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Teaching Research Using an Information Literacy Paradigm

By Ellie Margolis and Kristen Murray

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Introduction

Should you still teach research in books? When do you introduce free online research tools? How do you cover all of the different research methods? These are the questions legal research professors have asked increasingly in the past few years. The explosion in the number of legal research tools available has changed the nature of legal research and at the same time students are entering school as digital natives, conversant in online research technologies. We began to feel that traditional legal research pedagogy was no longer the most effective way to teach today's law students. In particular, it started to seem antiquated—quaint, even—to begin teaching legal research by using books.

It was time to think about a whole new approach to teaching research methods to these students in this new environment. Ultimately, we concluded that information literacy provides the ideal framework for a new paradigm for legal research pedagogy, to ensure that we continue to provide effective legal research instruction in an increasingly electronic research world.¹

Information literacy is the “ability to identify what information is needed, understand how the information is organized, identify the best sources of information for a given need, locate those sources, evaluate the sources critically,

and share that information.”² By focusing on information literacy, rather than specific research techniques or finding tools, we can give our students the skills they will need to cope with the ever-changing research environment.

Information Literacy: Background

Legal research has been taught the same way for many years: students are taught a multistep, linear research process that usually begins with secondary sources and ends with updating the primary authorities the researcher has found. Even as more information became available

¹ Thomas Keefe, *Teaching Legal Research from the Inside Out*, 97 Law Libr. J. 117, 121-122 (2005).

² *What is Information Literacy?*, University of Idaho: Information Literacy Portal, http://www.webs.uidaho.edu/info_literacy/ (last visited June 17, 2013).

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online, the teaching of legal research almost always started with print-based sources, with some schools restricting online access until later in (or even after) the first semester.³ In the early days of digitization, the online databases replicated the organization of the print world, and legal research professors felt it was important to understand print sources in order to conduct effective online research.

Now, however, the organization of digital information no longer follows the organizational model found in the print world, and no longer do legal researchers need to replicate the print-based methods of accessing information online. Instead of selecting databases and using subject indexes to find legal information, the point of entry in electronic research is the search engine.

Thus, legal research has become at once easier and more challenging than it ever was in the past. At the same time that the print system has lost its hold on the organization of legal material, legal researchers are increasingly going directly to the Internet to conduct their research.⁴ While print materials have not been abandoned altogether, it is clear that they are used rarely. It is possible, and common, for legal research to be conducted entirely online. Most legal research courses have not yet caught up to this reality, however, and devote substantial time to teaching legal research in print.⁵

As these changes have developed, information literacy has emerged as a new way of thinking about research. The Association of College and Research Libraries (ACRL) defines information literacy as “the set of skills needed to find, retrieve, analyze, and use information.”⁶ An individual who is information literate has the skills to adapt to changes in the research environment and retain the ability of lifelong learning.⁷

The ACRL standards identify five basic principles that transfer easily to the law school context. They are 1) possess fundamental research skills, 2) implement effective, efficient research strategies, 3) critically evaluate legal and nonlegal information, 4) apply information effectively to resolve a specific issue or need, and 5) distinguish between ethical and unethical uses of information and understand the legal issues arising from discovery and use of information.⁸ The first three of the principles are most closely related to the material generally covered in legal research courses. The final two, which involve the application of information and its ethical and legal uses, are more typically covered in instruction related to the writing, rather than research, process.

Teaching Using an Information Literacy Paradigm

As we began to consider the role information literacy should play in legal research instruction, we conducted a survey of incoming law students from twelve different law schools across the country in the fall of 2011.⁹ The goal of the survey was

“... the organization of digital information no longer follows the organizational model found in the print world, ...”

³ ALWD 2012 survey question 19, <http://www.alwd.org/wp-content/uploads/2013/02/2012-survey-results.pdf>. Of the reporting schools, seventy offer limited Westlaw/Lexis training in the first semester.

⁴ Legal Tech. Res. Ctr., Am. Bar Ass’n, 2011 Legal Technology Survey Report: Online Research at V-x (2011) (Question 17) (showing that of those surveyed, only 13 percent begin their research in print sources) and V-xiv, V-38 (Question 20) (showing that 98 percent of respondents conduct legal research online).

⁵ Popular legal research texts continue to devote significant space to teaching print sources such as indexes, digests, legal encyclopedias, treatises, and annotated codes. See generally Nancy P. Johnson, *Should You Use A Textbook To Teach Legal Research?*, 103 *Law Libr. J.* 428-435 (2011) (providing reviews of popular legal research texts); see also Steven M. Barkan et al., *Fundamentals Of Legal Research*, 78-80, 82-83, 232-33 (9th Ed. 2009); Laurel Currie Oates et al., *Just Research*, 46-48, 156-57, (2d Ed. 2009); Amy E. Sloan, *Basic Legal Research: Tools And Strategies*, 51, 74-76, 206-09 (5th Ed. 2012).

⁶ *Introduction to Information Literacy*, Am. Library Ass’n, <http://www.ala.org/acrl/issues/infolit/overview/intro> (last visited June 17, 2013).

⁷ *Id.*

⁸ *Id.*

⁹ The participating schools were: Drake University Law School; Elon University School of Law; George Washington University Law School; The John Marshall Law School; Northwestern University Law School; Shepard Broad Law Center, Nova Southeastern University; University of Pennsylvania Law School; University of South Carolina School of Law; Stetson University College of Law; Temple University, Beasley School of Law; University of Nevada-Las Vegas, William S. Boyd School of Law; and Wake Forest University School of Law.

to evaluate the incoming students' information literacy and research practices and skills.¹⁰

Based on the survey results, we came to two major conclusions. First, these researchers might be more competent than conventional wisdom would have us think. Although many students lacked formal research training¹¹ and made some choices based on convenience,¹² they also claimed to have experience, proficiency, and high comfort levels with a wide variety of types of sources.¹³ Second, the baseline information contained in the survey also shows that incoming law students are ready to move past traditional research instruction. Generally speaking, the respondents expressed a definite preference and privileging of online sources,¹⁴ seemed less familiar and/or comfortable with a process-based research approach, and tended to eschew the idea of using a research plan or journal.¹⁵

Taken together, these results indicate that today's researchers have a firm foundation for learning through an information literacy paradigm. The survey results revealed that our students are competent and ready to begin using online research techniques when they arrive in law school; they arrive with some amount of information literacy, which we need to both increase and refine, so that they become literate with legal information. Given that the digital research world is ever-changing, we also need to equip our students with the skills they need to conduct research well beyond the confines of the first-year course. The technology our students encounter as first-years may look very different by the time they graduate and

move into practice. Information literacy provides a transferable framework so that basic competency levels are not source- or research method-specific.

With this in mind, we have developed five principles that will allow us to begin teaching using an information literacy paradigm. They are: (1) reframe the goal of teaching legal research; (2) focus on evaluating, not finding; (3) move away from linear research plans; (4) reframe what it means to learn by doing; and (5) rethink traditional approaches to the first-year course.

Principle No.1: Reframe the goal of teaching legal research.

In order to transition to an information literacy environment, it is first necessary for us to rethink the goal of teaching legal research. Previously, we assumed our students were blank slates, ready to be taught about legal sources using a linear, bibliographic method to learn the different types of sources and how to use them. Now, legal research professors should start to think of the goal of legal research instruction as, simply, to increase the level of information literacy in our students in the context of law; stated differently, we want them to develop high levels of *legal* information literacy.

Practically, this means we must let go of our own resistance to abandoning traditional research instruction for fear that the quality of research will suffer. Students no longer need to be taught how to search. They come to law school with that ability. Instead of focusing on individual print and electronic research tools, we need to focus on helping students understand what they are looking for, through concepts such as hierarchy of authority, and how to recognize it when they find it. This is the goal of legal information literacy.

At Temple, the first research project has, for the most part, been a highly structured, multistep research report that sent students through the library before asking them to pursue a similar research path online. Using information literacy as our guide, this year we focused more on what to look for—cases, statutes, and other authorities—and asked much more open-ended questions

¹⁰ The full survey results are available in Ellie Margolis and Kristen Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm*, forthcoming, 38 U. Dayton L. Rev. ___ (2013)

¹¹ Ellie Margolis & Kristen Murray, *Information Literacy—The Next Wave of Legal Research Instruction* (2011) [hereinafter "Survey Results"] (on file with author) (Question 9).

¹² See, e.g., Survey Results, Question 28.

¹³ For example, the responses to Question 28 show highly literate answers regarding credibility and reliability of various sources.

¹⁴ See, e.g., Survey Results, Questions 13, 14, and 15.

¹⁵ See, e.g., Survey Results, Questions 17 and 29.

“... incoming law students are ready to move past traditional research instruction.”

about what they found.¹⁶ We introduced the major legal research search engines, but did not direct the students to start in any particular place. We followed this up with a discussion of their results.

This was the first step in adopting an information literacy-based legal research framework, and it was successful, largely because students were familiar with Google and the types of results it might produce. The students all achieved the goal of identifying relevant authority for this first assignment. While it was nerve-racking to give the students such free reign, the positive results showed that the information literacy model could work.

Principle No. 2: Focus on evaluating, not finding.

Whereas a bibliographic research process requires familiarity with “finding tools” such as digests and indexes, online research, for the most part, does not. It is now nearly impossible to complete a search box search that gets you zero results; even a poorly constructed search will yield something. Instead, new legal researchers must be taught to ask the right questions when evaluating their search results. For example, we presented our students with this list of questions one can ask when evaluating a source:

- Is it law?
- If it's law, is it *my* law?
- If it's my law, is it useful law?
- If it's not law, or not my law, is it useful in some other way?
- Is it credible?
- Is it permanent?

Through this list of questions, we can cover some of the basic concepts in legal research under both a bibliographic or information literacy paradigm—primary and secondary authority, mandatory and persuasive authority, and evaluating and updating source material.

Part of this instruction also involves teaching students to take ownership of the search. In an online environment, there are many tools presented under the guise of “helping” that may pull the researcher away from the intended research path (and in so doing, cost a lot more money). Being mindful of the purpose of one's search, and knowing that there are tools such as auto-filled search boxes and crowdsourced algorithms, allows students to exercise self-control and self-awareness to stay on their intended research path.

Principle No. 3: Move away from linear research plans.

For a long time, legal research has been presented as a process with a beginning and an end, with some recursive steps taken in the middle of a mostly linear path. Now, by asking students to start researching at a point that feels natural to them, we have taken a step away from this start-to-end way of thinking.

The new online research tools facilitate this type of research. For example, consider the following answer to this question, offered in a students' research report:

Try at least two source-driven searches using any two of Westlaw.com, WestlawNext, Lexis.com, or Lexis Advance. Identify your search terms and describe the process and results.

Using Westlaw.com we searched the database for U.S. Supreme Court Cases decided after 1945 using Hostile Work Environment + Sexual Harassment to find relevant cases. We found it much more difficult to find relevant cases without having secondary sources to guide us and we found the process of finding relevant secondary source databases to be challenging. Content driven searches on Lexis Advanced and WestlawNext easily allowed us to move back and forth between helpful secondary sources, related cases, and federal statutes. Because we could not easily move between databases, this process was much longer and more complicated using a source-driven search.

“While it was nerve-racking to give the students such free reign, the positive results showed the information literacy model could work.”

¹⁶ For example, one of the first questions in the research assignment was “Try a search on Google. What did you find?”

“... the transition to a paradigm based on information literacy must be marked by an increased focus on process and hands-on research.”

Under a traditional legal research instruction model, we might have guided the students to a particular secondary source to start with. These students jumped right into the research, and in so doing, learned firsthand the value of using secondary sources. They also developed a preference for content-driven searches for this research question, because this type of search allowed them to move with fluidity from secondary to primary sources until they felt they had the right information. As teachers, we need to let go of the idea that there is a “right” place to start research and a “correct” subsequent research path that follows. Focusing on information literacy rather than use of particular sources allows us to get away from that linear thinking.

Principle No. 4: Reframe what it means to learn by doing.

In the classroom, the transition to a paradigm based on information literacy must be marked by an increased focus on process and hands-on research. For example, one common method of introducing students to legal sources and the legal research process involves lecture-based instruction about mandatory and persuasive authority and primary and secondary sources, followed by a structured research assignment with questions designed to expose students to the basic bibliographic sources required for the assignment.¹⁷ The information literacy paradigm might flip these steps, so that the professor first sends students to research a problem based on a brief discussion of what they need, without any direction about which resources to use or how to use them. The professor then brings the students back to class to evaluate the results. The ensuing discussion would then involve an analysis of their research results that includes categorization and evaluation of the different types of sources they found, as well as a review of their search techniques and evaluation of various resources.

¹⁷ See Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 Santa Clara L. Rev. 101-103 (2005). The organization of most legal research textbooks reflects this approach. See, e.g., Sloan, *supra* note 7 at 74-76.

Principle No. 5: Rethink certain traditional approaches to the first-year course.

Finally, successful adoption of an information literacy paradigm probably means abandonment of certain components that exist in some (if not all) first-year legal research and writing programs. These include stand-alone training in Computer-Assisted Legal Research, offering separate training on “free” legal research sources, and using closed-packet problems.

Information literacy requires that legal research instruction include all of the available online research tools, which might mean staffing legal research training differently than is currently done. At many schools, service provider representatives conduct online legal research training, either through guest lectures/class visits or separate, mandatory training sessions. Information literacy requires integrating this into the course itself.

It also means dissolving the distinction between “free” and “paid” legal services. At many schools “online legal research” training involves the paid legal services, and “free” or “cost-effective” legal research training is done separately and later. Now, we must tackle all of these at once.

Finally, information literacy contemplates an integration of research and writing that is not present in closed-packet assignments. The “learning by doing” inherent in an information literacy paradigm brings understanding of sources through use of sources. According to the 2012 ALWD survey, only forty-three schools offer all open library research for writing assignments.¹⁸

In order to prepare practice-ready students, able to cope with the ever-changing research environment, we must move away from traditional methods of teaching legal research. Information literacy offers a new paradigm to teach legal research more effectively.

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¹⁸ ALWD 2012 survey results question 19c. Twenty-one schools use all closed-universe writing assignments in the first-year course.

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The Missing Piece: Teaching Cost Recovery as Part of Cost-Effective Research

By Kathleen Darvil & Sara Gras¹

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Due in large part to the declining legal job market, law schools are starting to place great emphasis on graduating students who are prepared to practice.² For legal research courses, this means connecting the classroom to “real-world” legal research skills. In today’s market, knowing how to research an issue cost effectively is a pivotal skill.³ For law firms, a key component of cost-effective research is the ability to recover online legal research costs from clients.⁴ A way to connect classroom legal research instruction to the “real world” of lawyering is to incorporate training for cost-effective research and cost recovery.

Few students contemplate the many costs associated with operating a law practice. Some expenses, such as rent, personnel, computer equipment, and office supplies, are considered overhead. Other costs

are classified as additional expenses attributable to individual clients, such as staff overtime, travel, messenger services, and computer research. The ABA Model Rules authorize lawyers to recover these types of expenses from individual clients, but do not specify precisely how costs should be calculated.⁵ The Model Rules simply state that the expenses charged must be reasonable.⁶ Each law practice must then craft its own policies and strategies for cost recovery in compliance with the ABA Model Rules and ethics opinions and its own state’s opinions.⁷

The high monthly cost of online legal research platforms, such as Westlaw⁸, LexisNexis⁹, and Bloomberg, creates a significant incentive to recoup some of those costs from clients. Over half of AmLaw 200 respondents to the LexisNexis Cost Recovery Survey in 2011 reported that recovering research costs was extremely or very important to achieving their financial goals.⁸ It should, in theory, be simple to tally the online research costs associated with each client’s matter—an issue of basic addition—using vendor-supplied price sheets. The price sheets assign dollar values to virtually every task one could perform on the research platform, from running a search to printing a document. These retail prices provide law firms with a baseline they use to assess reasonable legal research expenses. However, these retail prices tell very little about the actual cost of online legal research, since virtually every firm, from solo practitioners to giant international

“Over half of ... respondents ... reported that recovering research costs was extremely or very important to achieving their financial goals.”

¹ The authors would like to thank Janet Sinder, Library Director and Associate Professor of Law at Brooklyn Law School, for her invaluable feedback throughout the writing process. We would also like to thank Caren Biberman, Mark Gediman, Connie Smith, and Cheryl Niemeier for contributing their time and expertise, as well as the anonymous librarians who responded to our initial survey.

² See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. Times (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

³ See Patrick Meyer, 2012 Law Firm Legal Research Requirements for New Attorneys, (Sept. 26, 2011), available at <http://ssrn.com/abstract=1953437> or <http://dx.doi.org/10.2139/ssrn.1953437>.

⁴ LexisNexis, Cost Recovery & AFA Survey: Large Firms & Corporate Counsel, 11 (2011) (on file with author). See also Mark Schartz, *Features-Keys to Effective Cost Recovery*, LLRX.com (Jan. 15, 2003), <http://www.llrx.com/features/costrecovery2.htm>.

⁵ See Model Rules of Prof'l Conduct R. 1.5.

⁶ See *id.* R. 1.5(a) cmt.

⁷ See generally Am. Bar Ass'n, *Cost Recovery 50 State Survey*, <http://www.americanbar.org/content/dam/aba/migrated/genpractice/resources/costrecovery/StateSurveyCostRecoveryresearch.pdf> (providing state-by-state citations to sources addressing recovery of computerized research costs).

⁸ LexisNexis, *supra* note 4.

firms, contracts directly with research vendors to avoid the unpredictability of retail prices.

The aim of this article is to inform legal research instructors about law firms' recovery of online legal research costs from clients, and to suggest ways this information can be integrated into a class on cost-effective research. In March 2013, we requested that academic law librarians complete a brief survey about their own experiences teaching cost-effective research.⁹ Our goal was to learn whether academic law librarians incorporate cost-effective research instruction into their legal research courses and, if so, what information they taught. We specifically wanted to know if they discussed the recovery of research costs from clients. We also wanted to learn whether academic law librarians think cost recovery instruction is important for law students and why.

Of the 151 academic law librarians who responded to the survey, 143 reported that they incorporated cost-effective research into their legal research courses. Almost all of the respondents reported teaching students about free and low-cost research options, and about cost-effective strategies on Westlaw and LexisNexis, such as browsing the table of contents, searching the digest, and using filters. The vast majority of respondents also teach students about the retail pricing of Westlaw and LexisNexis, and about law firm billing models, such as transactional, hourly, or flat rate. Most significantly, although almost 89 percent responded that it was important to teach students about the cost recovery process, only 23 percent reported having a working knowledge of cost recovery strategies employed by law firms.

We utilized the survey results to design a program for the 2013 American Association of Law Libraries Annual Meeting entitled, "It's All About the Money: Rethinking the Way We Teach Cost-Effective

⁹ The eight-question survey was designed and conducted using the Survey Monkey website. We posted a request for responses to the survey using the list-serv of the Academic Law Libraries Special Interest Section in order to reach the largest number of desired respondents. The survey was open for thirty days and received 151 responses. The survey and a summary of responses received can be found in the Appendix: Survey Questions about Teaching Cost-effective Research, March 2013.

Research."¹⁰ During the program, a panel of four experienced law firm librarians discussed how their firms, which are of various sizes and located in different regions of the country, tackle recovering legal research costs. The panelists also discussed how they train their associates to research cost-effectively based on their cost recovery strategies.

The Importance of Cost Recovery Instruction

We believe the typical law school approach of teaching law students about cost-effective research, which focuses mainly on retail prices and general cost-saving tips, fails to capture the complexity of how law firms deal with online legal research costs. In some cases, it may even discourage students from tackling research projects efficiently and confidently. The respondents surveyed agreed. One librarian stated, "Law students NEED to understand the business of law, they need to understand how their firm or employer will be charging for the research they do, and the resulting rules that will govern their ability to use different online tools ..." Another librarian said,

I learned from a law firm colleague that some recent graduates are so afraid they will be that one that piles up a \$10k bill (we all hear those warning stories) that they will waste hours on the Internet and otherwise spinning their wheels rather than run a search that may cost money on Lexis or Westlaw. Recent grads shouldn't be afraid of research costs, they should be informed.

