

Perspectives

Teaching Legal Research and Writing

Vol. 24 | No. 1 & 2 | Summer 2016

In This Issue

3 [Introducing Marijuana Law into the Legal Writing Curriculum](#)

Using marijuana law in the legal writing classroom might strike you as unworkable, but Howard Bromberg and Mark K. Osbeck examine the opportunities and offer substantial advice for using this rapidly developing area of law to craft hypothetical problems.

8 [The E-Comment: A Simple Exercise for Public Law Courses](#)

Sarah J. Morath designs a writing assignment using regulations.gov for a traditional, upper-level class with a regulatory component that allows students to transfer the persuasive writings skills learned in their 1L year to a new practical context.

17 [Show and Tell in the Legal Research Classroom: Screencasting as an Effective Presentation Format](#)

Ingrid Mattson and Susan Azyndar outline how having students create screencasts allows them to learn new technology, use their professional skills, demonstrate knowledge, and produce a digital sample of their work that can be used as part of their resume.

23 [Teaching Patience: Why Law Students Need to Slow Down and How to Help Them Do It](#)

Lawyers must learn to concentrate on important tasks for a sustained period of time, not just answer emails from “the busy partner.” Erin Carroll offers ideas and insight on how to help students slow down and develop the focus and patience they need.

29 [Fika—Mindfulness for the LRW Professor](#)

Although the legal writing community has a strong national network, Karen D. Thornton chronicles her rediscovery of a Swedish social tradition and how it adds to her feeling of contentedness with her colleague.

32 [Book Review: Reading Style: A Life in Sentences](#)

Deborah L. Borman reviews Reading Style: A Life in Sentences by Jenny Davidson, and finds that great literature has lessons for legal writing.

36 [Seek Out Different Learning Experiences to Inspire Your Teaching: Vignettes from Flute Camp](#)

Lessons from flute camp reinvigorate Julia M. Glencer's teaching by offering real-world, transferrable experiences for confronting weakness, increasing motivation, and handling difficult student exchanges with empathy from both sides of the podium.

41 [When Should We Teach Our Students to Pay Attention to the Costs of Legal Research?](#)

Beth Hirschfelder Wilensky argues that teaching first-year law students to think about the costs of legal research undermines our ability to teach them effective research at all.

47 [Legal Writing Professor's Lament \(or, Because, Your Briefs\)](#)

A poem by Kathryn Fehrman.

48 [The Final Legal-Writing Class: Parting Wisdom for Students](#)

Joel Atlas, Estelle McKee, and Andrea J. Mooney advise students about conducting themselves professionally to get the most out of their work experience.

50 [Toward a Writing-Centered Legal Education](#)

Adam Lamparello argues that externships and clinics are not the only curricular enrichment law schools should be looking toward to improve the practice ready skills of students, an intensive program that integrates in persuasive writing throughout the curriculum is needed, too.

55 [Practice Makes Proficient: Writing Classes for Struggling Students](#)

With law schools facing increasing pressure to retain their students, they must find creative ways to help the ones who struggle. In this article, Peter Nemerovski offers advice on creating and teaching a remedial writing course for students who earned low grades in their first-year writing courses.

59 [Analytical Search Strategies: A Tip Sheet with Examples for Teachers and Students](#)

Roberta Freeland Woods outlines a number of advanced search strategies and teaching examples designed to take students beyond browsing and basic keyword searching.

62 [Bright Idea: Connect the Power of Your Library to Your Law School's Pedagogy by Creating Legal Research Courses that Fill Gaps in the Curriculum](#)

Christina Glon's poster illustrates how her library has developed legal research classes that add value to the curriculum and show how the librarians help the law school meet the larger university's goals. Each new course connects a law librarian's unique background with a goal or focus of the school.

63 [Customizing a Legal Research Ontology for Teaching 1Ls](#)

Frustrated with how to teach 1Ls the big picture of legal research, Amy Taylor shares her poster outlining her ontological approach to the problem. The framework classifies research by type of research problem, area of law, type of law, type of research materials, legal action, and final product.

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Perspectives is for anyone who teaches legal research or legal writing—in law schools, libraries, courts, and law offices. Perspectives articles are short, readable, and explore a broad array of teaching theories, techniques, and tools. The idea can be large or small but if it provides a fresh and creative way to teach or learn about legal research or legal writing skills, Perspectives editors would like to publish it. Writing for Perspectives allows you to add to your resume and get published quickly while reaching the people who share your passion for this area of the law.

Perspectives appears twice yearly. Articles are typically between 1,500 to 7,000 words, lightly footnoted, and highly readable. They may focus on curricular design, goals, teaching methods, assessments, etc.

[Author Guidelines](#)

New in this Volume, and Another Micro Essay Challenge for v. 25!

This issue includes the results of our first call for micro essays. We feature 7 pithy and thought provoking responses to the prompt “Practice Ready.” You will find them spread throughout the issue. For the next in our series of micro essays, we are asking readers to submit 100 words or less on one or both of the following topics: “Digital Natives” or “Print Matters?” We welcome multiple submissions and will publish the best selections in volume 25 (we will even do so anonymously). Be honest; be creative; let us know what these words provoke or inspire!

Cite as: Howard Bromberg and Mark K. Osbeck, *Introducing Marijuana Law into the Legal Writing Curriculum*, 24 *Perspectives: Teaching Legal Res. & Writing* 3 (2016).

Introducing Marijuana Law into the Legal Writing Curriculum

By Howard Bromberg and Mark K. Osbeck

Howard Bromberg is a Clinical Assistant Professor of Law, and Mark K. Osbeck is a Clinical Professor of Law, both at the University of Michigan Law School in Ann Arbor, Mich.

Interest in marijuana law continues to grow, due in large part to the complicated and rapidly evolving landscape of marijuana laws in the United States. Nearly every day, newspapers report on new or proposed legislation and the legal controversies that have arisen with regard to this evolving landscape. There are now several marijuana-law blogs on the Internet, Congress is considering sweeping legislation that would essentially grant significant deference to the individual states, and public opinion continues to move in favor of increased legalization. For the last two years, *Newsweek* magazine has published special editions devoted exclusively to marijuana law and the movement toward legalization, with cover captions “WEED NATION,” and featuring a large red, white, and blue cannabis leaf.¹

In light of this growing interest in marijuana law, we propose that the topic is ripe for the legal writing classroom. Not only is marijuana law a rapidly evolving area of law, and therefore a fertile source of new legal issues, it also is an area of significant interest for many students, and it raises many fascinating legal issues—civil, criminal, and constitutional. This article therefore proposes that legal writing professors consider incorporating marijuana law issues into their first-year courses, and it offers some ideas for how they might create marijuana-related legal writing problems.

¹ *Weed 2016: The Beginning of the End for Pot Prohibition*, *Newsweek* Special Issue, Feb 2016; *Weed Nation: is America Ready for a Legalized Future?*, *Newsweek* Special Issue, Feb/March 2015.

Despite this burgeoning interest in marijuana law, teaching about the changing landscape of marijuana regulation has been largely absent from the law school classroom.² There seem to be two reasons for this neglect. First, the subject has appeared a bit tawdry: not quite upstanding enough, in other words, for the law school classroom. Secondly, and perhaps most importantly, the debate over the pros and cons of legalization has tended to overshadow the fact that marijuana law raises a number of complex issues on topics such as constitutional law, federalism, criminal enforcement and civil rights, family law, taxation, professional responsibility of lawyers, racial discrimination, and civil liberties.³

How can this plethora of legal issues relating to marijuana be utilized in the legal writing class? There are two basic approaches to creating marijuana-related legal-writing problems. One approach is to situate a problem squarely within the complexities of marijuana legalization that raise interesting legal issues of first impression. The other approach is to use a marijuana-related hypothetical to situate a legal writing problem in a traditional area of law.

Both approaches take advantage of the inherent interest of students in the social and political controversies raised by marijuana use, as well as the constitutional and legal complexities raised by our bifurcated legal system. This paper discusses

² Only a handful of law schools have offered classes or seminars devoted to marijuana law. We offered an introductory seminar on the issue at the University of Michigan Law School in 2015, and we plan to lead another seminar on representing marijuana related businesses in the coming year.

³ For a good overview of current marijuana laws, see [Erwin Chemerinsky, Jolene Foran, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 *UCLA L. REV.* 74, 84-90 \(2015\)](#).

“Not only is marijuana law a rapidly evolving area of law, and therefore a fertile source of new legal issues, it also is an area of significant interest for many students, and it raises many fascinating legal issues—civil, criminal, and constitutional.”

each in turn. Part I highlights some possibilities of the first approach, and Part II outlines the manner in which we have constructed legal writing problems using the second approach.

I. Centering Problems Around Legal Issues of First Impression

The first approach situates the legal writing problem squarely within the context of evolving marijuana laws, thereby raising a variety of cutting-edge legal issues. Although a legal writing problem can be set in either the federal or a state jurisdiction, it will inevitably have aspects of both, given the strangely overlapping nature of our marijuana laws. Under the Controlled Substances Act of 1970,⁴ marijuana is classified as a Schedule I drug, the most stringent classification, and thus remains illegal under federal law. As a result, an ancillary question of jurisdiction is almost an inevitable aspect of such a problem, which provides instructors an opportunity to explain to beginning law students the dual sovereign nature of American laws, in which federal and state laws cooperate and conflict.

The instructor would also need to decide whether to situate the problem in a criminal or civil context. In a federal jurisdiction, or in one of the 26 states where marijuana is still completely prohibited, the problem will necessarily involve criminal law, since marijuana possession is inherently illegal. But in any one of the 24 states and the District of Columbia that has moved toward medical and/or recreational legalization,⁵ the problem may instead be set in the civil arena. However, even in those states where marijuana has been legalized for medical or recreational use, criminal issues lurk in the background, as prosecutions are brought both for acting outside the scope of permissible use, and for marijuana offenses that will always be criminal, such as driving while impaired. This bifurcation presents a unique opportunity for legal

writing instructors, as the intertwined nature of civil and criminal issues in marijuana law allows for an insightful discussion of the differences between criminal and civil laws and lawsuits.

As for traditional criminal-law problems, they raise some important new issues when examined in the context of marijuana law. For example, Fourth Amendment search-and-seizure law is one of the most developed areas in criminal procedure. But search-and-seizure law takes an entirely new twist with the question of whether marijuana odors alone give rise to probable cause. This is particularly troublesome for the courts in jurisdictions that have legalized medical marijuana use, since the odor may arise from legal use. Accordingly, at least one jurisdiction, the District of Columbia, has enacted a statute that specifically forbids police from basing a reasonable articulable suspicion that a crime is being committed on marijuana odor.⁶

Numerous civil issues can also give rise to interesting legal writing problems. In the area of employment law, for example, the courts have had to decide whether an employer can fire an employee who tests positive for marijuana use on a urine test, even if the use took place at home days earlier pursuant to a valid medical marijuana license, and the employee was not impaired while on the job.⁷ This raises real concerns because marijuana, unlike alcohol, can stay in the system for a significant time, and therefore an employee who uses marijuana during the weekend or while on vacation may test positive, even though they have not used the drug for days before returning to work.⁸ In the area of federal taxation, owners of marijuana-related businesses are concerned because the tax code treats marijuana-related businesses in states with legalized marijuana more harshly than any other businesses. For example, it denies these businesses deductions for all expenses paid or incurred in

⁴ Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 812 (2012)).

⁵ For an updated, online survey of state law see <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

⁶ See D.C. Code § 48-921.02a (2015).

⁷ See, e.g., *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (upholding right of employer to terminate employee with medical marijuana license who used marijuana only at home).

⁸ See JONATHAN CAULKINS, *ET AL.*, MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 12-13 (2012).

“[E]ven in those states where marijuana has been legalized for medical or recreational use, criminal issues lurk in the background ... This bifurcation presents a unique opportunity for legal writing instructors, as the intertwined nature of civil and criminal issues in marijuana law allows for an insightful discussion ...”

connection with their business enterprises.⁹ And in the area of landlord-tenant law, the courts will have to decide whether municipalities can pass ordinances allowing landlords to evict tenants who grow or smoke marijuana on the premises, even though the tenants have valid medical marijuana licenses that allow them to engage in these activities. This also raises the interesting legal issue whether a local law like this is invalid because it conflicts with state law authorizing medical marijuana use.¹⁰

Several of the most intriguing civil topics arise in the context of the lawyer's professional responsibility obligations. For example, there is an issue whether—and to what extent—lawyers can counsel marijuana businesses that are operating in conformance with state law. Professional responsibility boards have been dealing with this issue in states that have legalized medical marijuana use because such use is still illegal under federal law,¹¹ and Rule 1.2 of the Model Rules of Professional Conduct¹² prohibits lawyers from assisting clients in illegal and fraudulent activities. There is also an issue whether a lawyer possessing a medical marijuana license may use marijuana (outside of the workplace, of course), given that Rule 8.4(b) of the Model Rules of Professional Conduct¹³ prohibits engaging in

⁹ See 26 U.S. Code § 280E. See also Douglas A. Kahn & Howard Bromberg, *The Tax Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should Be Repealed*, 18 Fla. Tax Rev. 207 (2016).

¹⁰ See e.g., *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536-41 (Mich. 2014).

¹¹ See, e.g., Connecticut Bar Assn. Prof. Ethics Comm. Informal Op. 2013-02 (2013).

¹² Rule 1.2: *Scope of Representation & Allocation of Authority Between Client & Lawyer*—

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

¹³ Rule 8.4: *Misconduct*—

It is professional misconduct for a lawyer to:
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

activity that reflects adversely upon the lawyer's "honestly, trustworthiness, or fitness as a lawyer." The few state bars that have considered the issue thus far have taken mixed approaches, but the majority rule seems to be that lawyers do not act unethically, at least not per se, if they partake of marijuana legally in a state that allows it.¹⁴

These professional responsibility issues make attractive legal writing problems for two reasons. First, they get students to think about ethical questions concerning the practice of law, which is critical for aspiring lawyers. Second, they expose students to the rules of professional responsibility, which are a little-used but important source of authority in first-year courses.

II. Situating Traditional Legal Problems in a Marijuana-Related Context

The second approach to creating legal writing problems situates the legal writing problem within traditional areas of law, adapting them to a factual context that makes them relevant to the marijuana debate. This is the approach we have taken thus far in our legal writing problems. We have used marijuana law as a background to enrich legal doctrine in a settled area. As with the first approach, the resulting problems are realistic, contemporary, and interesting to students. However, the law they deal with is settled, with tests and factors that have been well-established by the courts. The nuances of marijuana law therefore add complexity to the problem—both as to jurisdiction and as to the relation of criminal and civil law—but they don't dominate the doctrinal subject.

