *genM: The Multitasking Generation*, TIME, (Mar. 27, 2006), available at <http://www.time.com/time/magazine/article/0,9171,1174696,00.html>. Students need to be made aware that the skills required of a lawyer far surpass the ability to find facts and information using the Internet. As one author sums it up, “You can’t Google context.” See Annie Murphy Paul, *Your Head is in the Cloud*, TIME (Mar. 12, 2012), available at <http://www.time.com/time/magazine/article/0,9171,2108040,00.html>. In fact, employer comments and feedback have emphasized this deficiency in the ability to focus deeply in new associates. See Amy Vorenberg and Margaret Sovo McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 PHOENIX L. REV. 1, 10 (Spring 2009).

⁸ Anne Enquist, *Multitasking and Legal Writing*, 18 (1) PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 7 (Fall 2009); see also Jacobson, *supra* note 6, at 435-41.

⁹ Merritt, *supra* note 5, at 46-47.

¹⁰ *Id.* at 47.

¹¹ Another effective option is to introduce new concepts by relating them to everyday life, allowing the working memory the “space” it needs to process the information. While many legal writing professors naturally engage in techniques that relate new information to already mastered or familiar material, being mindful of the benefit of “chunking” on managing the students’ cognitive load should help renew the commitment to using them.

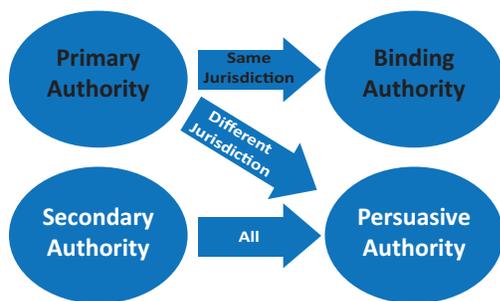
“[W]hen students are made to be aware of their own learning—what helps and hinders it—they become active learners.”

visually and aurally.¹² It follows that legal writing professors should incorporate more visual images and less text to illustrate an idea, for example when using PowerPoint® as a teaching tool. A PowerPoint slide that is crowded with text only is an example of an ineffective teaching tool because the audience is forced to read text and process it while listening to the professor’s comments.¹³ A well-chosen, simple image in conjunction with narration that associates the concept will be far more effective in helping the student grasp and retain the concept. A simple example of combining visuals with narration in the legal writing context would be to use a graphic to illustrate the hierarchy of common law authority, e.g., primary versus secondary law, binding versus persuasive, rather than simply explain what each type of authority is. The following two images of PowerPoint slides illustrate the difference between a text-heavy slide and one that utilizes a visual image:

Hierarchy of Legal Authority

- Primary authority = the law
— statutes, constitutions, cases, regulations
- Secondary authority = commentary on the law
— Law reviews, restatements, treatises, hornbooks
- Binding authority = primary law from same jurisdiction
- Persuasive authority = secondary authority or primary law from different jurisdiction

Hierarchy of Legal Authority



¹² Merritt, *supra* note 5, at 47.

¹³ *Id.* at 51-54.

Moreover, entertaining students with fun media tools, e.g., YouTube clips, music, and photos, can be effective, but only when the chosen piece is directly and specifically related to the concept being taught.¹⁴ Otherwise, it takes up precious working memory and serves as a distraction to learning.

Promoting Metacognition to Maximize Learning

The second challenge for legal writing professors to ensure that students are maximizing learning in the law classroom is to promote metacognition—to help students become aware of their own learning process. Metacognition has been defined as “one’s own knowledge concerning one’s own cognitive processes.”¹⁵ There have been several excellent studies of metacognition as it relates to how effectively students learn in law school.¹⁶ The basic point is that when students are made to be aware of their own learning—what helps and hinders it—they become active learners.¹⁷ The goal for legal writing professors in utilizing active learning strategies is to maximize students’ ability to not only understand concepts, but also the skills required for the practice of law.¹⁸ Legal writing professors can begin promoting self-awareness in our students by sharing knowledge

¹⁴ *Id.* at 45-46.

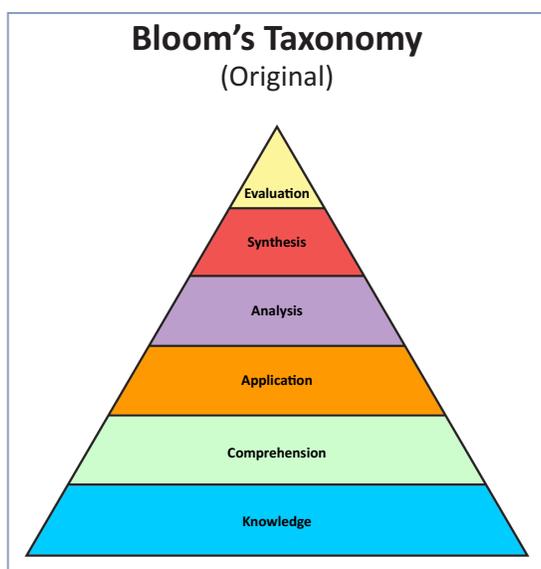
¹⁵ Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. Det. Mercy L. Rev. 1, 7 (Fall 2003) (quoting John H. Flavell, *Metacognitive Aspects of Problem Solving*, in *The Nature of Intelligence* 231 (Lauren B. Resnick ed., 1976)).

¹⁶ See generally, e.g., Boyle, *supra* note 15; Anthony Niedwicki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 Cap. U. L. Rev. 149 (Winter 2012).

¹⁷ In a presentation to Suffolk Law faculty entitled *Teach Law School Students HOW to Learn: Metacognition is the Key!* in May 2012, Dr. Saundra McGuire, Asst. Vice Chancellor for Learning, Teaching, and Retention at Louisiana State University, shared her experiences in using metacognition strategies with students at her institution, and suggested that similar strategies would be beneficial to law school students. Professor McGuire illustrated the different levels of learning goals using the pyramidal classification known as Bloom’s Taxonomy. See Benjamin S. Bloom, et al., *Taxonomy of Educational Objectives: The Classification of Educational Goals; Handbook I: Cognitive Domain* (Longmans, Green 1956). Although the levels and their descriptions were updated in the 1990s, the original pyramid’s six levels of learning objectives, from lowest to highest, are Knowledge, Comprehension, Application, Analysis, Synthesis, and Evaluation.

¹⁸ Boyle, *supra* note 15, at 5-6.

about cognitive theory, the limits of the working memory, and the negative impact of “multimedia multitasking” on deep learning. The message is that the levels of learning required to succeed in law school and in the practice of law cannot happen without effective management of cognitive load and awareness of one’s own learning.¹⁹ A simple visual image of the Bloom’s Taxonomy pyramid is an excellent vehicle for showing students that the levels of learning they should aspire to in law school occupy the top two levels—synthesis and evaluation:



Promoting learning at the highest levels can be achieved through helping students become expert learners. If we set as our teaching goal converting students into experts of the material they are learning, we need to explore ways to facilitate that process. Learning at the highest levels can occur

¹⁹ Bringing awareness to students about their learning styles—visual, auditory, or kinesthetic—can help both the professor and the students learn more effectively. See Boyle, *supra* note 15, at 6-7.

when students are challenged to become experts in a topic. One example of achieving this goal is to assign students to be in charge of teaching or presenting on a topic, as the preparation and level of understanding required to teach someone else forces learning at the highest level.²⁰ For example, once students have found relevant cases for their persuasive memoranda, assigning one or two cases to each student to be in charge of understanding and explaining how they will be used for the persuasive memorandum is a simple but effective way to encourage learning at the highest level. Rather than simply cold calling students or even putting them on call for a given class, assigning students the job of being the designated expert can enhance their learning beyond what is normally possible in the law classroom.

The good news is that legal writing professors are already at the forefront of the legal academy in engaging and assessing our students to promote metacognitive strategies and active learning. This is an objective all law teaching should take into account when considering how we can best serve our students. The work of cognitive scientists has shed further light on the physiology of how human beings learn and has made it possible for us to share this information with our students. Applying that knowledge to the legal writing classroom involves making teaching choices that can help lighten the cognitive load for our students and, at the same time, encourage learning at the highest levels.

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²⁰ This is yet another example of a technique many legal writing professors already employ, but doing so with an understanding of the importance of encouraging learning at the highest levels of Bloom’s pyramid makes the technique even more worthwhile.

“[A]ssigning students the job of being the designated expert can enhance their learning beyond what is normally possible in the law classroom.”

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Traditional Office Memoranda and E-mail Memos, in Practice and in the First Semester

By Charles Calleros

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Is the traditional legal memorandum dead? Should we continue teaching it? Has it been replaced in the iPhone® age with e-mail memos? Or is the body of an e-mail necessarily an inappropriate medium for conveying a legal analysis?

Colleagues have begun to raise questions like these in scholarship and teaching conferences, and many of us have responded with divergent opinions. In this author's view, the traditional office memorandum is alive and well, and it remains an excellent teaching tool. E-mail memos, however, have earned their place as another point on the spectrum of documents that communicate various kinds of legal analyses to an assigning attorney or to a client, and we should consider incorporating them into our curriculum as well.

Defining E-Mail Memos

An e-mail memo is not simply an e-mail that attaches a 15-page legal memorandum; that's just a system for delivering a traditional office memorandum for printing or for viewing on a standard-size computer screen. Instead, to draw a distinction with traditional memoranda, an e-mail memo should be defined as a presentation of legal analysis—or at least the fruits of legal research—set forth in a streamlined format in no more than one or two single-spaced pages so that a recipient on the move can read it without difficulty by scrolling down the screen of a compact hand-held electronic device such as a BlackBerry® or iPhone.

The Issues: Focus and Debate

Our academy focused effectively on e-mail memos in three presentations at the Legal Writing Institute's Fourteenth Biennial Conference in Florida in 2010. The first panel on the topic¹ reacted to an article by Kristen Robbins-Tiscione, reporting her survey of graduates of Georgetown University Law Center and their growing use of simplified office memos, some of which can be easily conveyed in an e-mail message.² The members of this panel explicitly addressed and debated the question whether the traditional office legal memorandum, with overlapping elements built into its most popular formats, was obsolete and should gracefully relinquish its role as a favored teaching tool.

A second panel featured three attorneys engaged in different practices: transactional, civil litigation, and public interest litigation.³ Their fascinating presentations suggested that the preferred format for conveying a legal analysis between associate and assigning attorney varied considerably, depending on the nature of the practice and the complexity of the assignment.

The transactional attorney reported that she is constantly on the move, "making deals," and communicating with staff and associates through an

¹ Doug Godfrey, Richard Neumann (moderator), Kristen K. Robbins-Tiscione, & Mary Rose Strubbe, *Rethinking the Traditional Legal Memorandum as a Teaching Tool*, LWI 14th Biennial Conf., Sess. 3 (Marco Island, Fla. June 28, 2010).

² Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century (hereafter "Snail Mail to E-Mail")*, 58 J. Legal Educ. 32 (2008).

³ Carlton Fields, Jim Levy (moderator), Valerie Novales & Margaret Zehren, *What Skills Do Employers Expect Today's Law Students to Have?*, LWI 14th Biennial Conf., Sess. 3 (Marco Island, Fla. June 30, 2010).

“E-mail memos ... have earned their place as another point on the spectrum of documents that communicate various kinds of legal analyses to an assigning attorney or to a client, and we should consider incorporating them into our curriculum ...”

iPhone or similar hand-held device. Her associates typically support her by sending e-mail messages conveying brief research findings in response to questions, limited in scope and requiring quick responses, which pop up during negotiations.

The other two attorneys who regularly litigate substantial cases raising significant issues reported that traditional office memoranda remain valuable vehicles for conveying research and analysis in major cases, when the issues are complex and the stakes justify the cost. In other contexts, oral presentations or e-mail memos could suffice.

A third presentation at the 2010 Biennial Conference, an excellent poster session,⁴ addressed pedagogy. The presenters persuasively advocated for including a substantive e-mail memo assignment at the end of the first semester, as a follow-up to a traditional office memorandum assigned earlier in the course. This position is not so far from Professor Robbins-Tiscione's scholarship, which contains a few strong suggestions of the imminent demise of the traditional office memorandum,⁵ but contemplates its retention as a legitimate teaching tool if supplemented with instruction about less formal memoranda and substantive e-mail memos.⁶

Scholarship and conference discussions since the 2010 Biennial Conference have also warned of the risks associated with a trend toward short and less formal analyses that can fit comfortably in the

body of an e-mail message. First, of course, e-mail can sometimes be forwarded to an unintended audience, particularly if a substantive memo in the body of an e-mail message becomes buried within a string of e-mail messages whose topics and addressees have gradually evolved. Second, at combined presentations on e-mail memos at the 2011 Rocky Mountain Legal Writing Conference,⁷ one member of the audience argued that a legal analysis that could comfortably fit within the body of an e-mail message likely would be oversimplified.⁸

E-mail Memos: Additional Points on the Spectrum of Formats

This author's views are consistent with a rough synthesis of the ideas expressed in previous conferences and scholarship, although I probably believe more strongly than does Professor Robbins-Tiscione that the traditional office memorandum has important pedagogic value and should remain as a central teaching tool in the first semester of legal writing courses. Moreover, I am inclined to frame the issue and the analysis in less starkly binary terms than has been the case in many discussions of this topic.