Students need to understand that cost recovery is important to many firms' business.¹¹

¹⁰ The four panelists were: Caren Biberman, Director of Library & Information Services at Cahill Gordon & Reindel LLP; Mark Gediman, Director of Information Services for Best Best & Krieger, LLP; Connie Smith, Firm Director of Research, Libraries and Competitive Intelligence Services at Morgan, Lewis & Bockius; and Cheryl Niemeier, Director of Library Services for Bose McKinney & Evans LLP. The cost recovery strategies described in this article are summaries of the cost recovery approaches taken by the panelists' firms. An audio recording of the program is available through the AALL2go website, <http://aall.sclivelearningcenter.com/index.aspx?PID=6278&SID=177685> (last visited Dec. 6, 2013).

¹¹ Lexis-Nexis, *supra* note 4.

“... although almost 89 percent responded that it was important to teach students about the cost recovery process, only 23 percent reported having a working knowledge of cost recovery strategies employed by law firms.”

One obstacle academic law librarians encounter when trying to teach cost recovery is that they do not know how the law firms recover costs. Over 75 percent of our respondents either do not have a working knowledge or only somewhat understand how law firms recover research costs from clients. Because they do not have a solid understanding of this process, they do not effectively teach it.

Strategies for Recovering Online Legal Research Costs

There are a number of different potential contractual arrangements between firms and information vendors. The most common type, generally called a flat-rate contract, gives the firm unlimited access to an agreed-upon set of content at a fixed price, although the amount of content and the price charged vary wildly depending on the needs and size of each firm. This means that regardless of use, the firm's obligation to pay the vendor for use of this content remains constant from month to month. If the retail value of a firm's usage of an online research platform exceeds the contractual obligation, this difference represents a "discount" on online research costs, which must be passed on to the client.¹² On the other hand, if a firm's use does not meet or exceed their obligation, they are still responsible for the entire amount and cannot ethically recover higher-than-retail rates from their clients for research.

How do firms ethically proportion their legal research costs and justify those charges to individual clients? Just as there are a number of different contracts between law firms and legal research vendors, there are many different strategies firms employ to determine what reasonable costs belong to individual client matters. Described below are three different methods: traditional proportional billing, all-inclusive billing, and no billing. Each firm determines what fees it can

reasonably charge its clients and what strategy makes the most sense for its practice.

Traditional Proportional Billing

In the traditional proportional billing method, a firm with a flat-rate contract would discount research charges based on what the firm pays to the vendor. For example, a firm might be contractually obligated to pay \$12,500 per month for research. If, in February, the total retail value of the firm's research is \$25,000, then all of the firm's clients receive a 50 percent discount on research charges from that vendor. If \$2,000 worth of research is conducted for a particular client matter that month, then that client would be billed \$1,000 for research expenses. However, this "discount" will vary from month to month. If a firm's retail research costs are equal to or below the amount they are contractually obligated to pay, clients may be billed at the retail rates. In our example, if in March the firm's research has a retail value of \$10,000, then that same client, who received a discount earlier in the year, would be charged the retail rates for research conducted on her behalf.

All-Inclusive Billing:

All-Inclusive Billing is a cost recovery approach that fixes a standard fee per search or per minute or hour. Firms may choose this method because clients find it more predictable than proportional billing, as the standard fee does not fluctuate from month to month. Some firms also choose this approach because it allows attorneys to focus on finding the right answer, rather than on the costs associated with online research. Firms base these standard fees on different factors. If a firm formulates a fixed transactional fee, some factors considered are: 1) a historical assessment of the content accessed, including what sources they use and how often they use a given source; 2) the clients' expectations; and 3) the firm's budgetary goal for offsetting research costs. To formulate a fixed hourly fee, the firm looks at how many minutes or hours a resource was used in the past year, the costs of that resource, trends in the market, and changes in the contract and services offered.

“How do firms ethically proportion their legal research costs and justify those charges to individual clients?”

¹² Firms must account for these discounts when recovering costs from their clients, since the ABA's Committee on Ethics and Professional Responsibility has made it clear that lawyers and firms may not use recovery of costs as profit centers, and should pass along discounts from third-party providers to clients. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993) (discussing billing for professional fees, disbursements and other expenses).

No Billing:

For a number of reasons, some firms do not attempt to recover their legal research costs directly from the client. Two main reasons firms adopt this approach are (1) because it benefits the clients, who no longer have added research expenses, and (2) because it allows attorneys to focus on the accuracy of their research, rather than the cost. It also eliminates the time and energy required to calculate the research fees that can or should be billed to the client. However, this model may not be practicable for large law firms with multimillion-dollar legal research contracts.¹³

Teaching Strategies

The approach one takes to teaching cost-effective legal research will vary depending on the amount of available time, the setting, and the students. However, based on our experiences as teachers and feedback from survey respondents and program panelists, we offer the following suggestions for anyone interested in broadening their approach to teaching this subject.

Consult Experts

As the panelists in our AALL program discussed, law firm cost recovery strategies are varied and constantly evolving based on the business's needs. Many law school librarians are quite removed from the operations and business decisions of private law firms, so it is helpful to utilize the expertise of professionals involved in billing and negotiating online research costs. This can provide students with an accurate perspective on what future employers expect of them. If time allows, students may benefit from presentations of law firm librarians who are familiar with cost recovery. Otherwise, librarians can discuss the various cost recovery methods that their law firm colleagues use. The discussion highlights the complexity and variability of these strategies.

Dig Deeper with Vendors

Academic representatives of online research vendors generally do not have daily contact with law firm or government clients. Often their information about billing and contract practices are out of date. However, they can often access current law firm pricing information through their colleagues and provide answers to specific questions, or put students in contact with law firm vendor representatives who may be more knowledgeable. If vendor representatives teach "prepare to practice" sessions at your school, ask them to include in those sessions a discussion of the different approaches firms take to calculating research costs and the methods researchers employ to be cost effective. If these sessions are not given at your school, then ask the vendor representatives to help you understand law firms' different strategies for doing cost-effective research, and then pass this information along to students.

Avoid Scare Tactics

One of the librarians on our panel described the arduous process of deprogramming new associates who were so afraid of incurring online research costs that they would waste hours of billable time doing research on Google that ultimately was incomplete and unreliable. Associates' fear of unpredictable and exorbitant costs is precisely what vendor contracts are designed to avoid. Students should understand that if their employers have expended time and energy negotiating contracts with online research vendors, it is because they want these tools to be used. When used properly, online research platforms can save significant time and improve reliability of legal research. If you use retail price sheets in teaching, explaining how law firms use these price sheets will avoid creating anxiety in students that may impede effective research practices. When students understand that the prices generally have a proportional, but not direct, effect on how clients are billed for legal research, they are more likely to research cautiously, but without fear. Students should also be encouraged to ask questions of their employers about billing practices and the financial expectations related to online research costs.

“Students should understand that if their employers have expended time and energy negotiating contracts with online research vendors, it is because they want these tools to be used.”

¹³ Lexis-Nexis, *supra* note 4

Conclusion

In order to prepare students to practice law competently and confidently, law schools need to provide students with the skills that the legal market requires. Employers expect and need recent graduates to have a strong grasp of online legal research tools—not just how to answer a question, but how to research efficiently. Teach students to understand the appropriate sources for particular tasks, while keeping an eye on the cost to both the firm and the client for using these sources. With on-the-job training time diminishing at law firms, legal research instructors must take responsibility for teaching their students about real-world business considerations and include information on cost recovery in law firms so that their students will be better prepared to begin legal research tasks as professionals.

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Another Perspective

"Somewhat surprisingly, a majority (56%) of students said that cost containment/cost-effective research was 'never mentioned' (37%) or 'not important' (19%) to their employers. Twenty-one percent said it was 'somewhat important,' 11% 'important,' and 12% 'very important.' Students' perceptions of their employers' level of concern was apparently reflected in own their research practices. A majority of students reported that cost considerations were 'not important' (51%) for their choices of research sources or formats. Twenty-nine percent said it was 'somewhat important,' 13% 'important,' and 7% 'very important.'"

Sarah Gotschall, *Teaching Cost Effective Research Skills: Have We Overemphasized Its Importance?*, 29 Legal Reference Services Q. 149, 153 (2010).

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Diversifying the First-Year Skills Coverage by Creating Three Separate Tracks for 1Ls

By Tracy L. Turner

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

First-year legal writing and skills courses have become a popular home for the broad array of skills that law schools now seek to introduce to their students.¹ However, the incorporation of additional skills poses a challenge because these first-year courses already need to provide intensive training in the fundamental skills of legal analysis and writing. It is difficult for the courses also to adequately cover professionalism, client counseling, interviewing, professional identity, negotiation, trial briefs, appellate briefs, trial advocacy, and oral argument.

As we mulled over this challenge at Southwestern Law School, our conversation went something like this:

“Our existing program provides rigorous training in key research, writing, and oral advocacy skills.”

“Yes, but our exclusive focus on appellate advocacy does not match our students’ future careers well. Most of our students become

prosecutors, public defenders, nonprofit advocates, and transactional entertainment lawyers. Even the litigators write mostly motion briefs rather than appeals. Others may never even write a brief.”

“Well, if they can handle the rigors of our moot court problem, they can handle any other task too.”

“Still, we could envision a program that is more closely tailored to their future practice areas. Students might be more able to understand the course’s relevance to their career and become more engaged than they currently are. Wouldn’t it be nice also to involve our Trial Advocacy and Negotiation honors teams in the 1L intramural competitions?”

Once we answered these questions with a resounding “yes,” a new idea emerged. Rather than trying to cram everything into one course, why not let our students select from different menus of skills to suit their personal interests and career goals?

The result of our discussions was a new three-track program. It offers students three variations of our first-year Legal Analysis, Writing, and Skills (LAWS) course: appellate advocacy, negotiation, and trial practice. It also offers three matching intramural competitions held at the end of the spring semester, followed by a combined banquet to celebrate the students’ accomplishments.

Now, in our program’s fifth year, we can see many signs of its success. More 1Ls participate in the intramurals. More alumni come on campus to serve as judges. More upper-division students participate in our Moot Court, Trial Advocacy, and Negotiations honors programs. And our LAWS course is more relevant to our students’ future careers.

¹ See *Report of the Annual Legal Writing Survey 2012* 13 (Association of Legal Writing Directors and Legal Writing Institute 2012) (listing a wide range of writing and speaking skills covered in first-year legal skills courses); Catherine Carpenter, ed., *A Survey of Law School Curricula 2002-2010 Executive Summary* 15 (American Bar Association, Section of Legal Education and Admissions to the Bar 2012) (reporting broadening coverage of skills in first-year legal research and writing courses); Roy Stuckey, *Best Practices For Legal Education: A Vision and a Roadmap* 99-100 (Clinical Legal Education Association 2007) (quoting, with approval, calls for broader coverage of lawyering skills); William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* 188, 208 (The Carnegie Foundation for the Advancement of Teaching, Preparation for the Professions Program, 2007) (calling for enhanced coverage of lawyering skills).

“... why not let our students select from different menus of skills to suit their personal interests and career goals?”

Design

To implement our vision, we had to navigate some difficult decisions. First, how distinct did we want the three tracks to be? Should students in the negotiation track draft contracts instead of a persuasive brief, and students in the trial-practice track draft dispositive motion documents? Piling such tasks on top of a complex legal research and writing assignment, however, would be too much for students. We would have to sacrifice either our program's traditional "big brief" writing assignment or some of the alternative coverage the new LAWS tracks could offer.

An important consideration was that LAWS was nearly the only course that exposed students to the "big brief." In contrast, several upper-level courses offered students extensive training in negotiation and trial advocacy. Therefore, we ultimately decided to accommodate the "big brief" and take a more modest approach to coverage in the new tracks.

Our fall semester has retained its focus on objective legal writing and research. It remains unaffected by the three-track selection. In the spring, we guarantee a universally deep experience in the fundamental skills of legal research and persuasive writing for students in all three tracks. We use one flexible hypothetical case as the basis for the writing assignment for all three tracks. While appellate advocacy students write an appellate brief, students in the other two tracks write a memorandum of points and authorities in support of or in opposition to the dispositive motion (pre-appeal) on the same issue with the same fact pattern. The uniformity in the writing and research component of the course ensures that students will be trained in fundamentals and enables our LAWS faculty to move fairly easily between tracks.

We changed our past practice of designing the spring problem to present a question of first impression in the jurisdiction. Instead, we now design a problem that has existing precedent on the issue but also a gray area into which the fact pattern falls. Consequently, our spring problems are now much more typical of the challenges our students will face in practice. They provide opportunities for further training

in rule synthesis, fact-based analysis, analogical reasoning, and large-volume legal research.

Despite the uniformity in coverage of fundamentals, the three tracks nonetheless offer unique experiences to our first-year students. The different procedural settings require different strategies: the appellate students need to focus on the appropriate standard of review, while students in the other tracks need to focus on the procedural standard for the particular type of motion. Also, the three tracks offer completely different oral advocacy training. In the appellate advocacy track, students practice oral argument based on their appellate briefs. In the negotiation track, we create a factual addendum to the problem that gives rise to a contractual or settlement negotiation in which students participate. In the trial practice track, the motion is denied and the parties proceed to trial; the students practice witness examination and closing arguments.

Track Selection

We next had to address when and how students would select their tracks. We considered having students select a track in mid-fall and reshuffling the LAWS sections in the spring to accommodate their choices. However, LAWS faculty members valued having students for an entire year to foster a close mentoring relationship. Therefore, incoming students now select a track before the fall semester so that they can remain with the same professor for both semesters.

To aid students' decision making, the LAWS Director speaks about the three tracks at a summer event for incoming students, and the school posts video presentations by the LAWS faculty. In addition, we work closely with the student honors programs that run the three intramural competitions to ensure that students may compete in any one of the three intramurals regardless of which LAWS track they choose. Students must participate in one mandatory round of competition in their LAWS track. Thereafter they can switch into a different competition for the competitive rounds. Students who switch into a different competition receive training from the relevant

student honors programs; the training includes a mock competition and experiential workshops.

Logistics

Finally, we had to deal with the challenge of running three different tracks and three different competitions. The effort requires widespread participation and cooperation. The LAWS faculty designs the problem, the lessons, and the in-class practice sessions. The student honors programs run the competitions. Alumni Relations finds judges for the competitive rounds. Student Services oversees and coordinates the honors programs. And Administrative Support finds space, times, and money to make things happen. All of these players had to meet multiple times as we were designing the first year of the three tracks and still continue to meet regularly as we gear up for each new year. These meetings are absolutely essential to avoid conflicts, ensure consistency between tracks, and spot and resolve problems before they occur.

A Success Story

When we had only a moot court competition, approximately 60 percent of our 1Ls participated in the optional rounds of the competition. That number has risen to a fairly consistent 75 percent. In addition, the popularity of the new tracks has confirmed our assumption that students would be interested in being exposed to negotiation and trial practice skills.

In sum, our exciting but initially daunting idea turned out to be extremely manageable. We maintained the course's core focus on fundamental legal analysis and writing skills while allowing our students to tailor their skills training to their particular career interests. We increased participation in the intramurals and in the upper-division honors programs. More of our students are benefiting from the excellent skills training the upper-division intramural competitions provide. And more of our alumni are coming back to campus to participate as judges and thus to connect with our students as mentors. It has been a win-win situation for everyone.

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“When we had only a moot court competition, approximately 60 percent of our 1Ls participated ... that number has risen to a fairly consistent 75 percent.”

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Oral Advocacy in 90 Seconds: Turning Fear into Fun

By Jill Barton

Jill Barton is Professor of Legal Writing at the University of Miami School of Law in Coral Gables, Fla.

Basketball, dogs, and ice cream—these are a few of the topics I’ve used to teach oral advocacy to law students. Because oral arguments can be among the most intimidating experiences of the first year of law school, I fit in as much practice as is practical. This practice begins the first day of the second semester with 90-second arguments on topics that typically are not related to the law. Students choose a topic, pick a side, and make their case.

The lesson leads to a rush of volunteers, an increase in their confidence, and occasionally, a dose of hilarity. This article describes my 90-second approach, explains why it’s fun and effective, and demonstrates how it serves as a warm-up to the trial- and appellate-level oral arguments students complete later in the semester. In addition, I’ll summarize other creative approaches for teaching oral advocacy from colleagues around the country.

The 90-Second Approach

I start by asking students to suggest topics. Students have proposed cats vs. dogs, chocolate vs. vanilla ice cream, Macs vs. PCs, and movie theaters vs. Netflix. This teaching exercise is the brainchild of my colleague Annette Torres, whose students have engaged in similar debates, including LeBron James vs. Michael Jordan, along with more substantial topics, such as campaign finance reform and the death penalty.

To start on day one, students put potential topics anonymously on note cards, and I quickly skim them for approval. I reserve ten minutes at the end of each class for the arguments and try to fit in four students. For my class of about twenty students, which meets once a week, this schedule means

that everyone will stand at the podium and finish an oral argument within the first five weeks of school.

The earliest, bravest volunteers can sift through a stack of note cards to find a topic they prefer. Students who volunteer later might get stuck with a topic they feel less passionate about. Students also may choose to rebut any argument made earlier in the semester. So if a student in the first class argued why cats make great pets, a student in the third class could argue in favor of dogs. This format allows students responding in a later class to research their topics in advance of class—and their enthusiasm for the exercise shows in their creativity. On cats vs. dogs, which has been a topic three years running, students have researched the psychology and costs of pet ownership, instances of allergies and bites, training challenges, and legislation banning specific breeds.

I ask students to start each argument with the standard “May it please the court” introduction and a road map. In the road map, students introduce themselves, state their positions, and outline one or more points in support of their argument. This structure allows students to practice an opening that’s similar to what they will use in their formal oral arguments later in the semester.

The short arguments allow time for each student to practice early in the semester and before completing a formal argument on a trial motion during week six. My syllabus calls for an ungraded oral argument on a trial-level motion—typically a motion to dismiss or a motion for summary judgment—during the sixth week of the semester. Students stand at the same podium in the same classroom, and they have five minutes to make their case. I serve alone as the hot bench, and I make audio recordings of the arguments for students who want to analyze them with me one-on-one during office hours. The course ends

“The lesson leads to a rush of volunteers, an increase in their confidence, and occasionally, a dose of hilarity.”

“When these practice arguments lead to a standing ovation or to a shy student sharing a passionate plea, the moments do seem to have a bit of magic.”

with a graded, 10-minute oral argument before an appellate panel made up of judges, lawyers, and me.

To keep every student engaged while one student practices a 90-second argument, I call on everyone else in the class to serve as judges on one “bench.” I encourage a hot bench—and students rise to this challenge zealously. It’s common for student-judges to begin firing off questions as soon as the speaker finishes stating her position. As an alternative, I’ve tried assigning three students to serve as a mock appellate panel, but questions were sparse. By making every student a judge, speakers are challenged with a steady barrage of questions, and the judges practice public speaking as well.

Questions from the bench are often thoughtful and even well researched. Some students show their Google savvy by quickly pulling up a statistic to challenge the speaker. Many speakers and judges use ethics, emotion, logic, or a combination of these methods—allowing me to reinforce the lesson of ethos, pathos, and logos.¹ With both the questions from the bench and the arguments from advocates, students have fun but they remain professional. It helps, of course, that professionalism and participation count for ten percent of their grade.

While students take the exercise seriously, the arguments remain lighthearted because of the topics. For instance, in my colleague Professor Torres’ class one year, two students asked if they could argue *Shake Shack vs. Five Guys* after spring break so that they would have enough time to conduct research. The students gathered relevant facts about store locations, menu offerings, prices, and even nutritional information. The students’ efforts were rewarded with cheers and applause.

Benefit: Magic in the Classroom

In *What the Best Law Teachers Do*, Dean Michael Schwartz and his coauthors assert that the best law classes can “sometimes seem almost magical, suggesting that good teaching is more art than

science.”² When these practice arguments lead to a standing ovation or to a shy student sharing a passionate plea, the moments do seem to have a bit of magic. An added benefit is that once students experience how helpful the practice rounds can be, they realize that they can continue to teach themselves through additional practice. It helps that students can easily record a practice argument with their phones or laptops and then critique the replay. I encourage this out-of-class strategy, particularly when students are preparing for the final appellate oral argument. The result is that the magic in the classroom continues outside the classroom.

Benefit: Overcoming Stage Fright

The fact that these practice arguments are fun keeps students engaged. But the arguments are more than fun: they help students overcome their fear of public speaking, become comfortable with the format and organization of arguments, and practice thinking on their feet. Because time is so short, students learn to lead with their strongest argument. This organization is important because “judges’ questioning may prevent you from ever getting beyond your first point,”³ as Justice Antonin Scalia and Bryan A. Garner point out in *Making Your Case*.