We have found First Amendment free-speech law involving marijuana advocacy to be a particularly fruitful source of problems. The U.S. Supreme Court has developed several significant tests over the last decade, which apply to speech in various settings. That the speech involves marijuana controversies raises a question of jurisdictional

¹⁴ See e.g., Colorado Bar Association Formal Opinion No. 124, 41 COLORADO LAWYER 28 (July, 2012).

“These professional responsibility issues make attractive legal writing problems ... they get students to think about ethical questions concerning the practice of law ... they expose students to the rules of professional responsibility ...”

overlap, and also a question whether the speech involves the promotion of criminal acts.

The two free speech areas that we have used to situate our problems thus far are (1) speech in schools and (2) speech by employees in public-employment spheres. The first problem involves a high school student who leads a chant and distributes wristbands at an off-campus pep rally for her high school football team. The chant was “Legalize and Get High as the Skies,” and the wristband was imprinted with a small marijuana leaf. After these actions create a minor ruckus the following school day, the high school principal demands that the student write a letter of apology and collect all of the wristbands, citing the school code of decorum which forbids inappropriate, graphic, or offensive clothing, as well as disruptive behavior. Instead, the student files a complaint with the federal district court, challenging the application of the decorum code to her chant and wristbands as a violation of the student’s First Amendment right to free speech.

The law is well-developed in this area, with many nuances. A trio of U.S. Supreme court cases, *Tinker v. Des Moines Independent Community School District*,¹⁵ *Bethel School District v. Fraser*,¹⁶ and *Hazelwood School District et al. v. Kuhlmeier*,¹⁷ have established basic rules for free speech in the school zone. *Tinker* allows restriction of disruptive speech in schools; *Hazelwood* allows restriction of student speech that bears the imprimatur of the school; and *Bethel* allows restriction of obscene student speech. Also, in 2007, the U.S. Supreme Court decided *Morse v. Frederick*,¹⁸ which allows schools to restrict speech that promotes illegal drug use, specifically marijuana.

This problem is attractive because students must make subtle choices about which of the four tests

to apply. The tests are extensively discussed law, but must be calibrated for the unique issues that arise in marijuana advocacy in school. The *Morse* test raises directly the question of whether advocating for legalization of marijuana counts as promoting the illegal use of drugs or protected political speech.¹⁹ It also raises the issue whether schools are allowed to prohibit students from promoting marijuana use in off-campus forums that have only a tenuous connection to the high school campus.

The second problem we have used relates to a parallel issue, but in the public workplace. In that problem, an administrative assistant in a federal agency placed a small sign that displayed a message advocating the use of medical marijuana on the outside of his office cubicle. The employer told the assistant that his sign violated office policy as it was inappropriate, disruptive and advocated drug use. The assistant was then instructed to remove the sign or face discipline. Analysis of public workplace free speech has traditionally required the application of two Supreme Court cases, *Pickering v. Board of Education*,²⁰ and *Connick v. Myers*,²¹ along with their progeny. First, to be protected, the employee’s speech must relate to a matter of public concern as to content, form, and context. Second, the court must balance the interests of both the employee and employer. On the employee side, the court must weigh the importance of the employee’s speech as political discourse. On the employer’s side, it must weigh whether the speech impairs discipline, interferes with working relationships, and disrupts normal operations of the office.

This is an ideal problem according to traditional criteria. It employs two issues: the first—public concern—is a threshold issue, which takes on directly the importance of marijuana discussion and debate in our public life. The second is a traditional balancing test. The problem makes use of analogical reasoning, comparing the fact scenario with other

¹⁵ 393 U.S. 503 (1969).

¹⁶ 478 U.S. 675 (1986).

¹⁷ 484 U.S. 260 (1988).

¹⁸ 551 U.S. 393 (2007).

¹⁹ *Id.* at 404; *see also id.* at 422 (Alito, J. concurring).

²⁰ 391 U.S. 563, 568 (1968).

²¹ 461 U.S. 138, 146 (1983).

public concern cases. It also makes use of deductive reasoning, applying the varying factors that weigh the employee's free speech interests against the employer's interest in efficient operations. Although these cases are fact-laden, the questions of free speech are matters of law. Thus, students are compelled to use all of their analytical skills in assessing this hypothetical, without resorting to the refuge that "it is a complex issue, let the jury decide." As with any marijuana problem, policy questions are paramount as well.

Conclusion

This paper has outlined two approaches to developing marijuana-related legal writing problems. No matter which approach the instructor chooses, marijuana law presents numerous difficult and interesting issues. And the fact scenarios are invariably realistic, cutting edge, and of significant interest to students. Thus, marijuana law provides an excellent source for new legal writing problems. Introduction

“No matter which approach the instructor chooses, marijuana law presents numerous difficult and interesting issues. And the fact scenarios are invariably realistic, cutting edge, and of significant interest to students.”

Micro Essay: Practice Ready

A Moving Target

Memo to the new law school graduate:
Your skills are now obsolete!

Know what you know
Know what you don't know
Know the difference between the two
Know a law librarian

The world keeps on turning
Lawyers must keep on learning
Law, skills, technology: need to know now
Again and again
Consult the law librarian

Learn what you don't know
Practice what you learn

Repeat.

Donna Tuke, Chicago, Ill.

Cite as: Sarah J. Morath, *The E-Comment: A Simple Exercise for Public Law Courses*, 24 Perspectives: Teaching Legal Res. & Writing 8 (2016).

The E-Comment: A Simple Exercise for Public Law Courses

By Sarah J. Morath¹

Sarah J. Morath is Associate Professor of Legal Writing at The University of Akron School of Law in Akron, Ohio.

In the wake of calls to make law school students more practice ready, law schools across the country are reevaluating and redesigning their curricula. One example of this reform is the number of law schools that now require courses in legislation and regulation.² This change was examined in the August 2015 edition of the AALS Journal of Legal Education titled “Legislation/Regulation and the Core Curriculum.” In that publication, Professors Manning and Stephenson describe a Legislation and Regulation (leg-reg) course that has been part of the 1L Curriculum at Harvard Law School since 2006 to “broaden” the 1L perspective “from the essential, but by today’s standards incomplete, focus on private law topics and common law reasoning” that has dominated the law school curricula of the past.³ Professor and Manning and Stephenson argue that courses in statutory and regulatory law would help prepare students for growing practice areas that are permeated by regulations including environmental, occupational health and safety,

health care, immigration, food and drug, securities, banking and finance, labor and employment, and tax law.⁴ Yet, as Manning and Stephenson have discovered, learning about statutes, regulations, and administrative law is not always “intuitive or accessible” for students.⁵ They note that “there is relatively little about legislative procedure, notice-and-comment rulemaking, deference, and the like that is intuitive to students—that resonates with experiences that [students] have had in life.”⁶ The challenge lies in making administrative law or leg-reg course accessible by showing students “real-life issues that cut across many areas of law and many kinds of human experiences.”⁷

The e-comment exercise is my attempt to address Manning and Stephenson’s concern. This article describes an exercise that can be used in any course that has a regulatory component. An exercise where students comment on an administrative comment is nothing new, especially in the context of an Environmental Law course.⁸ And while resources exist to assist professionals and the public in writing administrative comments,⁹ little

¹ The exercise was presented at the 2015 Northwest Regional Legal Writing Conference, Legal Writing and Leadership, University of Oregon School of Law in April 2015.

² These courses are often called “leg-reg,” and typically include some component of legislation, statutory interpretation, and administrative law, and might be seminar or lecture type courses. See generally, [Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation & Administrative Law in Law School Curriculum*, 65 J. Legal Educ. 121 \(2015\)](#) (examining the effect of leg-reg courses on upper-level offerings in legislation and administrative law). The exercise describe in this article is not limited to “leg-reg” courses, but instead can be used in any course that has a regulatory component.

³ [John F. Manning and Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. Legal Educ. 45, 45 \(2015\).](#)

⁴ [James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?* 65 J. Legal Educ. 3 \(2015\).](#)

⁵ Manning and Stephenson, *supra* note 3 at 69.

⁶ *Id.*

⁷ *Id.*

⁸ [Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 Wash. U. J.L. & Pol’y 11, 49-55 \(2003\)](#) (describing a seminar in environmental advocacy, which includes an assignment where students draft an administrative comment); see also [Michael Robinson-Dorn, *Teaching Environmental Law in the Era of Climate Change: A Few Whats, Whys, and Hows*, 82 Wash. L. Rev. 619, 639 \(2007\)](#) (describing the use of case studies and simulations such as drafting administrative comments as a way to integrate doctrine and skills in an environmental law course).

⁹ Elizabeth Mullin, *The Art of Commenting: How to Influence Environmental Decisionmaking With Effective Comments*,

“[L]earning about statutes, regulations, and administrative law is not always ‘intuitive or accessible’ for students.”

has been written about instructing law students on the drafting of administrative comments. As this article explains, the e-comment exercise offers numerous benefits to the students who complete this assignment and the professors who teach it.

Part I: Background

I assigned the e-commenting exercise described in this article in my Environmental Law course. I primarily teach Legal Research and Writing (LRW) and was asked to teach Environmental Law when the need arose. The Dean recognized my scholarly interests in environmental law, and I was excited to try my hand at an upper-level “podium” course. As I prepared for Environmental Law, I thought about ways to integrate a writing exercise into the course. At the same time, I was working on an article that included a discussion on the Food Safety Modernization Act (FSMA). FSMA was overhauled 2010 and, as a result, the Food and Drug Administration (FDA) was in the process of promulgating several new rules. Some of these rules were controversial, such as “Standards for growing, harvesting, packing, and holding of produce,” which had onerous water-testing, equipment, and record keeping requirements.¹⁰ In 2013, many farming organizations were soliciting their members to “comment” on these new rules and I was one of many who received emails asking me to tell the FDA, “Let a Farm Be a Farm.” This got me thinking about public participation in the notice-and-comment process and how comments influence the outcome of a rule. If a proposed rule needs to be modified or changed, how can a comment “convince” the reader to make the necessary changes? The rulemaking process is an essential part of environmental law and I thought having students comment on a proposed environmental rule might be a great way to integrate the substance of what they were learning with a writing exercise. And so the e-commenting exercise was born.

Environmental Law Institute, 2d Edition (2013); see also http://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf

¹⁰ 78 Fed. Reg. 3503 (Jan. 16, 2013) (Laurie J. Beyranevand, *Balancing Food Safety and Burdens on Small Farms*, NAT. RESOURCES & ENV'T, Fall 2013, at 17.

E-Government Act, E-Rulemaking, and E-Commenting

E-commenting¹¹ is part of e-rulemaking,¹² which is a product of the E-Government Act of 2002.¹³ With the E-Government Act of 2002, the federal government began to use information technologies to make information available to the public online, but also to perform processes that required public participation, such as the notice-and-comment process.¹⁴ E-commenting is much like traditional paper-based commenting that occurs during the notice-and-comment period except that the e-comment is written and submitted online rather than written on paper and submitted through a mail carrier (or “snail mail”).

As part of the E-Government Act of 2002, federal agencies were required to publish regulatory dockets online and to accept electronically-submitted public comments.¹⁵ Regulations.gov is the mechanism designed to achieve this requirement. Launched in 2003, regulations.gov operates “to provide public users

¹¹ E-commenting is also common term used by legal writing professors who provide written feedback online. For purposes of this article, e-commenting refers to comments to a proposed administrative rule that are submitted online using www.regulations.gov.

¹² E-rulemaking is “the use of electronic media by regulatory agencies.” Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 Mich. J. Envtl. & Admin. L. 1, 7 (2012); see also Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 Admin. L. Rev. 893, 895 (2011) (defining e-rulemaking as “using web technologies before or during the APA’s informal rulemaking process, i.e., notice-and-comment rulemaking under 5 U.S.C. § 553. This includes many types of activities, such as: posting notices of proposed and final rulemakings; sharing supporting materials; accepting public comments; managing the rulemaking record in electronic dockets; and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.”).

¹³ This act is codified in scattered sections of title 44 of the United States Code.

¹⁴ See Beth S. Noveck & David R. Johnson, *A Complex(ity) Strategy for Breaking the Logjam*, 17 N.Y.U. ENVTL. L.J. 170, 178-79 (2008) (explaining that with the E-Government Act of 2002, “Congress legislated “e-rulemaking” to put the APA public comment process online and “improve the 179 quality and use of Federal information to strengthen decisionmaking”) (quoting E-Government Act of 2002, 44 U.S.C. § 3501(4) (2000)).

¹⁵ Coglianese, *supra* note 12 at 8.

“The rulemaking process is an essential part of environmental law and I thought having students comment on a proposed environmental rule might be a great way to integrate the substance of what they were learning with a writing exercise.”

access to federal regulatory content.”¹⁶ As the website explains, regulations.gov allows the public to: “search publicly available regulatory materials, e.g., posted public comments, supporting analyses, FR notices, and rules; submit a comment on a regulation or on another comment; download agency regulatory materials as an excel file”; and “sign up for email alerts about specific regulations.”¹⁷ Thirty-nine agencies participate in the governance of the eRulemaking program and post the comments they receive online.¹⁸ Another 300 agencies’ rules and regulations are posted to regulations.gov, but because these agencies are “nonparticipating” agencies, the submitted comments are not visible through regulations.gov.¹⁹ At the time of this article, over 2,000 notices and proposed rules were available for comment.²⁰

A variety of documents can be found on regulations.gov including: proposed rules, rules, and notices from the Federal Register.²¹ Comments associated with the proposed rules and notices can also appear on the site so that the public—and students—can view what others have written in response to a proposed rule or notice.²² Over the years, regulation.gov has been modified to improve its management, functionality, and design.²³ Introducing students to this website and its contents is a fairly straightforward task, and students generally welcome the opportunity to be online during class.

Part II: The E-Comment Exercise

In the e-comment exercise, the professor can pre-select proposed rules from regulations.gov for students to comment on or the professor

could have students choose a rule that interests them. The first time I ran this exercise, I had students draft a comment letter on the proposed change to the definition of “navigable waters of the United States” under the Clean Water Act (WOTUS).²⁴ The proposed rule was in response to the Supreme Court’s interpretation of this definition, which led to some confusion among lower courts.²⁵ Because my students read the Supreme Court decisions interpreting this phrase, the proposed definition change was particularly timely and relevant to the class.