Rather than asking whether the traditional office memorandum is dead and should be replaced by shorter, less formal e-mail communications, I believe that familiar formats are just shifting in their positions a bit to make room for another member of the club. The growing practice of conveying legal analyses in e-mail correspondence is simply a technologically spurred extension of long-standing diversity in law office communications.

For decades, associates have communicated the fruits of their research in formats ranging from oral presentations to formal legal

“The growing practice of conveying legal analyses in e-mail correspondence is simply a technologically spurred extension of long-standing diversity in law office communications.”

⁴ Stephanie Hartley & Jenny Carey, Poster Presentation, *Reality Check: Giving Students Real World “E-mail Memo” Assignments to Make Legal Research and Writing More Current and Practical*, LWI 14th Biennial Conf., Sess. 5 (Marco Island, Fla. June 28, 2010).

⁵ E.g., Robbins-Tiscione, *Snail Mail to E-Mail*, *supra* note 2, at 36 (using the heading “*The Traditional Legal Memorandum May Be Obsolete in Legal Education As Well As Practice*”). In a summary of her earlier reported findings, Professor Robbins-Tiscione chose a title with a dire tone: *Ding Dong! The Memo is Dead*, 25 *The Second Draft* (Off. Mag. of Leg. Writing Inst.) 6 (Spring 2001) (hereafter “*Ding Dong!*”).

⁶ See Robbins-Tiscione, *Snail Mail to E-Mail*, *supra* note 2, at 49 (traditional office memoranda may still have a place in the curriculum, but “at a minimum” courses should also “acknowledge the newer modes of composition being used by practicing attorneys”); Robbins-Tiscione, *Ding Dong!*, *supra* note 5, at 6-7 (assuming that traditional legal memoranda will still be taught, while recommending supplementary instruction on “both the advantages and the disadvantages to using these shorter forms of analysis”).

⁷ Charles Calleros, *(Still) Teaching Traditional Office Memoranda in an Age of E-mail Memos*, and Ellie Margolis, *Incorporating Electronic Communication in the LRW Classroom*, Eleventh Ann. Rocky Mt. Leg. Writing Conf. (Las Vegas, Nev. Mar. 26, 2011).

⁸ See also Robbins-Tiscione, *Ding Dong!*, *supra* note 5, at 7 (e-mail memos may “fail to preserve the writer’s detailed thought process”).

“Against the backdrop of this longstanding flexibility and diversity in formats for office memoranda, e-mail memos simply show up as additional points on this spectrum of formats, holding positions between oral presentations and traditional office memoranda ...”

memoranda of varying length and complexity. The scope, length, and formality of each communication depend on the nature of the assignment and the needs of the audience.

The most popular format is the one that includes Issues, Brief Answers, Facts, Discussion, and Conclusion. If the memorandum addresses a single, simple issue, however, the “Conclusion” can be moved forward to replace the “Brief Answer”; the reader will not regret the absence of a Conclusion at the end, which is helpful in a multiple-issue memorandum to tie together the subsidiary conclusions stated in various sections of the Discussion. Indeed, if the issue is adequately conveyed implicitly in the Conclusion, a simplified format could drop the separate Issues section as well. Similarly, we have long recognized that a shorter, less formal version of a traditional office memorandum can serve as an effective advice letter to the client.

Against the backdrop of this longstanding flexibility and diversity in formats for office memoranda, e-mail memos simply show up as additional points on this spectrum of formats, holding positions between oral presentations and traditional office memoranda:

- Oral Presentation
- E-Mail Memo to Attorney or Client
- Simplified Office Memo for Formal Client Letter
- Traditional Office Memorandum (various formats)

If an assignment calls for more than an oral report but can be analyzed effectively in a memorandum of one or two pages, sending the analysis to an assigning attorney or client in the body of an e-mail makes it readily accessible through a few clicks of a BlackBerry or iPhone.

The precise format of the e-mail memo can also depend the nature of the assignment and the needs of the audience. In most cases, the writer should provide a bottom line very early in the e-mail memo, followed by a summary of the supporting analysis, as well as advice or

recommendations, if appropriate. Because—unlike a traditional office memorandum—it must be short and simple enough to be easily read on a hand-held device, it necessarily will dispense with the more complex format and overlapping elements of a traditional office memorandum.

For example, an e-mail memo might begin with the Conclusion or a similar heading, which implicitly suggests the issue, followed by a Discussion or Analysis that analyzes the law and facts without having first stated the facts in a separate statement. In some cases, the writer may provide helpful orientation at the outset by summarizing the assignment, which substitutes for an issue statement, as in “You asked me to determine whether any city ordinances appear to prohibit or restrict the operation of a musical venue at ...” Other e-mail memos might simply present a bullet-point list of statutory or case citations, followed by parenthetical explanations, if that content best responds to the assignment.

Appendix A sets forth a sample e-mail memo that I provide to students. It follows a sample traditional office memorandum that analyzes whether a lender’s purported promise to a third-party guarantor is illusory, thus making the guarantor’s promise gratuitous and unenforceable under the consideration doctrine.

The follow-up memo in Appendix A, however, covers only three paragraphs and is perfectly suitable for an e-mail memo that an attorney on the move could easily read on a hand-held device. It responds to a query from the supervising attorney about whether an argument unaddressed in the initial memorandum could be helpful to the guarantor. Because the e-mail memo is an addendum to an earlier submitted office memorandum, it appropriately begins by referring to the assignment to supplement the office memorandum and by referring to the facts of that memorandum, followed quickly by a bottom line and legal analysis, and finally ending by repeating the associate’s earlier conclusion and recommendation. Because the proposed argument is easily rejected in a couple of sentences with citations, a short e-mail memo does not reflect oversimplification.

Opportunities for such concise presentations may arise in a number of contexts, such as:

- Brief follow-up research on a previously submitted traditional office memo, as described in the previous paragraph;
- Preliminary analysis of case intake;
- Quick research to support negotiations or other transactional work;
- A short, simple office memo assignment, such as the effect of a new statute on prior law, without the facts of a new dispute; or
- A client advice letter summarizing analysis from a traditional office memo, if short, if client prefers e-mail, and if security concerns are addressed.

Avoiding the Pitfall of Oversimplification

An assignment will normally lend itself to discussion within a couple of pages only if it raises a single relatively simple issue without the need to recite and analyze a complicated set of facts. In litigation, perhaps this frequently will be the case if an assigning attorney requires some additional research on a simple matter to supplement an earlier submitted legal memorandum that thoroughly addressed the issues, law, and facts. In a transactional practice, an attorney on the move might need a quick e-mail report on the text of a statute or the holding of a single case that may help the deal proceed or that may send a warning signal that further analysis is warranted before proceeding.

On the other hand, if an assignment raises two or three substantial issues governed by ambiguous statutory text and case law, all applied to complex facts, the author will most effectively convey a thorough analysis in a traditional office memorandum.

An associate might risk oversimplification if an assigning attorney is frequently on the move, is overly fond of her iPhone, and requests a short and pithy e-mail memo on a complex matter that merits much fuller analysis in a 15-page traditional office memorandum. In such a case, at the very least, the associate should warn the assigning attorney that a shorter e-mail memo can serve only as an

executive summary of a complete analysis, which necessarily would be longer and more formal in format. The associate can offer to present that more complete analysis in a traditional office memorandum or directly in a draft of a pleading or brief that the firm will file. If the assigning attorney requests a traditional office memorandum, the associate can prepare the 15-page office memorandum, attach it to the e-mail, and type an executive summary into the body of the e-mail message. The assigning attorney can read the executive summary on her iPhone in the taxi ride from the airport, begin developing her strategy accordingly, and read the full analysis on her laptop or iPad in her hotel room after dinner.

Teaching Both Traditional Office Memoranda and E-mail Memos

This author strongly believes that we should continue to teach formal office memoranda in full traditional formats. Some assignments in law offices will continue to require such memoranda. Moreover, a traditional format provides an excellent tool for developing each student's ability to express an analysis in a careful, deliberate fashion. As recommended by the poster session at the 2010 LWI Biennial Conference, we can end the semester with a follow-up assignment that lends itself to concise analysis in an e-mail memo. A student who has mastered the traditional office memorandum in full format should not find it difficult to simplify the format to suit a more limited assignment, such as an e-mail memo or a slightly simplified office memorandum.

Moreover, students must learn to transfer the formality and polish of a traditional memorandum to an e-mail memo. A "streamlined" format does not mean a "casual" one. Unfortunately, students are accustomed to texting and e-mailing in exceedingly casual styles and formats. Accordingly, students should remember that the recipient of an e-mail memo will have high expectations and may print or forward the memo. Therefore, the memo, albeit exceedingly concise, should look polished

“[S]tudents must learn to transfer the formality and polish of a traditional memorandum to an e-mail memo. A ‘streamlined’ format does not mean a ‘casual’ one.”

in style and structure.⁹ This lesson is more easily imparted if students have first mastered the detailed formality of the traditional office memorandum.

Follow-up E-Mail Memo as an In-Class Final Exam

Spurred by the ideas in the poster presentation at the 2010 Biennial Conference, I added an e-mail memo assignment as part of an in-class final examination. I told my students well in advance that the exam would include an e-mail memo assignment and that it would supplement their closed-universe office memorandum, which they had prepared early in the semester and which they could bring to the exam.

That closed-universe assignment was based on a real case in which a tailor had ruined a young Latina's Quinceañera mass and reception—her “coming out” ceremony and party—by failing to sew the gowns for the celebrant and her fourteen maids of honor, while misleading them about the state of completion of the gowns. The dispute raised an issue about whether the plaintiffs could recover damages for their emotional distress if the arbitrator found a breach of contract but no tort. Two precedents in the jurisdiction both denied such damages, but dictum in each of those precedents supports a strong argument for damages for emotional distress in the Quinceañera case. An Arizona Supreme Court opinion explains a helpful legal rule, in which a couple could suffer emotional distress over the economic losses caused by breach of contract. The facts of the case did not satisfy this rule. An Arizona Court of Appeals opinion similarly denied damages for emotional distress for breach of an employment contract, but it took pains to distinguish an Alabama case that awarded such damages for breach of a contract to transport a wedding party to the church on time.¹⁰ In discussing the

problem with students early in the semester, I encourage them to synthesize the two precedents to formulate a rule that would be helpful to the plaintiffs, albeit one that is supported only by dicta.

As shown in Appendix B, part of the in-class final examination presents a two-page excerpt from a fictitious late-breaking opinion from the Arizona Court of Appeals, which awards damages for a bride's emotional distress against a hotel that breached a contract to provide a ballroom for a wedding reception for 400 guests, forcing cancellation of the reception. Like the students' earlier submitted office memoranda, the new opinion derived support for its rule from the dicta of the two earlier precedents. The exam question gives students 30 minutes to compose the body of an e-mail message, of no more than three paragraphs, summarizing the import of this new case to the assigning attorney, who is on the move: He has been participating in a hearing, he will engage in settlement negotiations at another law firm later in the afternoon, and he has been alerted by text message that he will receive an important e-mail about those negotiations within the hour.

I was pleased with the results. The students had little trouble understanding that they should alert the assigning attorney to the good news that the analysis conveyed in the earlier submitted office memorandum was now supported by a holding of an appellate decision. For the most part, then, the question presented an opportunity for students to summarize the essential points of the case and its positive effect on negotiations, and to present that information under time pressure in a well-organized, well-written essay that the assigning attorney could quickly and easily read on the screen of his iPhone. A sample answer appears in Appendix C.

This final exam e-mail memo worked well because it relied on each student's experience with a previous assignment, and because the supplemental analysis in the e-mail was quite limited. One might assign an e-mail memo as an introductory assignment early in

⁹ Patricia Shepard, Small-section Discussant, LWI Teaching Workshop 2010 (San Diego, Cal. Dec. 3, 2010) (recounting assigning attorney's demands for formal structure and format in e-mail memo).

¹⁰ This closed-universe assignment is set forth in Charles R. Calleros, *Legal Method and Writing* 578-85 (6th ed. 2011).

“[T]he question presented an opportunity for students to summarize the essential points of the case and its positive effect on negotiations, and to present that information under time pressure in a well-organized, well-written essay ...”

the semester, but only if the analysis is exceedingly simple, such as applying the clear holding of a precedent to the slightly different facts of a new case.

Where Do We Go From Here?

I recommend that the legal writing academy continue to employ traditional office memoranda assignments, with their overlapping elements, as the primary vehicle for students' introduction to legal analysis and writing. I also recommend, however, that we introduce students to the more flexible, less formal presentations of legal analysis that attorneys or clients could conveniently read in the body of an e-mail from a hand-held device, while warning students of the risks of oversimplification.

To educate ourselves about the realities of practice, the academy should also collect examples of both successful and problematic e-mail memos from practicing attorneys. To facilitate a collaborative effort, perhaps one of the established legal writing organizations could set up a website on which examples could be uploaded and viewed by others.