The exercise helps students test their mettle and avoid the fight-or-flight reaction that can result from stressful law school experiences.⁴ Even with some practice before their formal oral arguments, I’ve watched students faint mid-sentence, sweat through their suits before they even reach the podium, and throw their hands up in defeat upon even gentle questioning.

With the 90-second oral arguments, students get an early idea of what it’s like to stand before a hot bench. More than a few students have told me later that they were surprised that they suddenly became

¹ See, e.g., Michael Frost, *Ethos, Pathos & Legal Audience*, 99 *Dick. L. Rev.* 85, 87 (1994).

² Michael Hunter Schwartz et al., *What the Best Law Teachers Do* 177 (Harvard University Press 2013).

³ Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 7 (Thomson West 2008).

⁴ B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 *Conn. L. Rev.* 627, 628 (1991).

nervous when they looked out from the podium. Most are shocked by how quickly a minute can pass.

Benefit: Little Class Time

Of course, oral advocacy is only one component of the legal writing curriculum, so there's a practical limit to how much practice professors can fit into a semester. The 90-second argument fits perfectly. The key is to give students a constructive introduction to oral advocacy and to empower them to practice more on their own—so the focus in the classroom is balanced on legal writing and analysis as well. Short, in-class arguments that do not require outside research help respect that balance. Nonetheless, despite the ample practice rounds I hold in class, I hear a similar refrain from students in course evaluations each year: “More practice!”

Other Approaches

Creative approaches to teaching oral argument abound in the legal writing classroom. My colleague Rachel Stabler uses a grab bag filled with seemingly random objects and asks students to argue, for example, how a boomerang or clock relates to legal professionalism and ethics.⁵ Another University of Miami colleague, Rachel H. Smith, assigns articles on legal writing and oral advocacy and then gives students one minute to summarize them. This exercise during the last class pushes students to practice public speaking just before making their final appellate argument.

⁵ Rachel Stabler, *Using Sea Sponges, Boomerangs, and Sewing Kits to Teach Ethics and Professionalism in the Legal Writing Classroom*, 26 *The Second Draft* 20-21 (Fall 2012).

Still other professors incorporate public speaking practice earlier in the first year of law school. Professor Bill Chin at Lewis & Clark Law School requires each student to speak for three to five minutes on a writing tip during the fall semester. Students can select a writing, research, or oral advocacy tip, and they can use handouts or other visual aids to make their points. Professor Chin asks students to think deeply about the tip they're sharing and explain how it can be important and helpful.⁶

Conclusion

As we're called on by the ABA and the demands of the profession⁷ to better prepare students for law practice, we should recognize that students need experience making presentations long before their participation in a single appellate oral argument at the end of the 1L year. Practice with approachable topics and short time frames helps jumpstart students' introduction to an intimidating exercise. As Professors Corie Rosen and Hillary Burgess suggest, “Only through deliberate practice, that process of doing, erring, receiving feedback, and incorporating that feedback into subsequent efforts, will ... students become better learners, stronger performers, and, ultimately, experts in the field.”⁸

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⁶ Professor Chin described his technique during the brainstorming session at the 2013 Innovative Teaching Workshop at the University of Kansas School of Law, sponsored by the Association of Legal Writing Directors.

⁷ See, e.g., [Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, New York Times \(Feb. 10, 2013\)](#).

⁸ Corie Rosen & Hillary Burgess, *More than Merely Doing: Deliberate Practice, Feedback, and Academic Success*, *The Learning Curve* 2, 4 (Jan. 2011), available at <http://www.aals.org/documents/sections/academicsupport/LearningCurveJan2011.pdf>.

“... despite the ample practice rounds ... I hear a similar refrain from student in course evaluations each year: ‘More practice!’”

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Incorporating Ethics into the Research Curriculum

By Rima Sirota

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Two decades have passed since Deborah Rhode argued for teaching legal ethics by the “pervasive method”—that ethics should be both the subject of robust specialized courses and also woven into the fabric of the curriculum generally.¹ The method envisions a curriculum infused with a deep appreciation for the privileges and responsibilities of our largely self-regulated profession. It also recognizes the importance of arming students with a keen awareness of the dilemmas that they are likely to encounter in practice—a particularly pressing concern given the current job market and emphasis on producing “practice-ready” graduates.

The basic premise of the pervasive method is widely accepted and well established.² Substantial opportunities remain, however, for incorporating professional responsibility themes into legal research instruction. The exercise described below addresses this gap and provides students with an active learning experience that goes beyond the usual legal research sources of the first-year curriculum.

A. The Need: First-Year Ethics Research Opportunities

The pervasive method promotes *active* engagement with the material—beyond, say, simply adding a lecture on relevant ethics issues—beginning in the first year of law school. This early integration conveys the central importance of ethics obligations to legal studies and maximizes learning opportunities.³ While such learning opportunities remain few and far between for many first-year students,⁴ legal research and writing (LRW) professors have picked up much of the slack. Teaching what is often the first course in which students grapple with how to use law on behalf of a particular client, LRW faculty are particularly cognizant of addressing the responsibilities that accompany practice. LRW faculty have incorporated ethics teaching in numerous ways, including, for example, writing exercises that require students to consider how misconduct of various types may influence prospects for bar admission, citation exercises that confront the slippery slope of plagiarism, and using a professor’s real-life ethical dilemmas as a basis for discussion.⁵

Largely absent from these teaching innovations, however, is a focus on the research component of the basic LRW curriculum. Except as tangential to

³ See, e.g., *id.* at 152-54; Celia R. Taylor, *Teaching Ethics in Context: Wood. v. Lucy, Lady Duff-Gordon in the First Year Curriculum*, 28 Pace L. Rev. 249 (2008).

⁴ See, e.g., Miriam R. Albert & Jennifer A. Gundlach, *Bridging the Gap: How Introducing Ethical Skills Exercises Will Enrich Learning in First-Year Courses*, 5 Drexel L. Rev. 165, 169-70 (2012).

⁵ The entire Fall 2012 edition of *The Second Draft*, a magazine published by the Legal Writing Institute, was devoted to strategies for incorporating ethics lessons into legal writing programs. Additional resources include Richard K. Neumann & Kristen Konrad Tiscione, *Legal Reasoning and Legal Writing* 101-08 (7th ed. 2013); Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (2d ed. 2009); and Julie A. Oseid, *It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics*, 12 Legal Writing 105 (2006).

¹ See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Educ. 31 (1992).

² See, e.g., William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 151-52 (2007). Georgetown, for example, offers more than a dozen courses with professional responsibility themes as a primary focus, and the student evaluation form filled out for every course—whether professional responsibility-focused or not—assesses as an independent measure whether “the instructor identified and developed pertinent policy and ethical issues.”

writing assignments that touch on ethics themes, students have little opportunity to engage with primary and secondary sources of ethics law and commentary. And that is an opportunity missed for “pervasive method” goals because research assignments—incorporating as they do multifaceted levels of engagement—are a particularly effective vehicle for active-participation learning.⁶

To provide first-year students with skills that are both valued in practice and key to understanding multiple and interrelated sources of law, Georgetown LRW courses are required to introduce students to “advanced research sources,” including federal administrative law and federal legislative history. The manner in which such material is introduced is left up to the individual professor. For me, this requirement presented an active-engagement opportunity to incorporate ethics teaching into the first-year research curriculum. The resulting exercise is described below, and the homework assignment and in-class exercise are attached at Appendixes I and II.

B. The Vehicle: Ethics “Ripped from the Headlines”

The research exercise is organized around a dramatic but real scenario: lawyers whose client confesses to them that he committed a murder for which an innocent person is on trial. I knew that this scenario would immediately grab students’ attention. But I also chose it to focus on what is often the first professional responsibility issue faced by new lawyers, regardless of the type of law they practice or the setting in which they practice it: a lawyer’s obligation not to disclose confidential information without the client’s consent.⁷

⁶ See, e.g., Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 *Legal Comm. & Rhetoric*: J. ALWD 153 (2011).

⁷ Every state has adopted a rule of professional conduct concerning disclosure of confidential information. The basic rule, as framed by the ABA, prohibits a lawyer from disclosing “information relating to the representation of a client unless the client gives informed consent” or unless the disclosure falls within other specified exceptions. See Model Rules of Prof’l Conduct (hereafter “Model Rules”), R. 1.6 (2013).

1. The Private Lawyer Perspective

The “ripped-from-the-headlines” framework for the exercise follows a 2009 *60 Minutes* news report concerning Alton Logan.⁸ Logan was charged with a murder that, as the report makes clear, he did not commit. The man who did commit the murder, Andrew Wilson, confessed the crime to two lawyers, Dale Coventry and Jamie Kunz, who were representing him on a separate murder charge. Wilson refused to allow his lawyers to reveal Logan’s innocence, both during Logan’s trial and after Logan’s 1982 conviction.

Coventry and Kunz concluded that the Rules of Professional Conduct did not allow them to reveal the information without Wilson’s permission.⁹ They say that had Logan been given the death penalty, they would “somehow” have figured out a way to reveal what they knew. But since Logan instead received a sentence of life imprisonment, they said nothing. The truth finally came to light only because Coventry and Kunz convinced Wilson to sign an affidavit permitting them to disclose Wilson’s confession after his death. When Wilson died in 2008, the lawyers contacted Logan’s lawyer with the information.

Students begin the research exercise by watching the *60 Minutes* piece. They usually have immediate and strong opinions regarding the defense lawyers’ decision to remain silent—and, at least in my experience, overwhelmingly conclude that Coventry and Kunz did the wrong thing. Students then locate and read ABA commentary making the point that “virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system,

⁸ Depending on the time available, the *60 Minutes* piece can be assigned as homework (as it is in Appendix I, which also provides a link to the report), or it can be watched in class. The latter option provides the professor with the opportunity to gauge student reaction and to tap into an emotional moment for a particularly robust discussion.

⁹ The *60 Minutes* report somewhat conflates the professional responsibility obligation of confidentiality with the attorney-client evidentiary privilege. However, as the issue was disclosure—not evidence—the primary prohibition stemmed from the rules of professional conduct, which protects client confidences in all settings. See, e.g., Model Rules, R. 1.6, comment 3.

“... research assignments—incorporating as they do multifaceted levels of engagement—are a particularly effective vehicle for active-participation learning.”

and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.¹⁰ These basic tensions permeate the rest of the exercise, and we return to them throughout.

To understand Coventry and Kunz's decision, we have to understand the professional conduct constraints at the time—a good segue for introducing students to advanced research strategies and sources. Depending on the professor's goals, students can either peel through the research layers of locating the 1982 Illinois confidentiality rule or they can jump right to the process of locating current Rules of Professional Conduct. Taking the latter course, students locate and read Alabama's current rule,¹¹ which is similar in relevant part to the 1982 version of the Illinois rule. Either way, students at the end of this part of the exercise understand that Coventry and Kunz correctly interpreted the rule, which offered no exception from the broad disclosure ban, even though disclosure might have led to the exoneration of an innocent man.

At this point many students struggle to interpret the rule in a way that would have permitted disclosure in Logan's case, leading to a discussion of the perils of "over-lawyering" professional responsibility directives.¹² Others contemplate whether, if standing in Coventry and Kunz's shoes, they might choose to risk their licenses rather than live with the burden of the undisclosed information. Still others conclude that the rule must be worded as it is for a reason, leading to a conversation about the importance of lawyer-client confidentiality and the slippery slope potential of carving out exceptions.

Talking through the policy considerations underlying the confidentiality rule leads us to consider other ways in which the competing

interests might be balanced—a question answered through further research and an opportunity to use alternative research methods and sources to locate other states' rules. The current rule in Illinois, as in most jurisdictions, permits disclosures that are "necessary to prevent reasonably certain death or substantial bodily harm."¹³ Does a long prison term, with its concomitant health risks, or even a sentence of death qualify for this exception? We find some guidance by digging deeper into the research to locate the "comments" accompanying the rules,¹⁴ and reasonable, and sometimes emotional, arguments are made on both sides of the question.

Finally, students locate the Massachusetts confidentiality rule, which represents a potential new trend, specifically excepting disclosures "to prevent the wrongful execution or incarceration of another."¹⁵ As the mirror image of the rule governing Coventry and Kunz's conduct in 1982, students assess the same considerations from the opposite perspective: Is the potential but rare opportunity to free a wrongly convicted person worth the potential but much more likely damage to the sanctity of the lawyer-client relationship? The exercise does not aim to answer this question. Rather, it actively engages students in researching the primary sources necessary to begin to assess the question.¹⁶

2. The Government Lawyer Perspective

The exercise then shifts to Anita Lopez, a hypothetical federal prosecutor employed by the U.S. Department of Justice (DOJ). Lopez learns from a witness in an unrelated matter that someone other than Alton Logan committed the murder for which Logan was convicted. The rules of professional conduct in every jurisdiction recognize the principle

¹⁰ Model Rules, Preamble & Scope, comment [9].

¹¹ See Ala. Rules of Prof'l Conduct, R. 1.6 (2013).

¹² For example, the rule permits disclosure for purposes of keeping a client from committing certain crimes. See, e.g., *id.* at § 1.6(b)(1). Although there is no suggestion in the facts that disclosure of Wilson's information was necessary to prevent a crime, first-year students argue strenuously that *surely* keeping silent must constitute *some* crime.

¹³ See, e.g., Ill. Rules of Prof'l Conduct, R. 1.6(c) (2013).

¹⁴ See *id.* at comment 6.

¹⁵ See Mass. Rules of Prof'l Conduct, R. 1.6(b)(1) & comment 9A (2013).

¹⁶ For an overview of the evolution of confidentiality rules assessing a private lawyer's obligations in the situation of Coventry and Kunz, see James E. Molitano, *Rectifying Wrongful Convictions: May a Lawyer Reveal her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 *Hastings Const. L.Q.* 811 (2011); and Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence*, 17 *Tex. Wesleyan L. Rev.* 499 (2011).

that a prosecutor “has the responsibility of a minister of justice and not simply that of an advocate.”¹⁷ We consider what this means in practical terms—a significant issue given the substantial number of students who will be employed in government service as interns, externs, or staff attorneys.¹⁸

This shift in perspective raises the immediate question of whether and to what extent a federal government lawyer is bound by state rules of professional conduct. Answering this question requires advanced research skills involving legislative history and executive branch regulations. DOJ argued in the 1980s and 1990s that state rules should not apply to federal prosecutors, or at least should not apply to the extent that such rules would interfere with federal law enforcement priorities. DOJ lost this argument in 1998 when Congress passed the Citizens Protection Act (CPA).¹⁹ Because the CPA employs typically vague and confusing statutory language, students locate the legislative history and implementing regulations to understand its meaning. Utilizing an efficient combination of commercial and free resources, students are able to discern that the CPA binds federal prosecutors to state ethics rules in exactly the same way as all other lawyers are bound.

Having determined that Lopez is bound by state rules of professional conduct, we move to the specific question of whether she may disclose the witness’s information concerning Logan’s innocence. Students dig back into our previous research on various state versions of the confidential information rule to understand that protected information extends substantially beyond information received directly from a client. Rather, “confidential information” in the ethics context includes “all information relating to the representation, whatever its source”—an extremely broad formulation that has been adopted

in every jurisdiction.²⁰ Thus, Lopez has no greater leeway to disclose the witness’s information under the confidential information rule than Coventry and Kunz had to disclose what Wilson told them.

It is true, of course, that Lopez—again like Coventry and Kunz—could disclose the information with her client’s consent. We discuss the nature of the government “client,” which for this purpose is represented in the person of the Attorney General or his delegate, and why the government client might *not* agree to the disclosure. Logan’s situation was unusual, with actual innocence so clearly established. More typically, government lawyers are bombarded with “evidence” of innocence from witnesses or others who may be lying or may simply be wrong. The costs of disclosure may be significant, with a settled verdict upended or a witness potentially put at risk. Of course the costs of suppressing such information are significant too—certainly to the defendant but also to society. With this tension in mind, we engage in one more research exercise: locating rules concerning a prosecutor’s “special responsibilities,” including the decision to adopt, or not, a rule *requiring* disclosure of substantial evidence that a person has been wrongfully convicted.²¹

In the end, students’ active participation in the exercise leaves them with an appreciation for the multilayered sources implicated in complex ethics questions. They also appreciate that various research strategies can be employed depending on such factors as the lawyer’s existing base of knowledge, time pressures, and financial constraints. Substantively, students are left with a meaningful appreciation of the nuances of a lawyer’s obligation of confidentiality—and the pitfalls inherent in answering even the most seemingly innocuous question: “So, what happened at work today?”

“... students’ active participation in the exercise leaves them with an appreciation for the multilayered sources implicated in complex ethics questions.”

¹⁷ See, e.g., Model Rules, R. 3.8, comment 1.

¹⁸ As a DOJ ethics advisor from 2000–2007, I was surprised to find that many otherwise diligent government lawyers had little sense of the parameters of their confidential information obligations.

¹⁹ The CPA is codified at 28 U.S.C. § 530B (2012). For a history of the debate leading to the law, see [Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 211–14 \(2000\)](#).

²⁰ See, e.g., Model Rules, R. 1.6, comment 3.

²¹ Compare, e.g., Colo. Rules of Prof’l Conduct, R. 3.8(g) & (h) (2013) (postconviction disclosure required), with Ill. Rules of Prof’l Conduct, R. 3.8 (2013) (no reference to postconviction disclosure).

“... teaching the exercise jointly with a librarian makes for a far more dynamic experience ...”

C. Concluding Thoughts: Flexibility and Collaboration

I created this exercise with the specific goal of meeting Georgetown’s advanced research requirement in a way that also furthered the “pervasive approach” to teaching ethics. The exercise is, however, easily adaptable to a host of learning environments, with inherent flexibility to emphasize particular research sources and strategies.

I have taught the exercise toward the end of the spring semester of the first-year LRW class. From a pedagogical perspective, the exercise works well as an advanced research unit for students who have by this time spent a full academic year working on effective research strategies for locating basic sources (cases, statutes, and some related secondary materials). From a time-management perspective, the self-contained exercise works well as a two- or three-hour unit that I can teach even as I am immersed in commenting on student briefs and that students can complete even as they are starting to seriously prepare for final exams in their doctrinal classes.

The exercise could also be introduced at other points in the year and tied into other components of the LRW curriculum. For example, a professor who incorporates a lesson on email communications might add a component to the exercise that focuses on related ethical concerns, such as the obligation to take reasonable steps to ensure delivery to the intended recipient and obligations upon receipt of an email that the lawyer knows was not intended for her eyes. A professor might also choose to include other advanced sources of ethics law and commentary, such as bar association opinions, connected with a particular writing assignment.

The exercise also is easily transferable to upper-level courses. Virtually all law schools now offer advanced writing and research courses that teach students to engage effectively and efficiently with a multitude of legal sources, as they will be expected to do outside of the law school setting. Even more intriguing is the possibility of incorporating the exercise into upper-level professional responsibility courses, which have

been the subject of frequent criticism for failing to meaningfully or actively engage students and for leaving students ill equipped to research and assess the ethical dilemmas they are likely to face. The exercise provides a ready tool to begin to address these deficiencies, most logically as part of a unit on confidentiality or prosecutorial ethics.

Finally, the exercise chips away at the stubborn pedagogical wall between research on the one hand, and analysis and writing on the other.²² At Georgetown, as at many law schools, librarians working outside the LRW classroom assume significant responsibility for research instruction. This exercise certainly could be taught in similar fashion, with students attending a librarian-led lecture on researching legislative history, regulations, and professional responsibility rules, followed by a separate meeting with the professor to discuss the substance of their findings. I have found, however, that teaching the exercise jointly with a librarian makes for a far more dynamic experience—one that flows back and forth between research strategy and substantive discussion, just as it would in practice.

APPENDIX I – HOMEWORK ASSIGNMENT FOR STUDENTS PRIOR TO CLASS

In class, we will explore advanced research techniques and sources, focusing on rules of professional conduct, federal legislative history, and federal regulations. To prepare for class, complete the following four-part assignment.

1. The exercise centers on the real-life story of Alton Logan, a man who was wrongly convicted of murder and sentenced to life without parole. Logan’s story was the subject of a *60 Minutes* report. To begin your preparation, watch the report: <http://www.cbsnews.com/video/watch/?id=4126194n>.

²² See, e.g., Susan King & Ruth Anne Robbins, *Creating New Learning Experiences Through Collaborations Between Law Librarians and Legal Writing Faculty*, 11 *Perspectives: Teaching Legal Res. & Writing* 110 (2003). Indeed, the exercise described in this article benefitted substantially from the input of my co-teachers from the Georgetown library, Ann Hemmens and Morgan Stoddard, as well as my LRW colleague Diana Donahoe.