The in-class component of this exercise includes covering the substantive law behind the rule. For my example, this included reading and discussing the Supreme Court decisions in their textbook. I also discussed the proposed rule with students, as well. Proposed changes can be significant—for example, the WOTUS rule was 88 pages²⁶—so I wanted to identify specific portions of the rule for the exercise. Because I chose a live rule (or a proposed rule where comments are still being accepted), I also found newspaper articles, blog posts, bar journal articles, and other commentary on the rule. I was able to locate an article in TRENDS, the ABA Section of Environment, Energy, and Resources Newsletter, on the proposed WOTUS change.²⁷ This further illustrated for students the timeliness of the exercise and the legal community’s interest in this issue. Not all proposed

²⁴ The proposed rule was jointly announced in March 24, 2014 by the EPA and U.S. Army Corp of Engineers.

²⁵ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). Much of the confusion stems from *Rapanos*, which was decided 4-1-4, with no individual opinion (or test for determining what constitutes a navigable water) acquiring a majority. See *Kristen Clark, Navigating Through the Confusion Left in the Wake of Rapanos: Why A Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act Is Necessary*, 39 Wm. & Mary Envtl. L. & Pol’y Rev. 295, 307 (2014) (describing the circuit split that has emerged in light of *Rapanos*). The EPA and Army Corps tried to eliminate this confusion with rulemaking and guidance in 2003, 2008, and 2011. See *id.* at 308-309.

²⁶ Federal Register / Vol. 79, No. 76 / Monday, April 21, 2014 / Proposed Rules 22188

²⁷ W. Blaine Early, III, *Waters, waters everywhere: Does the proposed definition of wasters of the United States expand the Clean Water Act’s Reach?* TRENDS (November/December 2014)

¹⁶ <http://www.regulations.gov/#!aboutProgram>

¹⁷ *Id.*

¹⁸ <http://www.regulations.gov/#!aboutPartners>

¹⁹ *Id.*

²⁰ <http://www.regulations.gov/#!home>

²¹ <http://www.regulations.gov/#!help>

²² *Id.*

²³ See Coglianese *supra* note 12 at 9.

rules are this involved, so in the future it might be interesting to find a shorter and less controversial rule to show students that some rulemakings are straightforward and noncontroversial.

In addition to discussing the substantive law of the rule, I wanted to look at comments written in response and to discuss the components of a good comment letter. Like all written documents, style, substance, and organization are important considerations. Students should understand that the comment is a formal document, even though many comments the students might review are informally written. The student-writer should use a concise writing style that is grammatically correct and error free. The comment is also a persuasive document, so the student-writer should use a persuasive style.²⁸ It is also legal document, so the student-writer should state her position up front, use the law or data and other examples to support her position, state this law or data before engaging in application or analysis of the law and data, and provide citations to those laws and data. The student-writer should exhibit professionalism in her writing and rather than just pointing out deficiencies with the proposed rule, the student-writer should acknowledge the agency and its efforts and propose solutions or amendments. I devised a rubric or checklist for my students, similar to the one at the end of this article, as a reference them as they complete their assignment.

The writing aspect of the assignment took place outside of class. The students chose a stakeholder affected by this rule and drafted a three to four page letter supporting or opposing the proposed rule. Students had a few weeks to complete the assignment. I did not review any drafts, but the exercise could be designed such that students receive written feedback before submitting the final assignment for a grade. The students submitted the letter to me and could also submit the letter to the Environmental Protection Agency via the regulations.gov website if they chose to. On the website, students

could read comments made by others, as well as, track the status of the proposed rule.²⁹

A. Transferring Skills: Persuasive Writing 2.0

The primary reason I like this exercise is that it provides an opportunity for students to transfer the persuasive writing skills acquired during their first year legal writing course in a new context.³⁰ While learning theorists have studied the concept of transfer for quite some time, transfer has only recently made its way into discussions on legal education.³¹ Transfer theory is quite complex with different “types” and “hierarchies,”³² but for purposes of this article, it is easiest to think of transfer as “using information and skills that you learned in one context in another context.”³³ The transfer that I was hoping to see take place in this exercise was the use of logos, pathos, and ethos, commonly taught in the first year writing course for brief writing, in the comment that is submitted to an agency. But as Professor Tonya Kowalski has noted, the “problem of transfer is one of changing contexts.”³⁴ Small changes in context (changing

“The primary reason I like this exercise is that it provides an opportunity for students to transfer the persuasive writing skills acquired during their first year legal writing course in a new context.”

²⁹ The ability to read other comments could lead to some issues with plagiarism. I am not sure how to address this except to tell students that they are prohibited from reading comments on the proposed rule until after their comment is submitted. This is also why having an in-class example with effective comments is so important. Students can be encouraged to use these comments as samples.

³⁰ Studies show that students struggle with transferring skills, especially in the clinic setting. “Despite receiving rigorous training in doctrinal law, formal analysis, writing, and oral presentation in their first three semesters of law school, clinic students often struggle to “transfer” much of that learning to their clinic work.” See [Shaun Archer, James P. Eyster, James J. Kelly, Jr., Tonya Kowalski, Colleen F. & Shanahan, *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. Legal Educ. 258, 269 \(2014\)](#). “[T]ransfer theory addresses how to help learners connect prior learning to new contexts.” [Tonya Kowalski, *Toward A Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 Clinical L. Rev. 285, 291 \(2010\)](#).

³¹ In 2010, Professor Tonya Kowalski wrote the first piece of legal scholarship to provide a “comprehensive overview of transfer theory.” See [Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 Seattle U. L. Rev. 51, 59 \(2010\)](#). Professor Kowalski provides for a summary of articles that mention transfer as a concept in law school pedagogy. *Id.* at 53.

³² *Id.* at 61.

³³ Megan McAlpin, *Transferring Writing Skills from Law School to Law Practice Ready to Write*, OR. ST. B. BULL., October 2015, at 13.

³⁴ Shaun Archer et. al., *supra* note 30 at 272 (2014).

²⁸ See *infra* Transferring Skills section for more on this topic; see also Sarah J. Morath, *Standout from the Crowd: Drafting Persuasive Comments in an Era of “Notice-and-Spam”* (in progress).

from a brief to a comment letter, for example) can create a sense of inapplicability of a skill.³⁵

Because transferring knowledge from one class and context to another is not always easy, students completing the e-comment exercise may need a refresher on persuasive writing.³⁶ To aid in transfer, learning theorists suggest generalizing the problem to broaden its context and making direct references to past training.³⁷ Professor Kowlaski describes this as “cueing students to ‘reach back’ to prior learning.”³⁸

I begin by describing the similarities and differences between comments on proposed rules and appellate briefs. While the goals of each are different, both are intended to be persuasive legal arguments. The goal of an appellate brief is to explain why a lower court made an error in its judgment or was correct in its judgment. The goal of the notice-and-comment procedure is to provide for public participation in the crafting of a legislative rule or regulation.³⁹ This process ensures that an agency has all the facts and information, and is aware of possible alternatives, before a rule goes into effect. Although the goals are different, the persuasive tone is the same.⁴⁰ Both documents are written pieces of advocacy. A member of the public could write a comment in support of a proposed rule (similar to the attorney who writes that the judgment should be affirmed), or could write in opposition to a proposed rule (similar to the attorney who writes that the judgment should be reversed). In

both, the writer is writing to persuade the reader that her argument is sound. To further illustrate these similarities, I show my students the following quote from an attorney at Foley and Lardner.

If you are seeking substantial changes or a major turnaround in the [proposed rule], *make your comments look and sound like a legal brief (more on style and tone later). The more your comments look like you are seriously geared up for a legal challenge, the more seriously agency personnel will take your comments.* In this regard, carefully consider the case law on judicial review of agency rules, and prepare to attack any element of the proposal where there may be weakness. This would include arguments regarding statutory authority and interpretation as well as adherence to all prescribed procedures.⁴¹

As an advocacy document, both the brief and the comment will be more effective if the student-writer employs traditional rhetorical devices of persuasion: logos, ethos, and pathos.⁴² As a legal writing professor, my students have written an appellate brief in their second semester and so I can remind Environmental Law students of these concepts. We spend time looking at comments from other rules and examine what is and is not effective about the comment. Last year I used the FDA’s proposed change to the nutrition label that was announced in 2014. One proposed change involved separating out “added sugars” from “sugars” on the label, so that “added sugars” would be accounted for independently from “sugars.” As a class we looked at both effective and ineffective comments, paying particular attention to whether the comment was persuasive and whether the writer had demonstrated an effective use of logos, ethos, and pathos. An example of an ineffective comment might be:

This rule is fabulous! It will help the general public in recognizing what they are actually eating rather than what they should be eating. I

³⁵ *Id.*

³⁶ This is called “backward-reaching retrieval.” *Id.* at 271.

³⁷ *Id.*

³⁸ *Id.* at 272.

³⁹ 5 U.S.C. 553 (b) & (c) (2012); William Funk, *When Is A “Rule” A Regulation? Marking A Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 Admin. L. Rev. 659 (2002) (stating that “legislative rules are subject to the notice-and-comment rulemaking requirements of 5 U.S.C. 553”). Professor Funk also explains that the terms rule and regulation are generally considered synonymous. See *id.* at n. 7.

⁴⁰ “If, for example, the writer’s purpose in writing a brief is to persuade the court, then under this criterion, the brief is well written if in fact it persuades the intended audience (i.e., the court).” Mark K. Osbeck, *What Is “Good Legal Writing” and Why Does It Matter?*, 4 Drexel L. Rev. 417, 423 (2012).

⁴¹ Richard G. Stoll, *Effective Written Comments in Informal Rulemaking*, Admin. & Reg. L. News, at 15, 15-16 (Summer 2007) (emphasis added).

⁴² For an expanded discussion of the use of these rhetorical devices in administrative comments see Sarah J. Morath, *Standout from the Crowd: Drafting Persuasive Comments in an Era of “Notice and Spam”* (in progress).

“The goal of an appellate brief is to explain why a lower court made an error in its judgment or was correct in its judgment. The goal of the notice-and-comment procedure is to provide for public participation in the crafting of a legislative rule or regulation.”

fully support this change to the nutrition labels. As a nutritional professional, I feel that this is certainly a step in the right direction in relation to controlling America's obesity epidemic.⁴³

At first, this might seem like an effective comment—a health professional, with knowledge of nutrition concepts, stating his or her support for the change. But is it persuasive? Do we trust the writer's statement and if we trust it, is it clear why?

The lack of ethos in the above example become apparent when compared to the following introduction to a comment:

Since its establishment in 2008, the Consortium has developed, supported, and engaged in collaborative educational and professional opportunities for students and faculty at the University of California San Francisco and the University of California Hastings College of the Law. The mission of the Consortium is to support interdisciplinary collaboration on a wide variety of subjects at the intersections of law, science, and health policy. The Consortium concentrates on three broad areas: education, research, and clinical training and service. We submit these comments as part of our clinical service mission, to share the expertise on our campuses in the pursuit of improved individual and public health.

The Consortium recognizes the magnitude and complexity of the task delegated to FDA and commends FDA for its efforts to update these regulations with consideration of 21st century public health problems related to the American diet, including the crucial problem of the impact of added sugars on obesity and other chronic diseases. Nevertheless, the proposed rule can be strengthened to better accommodate the realities of food consumption by our citizens.⁴⁴

The writers of this comment instilled a sense of trust or ethos in the reader by clearly stating their expertise on this issue, by thanking the agency

for its efforts, and by making suggestions to “strengthen,” rather than redo the work that has already been completed. The ineffectiveness of the first comment becomes even more apparent when students view a comment where the writer has stated her qualifications, has demonstrated familiarity with the proposed rule by noting what the agency has stated and what others have stated, or has included citation to data or scientific reports.

Once students have viewed both effective and ineffective comments and have identified logos, pathos, and ethos, in each, they are better equipped to effectively transfer these skills when drafting their own comment on a proposed rule.⁴⁵ Students who practice transfer during law school will be better prepared to transfer what they have learned in law school to practice and this is one exercise that allows for this opportunity in the context of persuasive writing.

B. Learning a New Concept in a Familiar Format: Rulemaking Online

The second reason I like this exercise is because it exposes students to the rulemaking process in a fun way. Although Administrative Law courses have been a staple in upper level curriculum, many law schools now include some kind of required public law or leg-reg course in the first year.⁴⁶ Much of this is a result of curricular reform in law schools, efforts to make students “practice ready,” and the desire students to more than just the judge-centered perspective.⁴⁷ As one professor remarked, a “litigation-focused first

“Students who practice transfer during law school will be better prepared to transfer what they have learned in law school to practice and this is one exercise that allows for this opportunity in the context of persuasive writing.”

⁴⁵ While the focus of my exercise is the transfer of persuasive writing skills, we also discuss other skills students should be comfortable with transferring like organizational structure. For example, students should state their position and desired outcome at the beginning. Do you agree with the lower court decision or the proposed rule? What are you asking the court (in the brief) or the agency (in the comment letter) to do? Students should also be reminded of the “golden rule:” explain the law before you apply it.

⁴⁶ Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 *Tex. L. Rev.* 819, 837 (2008) (briefly describing the introduction of public law courses in legal education in light of the Carnegie Report); see also Richard B. Stewart, *On the “Administrative and Regulatory State” Course at N.Y.U. Law*, 7 *N.Y.U. J. Legis. & Pub. Pol’y* 39 (2004) (describing a new course at New York University on the administrative and regulator state).

⁴⁷ See *supra* notes 1-6. For a good discussion of first year legislation and regulation courses see Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 *J. Legal Educ.* 166, 170 (2008).

⁴³ Comment on file with author.

⁴⁴ Comment on file with author.

year curriculum ... disadvantages the many law school graduates who will ultimately be engaged in largely administrative, political, regulatory, ADR-oriented, or transactional work in their professional lives.⁴⁸ When I decided to incorporate the comment exercise in an upper-level Environmental Law course, one of my goals was to expose students to administrative law concepts like notice-and-comment rulemaking,⁴⁹ and the regulatory state.⁵⁰

I also thought students would find the online aspect of this exercise “fun,” or at least not as onerous as writing an appellate brief! Most of my students are Millennials or digital natives, which means they prefer reading things online rather than in print.⁵¹ They have a natural aptitude for technology because they grew up plugged in,⁵² which makes exploring regulations.gov an enjoyable, rather than tedious task.

C. Participating in the Process: E-Commenting

A final benefit of this exercise is the opportunity for students to engage in a legal process and have an impact on a legal outcome. Because students can submit their comment to the agency through regulations.gov, they feel involved in crafting an outcome on a real rule. They can follow the status of their rule as it makes its way through the notice-and-comment process.

⁴⁸ *Id.* An attorney at the U.S. Sentencing Commission has remarked “[l]aw school curricula, including the mandatory first-year curricula, ...needs to include less litigation-oriented courses and more business law, transactional, and regulatory courses.” See Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. Rev. 55, 85 (2012).