In addition, Doug Godfrey reminds us that we should pay attention to readability on the small screens of handheld devices,¹¹ which depends on factors other than the manageable length of an e-mail memo. Although each of the sample e-mail memos that I set forth in the Appendixes are only three conventional paragraphs in length, they are dense with text and may require more white space and more frequent breaks for maximum readability by an attorney on the move. The academy should experiment with nontraditional spacing and paragraphing to see if it enhances readability on the screens of handheld devices. An example of such an experiment appears in Appendix A, immediately after the illustration with conventional spacing and paragraphing.

Appendix A¹²

From: [Associate]

Sent: Monday, September 26, 2011 6:02 PM

To: [Supervising Attorney]

RE: Follow-up to Memo in File #11-127

Attachments: Green v Day.doc (25 KB)[Open as Web Page]

ASSIGNMENT:

This morning you asked me to: (1) assume the facts as stated in my legal memorandum dated September 16, 2011, and (2) determine whether Guarantor's promise to guarantee payment of Borrower's debt lacks consideration because Lender's "return" promise provided no benefit directly to Guarantor.

ANALYSIS:

The absence of a direct benefit from Lender to Guarantor does not undermine a finding of consideration. Lender's promise to delay collecting a debt from a third party, such as Borrower, can be exchanged for Guarantor's promise to Lender. *See Green v. Day*, 175 Calz. 32, 37, 865 P.2d 1204, 1209 (1993) (finding consideration in similar guarantee context). If Guarantor sought Lender's promise in exchange for her own, it is irrelevant whether she received a direct benefit from Lender's performance of the promise. *Id.* at 38, 865 P.2d at 1210 (citing to [Restatement \(Second\) of Contracts §§ 71\(2\), 79 \(1981\)](#)).

CONCLUSION AND RECOMMENDATION:

The additional research does not change the conclusion of the September 16 memo. On the facts currently known to us, Guarantor's best argument remains her claim that Lender's promise is illusory. It remains a relatively weak argument, because the phrase "until Lender needs the money" is not easily interpreted to leave Lender's performance to his unrestricted discretion. However, it may introduce

“I ... recommend ... that we introduce students to the more flexible, less formal presentations of legal analysis that attorneys or clients could conveniently read in the body of an e-mail from a hand-held device ...”

¹¹ Comment during discussion segment of Charles Calleros, *E-mail Memos in Context and in a First Semester Final Exam*, Second Ann. W. Regional Legal Writing Conf. (Eugene Ore. Aug. 11, 2012).

¹² This sample e-mail memo is taken from Calleros, *supra* note 10, at 230-31.

enough uncertainty regarding consideration to convince Lender to compromise his claim against Guarantor in a reasonable settlement.

Alternative Presentation with nontraditional spacing and paragraphing:

From: [Associate]

Sent: Monday, September 26, 2011 6:02 PM

To: [Supervising Attorney]

RE: Follow-up to Memo in File #11-127

Attachments: Green v Day.doc
(25 KB)[Open as Web Page]

ASSIGNMENT

This morning you asked me to:

- (1) assume the facts as stated in my legal memorandum dated September 16, 2011, and
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ANALYSIS

The absence of a direct benefit from Lender to Guarantor does not undermine a finding of consideration:

* Lender's promise to delay collecting a debt from a third party, such as Borrower, can be exchanged for Guarantor's promise to Lender.

See *Green v. Day*, 175 Calz. 32, 37, 865 P.2d 1204, 1209 (1993) (finding consideration in similar guarantee context).

* If Guarantor sought Lender's promise in exchange for her own, it is irrelevant whether she received a direct benefit from Lender's performance of the promise.

Id. at 38, 865 P.2d at 1210 (citing to [Restatement \(Second\) of Contracts §§ 71\(2\), 79 \(1981\)](#)).

CONCLUSION AND RECOMMENDATION

The additional research does not change the conclusion of the September 16 memo:

* On the facts currently known to us, Guarantor's best argument remains her claim that Lender's promise is illusory.

* It remains a relatively weak argument, because the phrase "until Lender needs the money" is not easily interpreted to leave Lender's performance to his unrestricted discretion.

* However, it may introduce enough uncertainty regarding consideration to convince Lender to compromise his claim against Guarantor in a reasonable settlement.

Appendix B

Final Exam Instructions and Question 1

Total exam time is 50 minutes. The exam will be administered in two parts: Part I, consisting of 30 minutes for one essay question in the form of an e-mail memo, and Part II, consisting of 20 minutes for 20 true-false questions. After the time has expired for Part I, you will turn in your essay answer and then await instructions for Part II. The exam is worth 40 raw points, 20 points for each part of the exam.

Both portions of the exam are "open book." You may bring with you into the exam room any of the books required for this course. You may also bring a hard copy of your closed-universe memo, addressing the breach of the Quinceañera contract, because the e-mail memo in Part I will relate to the Quinceañera memo.

Part I

In Part I, you will study a two-page excerpt of a recent (fictitious) opinion, published online in *Arizona Advance Reports*. You just discovered it today, and it is relevant to your previously submitted office memorandum on Trina Araiza's claims arising out of her Quinceañera celebration. Your supervising attorney, Charles Calleros, is at a hearing downtown and will meet at 3 p.m. with the attorney for Ramona Udave to try to negotiate a settlement, in an effort to avoid arbitration of Araiza's claims. He has your earlier submitted office memo in his possession.

You have texted Calleros and alerted him that you will be e-mailing him a short memo on a recent case relevant to his upcoming negotiations. When you receive instructions to turn the page, read the recent opinion and compose a short e-mail message to Calleros, suitable for quick reading on a handheld device such as an iPhone or BlackBerry.

In your *Bluebook* exam pages, or on your laptop computer with Examsoft, compose the body of your e-mail message to Calleros, in no more than three paragraphs, along with any headings that you choose to include. Keep it short and concise, providing Calleros with just a summary of the essential information to allow him to use this new case in negotiations, along with any insights that you might offer about the significance of the new case. You need not write down the heading lines that appear in an e-mail, such as To:, From:, Re:, and Date:. Just write the body of the e-mail.

You have a total of 30 minutes for Part I. You might allocate your time roughly as follows: 10 minutes to study the opinion and plan your answer, 10-15 minutes to write out your e-mail message, and the remaining time to polish your writing.

When instructed to do so, turn the page, where you will find the opinion on which to base your e-mail message.

* * * *

***Roberts v. Grand Hotel*, 614 Ariz. Adv. Rep. 12 (Ct. App. Nov. 1, 2011)**

....

[pg. 15]

FACTS

On February 5, 2008, Jenna Roberts entered into a contract to rent all three sections of the Grand Canyon Ballroom at the Grand Hotel in Phoenix for her wedding reception for 400 guests, scheduled for 6-10 p.m. on Sunday, June 8, 2008. The fee for rental of the Ballroom, not including the cost of paying for the food and beverages that would be served to guests, was \$10,000.

To Ms. Roberts's shock, when the wedding party arrived at the Grand Hotel at 6:30 p.m., after taking wedding pictures at the separate site for the wedding ceremony, the Grand Hotel was in a state of chaos. The Grand Canyon Ballroom was in use for the entire evening for a gala party scheduled on short notice by a national conference of financial advisors. The band hired by Ms. Roberts had long since left the site after being denied access to set up their equipment anywhere in the Grand Hotel; other caterers and wedding guests were left milling around in a state of confusion and frustration, waiting for instructions. Because the wedding party was unable to make arrangements for a suitable alternative location for their wedding reception, Ms. Roberts and her parents sent everyone home and asked them to wait for invitations to another reception. They never scheduled a substitute reception, and Ms. Roberts suffered great emotional distress as a result of the events.

Ms. Roberts brought several claims against the Grand Hotel in tort and for breach of contract. The trial judge granted summary judgment for Ms. Roberts on the issue of breach of contract, and she set the case for trial on the tort claims and on the issue of damages on the contract claim. The jury found for the defendant hotel on the tort claims but awarded damages to Ms. Roberts on her contract claim in the amount of \$100,225, which included damages for economic loss and damages for emotional distress. The only issues raised on this appeal relate to the damages for emotional distress, and the trial judge's rejection of the Grand Hotel's proposed instructions on mitigation of damages.

ANALYSIS

I. Damages for Emotional Distress

The jury awarded \$50,000 for Ms. Roberts' emotional distress. The trial court had provided the jury with the following instruction on this issue:

If you find that the defendant breached its contract with the plaintiff, you may additionally award the plaintiff damages for her emotional distress, but only if you find that the contract had a special nature known to both parties at the time of contracting, so that the

defendant could reasonably contemplate that a breach would cause the plaintiff to suffer emotional distress for reasons other than monetary loss stemming from the breach.

[pg. 16] The trial court's instruction is consistent with the opinion of this state's highest court that damages for emotional distress are available for breach of contract if the nature of the contract puts the parties on notice that a breach "would cause mental suffering for reasons other than the pecuniary loss." *Farmers Ins. Exch. v. Henderson*, 82 Ariz. 335, 343, 313 P.2d 404, 409 (1957) (finding that breach of an insurance contract did not meet this standard).

We have previously ruled that damages for emotional distress are not available for breach of a routine employment contract, one that did not present special reasons to depart from the normal measure of damages based on the difference between the unpaid salary and sums earned by the employee during the contract term through substitute employment. *Fogleman v. Peruvian Assoc.*, 127 Ariz. 504, 622 P.2d 63 (Ct. App. 1980). Even in that case, however, we suggested that a different issue would be presented by "a special situation," and we cited a contract for transportation of the groom to his wedding as an example of one that put the parties on notice that "failure of performance would, under the circumstances, expose plaintiff to particular consequences . . . for which the plaintiff was allowed damages." *Id.* at 506, 622 P.2d at 65 (distinguishing *Browning v. Fies*, 58 So. 931 (Ala. Ct. App. 1912), which awarded damages for mental suffering and humiliation).

We reject the Grand Hotel's argument that the contract in this case failed to meet the *Henderson* standard as a matter of law; therefore, the trial court appropriately instructed the jury on damages for emotional distress. Moreover, the evidence in the record amply supports the jury's award of emotional distress damages. When faced with four hundred frustrated guests and the complete ruination of her wedding reception, one would be shocked if Ms. Roberts did not suffer emotional

distress. The responsible scheduling supervisors at the Grand Hotel would certainly understand that a contract for a major wedding reception—so large that an alternative location would not be available on short notice—presented a situation unlike that of a routine commercial contract, where the damages are appropriately limited to economic losses.

We find no error either in the trial court's instructions or in the jury's award on this issue.

II. Mitigation of Damages

. . . .

[pg. 18] Affirmed.

End of Part I

Appendix C

Sample Answer

From: [Associate]

Sent: Monday, Nov. 14, 2011, 2 PM

To: Charles Calleros

RE: Urgent News on Araiza's Claim for Damages for Emotional Distress

Attachments: Roberts v. Grand Hotel.doc (25 KB)[Open as Web Page]

[The exam instructed students to omit the e-mail heading and to focus on the body of the e-mail, but I include it above to emphasize that this is intended to be an e-mail message.]

NEW DEVELOPMENT IN ARAIZA'S CASE: Roberts v. Grand Hotel

Mr. Calleros, a late-breaking case has strengthened our hand in the negotiations this afternoon over Ms. Araiza's claim for damages. *Roberts v. Grand Hotel*, 614 Ariz. Adv. Rep. 12 (Ct. App. Nov. 1, 2011). *Roberts* confirms our analysis of precedent in the October 4 office memorandum, except that it provides a positive holding rather than merely helpful dictum.

In *Roberts*, the Arizona Court of Appeals approved a jury award that included \$50,000 for a bride's emotional distress when the hotel breached a contract with the bride to provide a large ballroom for her wedding reception. The reception was canceled when the wedding party and its 400 guests arrived at the hotel, only to find that the hotel had committed the ballroom to another group. The court applied the dicta of *Henderson* and *Fogleman* to allow damages for emotional distress because the contract "was unlike that of a routine commercial contract," creating special circumstances that put the hotel on notice that breach of the contract would cause distress for reasons other than pecuniary loss. *Id.* at 16.

IMPLICATIONS FOR OUR CASE

The facts of our case are not as strong as those of *Roberts*, because Araiza's Quinceañera did take place in some fashion. Still, witnesses can effectively paint a picture of a "ruined" Quinceañera ceremony. Moreover, like the contract in *Roberts*, Araiza's contract was far from a routine commercial deal, and it fits nicely within the Arizona standard for damages for emotional distress for reasons discussed in the memo dated September 5, 2011. By analogizing a Quinceañera ceremony to a wedding reception, you can persuasively argue that a contract to supply a critical element for either event provides ample notice of special circumstances that make emotional distress easily foreseeable if the supplier breaches.

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Cite as: David I. C. Thomson, *Using Student Evaluation Data to Examine and Improve your Program*, 21 Perspectives: Teaching Legal Res. & Writing 115 (2013).

Using Student Evaluation Data to Examine and Improve your Program

By David I. C. Thomson

David I.C. Thomson is LP Professor and Director of the Lawyering Process Program at the University of Denver, Sturm College of Law in Denver, Colo.