2. In class, we will research and discuss the rule of professional conduct that governed the Illinois lawyers' obligations regarding their client's confidential information. We will also discuss other versions of this rule. To help you understand rules in context, navigate to the American Bar Association website, locate the Model Rules of Professional Conduct, and review paragraphs 1, 4, 7-9, 14, 16, and 19 from the "Preamble & Scope" section.

3. We will also research and discuss the professional responsibility obligations of a hypothetical federal prosecutor. Our initial question in this regard is whether the prosecutor is bound by state rules of professional conduct. In 1998, Congress answered this question with a law concerning "Ethical Standards for Attorneys for the Government." Using your statutory research skills from the Fall semester, locate this statute.

4. To understand the statute, we will locate and discuss its legislative history and implementing regulations. To prepare, complete the Library's "Legislative History" and "Administrative Law" tutorials: <http://www.law.georgetown.edu/library/research/tutorials/lrw.cfm>

APPENDIX II: RESEARCH PROJECT/IN-CLASS EXERCISE

A. A Lawyer's Obligation to Protect Confidential Information

1. The highest court of every jurisdiction has adopted a rule of professional conduct that prohibits lawyers from disclosing "confidential information." At the time of Alton Logan's 1982 arrest, lawyers in Illinois were subject to a confidentiality rule that was similar in effect to the rule that is currently in force in Alabama (and approximately one-third of American jurisdictions). The ABA website provides links to the current rules of professional conduct for each state. Using this free resource, find the **Alabama** rule concerning confidential information. Do you agree with Coventry and Kunz that a rule like this one prohibits lawyers in their position from disclosing Wilson's information? Was the information provided by their client "confidential" as that term is used in the context of the rule? Would you have made the same decision that they did?

2. The current rule in **Illinois** (and approximately two-thirds of American jurisdictions) now more broadly permits (or, sometimes, requires) disclosure of certain confidential information. Locate the current Illinois rule using WestlawNext[®] or Lexis[®] Advance. Does this version of the rule permit disclosure by lawyers in Coventry and Kunz's situation?

3. **Massachusetts** and Alaska have adopted rules that specifically address disclosure of confidential information relevant to another person's innocence. Find the Massachusetts rule using whatever resource is most efficient for the search. Does this version of the rule permit disclosure by lawyers in Coventry and Kunz's situation? Which of the three rules (AL, IL, or MA) best balances lawyers' various obligations as "a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice"? Why?

B. Federal Prosecutors' Obligations

Consider the following hypothetical scenario. It is 2002, twenty years after Logan's conviction. Assistant United States Attorney Anita Lopez is investigating Illinois gang members suspected of interstate drug trafficking. In the course of Lopez's investigation, she interviews a gang member who mentions that another gang member killed the man that Logan was convicted of killing. The witness begs Lopez not to disclose this information because the actual murderer will, according to the witness, "kill me if he finds out that I told." May (or must) Lopez tell anyone about the information that she received from the witness concerning Logan's possible innocence?

4. As part of the homework assignment, you should have found 28 U.S.C. § 530B. Using either WestlawNext or Lexis Advance, find the statute again and look at the credit or history note. Find the Public Law number.

5. Browse to this Public Law on Thomas.loc.gov to find the following information related to the bill that ultimately became law.

- a. The bill number (the “H.R.” number)
- b. The original sponsor of the bill
- c. Citation to the latest conference report
- d. The “latest title”

Click on the bill number to retrieve the bill-tracking report (also called the bill summary and status report). Can you determine how many amendments were offered?

6. Using Thomas, determine if the Representative identified for Question 5(b) has sponsored any legislation in the current Congress, and provide the name of one of the bills.
7. Locate and cite to regulations in the Code of Federal Regulations designed to implement 28 U.S.C. § 530B.

8. From the regulations cited in your answer to Question 7, determine: (a) whether Lopez is the type of “attorney for the government” covered by the statute, and (b) the meaning of the phrase “state laws and rules and local federal court rules governing attorneys.”

9. Now consider Lopez’s obligations regarding the information regarding Logan’s possible innocence that she received from the witness.

- a. Does the Illinois Rule regarding “Confidentiality of Information” permit Lopez to disclose the information?
- b. Using any method discussed in class, find the Illinois rule of professional conduct that concerns the “Special Responsibilities of a Prosecutor”—does this rule address whether Lopez may disclose the information? Would your answer be different if Lopez was an AUSA in Colorado instead of Illinois?

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Timing is Everything: Teaching Essential Time Management Skills for “Real-World” Legal Writing

By Camille Lamar Campbell

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Picture it. Your students are newly minted lawyers all fresh and shiny from passing the bar. Their boss, a short-tempered curmudgeon, gives them *one week* to write an appellate brief. In their legal writing class, these same students likely had an *entire semester* to write a brief. Can these students successfully manage the inevitable psychological stressors triggered by the time constraints of the real world of legal writing? Perhaps more importantly, does the legal writing curriculum provide students with the requisite time management skills to survive the rigors of writing in law practice?

In a legal world dominated by the billable hour, where some clients are reluctant to pay for the most rudimentary drafting and proofreading tasks¹ and where lawyers can be sanctioned or even disbarred for poor time management,² time is a valuable commodity that must be effectively managed. The culture of law practice and the stressors endemic to legal writing make teaching time management particularly important for legal writing professors.³

First, the demand for lawyers who can write effectively under severe time constraints requires that the legal writing curriculum balance pedagogical necessity with the realities of the legal marketplace.⁴ However, as the introductory scenario suggests, the generous deadlines legal writing professors give first-year students are often a pedagogical necessity, one that conflicts with the abbreviated deadlines inherent in law practice.

Second, legal writing students are particularly vulnerable to stress and avoidance behaviors that impede effective time management, such as procrastination, perfectionism, and detachment.⁵ Furthermore, the credit hour/workload disparity for legal writing classes when compared to that of doctrinal classes,⁶ frequent assignments, and multiple opportunities for feedback incentivize poor time management skills.⁷

Teaching time management to legal writing students is more nuanced than a system of to-do lists or simply warning students about the dangers of waiting until the last minute to begin an assignment. Instead, time management for law students includes two discrete components: (1) stress management

management and the ABA's recognition that time management is an essential skill for law students).

⁴ *Id.*

⁵ *Id.* at 907-908. See also Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance For Constructively Breaking the Silence*, 52 J. Legal Edu. 112, 114 (2002); G. Andrew Benjamin et. al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 Am. B. Found. Res. J. 225, 228 (1986).

⁶ Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 Berkeley Women's L.J. 3, 7 n.21 (2001).

⁷ Bartholomew, *supra* note 3, at 907.

¹ See Wayne Schiess, *What I Wish I Had Known About Legal Writing*, The Law Street Journal (March 15, 2010), <http://www.thelawstreetjournal.com/31/what-i-wish-i-had-known-about-legal-writing/>.

² See Gene Shipp, *Avoiding Avoidance*, Washington Lawyer (October 2006), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/october-2006-bar-counsel.cfm> (discussing procrastination and collecting cases where attorneys were sanctioned for avoiding and neglecting legal matters).

³ See Christine P. Bartholomew, *Time: An Empirical Analysis of Law Student Time Management Deficiencies*, 81 U. Cin. L. Rev. 897, 900-01 (2013) (discussing the need for more time management instruction and noting the MacCrate report and its emphasis on time

“... does the legal writing curriculum provide students with the requisite time management skills to survive the rigors of ... law practice?”

“I’m always shocked by the number of students who either aren’t aware or the deadline or who think [it] is farther away than it actually is.”

and (2) project management. Stress management acknowledges the psychological obstacles that preclude effective time management. Project management requires students to realistically assess their time and then devise a strategy for maximizing that time. The following time management strategies can be used in any first-year or advanced legal writing class, require minimal instructional time, and begin the necessary process of preparing students for the time constraints of real-world legal writing.

Assess Time Management Proficiency

“You can’t heal what you won’t acknowledge.”

—Dr. Phil

With this quote, Dr. Phil alludes to one of the most insidious obstacles to effective time management: denial. In the legal writing context, denial commonly manifests itself as magical thinking. Magical thinking is a pattern of thinking that lulls students into believing that they can temper the anxiety triggered by an impending deadline by denying its existence.⁸ Awareness is a powerful antidote to magical thinking and is a particularly effective stress management tool. Polling is a tool for heightening student awareness and introducing students to the concept of magical thinking. Begin with what seems to be a relatively easy question: “When is the XYZ due?” I’m always shocked by the number of students who either aren’t aware of the deadline or who think that the deadline is farther away than it actually is. This kind of informal poll forces students to acknowledge the impending deadline.

Another technique for combating magical thinking utilizes metacognition. Metacognition describes the critical role of awareness when learning a new skill.⁹ When talking to students, describe metacognition as knowing what you don’t know

and having the initiative to do something about it. Metacognition forces students to play an active role in improving their time management skills. With the professor’s guidance, students reflect on their personal preferences and habits to create an individualized time management plan.

Time management diagnostic quizzes and cognitive protocols are two metacognitive tools that are relatively easy to implement. A quick Internet search using the query “time management quiz” yields a plethora of free diagnostic tools.¹⁰ The best diagnostic quizzes are relatively short, ranging from ten to twenty questions; ask a series of questions that assess key time management issues such as scheduling, prioritization, procrastination, and managing interruptions; and categorize students based on time management proficiency. These quick assessment tools make it easy to direct students to specialized time management resources or refer students with more acute time management needs to academic support or other administrative personnel.

Similar to diagnostic quizzes, cognitive protocols facilitate awareness and self-reflection. A cognitive protocol¹¹ is a series of open-ended questions about the student’s time management journey, typically distributed after completing a writing assignment. To encourage candor, I permit students to respond anonymously. A well-designed cognitive protocol asks students to critically evaluate their performance in areas such as scheduling, prioritization, managing interruptions, and procrastination. A cognitive protocol question might ask students to circle the time management quote that best summarizes their experiences. Other questions might ask students to identify two things they would change about their time management process, time management techniques that they found particularly effective, and the total number of hours that they spent revising, editing, and

⁸ See generally, Diana DeLonzor, *Running Late*, HR Magazine (November 1, 2005), <http://www.shrm.org/Publications/hrmagazine/EditorialContent/Pages/1105managementtools.aspx> (discussing the phenomena in the human resources context).

⁹ Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 *Widener L. Rev.* 33, 35 (2006).

¹⁰ Some particularly helpful diagnostic quizzes are available at http://www.mindtools.com/pages/article/newHTE_88.htm and http://www.ucc.vt.edu/academic_support_students/online_study_skills_workshops/time_management_strategies/index.html.

¹¹ I adopted this term from a colleague, Professor Olympia Duhart, who attributes it to one of the doyennes of legal writing, Professor Sophie Sparrow.

drafting a particular assignment. These questions reinforce the idea that acquiring time management skills is a work-in-progress for students who might abandon future improvement efforts simply because certain aspects of the process need refinement.¹²

Students unfamiliar with cognitive protocols might consider them “busywork” unless the professor explains the importance of metacognition to the learning process. Show students that you value and respect their metacognitive efforts by synthesizing data in a PowerPoint slide or handout. Consider sharing examples of effective time management techniques used by the majority of the class or use bar graphs and pie charts to document similarities in student responses.

Effective integration of metacognitive instructional techniques such as diagnostic quizzes and cognitive protocols creates a classroom of self-regulated learners who can either seek individual assistance from the professor or teaching assistants, or utilize the collaborative time management techniques discussed in the last section of the article.

Require Written Time Management Plans

“A goal without a plan is a wish.”—Antoine de Saint-Exupéry (French writer 1900-1944)

For the same reasons that students engage in magical thinking, they often balk when required to prepare a written time management plan. However, a written time management plan is an extremely effective project management tool. First, a written plan is a tangible sign of the student’s commitment to the writing project. Second, a written plan puts the assignment squarely in the center of students’ consciousness, forcing them to begin thinking about an upcoming writing assignment. Help students draft an effective time management plan by dividing the process into three steps: (1) compute

the net completion time, (2) identify intermediate tasks, and (3) prioritize intermediate tasks.

Compute the Net Completion Time

Computing the net completion time forces students to acknowledge known and unknown contingencies that, if unaccounted for, can derail an otherwise effective time management plan. The net completion time is the actual amount of time that a student has to complete the project after factoring in known and unknown contingencies. Known contingencies are events such as coursework in other classes, family and other social obligations, leisure activities, and hobbies. Unknown contingencies are events such as illness, computer malfunctions, and other unanticipated surprises such as car trouble or the illness of a close friend or family member that inevitably occur days before a submission deadline. In the project management context, balancing known contingencies with the unknown ones is typically referred to as achieving work-life balance.¹³ Exposure to the concept of work-life balance as a law student should increase the likelihood that students will become more proficient at this balancing process as lawyers.

Help students compute the net completion time by uploading an electronic calendar template to an online platform such as TWEN[®] or by distributing blank calendar pages to the class. Tell students to select a start date and then count the number of days between the start date and the submission deadline. This calculation is the gross completion time. Then, ask students to subtract from the gross completion time the number of days that they won’t be able to work on the project because of known and unknown contingencies. This final calculation is the net completion time.

Students typically have no trouble accounting for known contingencies because of their relatively predictable nature. However, even the savviest legal writers struggle with accounting

“Computing the net completion time forces students to acknowledge known and unknown contingencies ...”

¹² A sample time management cognitive protocol is available upon request.

¹³ See Susan M. Heathfield, *Work-Life Balance*, About.com Human Resources, <http://humanresources.about.com/od/glossaryw/g/balance.htm?p=1> (last visited August 11, 2013) (defining work-life balance as “a daily effort to make time for family, friends ... self care, and other personal activities ...”).

for unknown contingencies. At the beginning of the writing process, most students are flush with optimism about their ability to reject those impromptu party invitations or to avoid the flu bug. However, far too late in the planning process, these students often realize the truth of Murphy's Law: "Anything that can go wrong will go wrong." Computers crash, printers break, and cars stall. To avoid Murphy's Law, encourage students to complete the assignment *at least* two days before the actual deadline. Consider the following net completion time calculation:

Brief-Writing Assignment:

Assigned:	Monday, March 4, 2013
Assignment Due:	Monday, April 1, 2013
Start Date:	Wednesday, March 6, 2013
Gross Completion Time:	Approximately 4 weeks/27 days
Net Completion Time:	2 ½ weeks/18 days [torts mid-term; sister's bachelorette shower; possible illness (flu affecting the entire first-year class)]

Identify Intermediate Tasks

Intermediate tasks are smaller tasks, such as researching and outlining, that are integral to the writing process. Novice legal writers can't anticipate all the intermediate steps involved in creating a polished, well-written document, and more advanced legal writers often need additional practice. Use a "pair and share" technique followed by a modified Socratic dialogue to educate novices about the process of identifying intermediate tasks and to review the process with advanced legal writers. Begin the process by placing students in groups of three or four. Then, ask each group to identify all the smaller intermediate steps for a particular writing assignment. After 10 or 15 minutes of group work, ask each group to share its intermediate task list with the class. Then, generate discussion about each group's list. As you moderate the discussion, your goals are to create a master intermediate task list for class use and to encourage specificity. For example, identifying an intermediate task as "outline the brief" won't

help students appreciate essential intermediate tasks such as issue identification and case selection. Also, stress the importance of intermediate tasks such as proofreading, revising, and citation checking that are the hallmarks of polished legal writing. Students often underestimate the importance of polished writing. I often tell students that polish is more realistic than perfection. The perfect piece of legal writing doesn't exist. If asked, most attorneys will tell you that they *always* feel that the perfect sentence or insightful observation about a particular case would magically appear if only they had more time. However, these very same attorneys know the importance of creating the illusion that the particular writing assignment was completed *weeks before* the actual deadline. Savvy writers create this illusion by avoiding obvious proofreading and citation errors.

Prioritize Intermediate Tasks

In this last step, students devise a strategy for efficiently completing intermediate tasks. Effective prioritization has important stress management benefits. For example, as students successfully complete intermediate tasks, they build confidence and want to complete more intermediate tasks. However, despite these important stress management benefits, discussing prioritization in a group context can be challenging. Prioritization often reflects individual student preferences. Some students *always* outline before writing. Other students *never* outline but begin with a free-writing method of jotting down random thoughts without organizing or editing those thoughts. Still other students are a bit more systematic, beginning the writing process where they feel most comfortable, where they feel the least comfortable, or with the task that they think will take the most or least amount of time.

The key to prioritization is fusing individual student preference with a realistic estimated completion time for each intermediate task. Resume the "pair and share" and modified Socratic dialogue technique discussed in the previous section. Give each group 20 to 30 minutes to estimate a completion time and then ask group members to prioritize each intermediate task on the master list. Encourage students to describe estimated completion times in hours or minutes. Precisely describing completion

“Novice legal writers can't anticipate all the intermediate steps involved in creating a polished, well-written document ...”

times will exponentially increase students' ability to schedule intermediate tasks. Then, use each group's work product to facilitate discussion. As you discuss each group's prioritization strategy, encourage flexible thinking, reminding students that the ultimate goal is a strategy that meets their individual needs and work preferences.

Once they complete their written plan,¹⁴ students should transfer it to a print or electronic calendar. The reminder functions on TWEN or on a standard smartphone keep students on track. Time management applications such as Things, AwesomeNote, and Alarmed, and free Internet resources such as The Pomodoro Technique (www.pomodortechnique.com) and Mytomatoes (www.mytomatoes.com) also help keep students on track.¹⁵

After completing this three-step process, most students are *amazed* by the time it takes to complete just one writing assignment. This realization about the time-consuming nature of writing, one that is obvious to experienced writers, is why written time management plans are an indispensable component of effective time management instruction.

Encourage Accountability

"But I have promises to keep, and miles to go before I sleep, and miles to go before I sleep." —Robert Frost

Once completed, the written time management plan is analogous to those promises Frost was determined to keep. However, keeping the promises memorialized in a time management plan is one of the hardest parts of a student's time management journey. Accountability is essential, yet it's inevitable that students will initially falter. Ensure that students get up, dust themselves off, and reaffirm their time management commitment by using one or more of the following strategies.

The 10-Minute Time Management Checkup

At various points during the writing process (i.e., every two weeks for novice writers or bimonthly for more advanced writers), schedule 10-minute time management conferences. The goal of these mini-conferences is to promote accountability in a supportive way instead of a punitive one. For some students, once they get off track, the time management plan becomes a constant reminder of their failings. Feelings of failure trigger a cycle of shame, detachment, and anxiety that ultimately results in more procrastination and more deviation from the strategy outlined in the plan. Interrupt this cycle by promoting healthy responses to the inevitable time management challenges. To encourage accurate reporting, ask students to bring completed time sheets to the checkup. Time sheets effectively highlight any disparities between actual performance and the time management plan. However, if conference time is limited, consider having students submit time sheets, and reserve the time management checkup for students whose time sheets demonstrate that they are struggling with accountability.

Time Management Partners and Mentors

Much of the time management literature assumes that time management is an individual problem.¹⁶ However, in law practice, time management is a collective problem because a lawyer's poor time management skills affect the client, other lawyers in the same firm, and the entire legal profession.¹⁷ Creating time management partnerships among students highlights the communal aspect of time management while harnessing the power of collaboration to promote student accountability. Time management partners are peers, typically from the same legal writing class, who provide a sounding board for solving time management problems. These partnerships can be created by professor

“For some students, once they get off track, the time management plan becomes a constant reminder of their failings.”

¹⁴ An excerpt from a student-drafted time management plan is available upon request.

¹⁵ This information comes from a wonderful handout created by Professor Teri McMurtry-Chubb and distributed on the Legal Writing Professor's Listserv.

¹⁶ See generally Bartholomew, *supra* note 3, at 913-18.

¹⁷ See Jennifer Murphy Romig, *The Legal Writer's Checklist Manifesto: Book Review*, 8 *Legal Comm. & Rhetoric: JALWD*, 93, 105 (2011) (discussing the collaborative and team-based nature of writing in law practice).

designation or by students selecting partners based on individual preference. Regardless of the selection methodology, the goal of the partnership is to create a “safe space” where students encourage each other to efficiently manage their time.