⁴⁹ Akron added a Legislative and Regulation Course in the fall of 2014, but that course does not include an exercise on commenting on a proposed regulation.

⁵⁰ One author has remarked that “most administrative lawyers” are “bound to mention the notice and comment rulemaking process” as “what characterizes the American regulatory state.” See Mariano-Florentino Cuéllar, *Notice, Comment, and the Regulatorystate: A Case Study from the Usa Patriot Act*, Admin. & Reg. L. News, Summer 2003, at 3.

⁵¹ Kari Mercer Dalton, *Bridging the Digital Divide and Guiding the Millennial Generation’s Research and Analysis*, 18 Barry L. Rev. 167, 169 (2012). This article is a great resource for teaching legal research and analysis to Millennials or digital natives.

⁵² See *id.*

In addition, this exercise allows me to engage students beyond the lectern and thus is a form of active learning.⁵³ In my case, this active learning exercise was a more effective way for students to absorb the law surrounding the WOTUS rule and allowed students to practice the skills needed for writing persuasive administrative comments. Furthermore, because students advocate on behalf of a stakeholder of their choice, this exercise is a type of simulation⁵⁴ or role-playing exercise. In role-playing activities students assume the role of another person.⁵⁵ Rules often affect a number of stakeholders including advocacy groups, landowners, residents, trade groups, and businesses. The exercise can be designed so that students choose the stakeholder they wish to represent. Legal educators have documented the benefits of role-playing exercises and role-playing exercises are considered effective ways to teach doctrine, skills, and values.⁵⁶ As one group of legal scholars noted, “[p]lay pedagogy engages and energizes the class, enhances learning, and enables us as teachers to more easily assess student learning.”⁵⁷

⁵³ A working definition of active learning is “[t]he process of having students engage in some activity that forces them to reflect upon ideas and how they are using those ideas. Requiring students to regularly assess their own degree of understanding and skill at handling concepts or problems in a particular discipline. The attainment of knowledge by participating or contributing. The process of keeping students mentally, and often physically, active in their learning through activities that involve them in gathering information, thinking, and problem solving.” See Kate E. Bloch, *Cognition and Star Trek: Learning and Legal Education*, 42 J. Marshall L. Rev. 959, 969 (2009).

⁵⁴ The ABA define a simulation course as an “experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.” ABA Standard 304(A)

⁵⁵ http://www.streetlaw.org/en/landmark/teaching_strategies/role_play

⁵⁶ Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. Legal Educ. 568, 578 (1995); see also James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 Gonz. L. Rev. 389, 403 (1997) (“Active learning by simulation, role play, and similar methods is beneficial because: 1) setting goals for students encourages student learning; 2) students like to participate, and they will learn in order to be able to participate; and 3) active participation and identification with a problem or role encourages relevant study.”)

⁵⁷ Bryan Adamson, Lisa Brodoff, Marilyn Berger, Anne Enquist, Paula Lustbader, & John B. Mitchell, *Can the Professor Come Out and Play?—Scholarship, Teaching, and Theories of Play*, 58 J. Legal Educ. 481, 497 (2008).

“[B]ecause students advocate on behalf of a stakeholder of their choice, this exercise is a type of simulation or role-playing exercise.”

Role-playing can also encourage students to consider various perspectives and further helps students develop a sense of professional identity. For example, the student may confront an ethical dilemma (environmental problems are full of ethical dilemmas) and be charged with advocating for a position she might not agree with on a personal level.⁵⁸ Students can reflect on these issues and consider how the resolution is consistent with her professional identity.⁵⁹

D. Adaptable and Expandable

A final benefit of this exercise is a benefit the professor or school reaps: the exercise's adaptability and expandability. While I used this exercise in my Environmental Law course, it could be adapted for any public law course, clinic, or simulation course that has a regulatory component. It could also be used in an advanced advocacy course. In addition, the exercise could be expanded to include an oral component, such as speaking at a real or mock public meeting or hearing. Professors could invite administrative lawyers or judges to meet with students. Or students can work with each other in either a group or in peer review setting to complete the "see one, do one, teach one" trilogy of learning.⁶⁰

Part III: Conclusion

With leg-reg courses becoming ever more popular, legal educators should look for creative ways to engage students in its most likely an unfamiliar aspect of the law. The e-comment exercise is up

⁵⁸ Jan L. Jacobowitz, *Cultivating Professional Identity & Creating Community: A Tale of Two Innovations*, 36 U. Ark. Little Rock L. Rev. 319, 324 (2014) (suggesting that to teach professional identity in law school, professors "need to create 'situations' in which [] students can be confronted with ethical questions and reflect on the decisions they make, and be guided by [professpr] as they form their own professional identities").

⁵⁹ "Professional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values. A lawyer with an ethical professional identity is able to exercise practical wisdom and to live a life of satisfaction and well-being." Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. St. Thomas L.J. 195, 201-02 (2012).

⁶⁰ See generally Christine N. Coughlin et. al., *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum*, 26 Ga. St. U. L. Rev. 361 (2010) (describing the see one (reviewing samples), do one (apply theory and skill), and teach one (demonstrating mastery)).

to the task. With an unending supply of proposed rules to choose from, the exercise is always timely and can be easily tied to substantive areas of the law. As a short writing exercise, the e-comment exercise provides additional opportunity for students to practice persuasive writing skills acquired during the first year of law school, without overwhelming professor performing the review!

Checklist E-Comment Exercise

Organization

- Has the writer started with information about the writer and who the writer represents?
- Has the writer stated her position up front?
- Has the writer described the law or data before explaining her argument?
- Has the writer ended by restating her position?
- Has the writer concluded with a term of appreciation ("thank you") and signature?

Style

- Has the writer used a clean writing style (concise, grammatically correct, error free)?
- Has the writer used a persuasive tone through the devises of logos, ethos, and pathos?
- Has the writer made the reader *think* the writer is correct through:
 - Clearly identifying the problem (legal, factual, procedural)
 - Using empirical data, statistics, or financial information
 - Including citations to law, statutes, and other legal (or non-legal) authorities
 - Suggesting specific language to use in the rule
 - Offering alternatives or proposing solutions
 - Using analogies where appropriate
- Has the writer made the reader *trust* the writer is correct through:
 - Establishing authority to comment (describe experience; describe organization or industry)

“With an unending supply of proposed rules to choose from, the exercise is always timely and can be easily tied to substantive areas of the law.”

- Showing that you performed a thorough review of the draft rule and prior comments
 - Using good writing mechanics and presenting a polished document
 - Using an appreciative, civil, and respectful tone
 - Has the writer made the reader *feel* the writer is correct through:
 - Specific examples to illustrate concerns
 - Supporting information (a compelling study or article)
 - Vivid narratives (personal stories, firsthand accounts)
- Format**
- Has the writer used heading for long comments?
 - Has the writer formatted the information in a manner similar to a letter?
 - Has the writer included the docket number for the proposed rule?

Micro Essay: Practice Ready

Help Wanted

Have you ever seen a Help Wanted advertisement like this?

For Hire: Law firm seeks newly graduated and barred attorney to handle highly complex legal matters with zero to minimal supervision.

Eek! I never have and I hope I never will. Although self-reliance has always been demanded of lawyers, confusing the term “practice ready” with omnicompetence is a mistake. Starting out, attorneys should show up for their first day of work being not only self-reliant, but also knowing when to hold up their own Help Wanted signs. Asking for help demonstrates credibility, an awareness of limitations, and a desire to learn.

Anna Hemingway, Associate Professor of Law & Director of Legal Methods, Widener University Commonwealth Law School, Harrisburg, Penn.

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Show and Tell in the Legal Research Classroom: Screencasting as an Effective Presentation Format

By Ingrid Mattson and Susan Azyndar

Ingrid Mattson and Susan Azyndar are Reference Librarians at Moritz Law Library at The Ohio State University in Columbus, Ohio.

Want to know how to cure cancer? Go to YouTube.¹ Maybe your needs are more mundane—you can also learn how to butter toast via a range of YouTube videos.² It should come as no surprise, then, that the legal research world also abounds with how-to videos.

Legal research videos often take the form of screencasts. A screencast captures the visual space you choose on your computer screen and is typically accompanied by narration. The result often takes the shape of a microlesson, such as those you may have seen on academic law library websites. For example, the Georgetown Law Library offers video tutorials on a wide range of topics, from “TWEN—Adding a class” to “Foreign Law Research.”³ Database vendors, such as CCH IntelliConnect, also post these kinds of videos on YouTube.⁴ When created by professors, screencasts are often used in a flipped or inverted classroom.⁵

If you are looking for an alternative to legal research guides or in class presentations to assess students’ learning, consider requiring students to create screencasts. Screencasts give law students the opportunity to exercise their professional and technological skills, demonstrate relatively in-depth substantive knowledge, create relevant course content, and produce a digital sample of work that could be a unique addition to a résumé. And all of these benefits come at little to no extra cost, as many free screencasting products are available for both Mac and Windows devices.

In spring 2015, we each taught an advanced legal research class piloting⁶ a screencast as a graded assignment. Here, we describe our reasons for creating this project, how we structured the assignment, how to help students succeed, and some tips to consider if you adopt this kind of assignment. In short, advance planning is the key, but it is well worth the effort given high student engagement and our satisfaction that the assignment met our classes’ core pedagogical goals.

A Preliminary Note about Technology

For our assignment we recommended our students use Jing,⁷ free software available for Windows or Mac that limits screencasts to five minutes. As a result, all of the screencasts had to be concise. There are a number of free alternatives, some of which place a time limit on the final recordings

“Screencasts give law students the opportunity to exercise their professional and technological skills, demonstrate relatively in-depth substantive knowledge, create relevant course content, and produce a digital sample of work that could be a unique addition to a résumé.”

¹ E.g., Infinite Waters, *How to Cure Cancer*, YouTube, Oct. 9, 2013, <https://www.youtube.com/watch?v=qUftEWbCfhk>.

² E.g., HowToBasic, *How to Perfectly Butter Toast*, YouTube, June 3, 2015, <https://www.youtube.com/watch?v=2Ush-1esQ-4>.

³ Tutorials, GEORGETOWN LAW LIBRARY, <https://www.law.georgetown.edu/library/research/tutorials/index.cfm>

⁴ Wolters Kluwer Tax & Accounting US, CCH Online Tour, *YouTube*, Apr. 7, 2015, <https://www.youtube.com/watch?v=kpwnXRRfCUU>.

⁵ Alex Berrio Matamoros, *Answer the Call: Flipping the Classroom to Prepare Practice-Ready Attorneys*, 43 Cap. U. L. Rev. 113, 118 (2015).

⁶ In fact, we are teaching the same courses this spring (2016) and using a slightly revised screencasting assignment. Towards the end of this article, we include reflections from this “second take.”

⁷ Jing, TECHSMITH, <https://www.techsmith.com/jing.html> (last visited Feb. 24, 2016).

“We discovered that lawyers use screencasts to attract clients, record e-discovery, and present basic information to associates and to clients.”

and some of which do not. Most free tools do not permit editing. In order to produce a high quality screencast, then, retakes are often required; however, students do not have to learn how to edit, so the cognitive load of learning new technology remains manageable. Alternatively, you could introduce your students to higher-quality software such as Camtasia, but consider how much time, money, and cognitive effort you want this assignment to incur.

Why Assign a Screencast?

Our inspiration for this assignment came from our own education backgrounds: one library school course⁸ required a variety of presentation formats, including a screencast. Our students, however, are law students rather than library students, so we sought to ground our assignment in a practice parallel to increase its relevance. We discovered that lawyers use screencasts to attract clients,⁹ record e-discovery,¹⁰ and present basic information to associates and to clients.¹¹ Ian Nelson and Chris Wedgeworth, for example, urge lawyers to adopt screencasts as a training tool:

“With the now common knowledge that clients are pushing back on junior time due to a lack of value, adopting a just-in-time approach can be a step towards showing clients concrete steps are being taken to fix the problem.”¹²

With this parallel in mind, our assignment furthered three main pedagogical goals:

⁸ Our thanks to Richard Jost, Information Systems Coordinator at the University of Washington’s Gallagher Law Library, for both encouraging us to experiment in the classroom and inspiring us as teachers.

⁹ Can You Make Money with Your Video Screencasting Skills, Learn Camtasia, <http://www.learncamtasia.com/misc/can-make-money-video-screencasting-skills/> (last visited Feb. 24, 2016).

¹⁰ Sharon Nelson, Screencast Tool to Preserve Cyber Investigation Evidence, Ride the Lightning, (Feb. 2, 2011, 10:00:00 AM), <http://ridethelightning.senseient.com/2011/02/screencast-tool-to-preserve-cyber-investigation-evidence.html>.

¹¹ Screencasting Scratches a Systemic Advocacy Itch, Legal Services NTAP, http://lsntap.org/Spiffy_screencasting (last visited Feb. 24, 2016).

¹² Ian Nelson & Chris Wedgeworth, *Why Just-in-Time Video is Perfect for Legal*, LEGALTECH NEWS (Dec. 16, 2014).

enhanced substantive expertise, communication skills, and experience with technology.

First and most importantly, we wanted our students to develop subject matter expertise in the research concept or database featured in their screencasts. Students who teach their peers often learn more effectively, reinforcing the learning process.¹³ In order to teach others, the screencast creators had to develop a deeper understanding of their chosen topic, whether it was using the Franklin County Auditor’s website or comparing search results in Google and Bing.

Second, we emphasized students’ development of effective communication skills. Whether in the courtroom, in the boardroom, or simply in a meeting with an individual client, clear communication is central to law practice. Similarly, explaining a research task or how a database functions requires more than an audible tone. Screencasts need to follow clear, logical steps, for example—a key component of effective communication. Additionally, when given a mere five minutes to convey a concept via screencast, students must devote more time to focusing on what they truly need to convey to their audience. Moreover, screencasts are more permanent than an in-class presentation, making feedback about effective communication more effective, as students can review their work with instructor comments in mind.

Third, in the course of this assignment, students gained a successful experience with unfamiliar technology. The ABA has admonished lawyers to keep abreast of technology and its effects on law practice,¹⁴ and many state bars are following

¹³ David Boud, *Introduction: Making the Move to Peer Learning*, in PEER LEARNING IN HIGHER EDUCATION: LEARNING FROM AND WITH EACH OTHER 1, 3 (David Boud, Ruth Cohen & Jane Samson eds., 2014).

¹⁴ See Comment to ABA Model Rule 1.1: Maintaining Competence:

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. G.M.

suit.¹⁵ Students can draw on the screencasting experience to think more broadly about this new duty, particularly because our goal was not to teach students about a particular software application but rather to get them comfortable with experimenting with unfamiliar tech tools.