At many schools, directing a legal writing program today is quite different than it was even 10 years ago. As LRW faculties mature and the individual faculty members grow in the profession, the need for a “top-down” director is lessening or going away in many programs. However, in many schools there remains a valuable leader/coach sort of role for a director, whether that person rotates, coordinates, or however it works in practice that is best for the school. This new sort of director is ideally someone who is able to encourage and support a culture of programmatic excellence and is willing to ask questions about how the program is doing as a whole—understanding, of course, that a culture of excellence and examination is created and given life by the faculty members in the program, not by the director.

One way to encourage a culture of excellence is to start with some measure of how you are doing and discuss whether there is room for improvement. Because we did not have that measurement, I looked around for what we did have, and of course—just like every program—we have student evaluations. They are certainly not a perfect measure, but they do have some validity.¹ “In general, student evaluations of teaching are likely to be much more useful than their critics typically believe.”² With respect to student evaluations of legal writing professors, it is a commonly held

belief that we inevitably receive lower scores on evaluations than those received by teachers of casebook courses. But this view has been challenged³ and, with effort, can in large part be addressed.⁴

Of course, whenever you start poking around in student evaluations, folks get nervous. The worry is that such an effort is secretly about going after someone, even if it is not. It is very important that it is clear to everyone up front that the purpose of gathering and examining the evaluation data is solely for program-wide assessment. Assuring everyone that the data would not be used for individual faculty assessment was an important step. Student evaluations are certainly used in the various review processes for all faculty members, but that is not what this sort of programmatic study is about.

Because I am not an expert empiricist, I sought out help from those who are. Every university has an assessment person somewhere. I found ours, and studied as much as I could. I learned quickly a fairly basic point: that such a study would be more reliable if it had a lot of data in it, rather than a little. So the first study we conducted includes five years of student evaluation data across 16 sections of the course, both semesters each year, between the Fall 2005 semester and the Spring 2010 semester. That is 160 sets of evaluations covering nearly 3,000 individual evaluation forms. Finding someone to collect and chart that amount of data is not generally easy, but at the time we had an administrative support person who was good at this, and enjoyed doing it. When I asked her to do this work, I gave her some specific parameters to look at.

¹ See, Arthur Best, *Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree*, 38 *Southwestern U. L. Rev.* 1 (2008).

² *Id.* at 34.

³ Julia Glencer, Erin Karsman, Jan Levine & Tara Willke, *The Fruits of Hope: Student Evaluations*, 48 *Duq. L. Rev.* 233 (2010).

⁴ *Id.* at 260-261.

“[S]tudent evaluations of teaching are likely to be much more useful than their critics typically believe.”

Our student evaluation instrument is pretty detailed, arguably too detailed. It contains 18 statements, and students are asked to rate our work with them as earning a rating of Strongly Agree, Agree, Neutral, Disagree, or Strongly Disagree for each statement. Students are then invited to write textual comments about the professor and textual comments about the course materials. The student evaluation participation rate runs about 60 percent school-wide, and is generally over 70 percent in our course. Of the 18 statements, it seemed to me that eight of them were most relevant to our course and important to study. These questions were:

- #7:** I found this course to be well organized.
- #8:** The professor held my attention in class.
- #9:** This professor is always prepared prior to class.
- #10:** This professor was willing to assist me outside of class.
- #12:** This professor made good use of class time.
- #14:** This professor effectively communicated the content of the course to me.
- #16:** This professor motivated me to do my best work.
- #18:** I would enjoy taking another course from this professor.

I selected these statements to focus on, in large part, because they seemed most aligned with the guidance provided in a leading article on the subject of student evaluations in legal writing.⁵ In his article, Professor Walter suggests that the best use of student evaluations in legal writing is to focus on those questions that relate to “professionalism and respect for students.”⁶ While all of our questions do not align perfectly with Professor Walter’s guidance, statements #8, #9, #10, and #12 do quite directly, and #16 arguably does as well. Examples of two statements on our evaluation that I did not include in the study were #15: I would recommend to others that they take this class, and #17: I was able to keep

up with the workload for this course. I left these out of the study because, with respect to statement #15, our students have to take the course, and with respect to statement #17, our students routinely complain about how hard the course is, because—generally speaking—it has to be. It seemed to me that including data from both statements would skew the results by including information that does not relate to the professionalism of the professor and his or her respect for students.

To keep the study at a manageable size, I decided also to reduce the number of responses to each statement that we would study from five to three. I excluded the Strongly Agree and Agree responses from the study, instead only including Neutral, Disagree, and Strongly Disagree answers. I did this because it seemed to me that the most useful information would be that which revealed those who were unhappy with our work, rather than those who were happy.

This was a fairly fundamental decision in this study. I decided that what we most wanted to know was where the problems were. I was thinking, I suppose, of the first line of Tolstoy’s *Anna Karenina*: “Happy families are all alike; every unhappy family is unhappy in its own way.”⁷ What we most wanted to know was how and in what ways our family—our students—were unhappy with the program. That would tell us more than just studying the students who were fully satisfied with what we were doing.

Further, I decided that when a student provides an answer of “neutral” to one of the statements, it is not a bad response, exactly, but it is not a happy one either. So I wanted to include the neutrals in the study as well.

The result of the study can be found in figures 1, 2, and 3. These charts show the mean number of Neutral (fig. 1) responses, Disagree (fig. 2) responses, and Strongly Disagree (fig. 3) responses over the period of the study. Given small class sizes, one would hope that the number of students using these response options would range from zero to five. As you can see, over this lengthy period of

“What we most wanted to know was how and in what ways our ... students—were unhappy with the program. That would tell us more than just studying the students who were fully satisfied with what we were doing.”

⁵ See, David D. Walter, *Student Evaluations – A Tool for Advancing Law Teacher Professionalism and Respect for Students*, 6 J. Leg. Writing Inst. 177 (2000).

⁶ *Id.* at 191-92.

⁷ Leo Tolstoy, *Anna Karenina*.

“I have long held a theory that teaching a small class such as legal writing in a large law school classroom might be just a little bit more difficult than teaching in a smaller classroom ... But I had no data to back that up.”

the evaluations we have a reduction in the mean number of students who responded on all three measurements. That is, the number of students who are unhappy has reduced over that time. Merely a reduction alone in the Neutral numbers, or in one of the other categories alone, would be interesting and good information to have. But it is the similar reduction across all three categories that make these charts compelling to us. We took this to mean that over the 2005–2010 period, students experienced an improvement in our program. Or at least they were less unhappy with it.⁸

Once we had this data, we could use it in other ways beyond the rough-cut “improvement” conclusion. We noticed that there was an obvious division between two statements and the rest. One of the two statements on which we were scoring the lowest dissatisfaction rate is fundamental to legal writing pedagogy—Statement #10: is “willing to assist me outside of class.” If we were doing very poorly on that measure, it would be something to be concerned about as a program. It was encouraging that we were not.

We also noticed that the unhappy mean numbers generally decreased between fall semester and spring semester each year. This is as we would expect, since students often do not fully understand the sometimes painful and difficult work we are assigning them in the fall semester, while by the spring semester they often understand much better what they have learned. It was somewhat affirming that this phenomenon appears in our evaluations as well, but it also led us into good discussions about why such a phenomenon exists, and how it might be addressed in the future.

This data also allowed us to notice that, for example, we were not doing as well with student responses to statements #12 (good use of class time) and #14 (effectively communicated content), particularly among those who selected “Neutral” as a response. This led to a healthy discussion of

the issue, and it is something we often talk about in our biweekly faculty meetings during the semester. Further, once we had this data, we were able to use it to cross-reference with other data points.

I have long held a theory that teaching a small class such as legal writing in a large law school classroom might be just a little bit more difficult than teaching in a smaller classroom that is more conducive to the kind of community that we try to foster in our classes. But I had no data to back that up.

I asked our data specialist to look at the evaluation data again, but to cross-reference it by classroom. I wanted to know whether there was a relationship between the “unhappiness” factor and the classroom in which the class was taught. I separated the rooms in which we have taught our LRW course in those years into two groups: larger rooms vs. smaller rooms. I also reduced the number of evaluation statements from eight to the three that seemed to me would be most directly affected by the dynamic created by teaching in a smaller or a larger room. The three statements that were examined in this study were: #8 (held my attention in class), #12 (made good use of class time), and #14 (effectively communicated content).

What we learned is that indeed there does seem to be some correlation between the classroom assigned and student unhappiness with the course. As you can see in fig. 4 (Neutral), fig. 5 (Disagree), and fig. 6 (Strongly Disagree), those smaller rooms (the blue bar) all have a lower “unhappiness” mean on each rating. I have used this data to request of our Associate Dean and Registrar that our Lawyering Process classes be taught in the smaller rooms whenever possible.

All of this work is based on student evaluations, which are certainly not a perfect instrument. Further, we are all quite sensitive about our student evaluations on an individual basis, and so we usually focus on them for individual improvement. Grouping a large data set of the evaluations and just examining the quantitative data that they contain helped us as a group of faculty to examine the program as a whole. It also led us to be more willing to examine program-wide data, rather than focusing on our individual scores. This has since

⁸ You might notice that we experienced a brief spike in the Strongly Disagree category in the spring semester of 2009. The source of that problem had already been addressed by the time we reviewed this data, so conducting this study did not lead to its resolution. But it did confirm the nature of the problem.

led us into a more rigorous assessment process that is based on measurable student learning outcomes, a standardized rubric, and program-wide assessment based on improvement in actual student work, rather than merely student perceptions in their evaluations of our work with them and of the program. This study will be the subject of the next article on our experience at the University of Denver with program assessment.

Figure 1

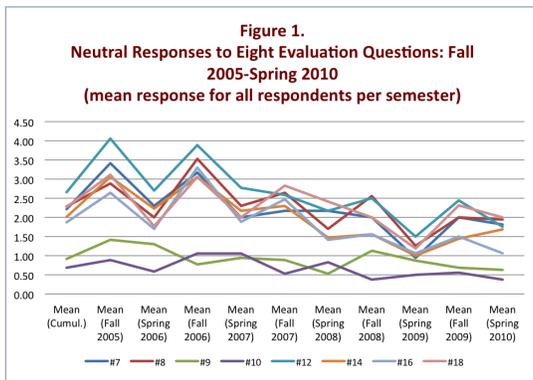


Figure 2

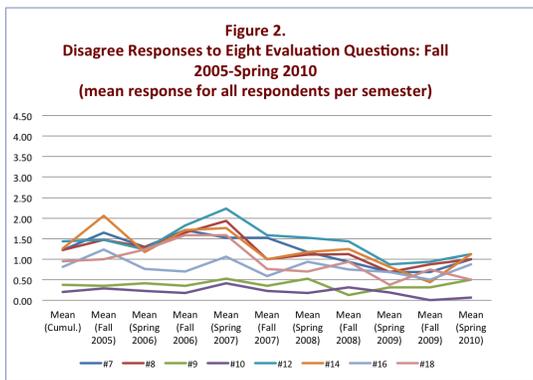


Figure 3

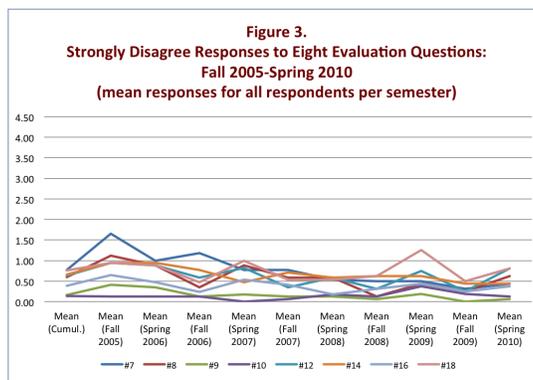


Figure 4

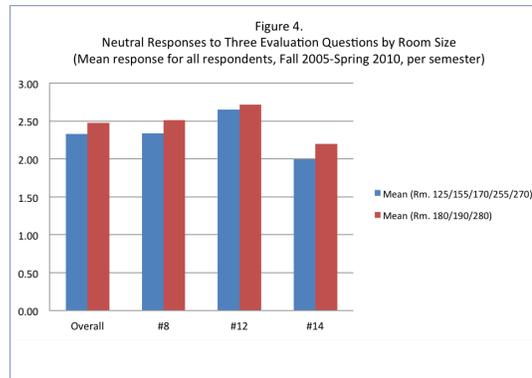


Figure 5

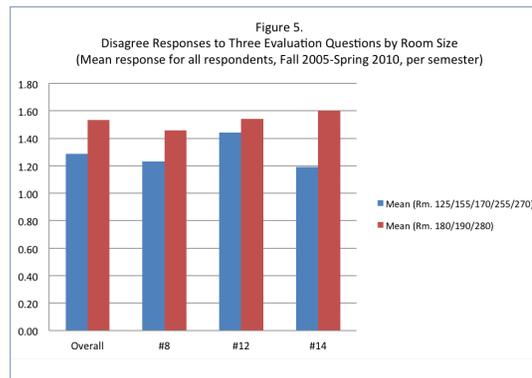
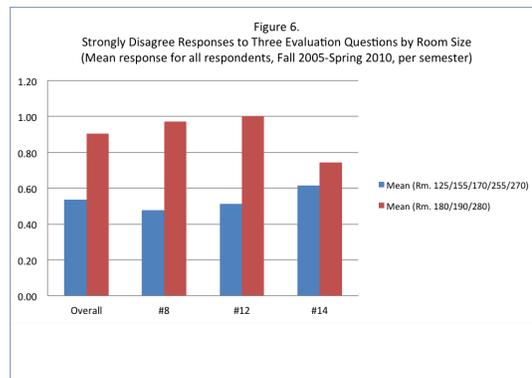


Figure 6



Cite as: Sarah Morath, Elizabeth A. Shaver, and Richard Strong, *Motions In Motion: Teaching Advanced Legal Writing Through Collaboration*, 21 Perspectives: Teaching Legal Res. & Writing 119 (2013).