Proficient time managers make excellent time management mentors. Mentors can come from a variety of sources, running the gamut from teaching assistants to second- and third-year law students vetted by the professor. Create informal mentors by inviting practicing attorneys to share their techniques for effective time management. Either singularly or in tandem, 10-minute time management checkups and collaborative accountability strategies, such as time management peers and mentors, create an environment where students feel empowered to keep the promises outlined in the time management plan.

Picture it. Your students are assigned to the same short-tempered, curmudgeonly boss from the introductory scenario. But now, these same students *don't* panic when the boss demands that they write an appellate brief in one week. They *don't* fall victim to magical thinking, procrastination, and denial. Instead, armed with the time management strategies outlined in this article, they are equipped not only to survive the time constraints of real-world legal writing but to thrive. What a wonderful world.

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Another Perspective

“Starting time management training early helps law students to survive and thrive both in school and after graduation. But only a handful of law schools specifically incorporate time management into their orientation programs. To date, there has been little effort to educate the law school community on what time management really is, let alone how to solve the time famine problem. This has left a clear gap in legal education’s attempt to provide essential legal skills. A full understanding of time management is essential to teaching this skill in a way that can be measured using outcome assessments.”

Christine P. Bartholomew, *Time: An Empirical Analysis of Law Student Time Management Deficiencies*, 81 Cincinnati L. Rev. 897, 901 (2013).

Cite as: Tenielle Fordyce-Ruff, *Teaching Active Listening: Flipping Roles in Client Interviewing Exercises*, 22 Perspectives: Teaching Legal Res. & Writing 131 (2014).

Teaching Active Listening: Flipping Roles in Client Interviewing Exercises

By Tenielle Fordyce-Ruff

Tenielle Fordyce-Ruff is Assistant Professor and Director of the Legal Research and Writing Program at Concordia University School of Law in Boise, Idaho.

Last fall, I found fifty extra minutes in my syllabus. The free time was a luxury I wanted to use well to prepare my students for their summer activities. I promptly knocked on the door of our Director of Experiential Learning and asked her: what single skill should the students have more exposure to? “Client interviewing,” she answered—but not because of externships. Turns out, she was in the process of setting up a spring semester street law clinic. Even before the summer, therefore, many of our first-year students would conduct client interviews.

Like many legal writing programs, ours introduces students to a variety of skills. Client interviewing was already one such skill. Our Director of Experiential Learning, however, wanted the students to come away with something extra: a deep understanding that good interviews include not only fact gathering but also *relationship building*.¹

But early in the fall semester, I could not give students sufficient substantive knowledge to help them become great information gatherers. Though attorneys would be present at the street law clinic, the students would interview actual clients alone and would ask the attorneys only for advice

about additional information to seek. The students were basically being thrown in the deep end.

I therefore chose to impress on the students the importance of active listening and empathy as the first step to a successful interview. After all, empathy is a core lawyering skill² and the students would soon be interviewing low-income clients who wanted to be heard by someone in the legal system. I aimed to help the students empower the clients and develop relationships with them, even if I couldn’t train them extensively in every necessary client interviewing skill.

Curricular Goals

Thus, I set out to design an exercise that would both introduce students to client interviewing in context and give them a firsthand understanding of why active listening matters to a client. I began by looking into creating a role-playing exercise.³

Traditional role-playing exercises certainly allow students to practice interviewing skills. Such exercises, however, seemed a poor way to help my students truly understand the importance of active listening in the short amount of time I had. I wouldn’t have time to help them analyze success based on whether or not they used active listening. Nor would they have time to debrief a client and to determine how the client reacted to certain choices. I worried also that they would

“[She] ... wanted the students to come away with something extra: a deep understanding that good interviews include not only fact gathering but also relationship building.”

¹ We wanted the students to be successful and recognized that to do so they would need many basic skills: permitting the clients to give a narrative or timeline in their own words, avoiding interrupting the client, engaging in active listening and showing empathy, questioning the clients about certain topics after the client finishes the narrative, organizing the interview and using particular types of questions, and finally, ending the interview in an orderly way. [Linda F. Smith, Was It Good for You, Too? Conversational Analysis of Two Interviews](#), 96 Ky. L. J. 579, 579-80 (2007-2008).

² See [Ian Gallacher, Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance](#), 8 L.J. ALWD 109 (2011); [Kath Hall, Molly Townes O'Brien & Stephen Tang, Developing a Professional Identity in Law School: A View from Australia](#), 4 Phoenix L. Rev. 21, 47-48 (2010).

³ The use of role-playing to introduce client interviewing is common. The students are introduced to the basic skills of interviewing and then an actor portrays the client while the student conducts a simulated interview.

be too focused on applying their newly learned questioning techniques for client interviewing. They might choose the easier path of practicing open-ended questions, rather than practicing active listening and demonstrating empathy.

I wanted to do much more than simply lecture about rules, patterns, and formulas for client interviews. Rather, I wanted to help students *feel* what an actual client interview could be like for a client. I wanted to give them a firsthand experience of how a client, by feeling heard and understood, can feel more comfortable with the attorney and more willing to continue a conversation.⁴ Finally, I wanted them to begin to develop an emotional intelligence that could help them become better lawyers on many levels.

My solution was to flip the traditional role-play: The students' first client-interviewing activity is a role-play in which the *students* act as the clients while the practicing attorneys conduct the interview.

Nuts and Bolts of Flipping the Role-Play Activity

To start, I developed a basic story for the student-clients. I tied this story loosely to the factual problem and legal issues they would have to research and write about in their final memorandum assignment. I worked to create realistic characters that the students could identify with. I included the basic facts to set up the legal issue and a backstory that was important for the client to have the attorney hear.⁵ I also created facts that would allow the students to be interviewed as a small group, and I instructed the students that they could ad-lib answers if I

hadn't included the necessary facts to respond to a question. Finally, the interview would include more than one client. I used an adverse possession problem, so the three-person family had a stake in the legal issue and attended the interview together.

I then introduced the students to client interviewing in a traditional manner. They read about client interviewing, and we discussed the skills in class, heavily emphasizing listening. Next, the students met with a practicing attorney for 45 minutes: a 30-minute interview followed by time for the students to ask questions of the attorney about the interview.

Before the interview, I sent the attorneys basic information about the exercise, the reading assignment on client interviewing, and a short article outlining adverse possession law in Idaho. I did not send the attorneys the factual scenario. I gave them only a bit of background knowledge—the type they would have from an administrative assistant who asked a few basic questions when scheduling an appointment—but not enough to make the interview canned. I also met with the attorneys to orient them to the exercise and my goals for it.

After the interview, I met with both the students and attorneys in class to determine how the interview went and asked them to reflect on how they felt during the interview.

Results

The exercise was a success. First, both the students and the attorney volunteers enjoyed the exercise. The attorneys enjoyed meeting the students and helping them develop interviewing skills. They also enjoyed the opportunity to discuss the choices they made during the interview with the students. The students, too, appreciated meeting practicing members of the bar and seeing how to conduct a client interview. They enjoyed, also, the ability to ask the attorneys questions about how the interview was conducted.⁶

⁴ Concordia University School of Law has a very active mentoring program, and some of the first-year students have the opportunity to attend a client interview with their attorney-mentor. But, because we cannot control the activities of the students when they meet with their mentors, I could not rely on this program to ensure that the students would see an attorney conducting a client interview.

⁵ This follows generally Peggy Cooper Davis and James Webb's advice for using process drama in the classroom by creating interesting and fully developed characters so that the interaction between the "client" and "attorney" is tied to a motivation and goals. [Peggy Cooper Davis & James Webb, *Learning from Dramatized Outcomes*, 38 Wm. Mitchell L. Rev. 1146, 1151-1153 \(2012\).](#)

⁶ Students also reported that because the activity was based on the facts they had to research for their open research memorandum, the client interviewing activity had the added benefit of helping them develop and execute a research plan. It also made them more motivated to find an answer that would help the client instead of simply trying to find the "right" cases for the assignment.

“I wanted to do much more than simply lecture about rules, patterns, and formulas for client interviews.”

Second, students learned firsthand the value of listening to clients. Many students reported that they didn't understand how difficult it would be to have someone ask them questions. Even though the subject matter—property law—was not particularly emotional or controversial, the students quickly realized that they felt an investment in the outcome and wanted the attorney to be able to help them. Moreover, those whose attorneys asked them more open-ended questions and allowed them to talk at first felt the interview went very smoothly. They all appreciated when they were allowed to answer and received signals from the attorneys (both verbal and nonverbal) that indicated the attorneys were listening.

Building on Success

I plan to build on the success described above. I will add a panel discussion with attorneys, and it will address active listening and emotional intelligence. I also will focus on various interviewing techniques in class and move the actual role-playing interview to an out-of-class time activity. In addition to debriefing the students in class, I will have them draft a short, guided reflection paper after they are done meeting with the attorney.

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Another Perspective

"Attorneys learn about clients in many ways—from reading the indictment and police report on the defendant they are appointed to defend, to reviewing the comprehensive intake form regarding family relations, assets and goals of the client seeking an estate plan. Nevertheless, client-lawyer interviews are significant interactions for both lawyers and clients. The initial interview permits the lawyer to learn the nature of the client's problem and/or goal, its history, and various legally relevant facts. The interview also permits the lawyer and client to establish 'rapport.' The lawyer may be able to advise the client during their initial consultation, or may need to schedule a follow-up counseling session to do so. These are the essential truths that are recognized in all texts that attempt to teach legal interviewing to law students and practitioners. However, one essential insight is missing: The client-lawyer interview is a conversation and, as such, an essentially *cooperative* activity."

Linda F. Smith, *Client-Lawyer Talk: Lessons from Other Disciplines*, 13 *Clinical L. Rev.* 505, 507 (2006).

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Doing Like the Locals Do: Using the Legal Writing Classroom to Teach Local-Rule Practice

By Cheryl S. Bratt

Cheryl S. Bratt is Clinical Fellow at the University of Michigan Law School in Ann Arbor, Mich.

Introduction

Ever since the adoption of the Federal Rules of Civil Procedure in 1938, federal courts have had the power to create their own local rules to “promot[e] uniform practice within a district.”¹ Although some debate whether these rules actually further “the just, speedy, and inexpensive determination of every action and proceeding,”² local rules are here to stay and we owe it to our students to give attention to these rules in the legal writing classroom. As a practical matter, students would benefit from early exposure to the local rules, which continue to proliferate, dictating the minutia of litigation generally, and even extending their reach to direct the processes of particular types of actions. Further, teaching students to read and adhere to a jurisdiction’s local rules—regardless of which—helps instill good habits of attention to detail and professionalism, and it sets our students up for success as junior lawyers. Finally, although lessons on the local rules are grounded in practical application, they need not involve only a superficial how-to explanation. Rather, teaching local rule practice opens the door to more

substantive discussions about legal strategy and the theoretical underpinnings of litigation generally.

As an adjunct legal writing professor and clinical law instructor, I require my students to read and adhere to local rules, even when doing so can seem tedious (“Can’t you just *tell* us whether we need to seek concurrence from the opposing party?”). My hope is that my students leave my courses appreciating the substantive effects of procedural practice and having a leg up when they begin their careers.

Why Learn the Local Rules?

Educating our students about the existence of and need to adhere to local rules is a critical lesson for the legal writing classroom. Nearly every state and federal jurisdiction has a set of local rules that governs the nitty-gritty details of litigation and, of particular concern to legal writing instructors, motion practice. As instructors, we can alert our students to the fact that districts vary widely on procedural matters that greatly impact brief-writing. For instance, whether a brief may be 25 pages or only six pages,³ whether a reply brief is as of right or prohibited absent court order,⁴ or whether a filing deadline is 6:00 p.m. or 11:59:59 p.m.⁵ plays an important role in motion practice and strategy.

¹ Fed. R. Civ. P. 83 advisory committee’s notes (1985 amendment).

² Fed. R. Civ. P. 1. For a summary of the critique on local rules, see Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 Loy. L.A. L. Rev. 213 (1981). See also 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3152 (2d ed.); Charles S. Fax, *Does Federalism Work for the Federal Rules?*, ABA Litig. News, Winter 2012, available at http://apps.americanbar.org/litigation/litigationnews/civil_procedure/012512-federalism-federal-rules.html.

³ For example, Local Rule 7.1(d)(3)(A) of the Eastern District of Michigan permits 25 pages for a brief, whereas Local Rule 7(e) of the Western District of Washington dictates that briefs may be anywhere from 6 to 24 pages, depending on the type of motion filed.

⁴ For example, the Eastern District of Michigan allows for a seven-page reply brief as of right, E.D. Mich. LR 7.1(d)(1)(A) & (3)(B), whereas the District of Massachusetts requires leave of court for a reply brief, D. Mass. LR 7.1(b)(3).

⁵ Local Rule 5.4(d) of the District of Massachusetts requires all ECF transmissions occur before 6:00 p.m. to be considered timely filed that day, whereas Local Rule 77.1 of the District of Colorado allows for documents to be filed until 11:59:59 p.m.

“... local rules are here to stay and we owe it to our students to give attention to these rules in the legal writing classroom.”

Additionally, we can expose our students to the relatively new wave of action-specific local rules cropping up around the country. Since 2001, at least twenty-six jurisdictions have adopted a particular set of rules governing patent litigation,⁶ and a handful of districts have rules dedicated solely to admiralty and maritime law and habeas corpus actions.

Further, and perhaps more important than simple exposure to these rules, we can teach our students to adhere to them so as to instill good habits of professionalism that they will take into practice. Although almost any practicing lawyer will agree on the need to comply with local rules, students may need a bit of persuading, and I offer them three concrete rationales. First, just like clear, organized writing and proper grammar and spelling, local-rule adherence builds credibility by demonstrating attention to detail and know-how, or at the very least ensures that credibility doesn't erode from simple and preventable errors.⁷ No attorney wants to be the target of an opinion lambasting his or her poor editing skills over a page-limit rule—an unfortunate outcome for one attorney who sought to skirt a local rule.⁸

Second, and perhaps more immediate to our students, knowing the local rules makes a junior associate valuable to her superiors.⁹ Although new lawyers may not yet have the judgment to establish a core theory of the case or develop a litigation strategy with the client's general counsel, they can

certainly read the local rules and ensure that all of the firm's papers comply with the court's requirements—particularly when a case is litigated outside the firm's home jurisdiction. Local-rule knowledge gives a junior associate an opportunity to participate in the case and become a critical team member. And if case participation and partner recognition weren't enough to inspire young lawyers to review the rules, in any event, knowledge of the local rules is often a tacit expectation of junior associates. We owe it to our students to help them avoid becoming another cautionary tale of a young attorney who failed to inform a partner about a pesky meet-and-confer or page-limit requirement.¹⁰

Third, at the end of the day, noncompliance with local rules can have dramatic consequences, and courts across the country have denied motions for failure to heed their requirements. Forgetting to file a proposed order with a motion,¹¹ failing to certify that a meet and confer occurred before a filing,¹² and even certifying a meet and confer took place but failing to specify the date, time, location, and participants—as required by the rule—have all resulted in lost motions.¹³ Courts are quick to point out that local rules “are not empty formalities,”¹⁴ and circuit courts “have consistently upheld the district court's discretion to require strict compliance with those rules.”¹⁵

“Although almost any practicing lawyer will agree on the need to comply with local rules, students may need a bit of persuading, ...”

⁶ Ben Hodges, *Local Patent Rules: A Survey of District Courts*, ABA Intellectual Property Litig. Comm., Oct. 31, 2013.

⁷ For an example of repercussions from both poor writing and a lack of local-rule compliance, see *Murray v. Carlson*, No. 4:11-cv-42-SEB-TAB, 2013 WL 5874740 (S.D. Ind. Oct. 30, 2013), dismissing a case with prejudice for a lawyer's indecipherable filings and repeated failure to follow federal and local rules of procedure, and noting that “a member of the bar of this Court ... is subject to higher standards and expectations.”

⁸ See *Belli v. Hedden Enters., Inc.*, No. 8:12-cv-1001-T-23MAP, 2012 WL 3255086 (M.D. Fla. Aug. 7, 2012) (denying motion to exceed page limit because “a modicum of informed editorial revision,” demonstrated by the court's revision of a paragraph of the proposed brief, would have “easily reduce[d]” the page count without affecting the brief's substance).

⁹ Advice to young lawyers to know and follow the Rules abounds. See, e.g., *How to Become an (Almost) Indispensable Junior Associate (Part 4)*, Above the Law, Mar. 29, 2011, <http://abovethelaw.com/2011/03/how-to-become-an-almost-indispensable-junior-associate-part-4/>.

¹⁰ See Ryan J. Works, *Tips from the Trenches: Anecdotes for Young Practitioners*, Nevada Lawyer, March 2011, at 48, available at <http://nvbar.org/articles/content/young-lawyers-column-tips-trenches-anecdotes-young-practitioners>.

¹¹ *Pickering, Inc. v. Johnson*, No. 03-2913-DV, 2004 WL 2905386 (W.D. Tenn. May 19, 2004).

¹² *Id.*

¹³ *Autotech Techs. v. Automationdirect.com, Inc.*, No. 05C5488, 2007 WL 2736681 (N.D. Ill. Sept. 10, 2007).

¹⁴ *Lore v. City of Syracuse*, No. 5:00-cv-1833, 2007 WL 655628 (N.D.N.Y. Feb. 26, 2007) (denying motion for summary judgment for failure to follow local rules regarding affidavits, tables of contents, parallel citations, and statements of material fact).

¹⁵ *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 633 (7th Cir. 2005) (affirming summary judgment based on district court's enforcement of local rule regarding statements of material fact).

Teaching Strategies

In view of the importance of local rule practice, I've developed a handful of strategies to teach my students about the local rules and to get my students in the habit of following them, using the rules of the Eastern District of Michigan where I teach. Most of my students will not end up practicing law in our district, but having them read and apply the rules to their motion papers increases their comfort with rule adherence and helps them begin to develop a professional approach to their work that they will then carry into their careers. Although the strategies I outline below are specific to my district, each jurisdiction is likely to have several local rules that can be similarly adopted into the legal writing classroom.

For the first day of class, I require my legal writing students to read the local rules, paying particular attention to those governing the filing of papers (LR 5.1), motion practice (LR 7.1), and sanctions for noncompliance (LR 11.1). As a class, we then review example motions and memoranda of law that I pull from the docket and identify how the papers comply with the requirements, or neglect to do so. I save these and many more examples to our course website, so that the students can continue to refer back to the filings as they draft their own motions and briefs.

Then, I explain to my students that as part of their brief-writing assignments, they are responsible for adhering to the local rules in the papers they “file,” just like practicing attorneys, and that their failure to do so may have consequences.¹⁶ I require compliance with a handful of local rules specific to motion practice: filing a motion and memorandum of law (LR 7.1(d)(1)(A)), seeking concurrence before filing (LR 7.1(a)), drafting a statement of issues presented (LR 7.1(d)(2)), and providing a list of controlling authority (LR

7.1(d)(2)). As explained more fully below, requiring adherence to these four rules not only allows me to inform my students about the rules themselves, but also creates an entry point to discuss substantive legal issues and theories, enriching our course.

- As to motions and memoranda of law (LR 7.1(d)(1)(A)), I teach my students the difference between the two filings: the motion states the request, and the memorandum of law details why the movant is legally entitled to it. We also review the vocabulary of motions—parties “move” (not “motion”) for relief, and they request that motions be “granted” or “denied” (not “given,” “dismissed,” or “stopped”). In reviewing examples of these papers, I explain that some districts like ours require lawyers to draft both a motion and a memorandum, although others require lawyers to draft one document containing both.¹⁷ Teaching these technical details allows us to discuss more broadly the formalistic nature of the law and whether process and jargon cloak our profession in mystique as a way to intimidate nonlawyers.
- Our district’s meet-and-confer requirement (LR 7.1(a)) also lends itself to both procedural and substantive discussions about the law. The Eastern District of Michigan requires attorneys to state in their motions either that a conference between the parties occurred, but the movant was unable to obtain concurrence, or, despite reasonable efforts specified, the movant was unable to conduct a conference in the first place. Students enjoy drafting their motions with descriptions of these pretend conferences, or explaining their failed efforts to arrange one. Teaching this rule allows us to discuss what these conferences typically look like in practice, but more than that, it invites a conversation on the theme of judicial economy, which permeates the federal and local rules. We discuss the value (or lack thereof) of meet and confers and, more generally, the proliferation of litigation and the judiciary’s attempts and tools to manage it.