Our secondary pedagogical goals also reflect current expectations of law practice. This assignment requires many parts, as described below, making project and time management vital. Patience and persistence were valuable tools. As mentioned above, the free screencasting technology we used did not permit editing. Consequently, if a dog barked in minute two of the recording, students had to start over. Finally, many potential problems may surface during a screencasting project—from not knowing where to start with a topic to microphone failure. By its nature, then, this assignment required problem-solving skills.

Clearly, many reasons support the adoption of a screencasting assignment in the legal writing classroom. One small screencasting project can help meet many objectives, and ultimately, students may in fact use this kind of tool in practice.

Our Screencasting Assignment

The screencasting project included several required components in addition to the featured product, the screencast: an email to deliver the screencast to the class, a screencast script, a reflection paper by the screencast creator, and peer-reviews from the audience. Each part of the assignment furthered one or more of our pedagogical goals.

Filisko, Reality Bytes: New ABA Rules Require You to Get with Tech Program—Like it or Not, ABA J. (Apr. 1, 2013), http://www.abajournal.com/magazine/article/new_aba_rules_require_you_to_get_with_tech_programlike_it_or_not/.

¹⁵ See, e.g., Va. Proposed Amendments to Rules of Professional Conduct Based on Ethics 20/20 Amendments to ABA Model Rules, http://www.vsb.org/docs/prop-1_1-1_6-022815.pdf (last visited Feb. 24, 2016); OHIO RULES OF PROF'L CONDUCT R. 1.1 cmt. 8, (2015); *California Ethics & Technology Resources*, THE STATE BAR OF CALIFORNIA, <http://ethics.calbar.ca.gov/Ethics/EthicsTechnologyResources.aspx> (last visited Feb. 24, 2016) (“addressing attorney professional responsibility issues that arise in connection with the use of Internet websites, email, chat rooms and other technologies”).

We asked students to send their screencasts to the class via email, which required a short professional email with a functional link to the screencast. We recommended that the screencast creator describe the aims of the screencast briefly in the body of the email. This step reduced the administrative work on the part of the instructor.

Screencast creators were also required to submit a script to the instructor, serving two purposes. It was useful for those instances where the audio portion was unclear. More importantly, however, we intended that it compel students to truly think through and plan their screencasts—reinforcing several pedagogical goals: communication skills, project management, and time management.

To encourage full class participation, we required both student viewers and screencast creators to engage in some form of assessment. Screencast creators submitted reflection papers explaining their strategy for developing their ideas, challenges they encountered and how those problems were resolved, and lessons they drew from the experience. The reflection paper gave us important feedback about students' learning. Some comments reinforced cautions we alerted students to early: many students had to restart recording because a dog barked, a phone rang, or a pop-up window appeared on their computer screens. A number of comments, however, demonstrated deeper considerations about the project. Students remarked on the usefulness of providing a client inexpensive instruction on filling out a yearly permit, for example, or sharing basic but vital information with a practice group.

The peer reviews, on a scale of one to five, asked students to assess whether the screencast

- (a) accurately and interestingly portrayed the chosen subject matter;
- (b) used well-chosen examples to illustrate the topic;
- (c) demonstrated careful organization that was easy to follow;
- (d) contained no grammatical errors or unprofessional language;
- (e) included clear, easy-to-hear narration;

“[M]any reasons support the adoption of a screencasting assignment in the legal writing classroom. One small screencasting project can help meet many objectives, and ultimately, students may in fact use this kind of tool in practice.”

- (f) used visual space purposefully; and
- (g) was paced appropriately.

Students were also asked to comment on what they learned from the screencast they watched and what change or changes would most increase the effectiveness of the screencast. The reviews were emailed to us as instructors rather than to the screencast creator. We then compiled, edited, and returned the feedback to the screencast creator. This gave the screencast creator a second perspective, and the peer reviewers' comments often reinforced our own observations about the quality and effectiveness of the screencast.

In turn, we gave students feedback throughout the course. When the project was introduced at the start of the semester, we provided an assessment rubric that covered criteria similar to those addressed in the peer evaluation form. These criteria mapped onto our pedagogical goals for the assignment. We then provided formal, written feedback after a student completed his or her video. This feedback was comprised of a one to two-page narrative about the student's work and incorporated comments from the peer reviews. Finally, we waited until all screencasts were complete to provide a grade to each student so that we graded them from the same perspective.

Setting Students Up for Success

While some students may feel overwhelmed by the mere thought of learning technology—we are in law school, after all, not computer science class—there are several ways to prepare students to use the technology effectively.

Consider requiring each student to meet with you to scope a topic to successfully fit it into a five-minute screencast. We did not require this in our pilot of this assignment,¹⁶ but for those students we did meet with, their screencasts were more detailed and thoughtful. In other words, they did not just cover something so broadly they never got past information their colleagues could figure out on their own.

¹⁶ One of our project revisions for this semester is a meeting requirement. See below for more information.

Training students on the software results in better quality screencasts. For example, we held a voluntary training session to explain Jing's features and quirks and to show how easy it is to avoid many screencasting errors, such as mousing at lightning speed. We also used that session to give students our expectations in terms of content and video quality. The slides from that training were then posted to our course pages.

Advance reading material encourages superior screencasts as well. We provided a reading on what makes a "good" screencast.¹⁷ The reading gave structure and timing tips, but it also encouraged students to think about professionalism. For example, the reading recommended screencast creators close any personal or objectionable tabs that might be viewable in the screencast frame. What could be more distracting in a screencast about the United States Patent and Trademark Office website than a series of tabs suggesting the screencast creator is tracking the latest news on the NFL draft or Miley Cyrus? In addition to the readings, one instructor created good and bad samples to illustrate our expectations. Because screencasting was new to all of our students, we wanted to give them some context and to show them that we have experience with this genre.

Potential Hurdles

We encountered no insurmountable hurdles during the semester, a big relief when you are trying something new. If you have not tried screencasting yet, it only takes ten minutes to get a sense of how to do it. In order to design a thoughtful assignment, however, two key areas bear significant consideration.

Scheduling

Give some thought to whether screencasts will coincide with daily class topics. For example, if you teach legislative history research on the sixth class session, do you want the screencast concerning the Congressional Record online to be available for

¹⁷ E.g., Screencasting Best Practices, Screencast.com, <http://www.screencast.com/help/tutorial.aspx?id=403> (last visited Feb. 24, 2016).

“What could be more distracting in a screencast about the United States Patent and Trademark Office website than a series of tabs suggesting the screencast creator is tracking the latest news on the NFL draft or Miley Cyrus?”

students to watch as homework for that class? Our course schedules and screencast assignments were synchronized, so we developed a relatively detailed sense of the complete semester in advance. This approach seemed to make the screencasts more relevant to the course material for those watching.

In order to facilitate topic and date selection by students, consider a sign-up structure that encourages preparation of videos throughout the semester so students do not all wait until the end. Though tax databases are fascinating, watching seven screencasts on the same one for your last class requires its own special effort. To avoid a bottleneck, we limited the number of sign-ups available to three per class. Second, consider how to accommodate a student missing a turn-in deadline or needing to reschedule. Building in a couple of days of class where no student can sign up for a screencast gives you flexibility for unexpected issues with students or your own teaching needs.

In light of the many moving parts, clear deadlines are vital. It is important to allow ample time for you and the class to review a screencast, especially if you plan to talk about it during class. For example, both of us taught on Thursdays during the semester in which we piloted this project. Screencasts and associated written materials (script and reflection) were due on Monday, with peer reviews due before class. As a result, we could safely assume everyone had viewed the screencast before class, and we had plenty of time to fold those concepts into our lesson plans.

In spite of all your planning, something may unexpectedly go wrong for a student. Illness or family problems can interfere with deadlines, so have a backup plan if a student misses the turn-in deadline. For various reasons, we had requests to adjust dates after a student signed up for a screencast date. Depending on the timing of the request, we tended to let them just move the date (we had some spare dates for students in this situation) in the interest of ensuring the screencast was thoughtfully prepared and not simply dashed off.

Technology

Technology may get tricky for students, but planning reduces both the number of problems that arise and student frustration with technological hiccups. Tell students early to plan for something to go wrong with the technology. For example, students may unexpectedly need a microphone or a computer, perhaps due to a particularly nasty computer virus. After all, part of project management is planning in advance for unexpected issues. We also let students know we had arranged for a quiet office they could reserve to record in the event they needed it, with access limited to working hours. Alerting students to potential technology hiccups encouraged students to give the technology a try well in advance to ensure everything worked on their end. Setting that expectation early helped us defend any diminution in points from students who did not plan accordingly.

Accessibility

None of our students requested an accommodation for any form of disability. Visually impaired students, however, may require some form of adaptation. Your university's or law school's ADA coordinator should provide some suggestions. It is worth noting that both Thomson Reuters¹⁸ and LexisNexis¹⁹ provide accessibility support as well, so creating some sort of screencast on a research topic using either of those databases may be possible. In fact, any student could use their screencast to explain how those databases' accessibility features work and how they may hinder or improve one's research.

Assigning Screencasts: "Take Two"

We are each teaching ALR this semester (Spring 2016), and we have once again required students to submit Jing screencasts. Student feedback suggested that although the assignment was frustrating, it was a valuable learning tool. To illustrate, one student mentioned using a peer's screencast as a review when completing a final course project.

¹⁸ Accessibility, Thomson Reuters, <http://legalsolutions.thomsonreuters.com/law-products/about/legal-notice/accessibility> (last visited July 29, 2015).

¹⁹ LexisNexis Commitment to Accessibility, LexisNexis, <http://www.lexisnexis.com/gsa/76/accessible.asp> (last visited July 29, 2015).

Another student showcased tax research in Checkpoint, a database her summer firm had recently acquired—consequently, she brought an expertise no other summer associate did.

We learned from the experience as well and feel our students are benefiting from those lessons. First, showing students screencasts produced for the assignment during our pilot year and highlighting strengths and weaknesses from those student-produced works seem to have given this year's class a stronger reference point than the screencasts *we* created to illustrate the good and the bad. This approach also helped address another issue: peer feedback from the pilot assignment was, at times, not particularly meaningful.²⁰ To address this, one professor asked her students to first view the screencast prepared by a student during the pilot year, then provide feedback using the assignment feedback form. The professor gave feedback on

the feedback, noting how to make generic, positive feedback more constructive and meaningful.

Finally, this semester we require that students meet with us briefly to discuss what they intend to screencast. The screencasts being produced on this “second take” are more narrowly focused, better planned, and seem to be making a bigger impression on the class.

Conclusion

Screencasting provides a valuable alternative to more traditional classroom assignments. It requires students to engage with technology, giving our students a skill not all new lawyers will have. Students with particularly good screencasts can include links on their résumés to showcase their engagement with technology as well as their expertise on a particular LRW topic. These screencasts may not cure cancer, but they will do more than butter toast!

²⁰ Students often wrote things like “this was great; wouldn't change a thing!” or “nice job.”

Micro Essay: Practice Ready

Not Ready

Dear Graduate,

You're not practice ready yet. You've got a J.D., yes. You could take clients and sue people. You could draft a contract. Right? Right. No, you're not ready. Here's the thing: no one is. And no matter what impression older lawyers give you, they weren't either. Don't roll your eyes, but here's the truth: *practice ready is a journey*. It's a process, and law school is the first step. So don't just go along for the ride. Every day post-J.D. is a chance to learn something, to try something, to get ... ready. So get going.

Wayne Schiess, Senior Lecturer and Director, The David J. Beck Center for Legal Research, Writing, and Appellate Advocacy, Texas Law, Austin, Tex.

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Teaching Patience: Why Law Students Need to Slow Down and How to Help Them Do It¹

By Erin Carroll

Erin Carroll is an Associate Professor of Legal Research and Writing at Georgetown University Law Center in Washington, D.C.

In our classes many of us introduce our students to the “busy partner.” The busy partner needs his answer quickly. The busy partner doesn’t have time to chat about the details. The busy partner won’t read a lengthy email.

Yet, in focusing on the example of the harried lawyer, do we lose sight of the part of legal practice that is decidedly slow? A lawyer may litigate a case, puzzle over a legal question, or develop a client relationship not in an afternoon, but over a period of years. To be a competent attorney, one cultivates not only the fast-twitch muscles of a sprinter, but also the endurance of a long-distance runner. In addition to responding to the after-hours fire drill, lawyers need to be able to focus for sustained periods, to fend off fatigue, and to develop a skill not easily learned: patience.

Standing in front of a roomful of 1Ls when I started teaching three years ago, I found myself concerned about whether they had this kind of focus and patience. Laptop screens divided them from me, and I knew from past experience how easy it was to succumb to distraction. I had audited some classes at a highly-ranked law school the year before and had seen how some combination of multi-tasking hubris, Internet addiction, and boredom led many students to spend stretches

staring at their computers while the professor lectured. And putting aside that experience, many of us sense that as we spend more time online, we have a harder time concentrating and quieting our minds.

What can we do to tamp down this tendency toward distraction and multitasking, and how can we cultivate the kind of patience and focus that the practice of law demands? In developing my syllabus over my first few years of teaching, I’ve tried to address these questions. Here, I lay out why it is important to help students build patience and focus, and describe some opportunities I provide for students to slow down and practice these skills.

Our Magpie Minds

I suspect we are all familiar with the feeling that author Marie Myung-Ok Lee has referred to as the “magpie mind.”² It’s the feeling we get when our brain is flitting between shiny things. It often accompanies going online. We may start with a well-intentioned effort to find a chart on the organization of Texas appellate courts and end by pouring over satellite images of our neighborhood on Google Earth.

As regular users of the Internet, many of us read differently than we used to. Our brains are hungrier for bits of information. We may tire more easily when forced to stay with something dense for a prolonged period. Nicholas Carr described this phenomenon in *The Shallows: What the Internet Is Doing to Our Brains*.³ In the book, a finalist for the Pulitzer Prize, Carr writes about the eclipsing of the “linear mind”

¹ I presented on this topic at the 2014 Capital Area Legal Writing Conference and the 2015 Southeastern Association of Law School Annual Conference. Many thanks go to Suzanne Rowe for encouraging me to turn the SEALS presentation into this article and to my colleague Susan McMahon for her incisive comments on it.

² Marie Myung-Ok Lee, *The Internet: A Welcome Distraction*, N.Y. Times: Opinionator (Nov. 18, 2013, 9 p.m.), <http://opinionator.blogs.nytimes.com/2013/11/18/the-internet-a-welcome-distraction/>.

³ Nicholas Carr, *The Shallows: What the Internet is Doing to Our Brains* (2010).