Motions In Motion: Teaching Advanced Legal Writing Through Collaboration

By Sarah Morath, Elizabeth A. Shaver, and Richard Strong

*Sarah Morath, Elizabeth A. Shaver, and Richard Strong are Assistant Professors of Legal Writing at the University of Akron School of Law in Akron, Ohio.*¹

Legal education is at a crossroads. Practitioners, academics, and students agree that more experiential learning opportunities are needed in law school.

In 2007, the Carnegie Foundation report *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Report),² called for law schools to provide apprentice experiences to better prepare prospective attorneys for the world of practice. That same year, *Best Practices in Legal Education* advocated for “experiential education” and “encourage[d] law school[s] to expand its use.”³ Most recently, in August 2011, the American Bar Association adopted a resolution sponsored by the New York Bar Association summoning law schools to “focus on making future lawyers practice ready.”⁴ This move was followed by the front-page New York Times article provocatively entitled “What They Don’t Teach Law Students: Lawyering,” which criticized legal education for failing to provide students with “much practical training.”⁵

¹ The authors, who are listed in alphabetical order, received a 2011 ALWD Teaching Grant to develop the course design discussed in this article.

² William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

³ Roy Stucky et al., *Best Practices for Legal Education* (Clinical Legal Education Association 2007) at 122.

⁴ www.nysba.org/abaresolution.

⁵ David Segal, *What They Don’t Teach Law Students: Lawyering*, *N.Y. Times* (Nov. 20, 2011) at A1.

Many efforts are underway to create a learning environment in law school that will better prepare graduates for the practice of law. Not surprisingly, legal writing professors have led the way in designing courses to make students more practice-ready.⁶ One approach involves creating a course that replicates the law firm setting, so that students better understand what it is like to be a junior associate.⁷ Another approach involves legal writing professors collaborating with casebook or clinical professors.⁸

At our law school, upper-level writing courses present an opportunity for legal writing professors to engage in experiential learning. With extensive experience in the civil litigation context, both in front of and behind the bench, we created a “trio” of upper-level legal writing classes that simulate the three stages of motion practice: motion, opposition, and ruling.⁹ We collaborated to link three separate writing classes

⁶ Although the legal writing field has long been concerned with providing students with effective lawyering skills, several recent conferences have focused on better preparing students for practice. Some of these conferences are identified at <http://lwionline.org/other-conferences.html>.

⁷ In 2011, Duquesne University School of Law sponsored a conference entitled “The Arc of Advanced Legal Writing: From Theory through Teaching to Practice.” Julia Glencer, Erin Karsman, and Tara Willke of Duquesne spoke about having developed a team-taught advanced legal writing “law firm simulation” supported by an ALWD Grant; see also Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 *J. Legal Educ.* 96, 99 (1994) (describing a course where students are assigned to one of two “law firms” and represent either a plaintiff or a defendant in a year-long legal dispute).

⁸ Sarah Ricks & Susan Wawrose, *Comment: Survey of Cooperation Among Clinical, Pro Bono, Externship and Legal Writing Faculty*, 4 *J. Ass’n Legal Writing Directors* 56 (Fall 2007).

⁹ The *Best Practices* report identifies three types of experiential learning: simulation-based courses, in-house clinics, and externship. Our course is a simulation-based course because “students assume professional roles and perform law-related tasks in hypothetical situations.” See Stucky, *supra*, note 3, at 122.

into an integrated course that requires students to step into the role of either counsel or judge and interact with one another on a professional level.

This article summarizes how we coordinated our trio of classes to create a simulated litigation experience. We first describe our various goals in designing such a course. We then explain the practical considerations involved in creating and coordinating the trio of classes, each of which assumes a different role in the litigation process. Finally, we assess the success of the course design, using both our self-evaluation as teachers and our students' feedback.

Our Course Goals

At our law school, legal writing professors traditionally have taught a one-credit, upper-level "drafting" or writing course designed to enhance the students' legal writing beyond the first-year curriculum. In 2010, we collaborated to link our three, previously autonomous, courses together such that each class of students took on the role of either plaintiff's counsel, defense counsel, or judge.

We had three primary goals when we embarked on this new course design. Our first goal was to have the course simulate the actual practice of law within the somewhat limiting confines of the classroom setting. Our second goal, consistent with the traditional purpose of our writing courses, was to improve our students' legal writing. Our third goal was to expose our students, most of whom will practice in Ohio, to our state court civil procedure rules, local court rules, and customs of our local bar.

Standing alone, the goal of "simulating the practice of law" is so general it provides little guidance for actual course design. This first goal thus required a number of initial considerations that would give it a more definite shape. For example, we know that real civil litigation often involves cases with both human drama and intellectual challenges. Therefore, the centerpiece of the course would be a hypothetical that stirred emotion, posed factual difficulties or contradictions, and offered complex legal issues for the students to address. Our student-advocates would have clients with whom they could empathize, while also recognizing some negative characteristics. Our student-judges would take on

the somber responsibility of neutral arbiters of a dispute whose outcome would affect people's futures. The hypothetical thus would bridge the gap between students' understanding of abstract legal theory and their still-undeveloped sense of the human impact of a legal decision.

We also felt that the "actual practice" experience would be enhanced if we stepped away from the role as leader of the class and provided a more dynamic writer-reader context. Indeed, students often take a different approach when a writing assignment has an audience other than the instructor.¹⁰ We hoped that all of our students, by stepping into their professional roles, would consider their work as fulfilling a goal other than simply completing an assignment to earn a grade. Our students would begin to move beyond the purely academic concern of "cracking the professorial code" and instead consider how best to construct an argument and how a judge might weigh competing arguments.

We also wished to construct the course in such a fashion that the students would experience how actual litigation can be "messy," due to the unexpected factual or legal twists and turns that arise with most civil cases of reasonable complexity. As our litigation progressed, students might learn new facts, or previously known facts might become more prominent or problematic, thus providing challenges to the students when advocating for a client or issuing a ruling.

Our second goal was to refine the legal writing style and techniques of our upper-level students. In our first-year legal writing courses, the students' exposure to persuasive writing is in the form of an appellate brief. Therefore, judicial opinion writing would be a style of legal writing entirely new to the students in our judges' class. For our student-advocates, we sought to expose them to persuasive writing techniques specific to trial court litigation. For example, we wished to

“We ... wished to construct the course in such a fashion that the students would experience how actual litigation can be ‘messy,’ due to the unexpected factual or legal twists and turns that arise ...”

¹⁰ Many students experience obvious intimidation when writing only for the teacher. Peter Elbow, *Closing My Eyes as I Speak: An Argument for Ignoring Audience*, 49 *College English* 50, 51-52 (1987).

have our student-advocates practice the art of persuading a single judge of the merits of their clients' position by emphasizing different facts or legal issues as the litigation unfolded over time. In addition, unlike the appellate problem, where students dealt with a great quantity of potentially relevant cases, students should construct legal arguments using relatively little on-point precedent. Finally, all of the students—advocates and judges—would need to consider how their writing style might need to be tailored based on the court's discretion and the standard of review.

Another aspect of our second goal was to reinforce the idea that quality editing leads to higher-quality work product. To fulfill this second goal, we needed a robust peer review process. Cassandra L. Hill persuasively presented the benefits of peer collaboration in her recent article, which included proposed methodologies for implementing the approach in the legal classroom.¹¹ Through a good peer review process, “[s]tudents gain experience with cooperative and supportive peer relationships; improve their editing, analysis, and writing skills; and develop increased self-confidence—all of which are important skills for being successful practicing lawyers.”¹²

Our third goal was to expose our students to Ohio civil litigation practice. Most litigation-based courses offered at our law school—Civil Procedure, Evidence, Pretrial Advocacy, and Trial Advocacy—focus on federal court practice. Because most of our graduates will practice law in Ohio, simulating Ohio civil litigation would give our students valuable, practice-based information. We intended to explain how Ohio civil procedure rules differ from federal rules, introduce students to the local rules of our county-specific state trial court, and emphasize other ways in which local litigation practices can vary. Judicious use of anecdotes from

our own practice experience and guest speakers, including local judges, would help further this goal.

Finally, while not a primary goal, we also intended to further our students' developing sense of professional ethics. The Carnegie Report is viewed as challenging “law schools not simply to produce better-skilled practitioners, but rather to infuse lawyers with a highly developed sense of moral and ethical identity, which will then lead to a reform of the profession itself.”¹³ Our class of student-judges would learn about judicial ethics. Our student-advocates would learn about the ethical issues that can arise in actual practice, particularly when representing multiple parties. The students thus would face the necessity of making pragmatic strategic choices while satisfying the requirements of professional ethics.

The Details of the Course Design

With these goals in mind, we then began to focus on the details of the course design. Our first task was to determine the number, type, and length of our students' writing assignments. We quickly determined that the students' written work would consist only of pretrial motion practice. The motions would be filed by a class of plaintiff's counsel, opposed by a class of defense counsel, and ruled on by a class of judges. And so our “motions in motion” were born.

Our next task was to create a hypothetical lawsuit that would provide the basis for a number of interesting legal issues. After considering many options, we chose a medical malpractice action. In our view, the medical malpractice context had a number of advantages. First, a medical malpractice case would give us the human drama and factual complexities that we sought. We created a sympathetic plaintiff who had a few “wrinkles” in her past medical history. We created a breach of hospital protocol committed by hospital staff that, while perhaps embarrassing, did not seem

¹¹ Cassandra L. Hill, *Peer Editing: A Comprehensive Pedagogical Approach to Maximize Assessment Opportunities, Integrate Collaborative Learning, and Achieve Desired Outcomes*, 11 Nev. L.J. 667 (Summer 2011).

¹² *Id.* at 671-72.

¹³ Mark Yates, *The Carnegie Effect: Elevating Practical Training Over Liberal Education In Curricular Reform*, 17 Legal Writing: J. of Legal Writing Institute 233, 234 (2011).

“[A]ll of the students—advocates and judges—would need to consider how their writing style might need to be tailored based on the court's discretion and the standard of review.”

to affect the proper course of treatment.¹⁴ Indeed, while our defendants' conduct may have been less than stellar, we gave defense counsel some solid scientific evidence with which to mount a defense.

The hypothetical gave us the “real-life” human aspects that we sought. Our class of plaintiff’s counsel had a sympathetic client who should earn their loyalty. Plaintiff’s counsel could also criticize the defendants’ conduct on an “emotional” level based on the hospital snafu. And yet our class of defense counsel would also have plenty of facts with which to defend their clients. The plaintiff was vulnerable to some criticism of her own conduct. Defense counsel also could—as defense counsel in medical malpractice cases invariably do—assert a vigorous defense based on the science. Our class of student-judges would have to weigh the emotional aspects against the science to reach a just conclusion.

We also chose the medical malpractice context because it would expose the students to a specific area of tort law that is highly publicized and in which some of our students might practice. A medical malpractice case thus might help bridge the gap between the academics of law school and the “real world.”

Finally, Ohio medical malpractice law gave us the interesting legal issues for the pretrial motions we wished to set “in motion.” Ohio law requires a plaintiff asserting a medical malpractice claim to attach to his or her complaint an affidavit of merit from a medical professional in support of the case.¹⁵ Ohio also has specific statutory provisions that govern a number of issues in the medical malpractice context, including the discovery of certain internal hospital documents and the admissibility of testimony of medical professionals. In addition, given the relatively unsettled state of the law in Ohio on some issues, we felt that

both parties would have significant arguments in support of their respective positions.¹⁶

When selecting our particular issues and motions, one priority was to create equal workload between the three classes. We wanted our advocates to file or oppose motions of equal complexity and approximate length and our judges to draft an opinion of the same approximate length addressing the issues. We ultimately selected five pretrial motions for the classes to file, oppose, or rule on, as follows:

- A motion to dismiss the complaint for failure to attach a sufficient medical affidavit of merit to the complaint;
- A motion to compel discovery of certain documents potentially protected from production by Ohio law;¹⁷
- A motion for summary judgment on the ground that the plaintiff’s medical expert failed to establish the requisite causation;
- A motion in limine to exclude some negative facts in plaintiff’s past medical history; and
- A motion in limine to exclude statements from plaintiff’s physician per Ohio’s “apology” statute.¹⁸

We were pleased with this lineup of work. It exposed our students to both substantive and procedural issues specific to Ohio law, including additional requirements for filing a complaint and additional discovery and evidentiary provisions that are available under Ohio law. We also liked that the outcome of each motion was not predetermined. Most of the motions were a close call and our student-judges individually could grant or deny any particular motion based on the strength of the arguments made by specific student-advocates. In other words, each judge

“Most of the motions were a close call and our student-judges individually could grant or deny any particular motion based on the strength of the arguments made by specific student-advocates.”