¹⁶ I require my students to electronically “file” their papers by our class’s filing deadline (which I make up), and to include a proper heading, case caption, and signature block for their motions and briefs, based on a template I provide. Many thanks to Professor Beth Wilensky at the University of Michigan Law School for sharing with me this template and, in general, her teaching materials. My lesson on statements of issues presented, discussed below, derives entirely from her.

¹⁷ See, e.g., W.D. Wash. LR 7(b)(1) (“The argument in support of the motion shall not be made in a separate document but shall be submitted as part of the motion itself.”).

“... requiring adherence to these four rules not only allows me to inform my students, ... but also creates an entry point to discuss substantive legal issues ...”

- Requiring students to comply with the procedural requirement of issue statements (LR 7.1(d)(2)) also opens doors for substantive skill building. Although the Eastern District of Michigan is somewhat unique in requiring at the trial-court level that each brief set forth a concise statement of the issue(s) presented by the parties, teaching adherence to this rule allows us to discuss appellate practice and strategy, as the local rule is comparable to Federal Rule of Appellate Procedure 28(a)(5) and Supreme Court Rule 24(1)(a) on questions presented.¹⁸ As a class, we review the components of an effective issue statement and critique the various statements presented in the merits and amicus briefs of a particular Supreme Court case. Students then draft issue statements for their own briefs, which we workshop as a class.
- Requiring compliance with the Eastern District of Michigan's rule that each brief set forth a list of "controlling or most appropriate" authority (LR 7.2(d)(2))—apart from a table of authorities—is another procedural requirement that allows for broader discussion. Through this local rule, we further practice distinguishing between cases that bind a court versus those that provide persuasive authority, and we discuss the strategy and circumstances under which it would benefit a brief to list unreported decisions and decisions outside our jurisdiction.

Lastly, and to hit home the need for local-rule compliance, I require each student to find one case sanctioning a party in some capacity for failure to follow the local rules. The students present their cases to the class, which leads to a discussion on professional identity, credibility with the court, and judicial temperament. Students never seem to tire of hearing opinions embarrassing a lawyer for local-rule neglect, and the cases legitimize the time we spend on the local rules and the attention I give to them when commenting on student briefs.

Conclusion

The legal writing classroom offers a space for instructors not only to inform students about the practicalities of local-rule practice, but also to develop students' habits of conscientious lawyering and to discuss substantive legal issues. Weaving local rules into classroom assignments can be simple and seamless, and can reap long-lasting rewards for our students in their years of practice to come.

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“Students never seem to tire of hearing opinions embarrassing a lawyer for local-rule neglect, and the cases legitimize the time we spend on the local rules ...”

¹⁸ Fed. R. App. P. 28(a)(5) states: “The appellant’s brief must contain ... a statement of the issues presented for review,” and Sup. Ct. R. 24(1)(a) requires a brief to contain “[t]he questions presented for review.”

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Using Federal Agency Advisory Letters As “Real-World” Writing Samples (and to Validate the Fundamental Legal Writing Principles We Teach)

By Tina Boudreaux¹

Tina Boudreaux is Professor of the Practice at Tulane University Law School in New Orleans, La.

Most legal writing professors have encountered students who are skeptical that “real” attorneys use the organizational paradigms we teach, or that the best legal writing is clear, concise, and free of legal jargon. Perhaps as a result of this skepticism, some students find it difficult to trust the legal writing samples included in their textbook and clamor for more “real-world” examples.

I try to preempt such distrust and dispel some common misperceptions about legal writing in our first class of the semester. I promise students that they will learn about and prepare legal documents that actual attorneys produce, but I explain that my overriding goal is to help them learn the process of legal writing. And although we will have time to cover only a handful of these “real” legal documents, the fundamental skills they will learn and practice in the class will offer a strong foundation for the writing that will be expected of them in practice. As a former transactional lawyer, I am a true believer of this,² and I try whenever possible to prove to students that the best attorneys rely on the organizational and other writing conventions we discuss in class.

Some real-world examples that serve this purpose are informal advisory letters produced by federal administrative agencies. I have relied on these letters as models because they are typically written clearly and concisely and follow a general IRAC structure. They fit most logically into a class on legal correspondence but can be used to illustrate good writing and organizational principles, and they may even generate assignment ideas. Unlike other real-world writing samples, which can be difficult to find and dangerous to use without heavy redaction,³ these informal interpretive documents are available on most agencies’ websites. They also offer students a glimpse into the world of administrative law and agencies, which often gets little attention in the first year of law school.

What Are They?

The letters that I have used in class are those written by agency staff in response to a request for guidance from a member of the public. The initial requests are typically written by an individual or organization subject to the agency’s regulations seeking to clarify how federal regulations or a federal statute affect the unique circumstances of the requesting party. The agency responses fall within the broad category of “informal agency actions” that are “not covered by the formal adjudicatory and rulemaking provisions of the U.S. Administrative Procedure Act (APA).”⁴

¹ Thanks to Erin Donelon for reviewing a draft of this article and to Megan Garton, Tulane Law Library’s Reference Librarian and Instruction Coordinator, for her able assistance.

² Of course, I also agree with those who have written on the subject that students who hope to become successful deal lawyers should be introduced to the unique analytic skills required of those transactional attorneys. See, e.g., Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 *J. Legal Educ.* 223 (2004).

³ See Patricia Grande Montana, *Meeting Students’ Demand for Models of Good Legal Writing*, 18 *Perspectives: Teaching Legal Res. & Writing* 154, 154 (2010) (discussing some drawbacks to using models, including the “time-consuming and costly” nature of finding them in practice).

⁴ Alfred C. Aman Jr., *Informal Agency Actions and U.S. Administrative Law: Informal Procedure in a Global Era*, 42 *Am. J.*

“... I try whenever possible to prove to students that the best attorneys rely on the organizational and other writing conventions we discuss in class.”

The particular agency letters that I have found most useful are “informal discussion letters” written in response to requests submitted to the Equal Employment Opportunity Commission (EEOC). As the EEOC website states: “Although they do not represent Commission policy or legal opinions, these letters from the EEOC’s Office of Legal Counsel offer technical assistance in response to questions from the public on how the EEO laws may apply in particular fact situations.”⁵ The EEOC website includes links to “both informal discussion letters that respond to inquiries from members of the public and letters that respond to other federal agencies’ and departments’ requests for public comment.”⁶

Why They Are Good Models

One reason I find these EEOC letters useful is that they offer guidance on federal statutes that first-year law students often find interesting and easy to understand. The EEOC responses address discrete issues under those federal statutes that the agency enforces, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Title I of the Americans with Disabilities Act of 1990.

Most of these EEOC responses are brief and generally follow the organizational conventions for client letters and email correspondence described in legal writing textbooks. The EEOC responses

typically begin with a concise but clear summary of the inquiry or issue, as well as the facts related in the initial request. A clear and brief discussion of the relevant law follows this summary, and most of the letters conclude with an application of that law to the requestor’s particular situation.

To prove the importance of choosing a coherent organization that is tailored to the problem, the purpose of the document, and the reader, I sometimes have students compare one of the EEOC discussion letters addressed to an individual or employer with one of the EEOC responses to another agency’s request for comments on a proposed rule change. We discuss the different goals of the EEOC in writing to each addressee, and the students conclude that the strict CREAC paradigm they have been using in their interoffice memos probably would not work for either response. Students recognize, however, that both types of letters follow an overriding IRAC organization. I remind them that the paradigms we use in class are not rigid formulas that must be followed in all circumstances, but emphasize that a general IRAC organization will offer the most coherent structure in most situations. They also see that practicing attorneys actually rely on it.

By comparing the two kinds of letters, students also see the need to adjust detail and tone to the reader’s level of legal knowledge. Although the letters addressed to other agencies typically include a more comprehensive discussion of technical agency regulations and more citations than those addressed to individual employees or employers, students notice that the writing in both kinds of correspondence is never overcomplicated or muddled by legal jargon. The clear style of these letters shows students that attorneys working at the highest levels write in plain English. I also reinforce the importance of clarity by reminding them that many practicing attorneys are required to write plainly; as one example of this, the Plain Writing Act of 2010 now requires federal agencies to use “plain writing” in most written communications they direct to the public.⁷

“I... emphasize that a general IRAC organization will offer the most coherent structure in most situations. They also see that practicing attorneys actually rely on it.”

Comp. L. (Supp.) 665, 665 (1994). These informal agency actions “encompass[] a great variety of governmental actions that take a number of administrative forms.” *Id.* One such form is an agency letter written in response to a voluntary request from a member of the public for interpretive agency advice; these agency responses often have “legally non-binding effects” against the party asking for the advice and the agency giving it. *See id.* The process for requesting and giving such guidance can be just as varied; formal procedures describing when and how an agency may offer such guidance, as well as for submitting such a request to the agency, may be outlined in a statute or agency regulation, but some agencies may offer the interpretive advice as informally as over the telephone. *See id.* at 675. When using these interpretive letters in class, I briefly explain these concepts and encourage those students interested in learning more to see me for additional information and consider taking an Administrative Law course.

⁵ *Laws & Guidance*, U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/laws/index.cfm> (last visited Aug. 8, 2013).

⁶ *Informal Discussion Letters*, U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/eeoc/foia/letters/index.cfm> (last visited Aug. 8, 2013).

⁷ 5 U.S.C. § 301 note (2012).

“Exposing students to this different kind of legal correspondence also hints at the vast array of writing that attorneys produce.”

As an added benefit for students, reviewing these letters in class introduces them to some of the writing produced by attorneys who work within federal agencies. If nothing else, even the brief class time we spend on these letters gives them a more practical understanding of administrative agencies' role within the U.S. legal system.

As an added benefit for legal writing professors, the interpretive letters written to employers and other members of the public may inspire assignment ideas because they often raise interesting legal issues that do not have clear conclusions. Professors might also ask students to write a request for guidance to a federal agency, or even write the agency's response to such a request, as a creative spin on a legal correspondence or email assignment.

Where You Can Find These Informal Actions

Many federal agencies produce various kinds of informal agency actions, including interpretive guidance similar to the EEOC's informal discussion letters. The easiest way to find these informal actions for a particular agency is through the agency's website. The University of Virginia Library provides a research portal that offers links to those agency websites that post “other administrative actions which are outside the scope of the [Code of Federal Regulations] or the [Federal Register].”⁸ Some of these informal interpretive actions may also be available and searchable through a subscription database like Westlaw or Lexis.

A Few Caveats

Although most of the letters posted on the EEOC website are written in clear prose, some will likely include stylistic or organizational choices that instructors may want their students to avoid. Professors should warn students that they should not mimic the model “with a dogged literal-mindedness.”⁹ I have found, however, that using these agency letters as models of legal

correspondence actually deters thoughtless replication because it helps students focus on the underlying structure and process. If students rely only on a model of a more traditional client letter, they might be tempted to focus too heavily on the “surface features” of the document.¹⁰

Another potential limitation stems from the nonbinding nature of the agency's advice and the agency's need to respond to requests for guidance that are sometimes vague or confusing. Consequently, the application of law to facts in these interpretive letters can seem cursory and equivocal. But this ostensible shortcoming may actually offer a valuable lesson that attorneys should never promise more than they can deliver. Although the EEOC letters state that they do not constitute official opinions of the EEOC, students can identify how the author also uses effective word choice and even occasional passive construction to convey the advisory but ultimately nonbinding nature of the advice, and that the advice is based on the facts the “client” related.

Some may also warn that students might be confused by these guidance documents without a more comprehensive introduction to administrative law. But I have found that students quickly understand the purpose and effect of these letters with only a brief explanation. Exposing students to this different kind of legal correspondence also hints at the vast array of writing that attorneys produce. Perhaps more important, students see how “real attorneys” respond to the concerns of “real clients” by using the same writing and organizational conventions they have been learning throughout the semester.

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⁸ *Administrative Decisions*, Univ. of Va. Library, http://guides.lib.virginia.edu/administrative_decisions (last visited Aug. 8, 2013).

⁹ Helene S. Shapo & Mary S. Lawrence, *Surviving Sample Memos*, 6 *Perspectives: Teaching Legal Res. & Writing* 90, 90 (1998).

¹⁰ See Laurel Currie Oates, *I Know That I Taught Them How to Do That*, 7 *Legal Writing* 1, 7 (2001) (“Over and over again, researchers have found that transfer is more likely to occur when students have been presented with a number of different examples that have similar underlying structures and problem solutions but different surface features.”).

Cite as: Amy Langenfeld, *Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom*, 22 Perspectives: Teaching Legal Res. & Writing 141 (2014).

Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom

By Amy Langenfeld

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Student demand for drafting instruction grows every year. Legal writing faculty meet this demand with a range of upper-level courses. Some drafting instruction also fits well in clinics, seminars, or other courses. For anyone interested in teaching or learning drafting, legislative drafting manuals are valuable resources.

Legislative drafting manuals are available free online for the United States House of Representatives,¹ thirty states,² and the National Conference of Commissioners on Uniform State Laws.³ Taken together, these legislative drafting manuals show a wide range of pedagogical techniques. They support their rules with rationales, examples, and sometimes citations to precedent. Some legislative drafting manuals pair positive examples (what a drafter should do) with negative examples (what a drafter should not do). Some offer checklists and full-length samples of legislative documents. A few legislative drafting manuals introduce the basics of statutory interpretation.⁴

¹ Office of the Legislative Counsel, House Legislative Counsel's Manual on Drafting Style (1995), available at <http://www.house.gov/legcoun/pdf/draftstyle.pdf> (last visited Mar. 11, 2014).

² The National Conference of State Legislatures maintains links to current versions of those states' legislative drafting manuals on its "Bill Drafting Manuals" page. <http://www.ncsl.org/legislators-staff/legislative-staff/legal-services/bill-drafting-manuals.aspx> (last visited Mar. 11, 2014).

³ The Commission's website is www.uniformlaws.org.

⁴ For an empirical study of how legislative drafters approach their work and whether their practice matches judicial tools of statutory interpretation, see *Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013).

This article describes how legislative drafting manuals present three drafting topics: using words of authority, remembering the serial comma, and creating definitions. It concludes with suggestions for incorporating these free online texts into law school courses. Legislative drafting manuals are rich sources of examples to discuss in class and handy references for students to consult as they polish their drafting skills.

A. Lessons from Legislative Drafting Manuals: Three Examples

1. Words of Authority

Drafting requires precision. If a drafter is sloppy about *may*, *shall*, and *must*, then the resulting statute (or contract) fails in its essential purpose. Students are unlikely to mix up *may* and *shall*, but they are likely to be confused about when to use *shall* and when to use *must*. In legal drafting, *shall* is misused in so many different ways, and so many substitutes have been suggested for it, that novice drafters need to evaluate as many examples as time and attention spans permit.

What legislative drafting manuals offer to the *shall-versus-must* discussion are explanations and examples. Legislative drafting manuals explain and illustrate three basic principles about drafting with words of authority: (1) a drafter should not use *shall* to show future tense (and moreover should not use future tense at all); (2) a drafter should attach *shall* only to a person or entity, not an inanimate thing; and (3) a drafter should use words of authority consistently.

Several legislative drafting manuals compare correct and incorrect uses of *shall* side by side, suggesting "it is unlawful" instead of "it shall be unlawful" and similar improvements to phrases like "the term person shall mean" and "this section

“Legislative drafting manuals are rich sources of examples to discuss in class and handy references for students ...”

shall not be construed to.”⁵ By pairing flawed and improved examples, legislative drafting manuals show that even though existing statutes may be full of poor drafting, today’s drafter can do better. The *Minnesota Manual* concludes its discussion of *shall* and *must* with the following checklist:

Either *shall* or *must* may be used if all of the following conditions are satisfied:

- (1) The statement imposes a duty or prohibition.
- (2) The subject of the sentence is a human being or legal entity.
- (3) The duty or prohibition is imposed in the active voice.

If all conditions are not met, use *must* to impose a duty, prohibition, obligation, requirement, status, or condition.⁶

Whatever duty *shall* creates, someone must be accountable for performing it. The *Colorado Manual* shows that sometimes more than a change in verb is needed to clarify who has a duty:

Passive voice (actor absent): A notice *shall be mailed* to the parties within fifteen days after issuance of an order.

Active voice (actor present): The commission *shall mail* a notice to the parties within fifteen days after issuance of an order.⁷

In the “passive voice” example, “shall be mailed” incorrectly suggests that the notice has a duty. As long as the subject of the sentence is “the notice,” then any tinkering with the verb (*must* or *shall*)

⁵ Arizona Legislative Council, *The Arizona Legislative Bill Drafting Manual* 89 (2013-2014), available at <http://www.azleg.gov/alisPDFs/council/2013-2014%20BILL%20DRAFTING%20MANUAL.pdf>. (last visited Mar. 11, 2014) [hereinafter *Arizona Manual*]. For similar comparisons, see the legislative drafting manuals for Arkansas (*infra* note 37), Maine (*infra* note 13), Maryland (*infra* note 23), and Montana (*infra* note 36).

⁶ Office of the Revisor of Statutes, *Minnesota Revisor’s Manual* 283 (2013), available at <https://www.revisor.mn.gov/office/2013-Revisor-Manual.pdf> (last visited Mar. 11, 2014) [hereinafter *Minnesota Manual*].

⁷ Office of Legislative Legal Services, *Colorado Legislative Drafting Manual* 5-15 (rev. Feb. 10, 2014), available at http://tornado.state.co.us/gov_dir/leg_dir/olls/legislative_drafting_manual.htm (last visited Mar. 11, 2014) [hereinafter *Colorado Manual*].

leaves the more important question unanswered: Who ensures that the board’s composition meets this requirement? The “active voice” example shows one way to place that responsibility on an accountable group of people—the commission.

One Oregon legislative drafting manual includes an explanation for a similar revision, advising the drafter to focus on “the legal action” of a statute:

The drafter also should avoid constructions that use “shall” purportedly to impose a requirement on an entity that is not of a type that can logically fulfill a requirement. An example is “The member appointed under subsection (1) of this section shall be licensed by the Oregon State Boxing and Wrestling Commission.” Does this mean the commission shall license the appointee? Probably not. *Some drafters attempt to avoid this error by replacing “shall” with “must.” While the substitution is arguably preferable to the original, it still does not address the issue, which is one of statutory function.* The statutory function in this instance is not to authorize, require or forbid a legal action, but to impose a condition upon the appointment, and “shall” can readily perform its accepted role if the sentence is recast with that function in mind: “The (appointing authority) shall appoint a person licensed by the Oregon State Boxing and Wrestling Commission.”⁸

In pedagogical terms, the paragraph above begins with a rule and a hypothetical to illustrate the rule. It asks the reader a question, suggests an easy solution (changing just one verb), and then suggests an even better solution (change the subject of the sentence entirely).

Poor drafting habits live on in statutory codes, as many legislative drafting manuals point out. The words used to prohibit action provide a common example. The old-fashioned technique is to write “no person shall” or “no person may.” The modern technique is to use either

⁸ State of Oregon Legislative Counsel, *Bill Drafting Manual* 3.5 (2012), available at <http://www.lc.state.or.us/pdfs/draftingmanual.pdf> (last visited Mar. 11, 2014) [hereinafter *Oregon Drafting Manual*] (emphases added).

“It asks the reader a question, suggests an easy solution ..., and then suggests an even better solution ...”

“shall not” or “may not,” attaching the verb to a person or entity. The *Idaho Manual* explains:

“Shall not” is used throughout the Idaho Code and it may be difficult to break that tradition. However, “shall not” means that a person does not have a duty to act. To say “no person shall” means that there is no one who has a duty to engage in the action. The proper way to prohibit an act is to say “may not” in connection with the action prohibited: “The board may not revoke a license without a hearing.” “May not” properly denies the board the authority to act in that situation.⁹

As a teaching tool, this five-sentence paragraph covers many points. It explicitly acknowledges that some drafting habits are hard to break, and it implies that a novice drafter might be misled by contradictory examples in the state code. It then shows why examples in current statutes do not accomplish what the modern drafter wants. Finally, it gives a rule that is consistent with many drafting textbooks, and a simple example.

2. The Serial Comma

Also known as the Oxford comma, the serial comma is the last comma in a list before the conjunction *and* or *or*. In the drafting classroom, the serial comma reinforces the fundamental principle of avoiding ambiguity. Some law students may need retraining in the serial comma, even students who specialized in writing, such as journalism majors. Numerous examples in legislative drafting manuals show how a missing comma can create ambiguity. A related lesson is that legal drafting is different from other kinds of writing, even writing that is professional and technical.