“We want to encourage and sharpen students’ abilities to research and communicate quickly in response to the urgent requests they will get on the job, but we also need to prepare them for the tasks that take far longer.”

or “literary mind.”⁴ This is the mind, in development since the invention of Gutenberg’s printing press, which allows us to delve into our reading with an intense focus. This mind is being pushed aside, Carr argues, as our use of the Internet prompts our thinking to take on a staccato quality.⁵ He writes that we have become “lab rats constantly pressing levers to get tiny pellets of social or intellectual nourishment.”⁶

Some think that Carr is kind of a downer. According to Adam Gopnik of *The New Yorker*, Carr belongs to a school of thought about the Internet called the “Better-Nevers.”⁷ The Better-Nevers worry that for all the benefits of new technology, we are losing the ability to engage in quiet focus. They fret that Google is making us stupid and no one will ever read Tolstoy again. On the other end of the spectrum are the “Never-Betters.” The Never-Betters would say that the Internet is a liberating force where information is free and plentiful leading to unbridled creativity and that Tolstoy is overrated.⁸

There is, of course, a middle ground. It’s where I stand. It is the space for those of us who appreciate Google *and* phone book-length novels. I don’t believe that my twenty-something students are being ruined by their smartphones or that they’re never doing serious and deep reading. In discussing this issue with them, I have learned that many of them are attuned to the level of distraction that technology can cause and have methods to counteract it. Some take notes by hand in class. Some set up reward systems to prod themselves into working for uninterrupted stretches.

Given this, I believe in what Gopnik calls a “meatless Monday”⁹ approach to technology. I find that reading my Twitter feed is interesting and, among other things, aids in my scholarship, and I also know that reading novels enriches my teaching. I try to do both. Similarly, I think our students can reap enormous benefits from the Internet and even from dips into social media. Myung-Ok Lee says that when sitting down to write, she finds that “posting a tweet or a Facebook status update can be a nice little warm-up, mental knuckle-cracking before getting down to the real business.”¹⁰ My proposals should be seen through this lens. We want to encourage and sharpen students’ abilities to research and communicate quickly in response to the urgent requests they will get on the job, but we also need to prepare them for the tasks that take far longer.

From Magpie Mind to Monk Mind

What benefit do we get from practicing focus, patience, and from immersing ourselves in something? One answer comes from Professor Jennifer Roberts, an art historian at Harvard. She has written and spoken about the importance of what she calls “immersive attention” and teaching patience.¹¹

Students who take a course with Roberts are required to write a research paper on a piece of art of their choosing. The first thing the students need to do as part of their research is to go to where the art is displayed and sit with it for three full hours. The time span is, Roberts says, “designed to seem excessive.”¹² It is also intended

⁴ *Id.* at 10.

⁵ *Id.* at 7.

⁶ *Id.* at 117.

⁷ Adam Gopnik, *The Information: How the Internet Gets Inside Us*, *The New Yorker*, February 14 & 21, 2011, <http://www.newyorker.com/magazine/2011/02/14/the-information>.

⁸ *Id.*

⁹ *Id.* “A meatless Monday has advantages over enforced vegetarianism, because it helps release the pressure on the food system without making undue demands on the eaters. In the same way, an unplugged Sunday is a better idea than turning off the Internet completely, since it demonstrates that we can get along just fine without the screens, if only for a day.”

¹⁰ Myung-Ok Lee, *supra*.

¹¹ Jennifer L. Roberts, *The Power of Patience: Teaching students the value of deceleration and immersive attention*, *Harvard Magazine* (Nov.-Dec. 2013), <http://harvardmagazine.com/2013/11/the-power-of-patience>.

¹² *Id.*

to debunk the notion that by looking at something that you really see it. According to Roberts, just because something is immediately available to the viewer doesn't mean that she understands or internalizes it. Roberts says, "[A]ccess is not synonymous with learning. What turns access into learning is time and strategic patience."¹³

The science supports Roberts's approach. In *The Shallows*, Carr describes studies demonstrating that when the brain is not bombarded with external stimuli—such as after a brief walk in the woods or sitting in a museum—it becomes both "calmer and sharper."¹⁴ It is in this state that we don't need to tax our working memory, and we are able to absorb more material into the schemas of knowledge that we have in our long-term memories.¹⁵

As teachers, we know that practicing something and sitting with it over time are key to internalizing it. The time we spend with a thing and the attention and focus we give it directly impact its quality. Of course this is as true with lawyering as other endeavors. Chief Justice John Roberts has said there is a correlation between the quality of briefs submitted to the Court and the time that the lawyers dedicated to them. According to Justice Roberts, "the first thing you can tell" about many of the briefs "is that the lawyer really hasn't spent a lot of time on it." He added: "You can tell that if they'd gone through a couple more drafts it would be more effective. It would read better. For whatever reason, they haven't devoted that energy to it. That tells you a lot right there about that lawyer's devotion to his client's cause."¹⁶

In the practice of law, the need for slowness, patience, and attention goes beyond just research and writing. In order to be a truly successful lawyer, one needs to have patience for a host of

things. Developing arguments takes time. When researching for an appellate brief, for example, lawyers can't simply skim a case and get the gist of it. Instead, they need to sit with it, digest it, turn it over in their minds, and think about every way in which it could be used to support or undermine their arguments. Developing expertise takes time. In today's practice, lawyers are becoming increasingly specialized and developing deep knowledge in particular areas of law or industries. Developing a book of business—often a key to partnership at a firm—also takes time. Lawyers must put in the hours to cultivate relationships and build trust. So while in practice, the word "slow" may be taboo—the client paying in six-minute increments does not want to think that its lawyers are working slowly—the concept shouldn't be.

With this in mind, it is misleading for us to suggest to our students that practice is exclusively a stream of dashed-off emails to the "busy partner" or "busy client." Even an email memo, which can be sent instantaneously, may have involved focused and lengthy research and analysis. How do we help teach students to do the slow, reflective, repetitive work that we know is critical? We can do it in part by designing for our students what Professor Roberts at Harvard calls "temporal experiences."¹⁷

Heeding Roberts's advice, in developing my syllabus, I have tried to focus on how long assignments will take and whether they require students to return repeatedly to themes or questions. I consider how to create conditions under which students may more easily be able to concentrate. I have tried to purposefully inject opportunities for students to build attentiveness. To do this, I use several assignments, discussed below, that fall into three categories that I refer to as: duration, reiteration, and vacation. "Duration" exercises are ones that require students to spend an extended period of time on a certain task. "Reiteration" exercises are those that require students to revisit and rework material. Finally, "vacation" exercises require students to

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¹³ *Id.*

¹⁴ Carr, *supra*, at 219.

¹⁵ *See id.*

¹⁶ Chief Justice John Roberts on the Topic of Writing, LawProse, <http://www.lawprose.org/interviews/Chief-Justice-John-Roberts.php> (beginning at 2:20).

¹⁷ Roberts, *The Power of Patience*, *supra*.

physically put themselves in environments that may be less distracting. Several of the exercises described below fall into multiple categories, but I discuss them under the category that each represents most clearly.

Duration

As Professor Roberts observed, we don't always really see things just by looking at them. Sometimes, we need to spend extended periods of time viewing a thing to really understand it. Or, as historian Charles A. Beard said simply: "when it grows dark enough we can see stars."¹⁸ We can create the conditions under which our students can better learn. One way is by asking them to work on certain assignments in a focused way for extended periods of time.

In my class, as in many first-year legal research and writing courses, students draft an appellate brief. Co-opting Roberts's assignment that asks students to sit in front of a piece of art for three hours before writing about it, I suggest 1Ls spend a similar amount of time with the research and the initial drafting of their briefs. Early in the spring semester, I set aside two Friday mornings from about 9 a.m. to noon and invite students to join me to research the law for their brief (the first Friday) or work on the draft of the brief (the second Friday). The sessions are voluntary, but those that choose to come must commit to the ground rules: they must only work on the assigned task, they must shut down their phones, and they cannot use the Internet other than to do legal research. During the sessions, I am available to answer questions individually and quietly while others work.

In the two years that I have offered these sessions, about 25 to 30 percent of my students have willingly come to spend three silent hours together. My stated objective has been to give students a taste of what it is like to work without the tug of phones and browsers. My unstated desire is to

convince students to consider regularly carving out uninterrupted blocks of time to work.

Here are some of the responses I received about how it felt to work for three hours uninterrupted:

- "This has further convinced me that removing distractions is very helpful. I'm trying to shut my phone and Internet off for at least a few hours a day to try to break bad habits."
- "It helped me focus and get a lot done ... I felt I could think clearly."
- "It was definitely nice to have a three hour block to myself to just write free of the distractions of my email or my phone. It is not often that I have that opportunity and I felt that I was way more productive as a result."
- "Focusing on a case until I reached the end—rather than checking a website in the middle—made it easier to understand the logic and progression of a court's argument."
- "I think it helped to force [me] to really engage the 'big picture' of my project and helped me with continuity in my voice."
- "I tentatively plan on repeating this every Friday."

Given these responses, the exercise has been successful in getting students to think critically about their work habits and ways in which they might improve them with an eye towards greater focus and effectiveness. It provides one model for sustained work that students can then adapt to their own needs.

Reiteration

As teachers of writing, we know the importance of reiteration to the writing process. Practitioners also know that lawyers continually need to bounce between cases, often the same ones over a period of years. To simulate this, my students rewrite an objective memo multiple times and get feedback on each round. But beyond simply having them

¹⁸ Charles A. Beard, *Tendencies Affecting the Size of the Ballot*, Proceedings of the American Political Science Association, Vol. 6, Sixth Annual Meeting 99 (1909), available at http://www.jstor.org/stable/3038566?seq=1#page_scan_tab_contents.

“We can create the conditions under which our students can better learn. One way is by asking them to work on certain assignments in a focused way for extended periods of time.”

rewrite, I bring their attention to the importance and difficulty of revisiting one's own work. I do this with an assignment that I call Forced and Focused Revisiting. As the name suggests, it's unpleasant by design. Forced and Focused Revisiting requires students to look at their own work when they least want to: when they are sick and tired of it. Better that students get accustomed to reading, rereading, and picking apart their work before a supervisor or client or opposing counsel does.

In the fall, after my students turn in their first draft of an objective memo, an assignment that many of them struggle with as the rigors of law school set in, I wait several days. Over those few days I have been reading the memos and have started to develop a sense of where students need help. Then, without telling them what I have planned, I ask them to bring a copy of the memo to class. For the first ten or fifteen minutes, I have them sit silently and reread it.

What generally happens next is the kind of thing that teachers hope for. With virtually no prompting, the students launch into a list of the things that might have been better about their drafts. The large-scale organization wasn't clear. The analysis was incomplete. Authority was missing. In the next ten minutes or so, they list many of the very same things that I had noticed in reading their memos.

Through this process students are learning the importance of time not only spent focusing on rereading, but the importance of the time they spent away from their writing. Sometimes it is only with distance that we are able to see shortcomings. Students need to build this time into their writing process in order to become effective self-editors. Through this assignment, they start to internalize the iterative process of writing—returning to work and focusing on it—even when some fatigue with it has set in.

In the spring, I return to this idea in a different way. In the very first class of the semester, I ask students to complete an assignment intended to simulate practice—the partner needs some research done in the next hour on a discrete research issue. The students spend that class refreshing research skills and drafting a quick email memo. Then, at the end of the class, they learn that the quick, initial research issue—as is often the case in practice—is actually a gateway into a much broader legal question. It's the one that is at the center of their spring brief assignment. As they go through the semester they can see how their perspective on the correctness of their conclusions to that first assignment may shift as they learn more about the facts and the law.

Vacation

The last type of exercise I use to help students practice immersive attention falls into the category of “vacation,” which is less glamorous than it sounds. This exercise takes students physically out of a distracting situation and into a less distracting one. It gives them a break from what otherwise may be their technology-saturated existence. As I noted earlier, when Professor Roberts's students sit with a piece of art for three hours, they must go to the archive or museum where the artwork resides. Roberts does this in part because it removes the students from daily distractions and allows them to truly focus on the task.¹⁹

Courtrooms are one of the few public places where it's generally not acceptable to have your face glued to your phone. In the spring, I require my students to visit a courtroom—I have wavered between requiring that it be an appellate court or allowing them to visit any court—and sit and watch. I do this for a host of reasons: to prepare for their own oral arguments and to demonstrate advocacy in the litigation context. But I also do it to force them to shut out distractions and to focus on what is unfolding in front of them.

To help them better absorb what they are witnessing and commit it to memory, I ask them

“Better that students get accustomed to reading, rereading, and picking apart their work before a supervisor or client or opposing counsel does.”

¹⁹ Roberts, *supra* note 10.

“[R]egardless of the method chosen, it’s important for us as educators to be attentive to providing our students with opportunities to slow down and focus. They will need these skills in the practice of law.”

to write a reflection piece about the experience and to pay particular attention not only to the substance of the lawyers’ arguments, but to the non-spoken aspects of the advocacy. I have found in these pieces that the students are especially attentive to tone, body language, and other subtleties. The reports that I get tend to be detailed, and I believe that is in part because in the courtroom students are freed of distraction, focusing, and reflecting on what they are seeing.

critical reading skills, using one fact pattern or “case” as the basis for assignments over the course of an entire year, or even teaching mindfulness techniques. But regardless of the method chosen, it’s important for us as educators to be attentive to providing our students with opportunities to slow down and focus. They will need these skills in the practice of law. And the busy partners may even take the time to thank us.

Conclusion

There are, of course, many other possibilities for assignments that would require students to slow down, sharpen their focus, and bolster their patience. These could include modeling deep and

Micro Essay: Practice Ready

Respect & Perspective

Your secretary will know more about the practice of law than you. Respect, listen to, and recognize that person as a resource. The copy center staff will save your professional life on more than one occasion. Respect them and learn what they do. Making copies, attaching mailing labels, and assembling binders are not beneath you. Realize this: the clouds did not part and a beam of light did not radiate down upon your shoulder with a heavenly voice declaring that you shall be a lawyer. You went to school and passed a licensing exam; they didn’t. Nothing more.

Glen M. Vogel, Associate Professor of Legal Studies in Business, Hofstra University School of Business, Hempstead, N.Y.

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Fika—Mindfulness for the LRW Professor

By Karen D. Thornton

Karen D. Thornton is an Associate Professor of Legal Writing at The George Washington University Law School in Washington, DC.

This is a love story. The story of two LRW professors who have such a love for teaching and preparing students for practice that they allow their own love of writing to come second. Until they realized their love of food and steady companionship could lead them to a state of greater balance and attentiveness.