¹⁴ Professor Strong has extensive experience in defending medical malpractice cases and was the primary drafter of our hypothetical. We would be happy to share our course materials.

¹⁵ See [Ohio Rule of Civil Procedure 10\(D\)\(2\)](#).

¹⁶ For example, the requirement of Ohio [Rule 10\(D\)\(2\)](#) that a plaintiff attach a medical affidavit of merit to a complaint has been in place only since 2005, with relatively few cases that addressed the sufficiency of an affidavit.

¹⁷ See [Ohio Rev. Code Ann. § 2305.253](#) (West 2012).

¹⁸ See [Ohio Rev. Code Ann. §2317.43\(A\)](#) (West 2012).

could rule for either party without dismissing the case in its entirety after only a few weeks of class.

Our next step was to determine how the students would file, oppose, and rule on the pretrial motions. We first considered whether students should know their opposing counsel and judge and whether that “trio” of students (plaintiff’s counsel, defense counsel, and judge) should remain the same throughout the course. Assigning students to a particular trio of known individuals had obvious advantages. With assigned counsel and judge in one trio, the students easily could exchange documents with each other via e-mail. That scenario also would most closely align with the actual practice of law.

On the other hand, we considered certain drawbacks of having a known trio and the same trio for the entire course. One drawback was that each student would be exposed only to the writing styles of the two other students in the trio. By mixing up the opposing counsel and judge for each motion, we could expose the students to a much broader range of writing styles. We also wondered whether students could engage in honest peer review of each other’s work if the students knew their opposing counsel and judge. Even if the students would produce honest peer review of the other members of a known trio, there was a possibility that the quality of peer review might decline over time if the students always reviewed the work of the same two students in a trio. We therefore determined that the students should be anonymous to one another and that the trio of students should shift with each motion.

Those decisions led us back to the issue of the mechanism for filing and exchanging documents. After discussing the matter with our law school’s IT department, we chose to have the IT department create an electronic document-exchange site specifically for the course. Without delving into the specific workings of the site, we deliberately opted to make students responsible for retrieving the appropriate documents to complete their work. Among other considerations, this relieved us of the mechanical task of ensuring that each student had the materials needed to complete an assignment.

We next considered our grading system. We debated whether to assign points to each of the writing assignments or whether to grade most assignments as “pass-fail,” with only one assignment receiving a letter grade. In the end, we opted to grade four writing assignments as “pass-fail,” with one remaining assignment—work on the motion for summary judgment—to receive a letter grade.¹⁹

We decided to use a “pass-fail” system for several reasons. First, the course is only a one-credit course. Given the time constraints for both the students and professors, we determined that the form of feedback could not mirror our first-year legal writing classes. Although we did all provide students with written, substantive feedback on their documents, we did not provide any opportunity to rewrite an assignment or, with the exception of work on the motion for summary judgment, a conference to discuss work. Under those circumstances, we felt that it would be unfair to assign points to the earlier writing assignments.

More importantly, we hoped that, by grading assignments on a pass-fail basis, we would allow students to focus more on the writing process rather than the “product,” i.e., the grade.²⁰ We wanted students to read and apply our critiques (as set forth in our substantive written feedback) and not merely note the grade received on any particular assignment. We therefore decided that the pass-fail system would work well for us.

We next turned to the logistical considerations of class schedule, size, and timelines for due dates. We wanted students to experience the “ebb and flow” of litigation, where the parties’ work on a case may pause while awaiting a ruling from the court. However, students could not sit by idly while waiting for another class of students to prepare a responsive

¹⁹ The graded motion for summary judgment comprised 80 percent of a student’s total grade, with the remaining 20 percent reserved for class participation, attendance, and work on the pass-fail assignments.

²⁰ See Jennifer Cupar, *Putting the Emphasis on Process over Product by Making the First Memo Ungraded*, 19 *Perspectives: Teaching Legal Res. & Writing* 181 (2011); Ellie Margolis, et al., *Moving Beyond Product to Process: Building A Better LRW Program*, 46 *Santa Clara L. Rev.* 93, 123-24 (2005).

“[W]e deliberately opted to make students responsible for retrieving the appropriate documents to complete their work.”

document. So we mapped out the semester in such a manner that, consistent with actual practice, two classes of students were kept busy even as they were awaiting a filing from the third class of students.²¹

Finally, we addressed the details of our peer-review process. We created a peer-review form that was usable for any of the documents drafted by students, whether a piece of advocacy writing or a judicial opinion. We intended to have students complete peer-review forms for the first two writing assignments so that the students would have the benefit of feedback from their peers before they began work on the motion for summary judgment.

The Results

We had considered at the outset how we would assess the students' overall experience with the trio of courses and our success in achieving our goals. Naturally, we engaged in continuous self-evaluation throughout the semester. Yet we also had scheduled one day at the end of the semester for all three of our classes to meet jointly so that the students could comment on the class.²² In that joint meeting, we solicited feedback in two ways. Students filled out a questionnaire that targeted particular aspects of the class for specific feedback, including the value of the hypothetical, the course load, the peer-review process, and suggestions for focus on specific drafting skills. We then posed a number of questions to those students who were present at the meeting to solicit their immediate feedback on particular issues.²³

²¹ So, for example, while the defendants prepared a motion to dismiss the complaint, the plaintiffs discussed written discovery and the possibility of filing a motion to compel discovery. While the judges drafted their opinions on the motions for summary judgment, counsel for both parties continued to prepare for trial by drafting motions in limine.

²² Gerald Hess & Sophie Sparrow, *What Helps Law Professors Develop As Teachers?—An Empirical Study*, 14 *Widener L. Rev.* 149, 162 (2008) (identifying the “gathering and reviewing feedback from students” as one of five most effective activities for teachers to improve teaching); See also Gerald Hess, *Student Involvement In Improving Law Teaching*, 67 *UMKC L. Rev.* 343, 344-47 (1998) (describing the different ways to gather student feedback, including feedback forms).

²³ The students' questionnaires are on file with the authors. The students completed the questionnaires anonymously, although we did ask them to designate themselves as having been plaintiff's counsel, defense counsel, or a judge.

Our Evaluation of the Course

Throughout the semester, we noted both some successes and some difficulties in the course design. We were very pleased to see that we had accomplished our first goal of providing a real-world experience. The hypothetical worked extremely well to further our students' abilities to advocate for a client. We sensed in our class discussions a developing sense of professional identity and a desire to obtain a “good result” within the context of our litigation—a good result obviously meaning distinct results for each set of students. We also felt that we had succeeded in re-creating the “messiness” and “ebb and flow” of actual civil litigation.

We were confident that we had strengthened our students' writing abilities. Our student-judges experienced a great deal of growth in their understanding of judicial opinion writing. Our student-advocates began to think more strategically about their persuasive writing. They were more selective in using only those facts needed for the particular motion, rather than attempting to tell the entire story with each motion. They became more adept at writing concise introductory paragraphs that “teed up” the legal issue presented in the particular motion. They developed good persuasive arguments using little on-point precedent.

Finally, we were satisfied that we had exposed our students to local court rules and the customs and practices of our local bar. Guest speakers addressed our classes in order to give the students exposure to Ohio-specific customs and practices.

Our main difficulty with the course was mechanical, although the consequences were substantive. Early in the semester, we determined that our document exchange site was not working well. In general, the site did not provide clear direction for students to access the documents they needed. The result was that, for the first two motions, we had several motions that were unopposed or, even if opposed, had no ruling from a judge. To solve this problem, we decided to preassign opposing counsel and judges for the three remaining motions.

“We sensed in our class discussions a developing sense of professional identity and a desire to obtain a ‘good result’ within the context of our litigation ...”

“Another student stated that ‘the hypo was well set out so the judges really could rule any way, I liked that.’”

Primarily because of the issues with document exchange, we knew that our peer review process had not achieved the optimal results. We did not begin the peer review process until after the document exchange issues had been solved. Students therefore did not get the benefit of their peers’ comments and opinions about their work earlier in the semester, which they might have put to good use on the later assignments.

The Students’ View of the Course

With our own self-evaluation underway, we were anxious to hear from the students themselves. Using both the questionnaire they completed and their comments at the joint meeting, we assessed the feedback as follows.

First, students liked the hypothetical very much. They found that the hypothetical worked well in generating interesting issues for motion practice. Many students enjoyed the medical malpractice focus, although their reasons differed. One student remarked that “medical malpractice is an area where few students have probably had any experience, so ... I got the impression that everyone was on an even playing field.” Another student commented that the hypothetical “seemed to be more practical than some of the Const[itutional law] type material” addressed in the first-year legal writing course. A third student described the hypothetical as “hands on, real-life, and because of the human component, it was easier to add on policy arguments. Everybody can relate to such a case ... Also having several defendants is good practice.”

Students also agreed that the hypothetical was sufficiently complex that numerous motions could be generated from it and that the outcome of each motion was genuinely up for grabs with each motion. One student commented that the hypothetical “was realistic and involved many interesting topics both substantively and procedurally.” Another student stated that “the hypo was well set out so the judges really could rule any way, I liked that.”

We did ask students to identify any litigation drafting or writing skills that the course should

have covered. Students largely agreed that the course appropriately focused on motion practice and advanced legal writing techniques. Of those students who suggested additional document drafting, the most common suggestion was for instruction in the drafting of discovery documents. Some students also recommended that students engage in oral argument.

While we appreciate the students’ interest in drafting discovery documents, we do not intend to add this topic to the course. Written discovery is a topic that is addressed in other courses, including both Civil Procedure and Pretrial Advocacy. In addition, it would be difficult to create an assignment for our student-judges relating to the mechanics of drafting written discovery. We do agree that the course could involve an oral argument component. Presently, we are limited by the course’s designation as a one-credit course. If the credit hours do increase (which is currently under discussion), we likely will add an opportunity for oral argument.²⁴

Students shared our own view that the electronic site was not up to the task. One student remarked that the “system for uploading and downloading motions with the other classes was horribly confusing & distracting” and condemned the site as “worthless.” And, surprising to us, the students did not appreciate one of the main purposes of the site, namely anonymity. To the contrary, students objected to not knowing their opponent or judge. They maintained that the secrecy had dampened their competitive spirit. Students in our group meeting stated that they would put more effort into each assignment if their names appeared on the documents. At present, we intend to follow the students’ suggestions and make our trios known to each other, rather than anonymous.

²⁴ Given the course’s designation as a one-credit course, we asked students about the volume of work. Students’ reactions were mixed. Some students said that the workload “wasn’t bad,” “was appropriate,” “adequate,” or “was just right.” One student wrote that the course “was more than I expected for a one-hour class, but I learned a lot and felt it was a valuable experience.” Other students complained strenuously that the workload was excessive. For example, one student commented that “the amount of work this course requires far exceeds the requirements of other one or two credit courses.” Nearly every student agreed that the course credits should be increased to at least two credit hours.

Some students also suggested that the trios remain the same through the semester, although there were clearly mixed opinions among students on that issue. Students acknowledged that they did not want to be “stuck” in a trio with unmotivated students and that they would like to be exposed to a variety of their peers’ work. Yet they felt that the course would best simulate practice if opposing counsel and judge did not change with each motion. While keeping students in the same trio may look more like practice, we currently intend to continue to shuffle trios with each motion so that students have the advantage of exposure to a variety of writing styles.

Finally, students gave mixed reviews on the peer review process. Some students questioned the value of engaging in peer review at all. One student wrote: “I care what professors and practicing attorneys think of my writing style, not what students think.” Another student remarked: “I don’t think we are qualified enough at this point to be making the type of in depth critique asked of us.” Yet another student summed up peer review as “good for competition and pushing each other, but the professors are the ones whose feedback I want.” Other students indicated that peer review could have good value, remarking that “more feedback is always better” and that “peer review offers a different perspective which can be valuable.”

Although many students did not appreciate the peer review process, we will keep this piece of the course. With a better document exchange system, resulting in exchange of peer reviews early in the semester, we hope that students will benefit from the process. We also will better explain to students why they should take the opinions of their peers seriously.

Conclusion

Simulation of law practice is an obvious pathway to answer the *Carnegie Report’s* call for the training of practice-ready students. Effectuating that neat phrase within the traditional law school curriculum can be a bumpy road. We created an innovative course that furthered our students’ professional growth from law students to lawyers while also strengthening their legal writing. A collaborative approach enabled us to put our goals into practice. On a personal level, working together was immensely satisfying and an experience that we will repeat in coming years. We unequivocally recommend this form of collaborative course design.

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“We created an innovative course that furthered our students’ professional growth from law students to lawyers while also strengthening their legal writing.”