For example, one Illinois legislative drafting manual covers the serial comma with a rule, rationale for the rule, example, and explanation of what the example shows.

As a general rule, placing a comma before the conjunction will be clear, but omitting the comma may cause ambiguity. Because clarity is one of the cardinal virtues in drafting statutes, follow the practice of inserting a comma before the conjunction.

Potentially ambiguous: Real estate is classified as vacant, residential, farm, commercial and industrial.

In the example, are there 4 or 5 categories? Is “commercial and industrial” one category, or are commercial” and “industrial” 2 categories?

Clearly 5 categories: Real estate is classified as vacant, residential, farm, commercial, and industrial.

Clearly 4 categories: Real estate is classified as (i) vacant, (ii) residential, (iii) farm, and (iv) commercial and industrial.¹⁰

The *Minnesota Manual* reminds the drafter to consult with the client, because simply inserting the serial comma may not convey the intended meaning.

The revisor’s office uses a style that calls for a comma before the conjunction in a series. ... A drafter should think carefully, though, before adding a comma to a sentence written by someone else. In rare cases, such a sentence may be ambiguous. Here is an example:

The commissioner shall assign to the case two managers, a program specialist and a family visitor.

How many people are being assigned to the case? Without a comma, the sentence can be read to mean two or four people. Make certain that the original drafter meant four people before adding the comma. (If the drafter meant two people, rewrite the sentence.)¹¹

The serial comma is either not required or explicitly prohibited by the legislative drafting

⁹ Idaho Legislative Services Office, *Legislation Drafting Manual: Concise Version 31* (2013), available at <http://legislature.idaho.gov/about/draftingmanual.pdf> (last visited Mar. 11, 2014) [hereinafter *Idaho Manual*].

¹⁰ Legislative Reference Bureau, *Illinois Bill Drafting Manual 232* (2012), available at <http://www.ilga.gov/commission/lrb/manual.pdf> (last visited Mar. 11, 2014).

¹¹ *Minnesota Manual*, *supra* note 6, at 286-87.

manuals in Arizona,¹² Maine,¹³ Massachusetts,¹⁴ New Mexico,¹⁵ Oregon,¹⁶ South Dakota,¹⁷ and West Virginia.¹⁸ These seven states are a minority among legislative drafting manuals available online, and their drafting manuals offer no explanation for avoiding the serial comma.¹⁹ Ultimately, rules against the serial comma in a legislative drafting manual may make little difference in judicial interpretation of the legislators' intent.²⁰

Legislative drafting manuals recognize that conventions vary from one type of writing to another. They explain why the serial comma matters in drafting. Most importantly, legislative drafting manuals offer examples that show the potential ambiguity of omitting a serial comma from a list. Legislative drafting manuals are not unanimous about the need for a serial comma, and their recommendations are not persuasive in courts' statutory interpretation. However,

¹² *Arizona Manual*, *supra* note 5, at 83.

¹³ Office of the Revisor of Statutes, *Maine Legislative Drafting Manual* 113 (2009), available at <http://www.maine.gov/legis/ros/manual/Draftman2009.pdf> (last visited Mar. 11, 2014) [hereinafter *Maine Manual*].

¹⁴ Counsel to the Senate & Counsel to the House of Representatives, *Legislative and Research Drafting Manual* Part 3.A.5.b (2010), available at <https://malegislature.gov/Legislation/DraftingManual> (last visited Mar. 11, 2014) [hereinafter *Massachusetts Manual*].

¹⁵ New Mexico Legislative Council Service, *Legislative Drafting Manual* 105 (2008), available at <http://www.nmlegis.gov/lcs/lcsdocs/draftman.pdf> (last visited Mar. 11, 2014).

¹⁶ *Oregon Drafting Manual*, *supra* note 8, at 3.14.

¹⁷ <http://legis.sd.gov/docs/referencematerials/draftingmanual.pdf> at 26 (last visited Mar. 11, 2014) (untitled document with no author or publication date provided) [hereinafter *South Dakota Manual*].

¹⁸ House Clerk's Office, Legislative Services, & Senate Clerk's Office, *West Virginia Legislature Bill Drafting Manual* 21 (2006), available at http://www.legis.state.wv.us/Joint/Bill_Drafting/Drafting_Manual.pdf (last visited Mar. 11, 2014) [hereinafter *West Virginia Manual*].

¹⁹ While not referring specifically to the serial comma, South Dakota's manual comes closest to offering a rationale: "The utilization of short, simple sentences avoids the need for excessive punctuation and prevents possible misinterpretation. Extensive punctuation often indicates faulty arrangement or ambiguous grammatical construction." *South Dakota Manual*, *supra* 17, at 26.

²⁰ *Estate of Braden v. State*, 228 Ariz. 323, 326, 266 P.3d 349, 352 (2011) (discussing the treatment of serial commas in Arizona's legislative drafting manual).

several legislative drafting manuals give this simple punctuation mark a fairly robust treatment.

3. Definitions

Definitions offer many lessons to the novice drafter: (1) start with legal research; (2) use terms consistently; (3) avoid "stuffing" a duty or prohibition into a definition; and (4) keep the language simple. Several state legislative drafting manuals cover these lessons with clear rules, helpful explanations, and realistic examples.

Legal research is the first step in drafting. Like many other legislative drafting manuals, Alaska's manual reminds the drafter to check existing definitions at the beginning of the entire code, as well as other parts of the statutes being amended, before creating a new definition. It also includes citations to Alaska cases that apply the common-law meaning to an undefined term and cases that interpret the verb *includes*.²¹

Consistency is key in drafting. The *Florida Senate Manual* works through a series of examples involving a definition of *records* (as in school records about students) to show the danger of interchangeably using *records* and *reports* and other potential pitfalls when a statute's substantive provisions contradict or modify a defined term.²²

A drafter should avoid "stuffed" definitions. The *Maryland Style Manual* shows an example that "stuffs" requirements about where labels are placed on packaging into the definition of *label*.

In this subtitle, "label" means a display of written, printed, or graphic matter on the container, other than a package liner, of a substance, and, in order to comply with any requirement under this subtitle that a word, a statement, or any other information appear on the label of a substance, the word, statement, or other information shall:

²¹ Alaska Legislative Affairs Agency, *Alaska Manual of Legislative Drafting* 51-53 (2013), available at <http://w3.legis.state.ak.us/docs/pdf/DraftingManual.pdf> (last visited Mar. 11, 2014).

²² Florida Senate, Office of Bill Drafting Services, *Manual for Drafting Legislation* 42-46 (2009), available at <http://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Manual-for-Drafting%20-Final.pdf> (last visited Mar. 11, 2014) [hereinafter *Florida Senate Manual*].

(1) be placed on the outside container or wrapper; or

(2) be legible through the outside container or wrapper.²³

As a follow-up to this “unacceptable” definition, the manual directs readers to a particular statute for “the correct alternative to this example.” The *Maryland Style Manual* also shows examples of “humpty-dumpty definitions,” such as “Goods’ means goods and real estate,” and “Cow’ means horse.”²⁴

Simplicity is key in the verbs that connect a term to its definition. The drafter has three options: *means*, *includes*, and *does not include*. Examples in the Texas manual show the proper use of all three.²⁵

“Alcoholic beverage” means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted. ...

“Oath” includes an affirmation. ...

“Tax” does not include a special assessment for public improvements.²⁶

Most legislative drafting manuals discourage the phrases “means and include,” “shall mean,” and “including but not limited to.”

Legislative drafting manuals vary widely in their instruction about definitions. A few manuals have no instruction about definitions at all, even though these manuals have extensive guidance about other drafting principles. Other manuals have thorough chapters about how to draft definitions, chapters that could be assigned reading for novice drafters. The best legislative drafting manuals remind the drafter that well-

created and skillfully used definitions require strategic thinking and repeated proofreading.

B. From Syllabus to Slides: How to Use Legislative Drafting Manuals

Legislative drafting manuals vary widely in their coverage of topics and range of teaching techniques. Hawaii’s manual is a roughly 70-page collection of rules; Colorado’s manual is a more than 600-page collection of lessons, samples, and legal memoranda. Thus the ideal way to use legislative drafting manuals in the classroom is to rely on more than one.

With enough time, a professor can mine legislative drafting manuals for examples to include in presentations or in-class exercises. I would start with the following states’ legislative drafting manuals: Arizona,²⁷ Florida Senate,²⁸ Oregon,²⁹ Texas,³⁰ and Washington.³¹

From the beginning of the course, the syllabus can list one or more legislative drafting manuals as reference materials. In my syllabus, I have listed the following states’ legislative drafting manuals as supplementary texts: Colorado,³² Idaho,³³ Maine,³⁴ Minnesota,³⁵ and Montana.³⁶

An assignment’s instruction sheet can remind students to use a legislative drafting manual checklist to edit their work. If many of the students are struggling with a drafting principle,

“Thus the ideal way to use legislative drafting manuals in the classroom is to rely on more than one.”

²⁷ *Arizona Manual*, *supra* note 5.

²⁸ *Florida Senate Manual*, *supra* note 22.

²⁹ *Oregon Drafting Manual*, *supra* note 8.

³⁰ *Texas Manual*, *supra* note 25.

³¹ State of Washington Statute Law Committee, Office of the Reviser, *Bill Drafting Guide* (2013), available at http://www.leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx (last visited Mar. 11, 2014).

³² *Colorado Manual*, *supra* note 7.

³³ *Idaho Manual*, *supra* note 9.

³⁴ *Maine Manual*, *supra* note 13.

³⁵ *Minnesota Manual*, *supra* note 6.

³⁶ Montana Legislative Services Division, *Bill Drafting Manual* (2012), available at <http://leg.mt.gov/content/Publications/2012%20bill%20drafting%20manual.pdf> (last visited Mar. 11, 2014).

²³ Department of Legislative Services, Office of Policy Analysis, *Maryland Style Manual for Statutory Law* 28 (2008), available at http://dls.state.md.us/data%5Clegandana%5Clegandana_bildra%5Clegandana_bildra_marstymman%5Ccmdstylemanual_2008.pdf (last visited Mar. 11, 2014) [hereinafter *Maryland Style Manual*].

²⁴ *Id.* at 27-28.

²⁵ Texas Legislative Council, *Drafting Manual* 11-12 (2012), available at <http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf> (last visited Mar. 11, 2014) [hereinafter *Texas Manual*].

²⁶ *Id.* at 11.

the professor can post a reminder on a course website, with the reminder directing students to a particular legislative drafting manual's explanation of that principle as they work on the next assignment. For example, this sort of global feedback can help students improve their definitions sections by consulting the Arkansas,³⁷ Florida Senate,³⁸ Maryland,³⁹ Minnesota,⁴⁰ Texas,⁴¹ or Wisconsin⁴² manuals.

Portions of various legislative drafting manuals could serve as assigned reading, particularly in a course that does not have an assigned drafting text. A hypothetical course supplement might include the following excerpts from legislative drafting manuals:

- A research checklist, from the manuals of Massachusetts⁴³ or Montana⁴⁴
- A style checklist, from the Idaho⁴⁵ or Arizona⁴⁶ manuals
- Sample bills, from the manuals of Arkansas⁴⁷ or North Dakota⁴⁸

³⁷ State of Arkansas Bureau of Legislative Research, *Legislative Drafting Manual* 84-86 (2010), available at <http://www.arkleg.state.ar.us/bureau/legal/Publications/2010%20Legislative%20Drafting%20Manual.pdf> (last visited Mar. 11, 2014) [hereinafter *Arkansas Manual*].

³⁸ *Florida Senate Manual*, *supra* note 22 at 42-46.

³⁹ *Maryland Style Manual*, *supra* note 23 at 27-33.

⁴⁰ *Minnesota Manual*, *supra* note 6, at 35-40.

⁴¹ *Texas Manual*, *supra* note 25, at 11-14.

⁴² Wisconsin Legislature, *Wisconsin Bill Drafting Manual* 38-41 (2011-2012), available at <http://docs.legis.wi.gov/statutes/drafting-manual/general.pdf> (last visited Mar. 11, 2014).

⁴³ *Massachusetts Manual*, *supra* note 14, at App. A.

⁴⁴ *Montana Manual*, *supra* note 36, at 7-8.

⁴⁵ *Idaho Manual*, *supra* note 9, at 46.

⁴⁶ *Arizona Manual*, *supra* note 5, at 73.

⁴⁷ *Arkansas Manual*, *supra* note 37, at 164-77.

⁴⁸ Legislative Council, *North Dakota Legislative Drafting Manual* 21-47 (2013), available at <http://www.legis.nd.gov/legislative-drafting-manual> (last visited Mar. 11, 2014).

- Sample parts of a bill, such as the *Colorado Manual's* samples for delegating authority to an administrative agency⁴⁹
- A basic primer on statutory interpretation, from the manuals of Florida,⁵⁰ Minnesota,⁵¹ Oregon,⁵² or West Virginia⁵³ manuals
- A thorough discussion of words of authority, from the manuals of Maine,⁵⁴ Oregon,⁵⁵ or Texas⁵⁶
- Examples of tools to avoid ambiguity, such as the serial comma, tabulated lists, and references to ages and time periods
- Special topics, such as the *Montana Manual's* guidance about how to refer to Indian tribes⁵⁷ and guidance about “Person First Respectful Language” in the *Texas Manual*⁵⁸
- A glossary of proper usage, such as the one at the end of the *Illinois Manual*⁵⁹

Legislative drafting manuals are not written with the law school classroom in mind, and no single legislative drafting manual replaces a drafting textbook. However, samples from legislative drafting manuals extend and enrich the discussion in any course that covers transactional drafting, legislative drafting, or both.

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⁴⁹ *Colorado Manual*, *supra* note 7, at 6-14 to 6-21, H-1 to H-3.

⁵⁰ *Florida Senate Manual*, *supra* note 22, at 113-27.

⁵¹ *Minnesota Manual*, *supra* note 6, at 267-74.

⁵² *Oregon Drafting Manual*, *supra* note 8, at 20.1 to 20.15.

⁵³ *West Virginia Manual*, *supra* note 18, at 31-34.

⁵⁴ *Maine Manual*, *supra* note 13, at 90-92.

⁵⁵ *Oregon Drafting Manual*, *supra* note 8, at 4.4 to 4.5.

⁵⁶ *Texas Manual*, *supra* note 25, at 107-08.

⁵⁷ *Montana Manual*, *supra* note 36, at 4.

⁵⁸ *Texas Manual*, *supra* note 25, at 115-16.

⁵⁹ *Illinois Manual*, *supra* note 10, at 217-28.

“... samples from legislative drafting manuals extend and enrich the discussion in any course that covers transactional drafting, legislative drafting, or both.”

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Everything I Learned About Teaching Legal Writing I Learned From Being a Parent

Advice to new teachers about how prior life experiences translate into good teaching practices

by Heather Baxter

Heather Baxter is Associate Professor of Law at Nova Southeastern University Shepard Broad Law Center in Fort Lauderdale, Fla.

I began my first year teaching legal writing six years ago. I had a two-year-old son and a one-month-old daughter when my contract began, and I was overwhelmed to say the least. Everyone was throwing advice at me. Do this, do that. Don't do this, don't do that. *Never* do this, *always* do that. Although most of the advice was helpful, my brain was in overdrive—not to mention sleep-deprived. As I was processing all this information (and changing diaper after diaper), I realized I was getting the exact same advice from the two new camps in my life: the parenting gurus and the teaching veterans. This brought me to the realization there was substantial overlap between good teaching skills and good parenting skills.¹ What follows is a somewhat anecdotal accounting of some of the advice I was given in my first year of teaching legal writing, as well as some things that I have discovered along the way that may be helpful to new—and even not so new—teachers.

1. Be consistent.

I bring this up first because, like the First Amendment (it's the most important because it's the first one!), this piece of advice is probably the most important, both for a new parent and a new teacher. The easiest way for a child or student to

take advantage of you is for you to waffle on what you expect. Both law students and children want to feel safe. They want to know what their boundaries are.² If that changes from day to day, it is going to be a problem for them and, therefore, a problem for you. During my first semester of teaching, a student came into my office to “discuss” where she went wrong on her first memo. The meeting turned into an hour-long session of her pointing out all of the places in her paper where I commented on something that she said I told her to do, and then told her it was wrong later. I didn't handle it very well. I felt personally attacked and—worse—I questioned everything I had done up until that point. Although her tactic was not the most mature way to handle her frustration, she was probably right to some degree. I'm sure I did tell her one thing and then change my mind about it later because I was not confident in what I was doing at that point in my career. I was so afraid of being wrong that I was questioning every decision I made and every answer I gave. This lack of confidence showed, which brings me to my next piece of advice ...

2. Don't show fear; exude confidence.

Both children and law students are like sharks. If they smell blood, you are dead in the water. I learned the hard way that it is better to act like you know what you are talking about than to show weakness. Now, note the words “act like you know.” You aren't always going to be the expert, or you may be having an off day, but your students don't necessarily need to

“The easiest way for a child or student to take advantage of you is for you to waffle on what you expect.”

¹ Please note that you don't have to be a parent (or even ever want to be a parent) for this advice to be helpful. The good news is the advice applies equally to new parents and new teachers, which is what I found so fascinating.

² Kent D. Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. Legal Educ. 247, 248 (1993). I would highly recommend Dean Syverud's article for any new law teacher.

“It really is okay not to answer all of their questions; in fact it is much better for them if you don’t.”

know that. I’m not suggesting that you lie to them or make things up, but learn to stand your ground and not let them make you question yourself. We’ve all been there when a student swears to you that a case says A when you’ve always thought it said B. You rush to your assignment notebook to read the case for the hundredth time, scared that you have misinterpreted the case all this time. Instead, almost without fail, you read the case and see that you were, in fact, right. How many years of experience do you have in reading cases versus these novices? Hello? The good news is that every time it happens, it helps build your confidence for the next time it happens. Eventually, you learn not to doubt yourself every single time you are questioned. Likewise, parents learn not to doubt our initial response to a request from a child because if that child thinks there is some wiggle room, he will keep trying to get what he wants. On the other hand, if you keep up a steady front and make it clear there is no room for argument, the child will usually give up the battle.

Keep in mind, however, that showing confidence doesn’t mean failing to admit mistakes when you really are wrong. You can actually engender more confidence by admitting you don’t know the exact answer. I’ve found that it’s usually better to give a student the correct answer later than to give one answer and then realize hours later, after you’ve looked it up, that you were dead wrong. It also shows that you are confident enough to say, “I don’t know, let me double-check that.” The caveat to this, however, is it could obviously have the opposite effect if you are constantly looking up an answer. But if it’s only a once-in-a-while thing, students will tend to trust in what you say the other 99 percent of the time.

3. Don’t give them all the answers.

It is really okay *not* to answer all of their questions; in fact, it is *much* better for them if you don’t. There is a reason the Socratic method has not died, even in the wake of the McCrate and Carnegie Reports.³

³ McCrate Report, ABA Section of Legal Education and Admission to the Bar, Legal Education and Professional Development: An Educational Continuum at 138 (1992); William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (2007).

Though it may scare the dickens out of 1Ls, it does encourage active learning.⁴ In my first year of teaching, I watched a former colleague say to a student, when asked about where a rule should go in a memo, “that’s a great question and exactly what you should be asking yourself. Now, it’s your turn to make a judgment call on this.” I was shocked when the student said, “I thought you would say that, but I just had to try before I wracked my brain trying to figure it out.” The professor could have easily said, “Oh, that rule goes in the overall Rules paragraph, of course.” And the student would have said “thank you,” and we would have all gone on our merry way. But the student would have never had to think that through and would have lost the benefit of understanding *why* that rule belonged in the overall Rules paragraph. Furthermore, without having gone through that process and receiving feedback on it later, the student would have been without the skill to transfer that ability to another memo in the future. As a new teacher, however, I was caught up in making sure I answered every question. I was shocked by how much my stock went up when I actually stopped giving them the answers. I realized that by giving them all the answers, I was telling them what to think instead of how to think. Likewise, as a parent, we want to fight all of our children’s battles and take away all of their hurts. However, the best lessons learned by children and law students alike are those learned through experience.

4. Let them know you care about them and you love what you do.⁵

In the legal writing classroom, the lines between professor, friend, and mentor can get blurry. I tend to believe that’s not necessarily a bad thing. But because we are consistently evaluating and giving feedback to students, it is important to forge a relationship built on trust. If they believe you

⁴ Mary Kate Kearney and Mary Beth Beazley, *Teaching Students How To “Think Like Lawyers”: Integrating Socratic Method with the Writing Process*, 64 Temp. L. Rev. 885 (1991); James B. Levy, *Legal Research and Writing Pedagogy—What Every New Law Teacher Needs to Know*, 8 Perspectives: Teaching Legal Res. & Writing 103 (2000).