A Collegial Bond

I'll never forget my first day on the job at GW Law School. For weeks before I had lost sleep, worrying someone from the dean's office would call to strip me of my dream job, but when I reached campus on that first day, I was wide awake. So alert that when I approached the elevator below the LRW suite, I saw a young woman standing there whose nervous excitement reflected my own. I knew without introduction that she was my new colleague, Iselin Gambert.¹

During that first orientation day, we revealed our shared anxieties and the divergent paths that had led us to join a legal writing faculty that had just doubled in size from two to four. By the end of the day, we found we also shared a Scandinavian heritage, her mother from Norway, mine from Sweden. We told stories of our travels "home," and vowed together to channel our Viking strength into this new adventure.

Later that week, the LRW director was shocked to discover us in my office at 2 p.m., enjoying an afternoon snack. A *fika* to be precise. *Fika* is the Swedish social custom of pausing to enjoy a cup

of coffee and sweet treat with friends or colleagues. One *fikas*—the word is so essential to Swedish tradition as to be both a noun and a verb—not with the hurried energy that Americans "grab coffee," but with the simpler purpose of being connected.² Iselin and I were snacking on homemade oatmeal cookies and sipping coffee brewed in the faculty lounge Keurig machine. Our director called down the hall to our fourth team member—"Look at this!" Her tone was amused, not critical. How could there possibly be time in the day of an LRW professor to pause for reflection and gain connectedness?

As anyone in our profession might guess, our *fika* tradition ran out at the end of that batch of oatmeal cookies. By the third week on the job, we were so overwhelmed and stressed by the task of serving our students, that pausing to breathe, let alone reflect and connect, felt like an indulgence.

The LRW Professor in Search of Stillness and Attentiveness

Last August, five years and two contract renewals later, Iselin and I squeezed a rare lunch date into our final days of lesson planning to make resolutions for the 2014–15 academic year. We reflected on how far we had come since that first day—how many new lawyers we had shaped, LRW conferences we had presented at, and the professional relationships we had fostered there. Without an assigned faculty mentor, we had only each other to challenge for new goals. We

“One *fikas*—the word is so essential to Swedish tradition as to be both a noun and a verb—not with the hurried energy that Americans 'grab coffee,' but with the simpler purpose of being connected.”

² Yael Averbuch, "In Sweden, the Fika Experience," *The New York Times*, <http://www.nytimes.com/2013/11/13/sports/soccer/in-sweden-the-fika-experience.html> ("As an American, I had been accustomed to getting coffee to boost my energy during a day packed with activities. ... In Sweden, I've come to relish the art of what is called fika. *Fika*, as a noun, refers to the combination of coffee and usually some sort of sweet snack. But fika, as a verb, is the act of partaking in a Swedish social institution. [In my career as a professional soccer player] every success or momentary failure can wreak havoc on my mind and spirit. I have learned in some ways to thrive on the tumult, but in other ways the upheaval takes a huge toll. The fika experience is a time of stillness amid my roller-coaster ride.")

¹ You may know Iselin from the December 2014 issue of the "LWI Lives" Newsletter, <https://drive.google.com/a/usfca.edu/file/d/0B-qVHm6mC6YoYm50S2Eyd1J4UUE/view?usp=sharing>

“But how, even with our proven discipline and work ethic, could we find time to research and write where we had not in the past five years? We decided it was time to do something drastic.”

channeled the innovative genius Scandinavians are known for³ and determined the change we needed was to produce more written scholarship.

In a 2013 piece for *The Second Draft*, Iselin and I partnered with our friend and LRW colleague, Amy Stein, to take issue with the question of whether scholarship must be written.⁴ We asserted that presenting at and planning a conference can supply the same conversation, engagement, and teaching that make scholarship an ethical responsibility of law faculty. While we continue to hold this belief, we have come to realize that the connections made at conferences cannot replace the exhilaration one feels when putting the final polish on a written piece that proves a new connection and adds new voice to a scholarly conversation.

But how, even with our proven discipline and work ethic, could we find time to research and write where we had not in the past five years? We decided it was time to do something drastic. Without putting our students second to our scholarly aspirations, we would start doing for ourselves what we had been doing for our students all this time.

The *Fika* Revived

As fall classes got underway, Iselin and I reinstated the *fika* tradition from our first days together. If not every day, we could schedule⁵ ourselves a healthy portion of mindfulness every Thursday from 1:30-2:30 p.m. at Le Pain Quotidien,⁶ three blocks from campus.

³ See generally, (in no particular order) ABBA, Bjorn Borg, Edvard Munch, Volvo Motors, Roald Dahl, IKEA, Henrik Ibsen, Ericsson, Raoul Wallenberg, Astrid Lindgren, Statoil, Edvard Grieg, H&M, Skype....

⁴ Iselin Gambert, Amy Stein, Karen Thornton, *The World is Not Flat*, 27 THE SECOND DRAFT: THE OFFICIAL MAGAZINE OF THE LEGAL WRITING INSTITUTE 14 (Summer 2013) http://lwionline.org/uploads/FileUpload/LWISsecondDraft_vol27no1b.pdf

⁵ As Scandinavians, we find comfort in having a schedule and sticking to it. See #14 in the list of 20 things to know before you move to Sweden. <https://sweden.se/society/20-things-to-know-before-moving-to-sweden/>

⁶ Offering a delicious pastry selection, including vegan fare. <http://www.lepainquotidien.com/landing/core-menu/>

We realized that if we were not able to engage, on at least a weekly basis, in the same mindfulness our Inns of Court program⁷ urges 1Ls to embrace, then we were hypocrites. After reading Shailini George's excellent article about mindfulness as the cure to the distracted mind,⁸ I had begun opening each of my Upper-Level Writing classes for seminar paper writers with 3-minutes of guided meditation.⁹ The students loved the way it helped them shut out the rest of their classes and stressors for the 55 minutes we had together.¹⁰ Escaping campus to *fika* could provide the stillness and attentiveness that Iselin and I needed.

At our first meeting, Iselin gifted me a small journal, because it does no good to leave a focused, productive conversation with a head burdened with ideas. You have to write down these discoveries to free up your brain, making it more receptive to finding new connections. Iselin and I were finding ways to make the work we assigned our students, like self-reflection journals, work for us. We were beginning to reach a state of balance.

Now at each *fika*, we ask each other open-ended questions and we listen. Just like Iselin teaches her lawyers-in-training to do. When I sent her a draft the night before one Thursday *fika*, Iselin marked it up with questions, not fixes. She was respectful, helping me make it the paper I wanted it to be, not

⁷ <http://www.law.gwu.edu/Students/Pages/InnsOfCourt.aspx>

⁸ *The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness*, <http://ssrn.com/abstract=2474338>.

⁹ Free audio recordings of short, guided meditation sessions created by the UCLA Mindful Awareness Research Center, which I found via the Berkeley Initiative for Mindfulness in Law, can be found here, <http://marc.ucla.edu/body.cfm?id=22>.

¹⁰ Here is an example of student feedback from the course evaluations, “Starting every session with meditation was the most amazing thing ever. I am at the point where I can't sit down and work properly on a paper without meditating first. I cannot explain how much I have used this semester with school and with work to regroup and recenter. ... I have had serious anxiety over this paper, and this course really helped me conquer it. This was absolutely my favorite class; I thoroughly enjoyed coming every week, and I enjoyed the aura that Professor Thornton created in this room. It was a fantastic class.” There was not one negative comment in the course evaluations about my use of guided meditation in each class.

the paper she might have made it. Her inquisitive comment bubbles urged me, with a mastery of the art of critique, to be more attentive, to clarify my purpose and message. I could see why the Writing Fellows who staff our Writing Center are so grateful for the training she provides in how to give feedback that brings out the best in the writer. This is a skill that will distinguish Iselin's students in future practice, but in this moment, I am the grateful one.

The happy ending to this story is that the paper I was working on got selected for publication in Fall 2015 issue of *Legal Communication & Rhetoric: JALWD*. Ultimately, the published product was even better than I had hoped because of the exceptionally helpful feedback I received from two other LRW colleagues, Jeffrey Jackson and Amy Langenfeld, the peer review editors assigned to usher my paper through the publication process. So positive was my experience, that it has inspired me to conduct a training session for incoming student editors on GW Law's journals about how to establish a respectful, collaborative relationship with authors.

Ultimately, that *JALWD* article came full circle, the perfect demonstration of how an LRW professor can both implement her teaching and find teachable lessons in the writing process. The journal training session has become my new writing project. Iselin has her own exciting endeavor as a commentator on the U.S. Feminist Judgments Project,¹¹ something she will admit she dove into on a *fika*-dare. In the busy spring semester full of motion memos and individual conferences, it was not easy to make time to trudge snow-custed sidewalks to Le Pain Quotidien, but we knew when we got there, we would find the stillness and attentiveness we needed to get these new projects underway.

¹¹ <http://www.thefacultylounge.org/2014/09/cfp-us-feminist-judgments-project.html>

Conclusion

LRW professors have a stronger national support network than most doctrinal professors. At our biennial conferences, generous colleagues offer practical and encouraging presentations on how to get your article published.¹² More frequent regional conferences include ALWD-sponsored Scholar's Forums, "to provide more opportunities for authors to receive input and feedback from their peers on their legal writing scholarship projects ..."¹³ For introverts like Iselin and me, who greatly appreciate the community LWI provides, but return home from conferences drained and exhausted, the *fika* is our refuge. Some weeks we have no work product to share. We simply sit together. "... [T]he true nature of the *fika* is to enjoy time and company with no plan or purpose. To *fika* is not to *do*, but simply to *be*."¹⁴ We talk and chew and listen and sip and new ideas are born. You should try it.

¹² <http://lwionline.org/uploads/FileUpload/ConferenceProgram625.pdf>

¹³ www.alwd.org/grants "Scholars' Forums give legal writing scholars the chance to present their scholarship ideas, works-in-progress, or developed drafts of legal writing articles to a group of other legal writing faculty. ... This event should be limited to sixteen participants [divided into small groups].... ALWD recommends that each group have an "experienced scholar" to lead each group and help give feedback. Scholars' Workshops give participants an opportunity to participate in peer review, with all the benefits of that process to readers and writers. These workshops are limited to sixteen participants Participants must submit a paper in draft to the planners three weeks before the workshop. The planners will assign participants to groups of four. In assigning groups, planners should aim to promote diverse and constructive interactions. Each member of a group should receive the other three group members' papers at least one week in advance. Authors may request specific types of input from the small group on the paper. At the Workshop, each group of four would meet together to discuss the papers. For sixteen participants, the event could last anywhere from one-half day to a full-day."

¹⁴ Averbuch, *supra* note 2.

“For introverts ... who greatly appreciate the community LWI provides, but return home from conferences drained and exhausted, the *fika* is our refuge.”

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Book Review: *Reading Style: A Life in Sentences*

By Deborah L. Borman

Deborah L. Borman is Clinical Assistant Professor of Law at Northwestern Pritzker School of Law in Chicago, Ill.

Set the scene: you are hunkered down to grade a set of student briefs. Before long before your eyes glaze over, your lids grow heavy and you start to doze because of the dull, uninspired writing. Suddenly you find yourself going micro and writing this sentence in the margin: “make the subject more compelling.” Legal writers, especially novices, are often so focused on technical details that they forget good written communication begins with sentences that engage, “glimmer,” and at their best transport the reader.

To become better writers, students need to read great authors. For this reason, I always recommend that law students who want to become the best legal writers read great literature and novels especially those with subtle themes and complicated plots. Any good story with a subtext can help students develop better legal communication skills. The use of subtext, both psychosocial and historical, by many authors influences the reader’s perception and opinion of the characters. A compelling story can also be told with strong allusions and a variance between embellished details and short, direct descriptions. By working at the micro level with each sentence, students can craft a full brief that will glimmer from start to finish.

In her new book, *Reading Style: A Life in Sentences*,¹ Jenny Davidson, a professor of comparative literature at Columbia, makes a detailed examination and analysis of the sentences of great literature, identifying the techniques within the small scale of each that tacitly lead to “transcendence in fiction: getting lost in a book.”

Davidson defines the concept of transcendent reading as the “high glimmer factor.”²

Davidson’s book consists of a series of lectures on literature she gave in 2009. Each chapter stands alone as a unique lesson students can glean from literature to better inform their legal writing. While Davidson’s book analyzes fiction writing (and a little bit of nonfiction in the last chapter), and some concepts are more relevant to crafting good legal communication than others, she offers many writing techniques that are adaptable to legal communication, particularly when it comes to advocacy.

The first step to crafting better sentences starts with “immersive reading.” As Davidson posits: getting lost in a book “makes life itself worthwhile.” By becoming an immersive reader students will appreciate writing for an audience that wants to be immersed in the material.

What makes the reader get lost in a book? To answer that question, Davidson explains we should look closely at the way great writers describe human thoughts and existence in ways that “involve[s] the application of a critical intelligence, more neutrally observing than judging or summing up and yet ready to make selections and discriminations when they are called for.”³ Davidson advised to “show, not tell.” Applying critical intelligence to a story is the very essence of effective legal writing in both objective and persuasive forms.

Moving on to style, in her chapter “The Advantages of Bad Writing” (don’t get too worried here), Davidson writes: “Sentences can be verbal artifacts of untold complexity ... The term style derives

¹ Jenny Davidson, *Reading Style: A Life in Sentences*, (2014).

² *Id.* at 3.

³ *Id.* at 8.

“To become better writers, students need to read great authors.”

from the Latin *stilus*, a pointed instrument for writing; *glamour* is etymologically a corruption of *grammar* to refer to a body of occult knowledge.”⁴ Style is everything, and that this is not just true for literary writing but for all writing. Davidson uses the word “temperament” to describe the complex set of intellectual, emotional, political, and cultural traits that make up a given person’s identity as expressed in words: *to wit*, the author’s writing “style.” The sentence is the key to the heart and “embodies ethos in a way that renders deeply ingrained habits of thought visible to the naked eye.”⁵

Clear and effective writing is ethical and clichés are an offense against humanity. Hear, hear.

In legal communication, we instruct our students to keep themselves out of the story. Personalization, or the preoccupation with the social self is also annoying in fiction: Davidson writes that it is trivializing. She calls out John Cheever, John Updike, and Alice Munro, whom she criticizes for focusing on depicting personal shortcomings, as a “massive foreground of people with problems.”⁶ These authors, and Alice McDermott, quoted in the passage below, offer sentences describing *sensation* at the expense of *emotion*:

Leaving the church she felt the wind rise, felt the pinprick of pebble and grit against her stockings and her cheeks ... And all before her, the lunch-hour crowd bent under the April sun and into the bitter April wind, jackets flapping and eyes squinting, or else skirts pressed to the backs of legs and jacket hems pressed to bottoms. And trailing them, outrunning them, skittering along the gutter and sidewalk and the low gray steps of the church, banging into ankles, candy wrappers, what else?—office memos? shopping lists?⁷

What is important in describing an event, says Davidson, is what the character—and for our

purposes the lawyer’s client—was *thinking* not *feeling*: reading about sensation is alienating to the reader. This is something brief writers should remember if they ever cross the fourth wall in advocacy and begin raging against the opponent or the opponent’s position.