Another Perspective

“Judges attempt to reach the correct result on the facts and the law. It is the job of the lawyers to explain why the judge should rule in their favor, and the clarity of the explanations does not increase proportionally with the length of the papers. It is much more important to distill the facts and the law and to understand and explain the critical issues than it is to bury the judge with paper. ... Simply because cases and issues are complex is no excuse for failing to understand what the truly critical issues are, and to explain them concisely.”

John G. Koeltl, *Brevity*, 30 *Litigation* 3, 4 (2003).

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Teaching WestlawNext: Next Steps for Teachers of Legal Research

By Ronald E. Wheeler

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Introduction

It's been nearly three years since the rollout of WestlawNext[®] began in the summer of 2010. Since that time, the innovative research system has dominated the scholarly conversation around electronic legal research. WestlawNext has been the subject of numerous articles,¹ blog posts,² and scholarly presentations and programs.³

However, most of these discussions have focused primarily on the system's search engine, usage, and effectiveness, and not on WestlawNext instruction. Many of us who teach legal research have already begun providing instruction on how best to conduct research using WestlawNext, but we have done so without much guidance or experience. Therefore, in this essay, I hope to share some insights and provide a few tips about strategies for teaching students to research using WestlawNext.

Innovation and Change

One of the first things that teachers of legal research must come to terms with is change. We must face both our conscious and subconscious feelings about change, and if they are negative we must get past them. The landscape of legal research is now, more than ever, a moving target. Some of us have built our careers on being expert Boolean searchers using somewhat similar research systems. We may therefore be wedded to teaching Boolean search strategies in a somewhat static way. The idea that Boolean searching may be needless, irrelevant, or even obsolete is beyond our comprehension. Nevertheless, we cannot let ourselves devolve into disliking new legal research technologies because of a knee-jerk resistance to change. Christine Sellers makes the point nicely when she rightly asks, "Are we Fuddy-duddies? Do some of us resist change just because it is change?"⁴

The challenge of teaching students to use WestlawNext's algorithm legal research system effectively is upon us. This provides the teachers

¹ E.g., Christine L. Sellers & Phillip Gragg, *WestlawNext and Lexis Advance*, 104 Law Libr. J. 341 (2012); Lee F. Peoples, *Testing the Limits of WestlawNext*, 31 Legal Ref. Serv. Q. 125 (2012); Shawn G. Nevers, *WestlawNext: Westlaw's Next Generation Research System*, 39 Student Law., no. 4, 2011 at 12-13; Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research*, 103 Law Libr. J. 359 (2011); Lisa D. Kinzer, *Easy Does It: Examining First-Year Law Student Impressions of the Online Resources They Use Most Often* (Working Paper, 2011) (available at <http://ssrn.com/abstract=1885524>).

² E.g., Martha Sperry, *A Little Late to the WestLawNext Party*, Advocate's Studio (Oct. 14, 2010), <http://advocatesstudio.com/2010/10/14/a-little-late-to-the-WestlawNext-party> (discussing the accuracy of WestlawNext's search engine); Marshall R. Isaacs, *WestlawNext Review: Google for Lawyers*, Smallfirmville (July 27, 2010, 5:50 p.m.), http://nysbar.com/blogs/smallfirmville/2010/07/WestlawNext_google_for_lawyers.html (discussing WestlawNext usage and features); Greg Lambert, *WestlawNext—a Study in Applying Knowledge Management & Crowdsourcing*, 3 Geeks and a LawBlog (Jan. 28, 2010, 8:00 a.m.), <http://www.geeklawblog.com/2010/01/westlawnext-study-in-applying-knowledge.html> (discussing the WestlawNext search algorithm).

³ E.g., *The Impact of WestlawNext on Legal Research and Legal Research Instruction*, WestPac Annual Meeting, San Francisco, CA, October 2010, (program brochure and description available at <http://www.aallnet.org/chapter/westpac/newsletter/no34-2.pdf>) (panel discussion of librarians examining the impact of WestlawNext on law firm, court, and academic law library research); *Coordinating Legal Research Instruction: From 1st Year Law Student to 1st Year Associate*, All California Joint Institute, San Diego, CA, March 9, 2012, (program brochure and description available at <http://www.aallnet.org/chapter/sandall/scheduleofevents.htm>) (panel discussion

of law librarians examining approaches to legal research instruction with a focus on WestlawNext and other algorithm-driven legal search engines).

⁴ Sellers & Gragg, *supra* note 1, at 345.

“One of the first things that teachers of legal research must come to terms with is change.”

of legal research an opportunity to explore the new platform so that we can continue to provide research instruction to the best of our abilities. Moreover, even without factoring in the emergence of new research systems, we should be striving to change and innovate in our teaching in order to stay fresh and relevant and truly expert. It is my hope that we, the community of legal research teachers, can continue to strategize and brainstorm and learn from each other as we tackle teaching our students new platforms with algorithm-driven search engines like WestlawNext's.

Possible Issues to Address When Teaching WestlawNext

Aside from having a different look and feel from Westlaw Classic, WestlawNext does incorporate several substantive changes that impact research results.⁵ While I won't discuss each possible advantage or shortcoming of WestlawNext in this article, some of the possible limitations to address in evaluating these systems include the possibility that esoteric content is more difficult to find,⁶ the possible inability to search broadly and then narrow your search,⁷ and the possibility that these search systems erode the researcher's knowledge of legal sources.⁸ The huge and sometimes overwhelming number of results retrieved is another possible shortcoming researchers have identified as a consequence of the all-encompassing searching that is available on WestlawNext.⁹ The real struggle we face when teaching WestlawNext is getting students to resist the urge to just throw search terms into the search box at the top of WestlawNext's home page without taking the time to drill down to particular sources, choose a jurisdiction, or use the advanced search options. I acknowledge that there are times when this strategy of searching retrieves great results, but

I remain convinced that legal researchers need to know how to exercise other search strategies.

Choose a Source

Source selection is traditionally one of the first steps that legal researchers take.¹⁰ In WestlawNext, the user can bypass that first step and search across all content. While some may argue that teaching students to choose a source defeats the purpose of making WestlawNext easy and Google-like¹¹ to use, I nevertheless recommend that it be one of the search strategies that we continue to teach. Source selection reinforces a student's knowledge of the structure of U.S. law and U.S. legal institutions.¹² It informs the legal research process by requiring some knowledge of what a source contains, when and where it is published, how it is organized, and how it is best used. Granted, it is easy to use, "... but the ease of searching, while impressive, expects less of the user. It assumes [and even perpetuates] a lack of skill and understanding of material. ..."¹³ At least one highly regarded legal research textbook also suggests choosing a source before searching across all of the content on WestlawNext.¹⁴

Using the browsing links available on the WestlawNext home page, students can be taught to think about sources, decide on one that is relevant or desirable, and click through the browsing links to a particular source before searching. Teachers of legal research can design assignments to illustrate when searching a particular source is more favorable than searching multiple sources and vice versa.

“It is my hope that we, the community of legal research teachers, can continue to strategize and brainstorm and learn from each other as we tackle teaching our students new platforms ...”

⁵ See, Wheeler, *supra* note 1 (For an in-depth discussion of the advantages and possible failings of WestlawNext); Peoples, *supra* note 1 (for an empirical study of the differences in research results using WestlawNext versus Westlaw Classic).

⁶ Wheeler, *supra* note 1, at 364; Peoples, *supra* note 1, at 130.

⁷ Wheeler, *supra* note 1, at 370.

⁸ Wheeler, *supra* note 1, at 374; Peoples, *supra* note 1, at 134.

⁹ Nevers, *supra* note 1, at 12.

¹⁰ Morris L. Cohen & Kent C. Olson, *Legal Research in a Nutshell* 32 (10th ed. 2010) (discussing first steps and emphasizing that it is often wise to begin with a secondary source).

¹¹ Marshall R. Isaacs, *WestlawNext Review: Google for Lawyers*, Smallfirmville (July 27, 2010, 5:50 P.M.) http://nysbar.com/blogs/smallfirmville/2010/07/WestlawNext_google_for_lawyers.html.

¹² Wheeler, *supra* note 1, at 364.

¹³ Laurel Oates & Anne M. Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing and Electronic Supplement on Legal Research* § 7.4.4 (5th ed. 2010) (Seattle University School of Law Legal Paper Series #10-25) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649049).

¹⁴ *Ibid.*

“It is up to us to educate our students about the inverse relationship between the number of relevant results and the number of overall results.”

I like having students research an issue controlled by federal regulations to illustrate this point. Take, for example, the very specific issue of which U.S. counties are under Karnal Bunt quarantine.¹⁵ The search **karnal bunt quarantine**, run in WestlawNext without first choosing a source, yields over 5,000 results from 12 different sources, some of which do not contain the words **karnal bunt** at all. Wading through this many results can be confusing, time-consuming, and expensive when time equals money in practice. Simply put, “. . . a results list with everything in it is too much.”¹⁶ However, running the same search on WestlawNext after choosing the Code of Federal Regulations database yields only 51 results. Most of these results are irrelevant too, but the quarantine information can be found in the eighth result.¹⁷ This is arguably an overly simplistic example, but it conveys the point that exercises can be designed to encourage source selection. Exercises that illustrate the advantages of secondary sources can also be used in this way.

Filters Are Your Friends

Another strategy to use when teaching WestlawNext is to highlight and reinforce the usefulness of the filters that appear after searching. These filters, found under the “view” or “narrow” labels on the left side of the home page, are one of the features of WestlawNext that has received universal praise.¹⁸ The filters labeled “view” allow you to view particular types of materials like cases, statutes, proposed legislation, secondary sources, administrative decisions, and more. Spending time going through these materials with students after they run searches is a way to reinforce their knowledge of different sources. It can ultimately help them to differentiate between sources, learn which ones are useful

for particular types of questions, and choose appropriate sources earlier in the research process.

The filters labeled “narrow” allow you to narrow your search by jurisdiction, date, publication type, publication name, author, and viewed versus not-yet-viewed items. These filters allow a researcher to put some thought into what otherwise might be achieved through pre-search selection of jurisdiction, date limitation, and field searching. Indeed, because of the publication name and publication type filtering capacity, “. . . researchers are exposed to numerous types of publications and numerous titles that they may never have otherwise discovered.”¹⁹ Devising exercises requiring and reinforcing the use of these filters can achieve pedagogical goals related to exposing students to appropriate sources and essential titles.

Lots of Results

Legal researchers seem to agree that WestlawNext’s all-in-one searching produces a surprisingly large number of results.²⁰ These large result lists can be turned into teachable moments for our students. My experience has been that some students feel that the more results they get the better. They “. . . are unaware of the tendency of relevance to decrease when the number of returns increases.”²¹ It is up to us to educate our students about the inverse relationship between the number of relevant results and the number of overall results. Exercises juxtaposing results from a broad algorithm-driven search and a more focused Boolean search will help students understand these concepts.

If we use the same search I used in the example above,²² **karnal bunt quarantine**, run in WestlawNext’s Code of Federal Regulations database,

¹⁵ Karnal bunt is a fungal disease of wheat. See, NASDA: National Association of State Departments of Agriculture, <http://www.nasda.org/cms/7196/7351/8565.aspx> (last visited June 22, 2012).

¹⁶ Sellers & Gragg, *supra* note 1, at 344

¹⁷ 7 C.F.R. § 301.89-3.

¹⁸ See e.g., Robert J. Ambrogi, *Westlaw’s Great Leap Forward*, 67 *Bench & B. Minn.* 18 (2010) (praising the filters and preferring them over choosing a database).

¹⁹ Wheeler, *supra* note 1, at 373-374.

²⁰ See e.g., Lisa D. Kinzer, *supra*, note 1, section IV (calling the number of results returned on WestlawNext “mind-boggling”); Nevers, *supra* note 1, at 13 (asserting that when searching on WestlawNext “. . . the sheer number of hits can be overwhelming”); Sellers & Gragg, *supra* note 1, at 344 (proclaiming that “Every search seems to result in 10,000 results . . .”).

²¹ Kinzer, *supra* note 1.

²² See *supra*, Choose a Source section.

we get 51 results, and the desired regulation is the eighth result. If instead we use the advanced search option and run the search “**karnal bunt**” and **quarantine** in the text document field, we get only three results. The desired regulation appears third here. I’m sure there are better examples, but the idea is to show students the beauty of doing simple Boolean searching, using the advanced search options, and getting fewer results. In this example, the researcher will save time by only reading three documents instead of eight. In fact, by browsing the text previewed for each of the three results returned, it is fairly obvious that the third hit is the desired regulation without even opening the first two. Clearly this illustrates the power of a simple Boolean search in a correctly chosen field. Teachers of legal research will need to develop exercises like these to reinforce the desirability of Boolean searching in certain contexts.

Esoteric Content and Broad Searching

One concern researchers have voiced about WestlawNext is that it may do such focused searching that it excludes relevant content.²³ Esoteric, obscure, and less heavily used content may become harder to find with WestlawNext.²⁴ Legal research exercises that compare the functionality and the relevance of results between WestlawNext, WestlawNext’s advanced search, and Westlaw Classic can help students understand when they should be concerned with possibly missing content, as esoteric, obscure, and less heavily used content may be a challenge to find.