⁵ James B. Levy, *Legal Research and Writing Pedagogy—What Every New Law Teacher Needs to Know*, 8 Perspectives: Teaching Legal Res. & Writing 103 (2000).

are on their side, they are much more willing to take constructive criticism. If you appear to be an unfeeling dictator and they think you are just there to collect a paycheck, they will disregard what you have to say. One of the ways I've accomplished this is to play music at the beginning of each class to get everyone relaxed before we begin and to create a fun environment. I also tell them (read: admit) on the first day that I am a "legal writing nerd," and I let them make fun of me for that. It becomes this continual self-deprecating joke in the class, and there are many days I say to them, "Isn't this *fun*?" They all roll their eyes and laugh. Though they may giggle, what I'm communicating to them is that I love being there and that I am invested in their success. I know this method wouldn't work for everyone, but just like children, if students think you really do care about their success, they are much more likely to listen to your suggestions to achieve that success.

5. Give them an inch and they will take a mile—or don't smile until Christmas.

Although it is very important to show them you like them and what you do, it is also very important to set boundaries with both students and children. If you respond to emails within five minutes, students come to expect that you will always do this, and the first time you don't, they will be attacking you for being unavailable. The first time you cave and say, "I know you are all so busy, so I'll extend the due date for your paper," they will come to expect that you do that every time. And the first time you let the children have dessert before dinner, they will not understand why they can't do that every night. A colleague of mine who used to teach evening students would hold office hours very late, sometimes until midnight. My colleague found he couldn't continue to stay so late because it was interfering with his work and his home life. At the end of the semester, one of his students complained on the professor's evaluation that the professor wasn't available because he "had the nerve" to stop those midnight office hours and was only available until ten o'clock. On the other hand, if he had refused to meet until midnight at the beginning of the semester

but then decided to extend his hours at the end of the semester, the students would have praised him for it. My mother, who was an elementary school teacher for forty years, was told as a new teacher, "Don't smile until Christmas." While I do smile sometimes in the first semester, the key really is setting the boundary at the beginning. Once that boundary is firmly in place, you can always be nicer later. And it will mean so much more to them than if you had been "nice" all along.

6. You can't please all of the people all of the time.

One of the hardest lessons I've had to learn is that some students will love you, while others are never going to like you, for whatever reason. Maybe you remind them of a parent with whom they don't have a good relationship, or maybe they really don't want to be in law school and you are just an impediment to sailing through and getting their degree. Don't let yourself get caught up in pleasing them. You are there to do what is best for them, whether they like it or not. As a parent, the hardest thing I've ever had to do is to discipline my children. Until I became a parent, I never believed my parents when they said, "This hurts me more than it hurts you." Similarly, many students will not realize the value you are giving them until many years after they graduate. The biggest mistake we can make is letting them slide by because we want them to "like" us, or we want to get good student evaluations. Our job is to equip them for the bigger world of being a lawyer, just like our most important job as parents is enabling our children to be independent in the real world without us. Both require a fair amount of discipline and hard work, but the reward is successful students and children alike.

CONCLUSION

Though these are but a few of the most important pieces of advice shared with me or discovered by me, the most important thing to take from this is to realize that being a legal writing teacher is not so different from other things you have done in your life, like being a parent. If you are faced with

“One of the hardest lessons I've had to learn is that some students will love you, while others are never going to like you, ...”

a situation as a teacher and you aren't sure how to handle it, think about how you would handle a similar situation as a parent, and if you aren't a parent, try to imagine how your parent(s) would have handled it. Like children, who are novices at being—well—people, first-year legal writing students are novices at legal writing. But also like children, with a little encouragement and some strong discipline, legal writing students can bring us unending joy and a sense of fulfillment.⁶

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⁶ Many thanks go to Professors Olympia Duhart, Catherine Arcabascio, and Debra Curtis, as well as to my mom, Kate Treado. These women are some of the best teachers I know, who also happen to be some of the best moms I know. Their advice in my first couple of years of teaching helped me beyond measure and made me the teacher I am today.

Another Perspective

"A decade ago, Professor Douglas Whaley published an essay that offers comfort and advice to those commencing the metamorphosis from practitioners, judicial clerks, and students into professors of law. As Whaley points out, no particular course work or life experience is required for those of us who devote our professional lives trying to explain concepts as elusive as future interests and mens rea to students who regard Law in a Flash cards as essential resource material.

Now that I have completed my second year of full-time teaching, I readily concur with Professor Whaley that little can be done to prepare for the sink-or-swim test which all new professors endure. Consulting seasoned colleagues, reading volumes of law review articles on legal pedagogy, attending seminars, and spending endless hours charting course plans and outlining class lectures provide some modicum of comfort. But none of this truly prepares you for the first time you face eighty students who expect you to demonstrate a mastery of the law in a manner that is both enlightening and entertaining."

Susan J. Becker, *Advice for the New Law Professor: A View from the Trenches*, 42 J. of Legal Educ. 432 (1992).

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Working on Our Night Moves:¹ Strategies to Engage Evening Students

By Rosario Lozada Schrier

Rosario Lozada Schrier is Assistant Professor of Legal Skills at Florida International University College of Law in University Park, Fla.

SETTING: The classroom of a law school.

Monday night. An analog clock on a wall shows the time: 9:52 p.m. A woman in her early forties (Professor) stands in front of a whiteboard. Students are sitting at desks, with open laptops. Six Starbucks cups are visible on the desks.

PROFESSOR

Please email me three secondary sources on this issue by 5 p.m. Wednesday. Okay. Thanks, everyone. Uh ... I'm going to stick around for a few minutes after class if anyone has questions.

Cut.

Something I said seemed to upset a few students, but what was it? I shrugged off the little voice in my head. After six years of teaching classes in the morning or early afternoon, I was teaching my first evening class, from 9 to 9:50 p.m., twice a week. And I had just made my first rookie mistake.

A deadline of 5 p.m. mid-week made no sense for my students. At 4:30 p.m., they were still at work, scrambling to finish an assignment. And by 5 p.m.? They were already driving in Miami rush-hour traffic hoping to get to their first evening class on time. Fortunately, a few days later, students didn't hesitate to tell me how terrible my timing was. And for the rest of the semester, all assignments were due by 11:59 p.m. on Sunday nights, a deadline proposed by the students themselves.

By now it must be painfully obvious that, despite my daytime teaching experience, I faced a steep learning curve in nocturnal education.² I am optimistic that this music-inspired “Top Ten” list will benefit any professors teaching evening students for the first time.

1. Be aware of the demands on your students' time.

Under pressure. Pushing down on me. Pressing down on you.

—Queen

The typical evening student is under pressure—and a lot of it. She works during the day, drives in rush hour traffic to get to class on time, and summons whatever energy remains to attend three or four hours of classes in the evenings. Most of her class work gets done on weekends. During weekdays, she has time-sensitive work projects and supervisors breathing down her neck. Although her employer may be “supportive” of her decision to attend law school, her office is still performance-driven. She is likely older than the average full-time day student, and she may have kids at home or an ailing elderly parent to care for.

2. Draw explicit connections from classwork and assignments to legal practice—early and often.

Constant craving.

—K.D. Lang

Your evening student is ambitious and driven enough to go to night school, but she has a constant craving to know the “why” behind every class

“I was teaching my first evening class ... [a]nd I had just made my first rookie mistake.”

² Nor was I aware of circadian rhythms, but that's beyond the scope of this article.

¹ Thanks, Bob Seger, for kicking us off.

“... after a full day of work, a commute to school and a couple of evening classes, students my sit in your legal writing class like deactivated droids. What to do?”

exercise, assignment, and critique.³ Precisely how will learning to draft an effective thesis sentence make her a better lawyer? The odds are that she won't have the luxury of seeing you regularly during office hours to get the answers she craves, so the onus is on you, her professor, to draw explicit connections to legal practice in class.⁴ The more light bulb moments you facilitate, the better.

Cast away your students' doubts. Use recent decisions and briefs demonstrating how judges and lawyers use the very skills you are discussing—road map paragraphs, CREAC or CREXAC, introductory signals, you name it. Although such examples certainly inspire both day and evening students, your evening student will find the practical applications particularly satisfying and stimulating. Two- or three-minute video clips of a judge discussing the persuasive value of a well-written brief or of a practitioner making an argument in court are also invaluable tools to help students draw critical connections.⁵

3. Help your students be fully present in class.

Right Here, Right Now. There is no other place I'd rather be.

—Jesus Jones

Woody Allen got it wrong. Eighty percent of success isn't just showing up. Yet after a full day of work, a commute to school, and a couple of evening classes, students may sit in your legal writing class like deactivated droids. What to do?

Engage your students constantly. Call on them in unpredictable order. Lecture sparingly, if at all. Move around the classroom. Break up the class into small groups for constructive critiques of other students' drafts.⁶ Replace word-heavy PowerPoint slides with in-class writing exercises that relate to the assignment due the following week. “Draft a rule explanation using cases A and B right now. Take 15 minutes and let me know if you have questions.” Keep expectations high.

To help students' minds stay in class, give strict rules for their use of gadgets. This includes smartphones.⁷ Establish clear and reasonable parameters: “If you are expecting an important call or message, please let me know at the beginning of class and put your phone on vibrate.” Be wary of downcast eyes and hidden hands, sure signs that texting is afoot (or a-hand). And don't hesitate to let students know that you know: “Tommy, I hope your sister is in labor.” I didn't know whether Tommy's sister was expecting—or whether Tommy even had a sister—but he did look up from his front-row seat when he heard his name. And his hands magically reappeared.

If attention is waning, consider a short distraction. Acknowledging those wandering minds can help refocus the class: “Okay. I can tell your brain is elsewhere now. Maybe you are thinking of that project due at work, that Heat game you are not watching, the Chipotle burrito you crave, or how you're going to celebrate your 30th birthday. Go ahead. Think about that for 10 seconds.” Pause. “Now let it go. Come back to Legal Skills and Values. We have work to do.”

³ See Bonny L. Tavares & Rebecca L. Scalo, *Teaching After Dark: Part-Time Evening Students and The First-Year Legal Research & Writing Classroom*, 17 *Legal Writing: J. Legal Writing Inst.* 65, 103-04 (2011) (discussing the generational composition and corresponding needs of evening law students).

⁴ *Id.* at 69 (recognizing that limited access to faculty is a reason why evening LRW classes must be designed for maximum effectiveness and efficiency).

⁵ Consider playing a clip of Justice Sonia Sotomayor discussing how she improved her own writing. C-SPAN, *Diversity and the Legal Profession* (August 26, 2010), available at <http://www.c-spanarchives.org/program/295200-1&start=1738.9010989010987&end=1864.9084249084249>. For oral arguments, nothing beats the OYEZ project at IIT Chicago-Kent College of Law. www.oyez.org.

⁶ A document camera can help. Or just open the document in Word and project it onto the screen.

⁷ I know of no app that can write an effective thesis sentence for you. But mobile legal research apps are on the rise. See Eric T. Gilson, *Injecting Mobile Legal Research Skills into the Curriculum*, 19 *Perspectives: Teaching Legal Res. & Writing* 126 (2011).

4. Discover what other classes your evening students are taking and adjust your teaching and comments accordingly.

Isn't it ironic? Don't you think?

—Alanis Morissette

Day students may love hearing that, back in the day, their professor also read *Pennoyer* in Civil Procedure, *Palsgraf* in Torts, and the *Peerless* case⁸ in Contracts. This kind of classroom chatter usually forges connections through shared experiences—everyone takes the same courses and reads the same seminal cases, right? But it turns out that evening students aren't necessarily enrolled in the same classes as first-year day students. As a result, casual references to *Wong Sun* or *Twombly* may cause students to feel out of the loop or unprepared, producing unnecessary angst. (Isn't it ironic?) Similarly, if students are not taking Civil Procedure, an assignment that involves a Rule 12(b)(6) motion to dismiss may be more difficult than you intended.

Do your homework ahead of time. Email your registrar and request your evening students' class schedule. And mind your classroom comments.

5. Do a little detective work.

*Private eyes. They're watching you.
They see your every move.*

—Hall & Oates

So maybe you don't want to know your students' every move—or their Facebook* posts. I hear you. But you may find that knowing a few details about your students' background helps you be a more effective teacher.

Prepare a questionnaire to distribute to your students on the first day of class with the usual request for emergency contact numbers and preferred email addresses. But don't stop there; dig deeper.⁹ Ask about hobbies and employment experience. “What are the best times to meet with you outside of class?”

Here's a bonus question of unlimited potential: “Is there anything else you would like me to know about you?” Answers may enlighten you and help you adapt to your students' needs. Consider a few sample answers:

“Unlike most of my classmates, I work a graveyard shift so I sleep in the mornings and will not be checking email until noon.”

“If I seem jittery in class, it's because I'm highly caffeinated and it works for me.”

“My mind tends to wander a lot at night when I'm tired. Please call me out on it.”

“I haven't been in school in five years and I'm very nervous about public speaking.”

When you teach in the evening, this kind of data is priceless. Use it to “Set Fire to the Rain” in your class—I'm not sure what that means, but Adele makes it sound intriguing. Weave students' names, hobbies, or work experiences into your hypotheticals and exercises. Watch students perk right up and *lean in*, so to speak.

6. Create alternatives to walk-in office hours.

You can do magic.

—America

Your students' work schedules make meeting with the students during traditional office hours a bit of a challenge. With a little creativity and flexibility, however, you and your students can conjure up a few tricks to meet the challenge.

For one-on-one meetings, first ask students how they would like to “meet.” Some may suggest a conference call or a Skype™ meeting. If the purpose of the meeting is to go over a student's written work, consider inviting the student to add line numbers to the document to be reviewed.¹⁰ Numbered drafts will make your phone or Skype meetings more efficient and productive. If your student prefers reviewing her document on a laptop or tablet, consider using an online tool

⁸ *Raffles v. Wichelhaus*, 159 Eng. Rep. 373 (Exch. Div. 1864).

⁹ My FIU colleagues have made student information sheets into an art form.

¹⁰ On Word, go to the View menu, then click as follows: print layout>layout tab>text layout>line numbers.

“Because of the many demands on their time, evening students will appreciate tools that help them stay on task and manage their time efficiently.”

or app for you and your student to virtually review a draft together and add comments.

You can also hold ongoing Q&A sessions without being physically present. Technology offers myriad possibilities beyond the obvious email exchange.¹¹ For example, you can launch a discussion forum or board on The West Education Network (TWEN)^{*} or Blackboard, or invite students to post questions or comments using a document on your Google[®] Drive.

Be aware that many of your students' questions may come up on weekends, when working students have more time to prepare for class and work on assignments. Regardless of the forum you choose, consider carving out a block of time to answer questions on a Saturday or Sunday. Let your students know of your game plan ahead of time so they can plan accordingly.

7. Give interim deadlines and quizzes.

Cruel to be kind in the right measure.

—Nick Lowe

Because of the many demands on their time, evening students will appreciate tools that help them stay on task and manage their time efficiently. For example, if you hand out an initial closed universe exercise with cases and a client file, tell your students that they'll be taking a quiz on the file in the next class. And keep your word.¹² Similarly, if your students need to start doing research for an open universe exercise, provide interim deadlines with submission requirements.

Detailed and concrete directives are more helpful to your students than general guidelines. Compare “All your research should be completed by *x* date so you can begin to write,” with “By *y* date, email me and your TA three secondary sources you consulted, with a brief paragraph describing

how they helped you understand issue *z*.” The first directive is so open-ended as to be daunting; the second is specific and more manageable.

One caveat: additional interim deadlines and quizzes should not translate into significant additional work for you. You need not review every student's submission. If you want to check the pulse of the class, scan a sampling of submissions, but know when to stop. Otherwise, ask your teaching assistant to comb through students' submissions and summarize top hits for you. Your TA can let you know if anyone is going astray and would benefit from redirection. And this leads me to my next point.

8. Select an upper-level evening student as a Teaching Assistant.

Like a Prayer.

—Madonna

A solid and committed teaching assistant is like a prayer, or certainly an answer to a prayer. And why should you pick a second- or third-year student who is also an evening student? One word: empathy. An upper-level evening student has walked in your students' shoes—juggling work, school, and a personal life. This empathy serves both you and your students. Everyone will benefit from the insight and experience of an evening student. And, of equal importance, an evening-division TA is most likely available in the late evenings and on weekends, when your students may need him most.

9. Celebrate skills put into practice.

Let's hear it for the boy! Oh, let's give the boy a hand!

—Deniece Williams

You know those excited emails from students expressing a combination of gratitude and shock because they are using the skills they learned in class?¹³ When you teach daytime students who are attending law school full-time, the grateful emails don't appear until the summer. Well, you don't have to wait until summer now. The thrill of working with

¹¹ See Tavares & Scalio, *supra* note 3 at 115-19 (discussing effective use of technology to teach evening law students).

¹² If you are reluctant to give additional grades, make the quiz grade count toward the class participation. Do it in the right measure.

¹³ Remember to save these emails in a “Joy” folder in your Outlook[®] inbox. When the road gets rocky, these emails are as good as gelato.

evening students is that they may have an immediate opportunity to put new skills into practice—perhaps even the very morning after your class meets. And when they share their joy with you, which they will, encourage them to bask in the glow with their classmates. Hearing about the success of their peers will reenergize and motivate the entire class.

10. Be kind to yourself; you'll be a better teacher for it.

Tenderness ... where is it?

—General Public

Yes, I mean tenderness directed toward the professor—*you*. On this point, I don't know when to start or when to stop. Despite your evening schedule, you may feel a tug to show up at school in the mornings, when the place is abuzz with students, colleagues, and workshops. Once or twice a week, resist the urge. Take the morning off to refuel.¹⁴

Disconnect. If you love teaching, this is much easier said than done. I tend to think—sometimes even ruminate—about my teaching up until the moment I walk into class. A story on NPR, a new district court decision, or a conversation with a colleague may trigger a slight change in my plans for class. This fluid approach is energizing if you teach at 10 a.m. or 2 p.m. With an evening schedule, however, you'll find it depleting and counterproductive. It's a bit like churning butter in your brain, rather than “setting fire to the rain.”

¹⁴ Nocturnal animals sleep in the daytime. They don't schedule early morning meetings.

Got food? Got sleep? Take the advice you give your students. Don't teach on an empty stomach. Get enough sleep to get you through the long day. If you are used to unwinding at night before bedtime, know that your time for unwinding will start later, and sleep may come later, too. If something doesn't go quite right and you have an “off” class—everyone does every now and then—the experience may linger in your brain longer than you like. (There's that churning, again.) You may not have a colleague to debrief with in the hallway. Develop a strategy to help turn off your brain.¹⁵

Conclusion

Regardless of any academic experience you may have, teaching evening students for the first time presents new challenges and opportunities. Knowing what to expect will empower you to be a better teacher and help you maintain a healthy relationship with your new schedule. Now, off you go. Start working on those night moves.

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¹⁵ Try meditation, yoga, chamomile tea, *Seinfeld* reruns, or *Arrested Development*. See also Sharon Salzberg, *Lovingkindness: The Revolutionary Art of Happiness* (2004).

“Despite your evening schedule, you may feel a tug to show up at the school in the mornings ... resist the urge.”



TWEN: MEETING AND EXCEEDING YOUR TECHNOLOGY NEEDS

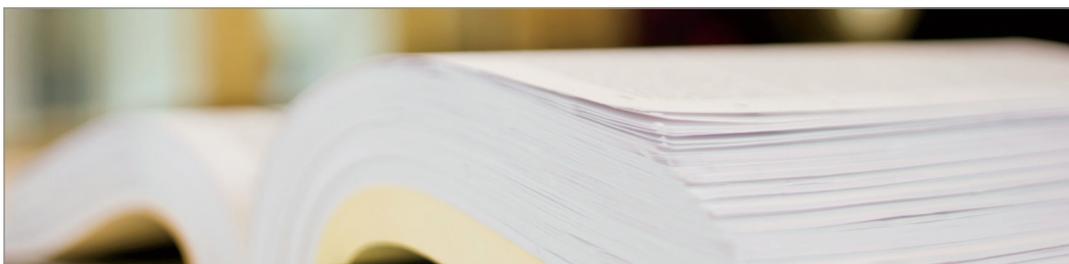
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