Consider this experiment. I chose the source “law reviews & journals” in WestlawNext, and ran the search **transgender discrimination**. I retrieved 9,950 documents.²⁵ However, when I ran the identical search using the text field box on the advanced search screen, I got 9,998 documents. Failing to use the advanced search screen will prevent a

researcher from discovering 48 documents, which is something our students should know about.

Next I ran the same search, **transgender discrimination** in the source “law reviews & journals,” but I used the advanced search feature’s box labeled “all of these terms.” This time I retrieved 1,859 documents. My expectation was that I had retrieved all of the documents containing both words. To test this theory, I ran the terms and connectors search **transgender and discrimination** in Westlaw Classic, and retrieved 2,019 documents. So, 160 documents were hidden or undiscoverable in WestlawNext. Again, this is a phenomenon legal research teachers can expose with exercises incorporating similar searches.

Finally, to test the Boolean searching capacity of WestlawNext, I ran the search **transgender /s discrimination** using the “law reviews & journals” source, but this time using the text field box on the advanced search screen. I retrieved 534 documents. However, when I ran the identical text field search in Westlaw Classic using the search **TE(transgender /s discrimination)**, I retrieved 591 documents. WestlawNext retrieved 57 fewer documents. Thus even Boolean searching exercises can teach students the very real differences between these legal research tools.

Necessity of Knowing other Resources

I’m sure all teachers of legal research tell their students how important it is for them to know how to search using many different research systems with varied platforms, search engines, and interfaces. When it comes to WestlawNext, this is even more important. Students tend to prefer using the resource that they find easiest to use.²⁶ At least one study has shown that students find WestlawNext the fastest and easiest online legal research system to use, and they therefore use it most often.²⁷ Nevertheless, not all law firms and other legal employers have adopted WestlawNext.²⁸

“Legal research exercises that compare the functionality and the relevance of results ... can help students understand when they should be concerned with possibly missing content, as esoteric, obscure, and less heavily used content may be a challenge to find.”

²³ See e.g., Wheeler, *supra* note 1, at 370-371.

²⁴ *Id.* at 364-368, and, Peoples, *supra* note 1, at 127.

²⁵ I ran all of the searches in this search on July 28, 2012. As I understand it, these results may change in the future as documents are added and documents are interacted with.

²⁶ Kinzer, *supra* note 1, section IIIB.

²⁷ *Id.* at section IIIB.

²⁸ Nevers, *supra* note 1, at 13.

“There is also no doubt that algorithm-driven search engines like the one that powers WestlawNext is the wave of the future.”

Students should be reminded that they will need to gain some proficiency using other legal research systems, including Westlaw Classic. This can perhaps serve as a motivator for students to learn to do Boolean searching on Westlaw Classic and on other legal research systems.

Conclusion

There is no doubt that WestlawNext is a powerful and desirable legal research tool.²⁹ There is also no doubt that algorithm-driven search engines like the one that powers WestlawNext is the wave of the future.³⁰ Legal research search engines powered by algorithms that take some of the control away from the researcher present a challenge to law librarians. First, we must learn as much as we can about these algorithm-driven search engines so that we can evaluate how and when they are best used. Second, we must figure out how best to teach our students not only how to use these resources but also when to use them.³¹ There may

be times when resources like Westlaw Classic or even others may better serve their legal research needs. WestlawNext is a fantastic tool that I continue to be amazed by, but teachers of legal research must design exercises and examples that illustrate both the strengths and the weaknesses of WestlawNext and other legal research tools. It is important for our students to know when they can expect to find the best answer quickly and easily using WestlawNext. Yet, it is just as important for our students to know when content is easily overlooked or hidden. The tips and examples provided here are just a first step in helping our students and each other to understand the ever-changing electronic legal research landscape.

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²⁹ Thomson Reuters, *WestlawNext Awards and Reviews*, <http://store.westlaw.com/westlawnext/awards-reviews/default.aspx> (last visited June 29, 2012) (listing numerous awards and favorable reviews that WestlawNext has received).

³⁰ Jason Eiseman, *5 Random Thoughts About WestlawNext*, Jason the Content Librarian Blog (January 29, 2010), <http://www.jasoneiseman.com/blog/?p=383> (asserting that “. . . the application of modern search techniques, coupled with new web technologies may open up a whole new world of legal research. . .”)

³¹ Peoples, *supra* note 1, at 145 (“Librarians have a significant role to play in educating law students in using WestlawNext.”).

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Sight and Sound in the Legal Writing Classroom: Engaging Students Through Use of Contemporary Issues

By Karin Mika

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Good teaching requires connecting with students, and connecting with students requires not only developing a methodology that keeps students interested and engaged but also being aware of what students' interests are. It is probably no secret that students in law school today are part of a technologically oriented generation. They are a generation that has grown up with technology at their fingertips and requires constant mental stimulation to remain engaged—both visual stimulation and aural stimulation. Thus, any law professor hoping to connect with her students cannot anticipate maintaining their attention without integrating some form of technology into the classroom, especially visual technology.

Over the years, I have integrated visual technology into the Legal Writing classroom and expanded beyond PowerPoint and into Internet videos. The videos I have used have ranged from tutorials to oral arguments to amusing videos that I have selected merely to keep my students entertained and interested.

Recently, I have begun to replace many of my fact situations with videos. Over the years, I have had a similar problem to that of many other Legal Writing professors—teaching students how to write a fact situation in law practice. Often the students are handed a “canned” fact situation that reads well and focuses on the very issues that the professor would like the students to focus on. When students are given this type of fact situation, they do not develop the skills to gather their own relevant facts and work on the appropriate

narrative skill that is necessary for good advocacy. As a result, I often will use videos from YouTube to represent the fact situation I would like my students to research. By using videos, I force the students to consider all aspects of what they are seeing and decide for themselves what is most important to emphasize and how it will be emphasized in their writing. Videos related to various torts are most beneficial, and I have also found that a touch of humor in the video is very much appreciated.

Another way in which I have used videos in the classroom is related to the legal issue stemming from the video itself. One way to keep students engaged in the classroom experience is to have them research and write on concepts that are pertinent to their interests. Currently, there are few things more important to students than their music, and the creativity explosion that has been engendered by the Internet has raised voluminous legal issues related to intellectual property, especially as they relate to music and music videos.

The ready technology available on any home computer enables almost any person even moderately tech-savvy to create her own videos or record her own music. Movies can be spliced, dubbed over, subtitled, and set to music within a few hours' time. Similarly, vocals can be downloaded, modified, repackaged, and integrated into an entirely new artistic work. Computer composition programs can replicate others' work, and the composition can be used to create other artistic works. There is almost no limit to what can be done with splicing, adding, and reconfiguring in order for any creative person to put together a whole new genre of materials that are then posted on YouTube for the world to see.

These types of recreations are so prevalent that many law students would not suspect that there

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is the potential that many of them are actually copyright infringements. It is so common to hear an artist “cover”¹ another song, or a musician take a “sample”² from a song, or even watch a video set to popular music, that it is easy to believe that there would potentially be no repercussions. However, although the copyright act has not quite caught up with YouTube, there is always the potential of a legal action where someone else’s original creation is sliced and diced and winds up in another person’s artistic creation.

Because videos and music have become an integral part of students’ lives, and because it appears that the consequences of copyright law are a contemporary legal topic, I have taken to combining the three in various research problems involving the Fair Use Act.

The Fair Use Act (17 U.S.C. § 107) is a relatively simple federal statute that allows an individual to use portions of the work of another so long as it does not significantly use the other’s work or displace it in the marketplace. The four exact factors that courts will weigh are the following:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work (e.g., whether the work is a new creation of fiction, or is a reconfiguration of factual information, such as a documentary or news report);
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. The effect of the use upon the potential market for or value of the copyrighted work.

Not all factors of the test must be weighed equally;³ however, all of the factors should be explored to consider their potential impact on a case.⁴ Moreover, courts will protect satires (which often use the entirety of someone else’s work in the spoof) in more instances than non-satiric works, although not all satires will be protected merely because they are satires.⁵

Using the Fair Use Act as the basis of a research problem done in conjunction with YouTube music videos presents a variety of ways in which I am able to demonstrate the range of situations in which the Fair Use Act might apply. It also affords me the opportunity to force the students to think in depth about various scenarios while comparing and contrasting them.

As an example, when comparing two similar musical compositions using a Fair Use factor analysis, one need only concentrate on the notes and the various choruses in the songs. However, when combining a song with a video, the nature of the composition changes. The song itself may be similar to another song, but the message of the video in combination with the song itself might be vastly different than a second video in which the use of portions of a musical composition is being challenged.

The example I used as the basis for a research problem this past year was the similarity of the bass lines from the songs, “Ice, Ice Baby” by Vanilla

¹ A “cover” is a recording of a song that was first recorded or made popular by somebody else. For examples of popular cover songs, see <http://www.coversproject.com/>, a virtual database of cover songs.

² A music “sample” is a portion of one sound recording that is reused as an instrument or a sound recording in a different song. For examples of music samples, see <http://www.whosampled.com/>.

³ See, e.g., *Stewart v. Abend*, 495 U.S. 207, 238 (U.S. 1990) (holding that the fourth factor of the fair use test is the most important and central factor); *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (describing the fourth factor of the fair use test as “the single most important element of fair use”).

⁴ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578 (1994) (holding that all four factors of the fair use test are not to be treated in isolation. “All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

⁵ See, e.g., *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, 553 F. Supp. 2d 680, 689 (N.D. Tex. 2008) (analyzing whether a use is satire involves a determination of whether the publication could be reasonably understood as describing actual facts).

Ice⁶ and “Under Pressure” by David Bowie⁷ and Queen. In 1981, “Under Pressure” was released and included one of the most recognized bass lines in the history of music. In 1989, Vanilla Ice, who was regarded as one of the first rap sensations, released “Ice, Ice Baby,” which replicated, with only a slight variation, the bass line from “Under Pressure.”

When analyzing the music alone, students contemplate and are challenged as to whether a bass line consisting of seven notes with only two of them different makes for a substantial borrowing of material, or whether the analysis should be reduced to the mere math. Students also are challenged as to whether one must look at the whole of the two songs, in terms of the notes and lyrics, and even whether one must look at the types of songs that include the notes that were borrowed. Finally, students are challenged to consider whether something very slight can become so universally recognizable (e.g., the Apple logo, or the Nike Swoosh) that any integration of the element into another artistic composition equals an automatic copyright infringement.

Once students contemplate the underlying nature of the copyright infringement of the music, I ask the students whether the music videos change things. The Vanilla Ice video and the Queen video are vastly different from one another. Vanilla Ice appears as a rapper posed in various “gangsta” scenarios interspersed with boy band

type choreographed dancing.⁸ The Queen video is more of a social commentary and features footage of bombs, Cold War era paranoia, and a fast-paced world leaving many behind.⁹ I ask the students whether the differing natures of the videos negates the significance of the bass line that is used or whether the prevalence of the similar bass lines is still the most important aspect of assessing whether a copyright violation has occurred. The students are also challenged to consider whether, when determining if copyright infringements have occurred, a musical composition must be assessed independently of a video that incorporates music.

All of these aspects of assessing the law not only give the students a much broader way of seeing the various arguments of both sides of the issue, but also a context that relates to their day-to-day lives. They listen to their music a little bit differently, and look at some of the music presented in videos a bit more reflectively. The use of the research problem seems to accomplish what it is that we all strive for—presenting a lasting lesson in law and in life that changes or modifies a perspective not even considered prior to law school.

It is my opinion that intellectual property law is going to be one of the broadest fields that graduating students will have to deal with in their careers and perhaps provides the most opportunity in litigation and in drafting. Thus, the students learn about an area of law that many will find useful in their careers.

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⁶ Robert Matthew Van Winkle, known by his stage name as “Vanilla Ice,” is an American rapper. For more information, see his official website at <http://www.vanillaice.com/>.

⁷ David Robert Jones, known by his stage name “David Bowie,” is an English musician, actor, and record producer. For more information, see his official website at <http://www.davidbowie.com/>.

⁸ <http://www.youtube.com/watch?v=rog8ou-ZepE>.

⁹ <http://www.youtube.com/watch?v=eWCa8OGaR0U>.

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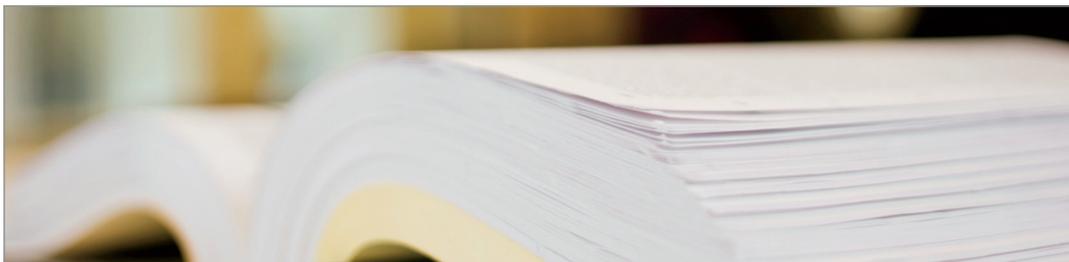
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