Davidson promotes (and enjoys) the occasional use of simile and comparison. She also illustrates the successful telling of two sides of a divergent story. For example, Davidson features a dual excerpt from *The Post-Birthday World*, by Lionel Shriver. There, Shriver features two different orientations toward a character’s state of being, and even illustrates the differing moral implications. In the first passage, the protagonist Irina has kissed another man, Ramsey, and is then serving pie to her boyfriend, Lawrence. Differences in the description of serving the pie show Irina’s internal world:

For Lawrence, she hacked off a far larger piece—Lawrence was always watching his weight—than she knew he wanted. The wedge sat fat and stupid on the plate, the filling drooled. Ramsey didn’t need admiration for his snooker game, and Lawrence didn’t need pie.⁸

In Irina’s alternative story, she has refrained from kissing Ramsey:

She shouldn’t have any herself; oddly, she’d snacked all afternoon. But countless chunks of cheddar had failed to quell a ravenous appetite, so tonight she cut herself a wide wedge, whose filling blushed a fleshy, labial pink. This she crowned with a scoop of vanilla. Lawrence’s slice she carefully made more modest, with only a dollop of ice cream. No gesture was truly generous that made him feel fat.⁹

In writing a legal brief, knowing how to tell both sides of a story is, of course, a very useful technique not only for the statement of facts, but also in crafting the theory of the case which is maintained throughout the brief.

“In legal communication, we instruct our students to keep themselves out of the story. Personalization, or the preoccupation with the social self is also annoying in fiction ...”

⁴ *Id.* at 11-12.

⁵ *Id.* at 13.

⁶ *Id.* at 16.

⁷ *Id.* at 18.

⁸ *Id.* at 22.

⁹ *Id.* at 23.

“[T]ransferrable sentencing techniques the legal writer can glean from Davidson’s book are paying attention to repetition and pacing ...”

Moving into how we hear words—in our heads or reading aloud—Davidson suggests that the sensation of acoustical elegance or aphorism can be both pleasing to and unpleasant for the reader, as distinguished from what she describes as “transactional” or “load-bearing” sentences, which provide objective information. She notes that it is better to evoke an emotional response in the reader elegantly (acoustical) than to attempt to do so via details of the sensation of the writer/character (transactional). Another example of the importance of “showing” rather than “telling.” In this chapter, Davidson hyper-focuses on the style and structure of Jane Austen (one of her favorite authors). First a transactional sentence from *Emma*:

Her mother had died too long ago for her to have more than indistinct remembrance of her caresses, and her place had been supplied by an excellent woman as governess, who had fallen little short of a mother in affection.¹⁰

The above sentence is a straightforward transactional description, providing context for the character. This is the kind of sentence structure legal writers might use to lead off an objective statement of facts.

Distinguish that sentence from the acoustical, aphoristic set of sentences below (a combination of a short pithy sentence containing the truth of a general import), a maxim (stylized, crafted, controlled), and a sentence that produces identification and empathy:

The real evils indeed of Emma’s situation were the power of having rather too much her own way, and a disposition to think a little too well of herself; these were the disadvantages which threatened alloy to her many enjoyments. The danger, however, was at present so unperceived, that they did not by any means rank as misfortunes with her.¹¹

The first sentence elegantly provides broad background information that operates as a summary of the character’s life. The second sentence catches the reader’s attention with its unusual word combination of “threatened alloy”—the word “alloy” being used as an abstract noun, rather than as a more familiar verb—thus signaling “that something is happening beyond what is said.”¹² The final sentence is like an 18th Century poetry couplet (i.e., “to err is human, to forgive, divine”), but the symmetry of the couplet is interrupted with the word “however,” transforming the traditional couplet into satire and portending an unpredictable future for the character. The inclusion of certain words, the omission of others, and an unusual combination of words—all of these techniques evoke responses in the reader.

Other transferrable sentencing techniques the legal writer can glean from Davidson’s book are paying attention to repetition and pacing: “The speed at which we read something is not supposed to affect the reading experience in any deep way.”¹³ Nonetheless, I know that I feel more positive about a memo or brief that I can sail through and digest it immediately, both for form and substance, as opposed to writing that is so turgid I need to don imaginary, mud-proof, reading Wellies. She pays homage to dear Strunk and White and their adage: “Omit needless words,” noting that it is good advice for inexperienced writers. But for the more advanced writer, a combination of elegant variation and repetition causes the reader to pay close attention and increases the momentum of the story. Note the “rubric” of “clamp racks” in Peter Temple’s *Black Tide*:

Against the righthand wall were the clamp racks: at the bottom the monster sash clamps; above them, the lesser sizes; in the next rack, the bar clamps, the infantry of joinery, dozens of them in every size; then the frame clamps, the spring clamps, the G-clamps, the ancient wooden screw clamps that Charlie love best, and flexible wooden go-bars arranged by length. Finally an assortment of weird clamps, many of them

¹⁰ *Id.* at 37.

¹¹ *Id.* at 38.

¹² *Id.*

¹³ *Id.* at 55.

invented by Charlie to solve particular clamping problems.¹⁴

On pacing, Davidson tells us that the speed at which the writer gets to a particular point can provide a flourish to details that she wants the reader to settle on for a bit longer or to point a direct route to conclusion.

In her final chapter, “The Bind of Literature and the Bind of Life,” Davidson addresses loss and the framing of emotions, both in fiction and nonfiction: describing the human condition. In quoting a nonfiction author who describes her observation following a nuclear disaster, she notes that the ultimate goal of the writer is to facilitate the production and recording of the testimony and acts of witnessing, “rather than to create sentences whose beauty and precision might do justice to the perfection of human ingenuity in a machine that brings death.”¹⁵ Poignant, important, and full-circle: to the legal writer, craft a sentence that

is meaningful, but always within the context of your client, your position and your argument.

Although to be sure Davidson at times gets lost a bit in the details of certain authors or passages—remember: these were lectures in a literature class—and there are some sections and chapters that do not particularly apply to legal communication as their purpose is to microanalyze passages from works of fiction, most of *Reading Style* operates as an informative book for advanced writers of all styles with great ideas for achieving a “high glimmer factor” in their writing.

“[S]he notes that the ultimate goal of the writer is to facilitate the production and recording of the testimony and acts of witnessing ...”

¹⁴ *Id.* at 56.

¹⁵ *Id.* at 170.

Micro Essay: Practice Ready

Interruptions in the Classroom

We all know law practice is unpredictable, yet most of our legal writing courses follow a predictable pattern. In a pilot course titled “Practice-Ready Writing” we taught this past summer, we incorporated “interruptions” into several classes. For example, in the middle of a class, students would receive an email via TWEN from their supervising attorney about a client with a pressing matter. The students had to respond within a set time, usually one to two hours. The interruptions helped students to be more efficient researchers and writers.

Jennifer Chiovaro, Legal Writing Professor & Maggie Vath, Senior Lecturer of Law, Georgia State University College of Law, Atlanta, Ga.

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Seek Out Different Learning Experiences to Inspire Your Teaching: Vignettes from Flute Camp

By Julia M. Glencer

Julia M. Glencer is an Assistant Professor of Legal Research & Writing at Duquesne University School of Law in Pittsburgh, Penn.

I. INTRODUCTION

As legal research and writing (LRW) professors, we value and strive to model a commitment to lifelong learning for our students.¹ We also know that strong and caring student-teacher relationships are built, in part, upon the ability to express genuine empathy.² But how often do we, as teaching professionals, embrace an opportunity to push beyond our own familiar skill set and learn something outside of our proverbial wheelhouse, guided by the efforts of a teacher attempting to teach us? And is there a point in one's teaching career when the student perspective simply becomes too distant a memory to draw upon as a credible source of understanding and relatable example?

As I approached my tenth year of teaching LRW, I found myself pondering these kinds of questions. It had been over 20 years since I had first sat in a law school classroom, and I had only vague memories of feeling vulnerable in a new learning environment with a new set of peers. Even the waves of uncertainty I had felt as a new lawyer, and later as a new professor, had receded over time. But

¹ E.g., Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 Cap. U. L. Rev. 149, 153 (2012) (explaining that a major focus of law school education should be on “train[ing] students to be lifelong learners” so as to equip them to “transfer their learning [as well as their skill in learning itself] ... to the novel situations they will face in the legal profession”).

² E.g., Kate Eliza O'Connor, “You Choose to Care:” *Teachers, Emotions and Professional Identity*, 24 Teaching & Teacher Educ. 117 (2008).

now, from my mid-career vantage point, I had some new concerns. I wondered if perhaps drawing on my own experience as a law student and new lawyer was starting to sound forced (maybe even a little corny) to my modern-day students. I also wondered if perhaps my fervent exhortation to embrace the goal of life-long learning was subtly being undermined by my own conduct. Sure, I attend conferences and stockpile CLE credits, I read a lot, and I am committed to mastering Google Scholar. But realistically, these are all learning pursuits I am well poised to absorb with a minimum of effort and little genuine growth. These pursuits do not require a different mindset, a new vocabulary, or the assistance of a teacher drawing from pool of expertise beyond my own—all things my first-year law students face when they arrive for orientation. And then I went to flute camp.

Flute camp? Isn't that for high school kids in the marching band? No, it's not that flute camp. This weeklong immersion program, hosted on a university campus and taught by three flute clinicians,³ was aimed primarily at adult flute hobbyists. The “campers” who assembled in the summer of 2015, ranging in age from approximately 17 to 65, and hailing from at least four different states. They were armed with a variety of flute-playing skills, musical abilities, and performance backgrounds. This unique experience re-inspired the flute playing that I enjoy in my personal life. But it also replenished a professional well I feared was beginning to run dry by allowing me to see the world again from a true “student perspective” and to observe teachers—albeit in a different but transferrable context—handle “teaching moments” similar to those I encounter in LRW. Yes, attending a “flute camp”

³ The clinicians held degrees in flute and flute performance; they were also active players and teachers of students at a variety of levels.

“*Flute camp?*
Isn't that for high school kids in the marching band?
No, it's not that flute camp.”

may be a rather esoteric opportunity but, as LRW professors, we have much to gain by purposefully seeking out active learning experiences guided by a teacher in any setting: from horseback riding lessons, to culinary classes, to a calculus course.⁴

My week at flute camp inspired my teaching in many ways. In Section II, I offer three vignettes from flute camp capturing those moments when I was most deeply aware of the transferability between this experience and the teaching of LRW: (1) confronting a known weakness, (2) reinvigorating flagging motivation, and (3) observing a different kind of teacher handle a difficult question. While these vignettes are undeniably context-specific, each one also contains a broader nugget of insight into the psychology (and perhaps mystery) of learning. In the end, my aim is simply to give life to the concept that actively seeking out different learning experiences can greatly inspire teaching.

II. VIGNETTES FROM FLUTE CAMP

A. Confronting a Known Weakness

Practically no one at flute camp knew I was a lawyer or a professor. The focus remained unwaveringly on our “flute lives.” I had played from fourth grade through twelfth, participating in orchestra, wind ensemble, and marching band. But I had also left my flute under the bed when I drove off to college. Almost 20 years passed before I played a few notes again, initially just as a lark to entertain my five-year-old daughter. I took sporadic lessons and struggled to practice—mostly in the kitchen while cooking dinner. Then last winter my husband registered me for flute camp as a surprise birthday present. I was *quite* surprised. As the months passed between January and July, I became less and less sure of what to expect. The first person I met at flute camp on the night I arrived at the dorm asked if I was ready for “boot camp.” I smiled, thinking

how my colleagues and I refer to our law school’s LRW Orientation Week by the very same name. “Oh, that’s cute,” I thought. I should have been wavier.

Each day of flute camp followed a 9 a.m. to 9 p.m. schedule. It was grueling: rehearsals, practices, master classes, and lectures on a variety of flute-related topics. It had been years since I had played in an ensemble under the watchful eye and keen ear of a demanding conductor, and I found the clinicians intense. By Monday afternoon, I was roundly intimidated; the music was difficult, my peers appeared to be excellent sight-readers, and my arms, unaccustomed to hours of flute playing, were starting to shake. I became increasingly bewildered as trickier measures and two-octave runs roared past like a freight train. My internal commentator wryly observed that I *could* play this music; it would just take weeks to learn it. Weeks? I had *four days* before the culminating recital on Friday afternoon. How could I keep up? I was hitting wrong notes, I was missing entrances, I was measures behind. I fought back the urge to crawl under my chair.

It had been decades since I felt this exposed and vulnerable before a teacher and a classroom full of peers. And that’s when it hit me. My LRW program had recently hosted a conference on the “academically underprepared law student” and here I was—the analogously “underprepared flute player.” My sight-reading abilities and sense of rhythm—two fundamentals in music—had always been weak, and, like many students, I had developed a bevy of coping mechanisms rather than tackle these weaknesses. Basically, I was a clever mimicker; I could play any measure if someone else played it first. But this indirect approach wouldn’t work here, and I knew, with every mature but resisting bone in my body, I had to acknowledge these weaknesses and seek help. But how?

In the end, it wasn’t pretty. I stopped dead in the middle of the first quartet practice, admitted my weaknesses, and asked to double up on a part (playing the same part as another musician, so

“It had been decades since I felt this exposed and vulnerable before a teacher and a classroom full of peers.”

⁴ Scared of math? See Matt Waite, *How I Faced My Fears and Learned to Be Good at Math*, Neiman Foundation (Nov. 13, 2013), <http://www.neimanlab.org/2013/11/matt-waite-how-i-faced-my-fears-and-learned-to-be-good-at-math/>. Waite, while teaching as a journalism professor, took freshman-level math classes at age 37, prompting “absolute terror that he wouldn’t do well,” but also the realization that math can be conquered through hard work. See *id.*

we became a trio). But, I added awkwardly, I was committed to improvement in the long-term. After a moment of surprised silence, the other three players nodded and life went on. In fact, life got better, because once word spread that I needed help with these fundamental skills, every other participant offered tips I am still using today.

Those moments of vulnerability on the first day of flute camp gave me tremendous insight into how I can best counsel law students facing down similar weaknesses with fundamental writing skills. Like many LRW professors, writing has always been my strong suit, so I sometimes struggle to relate to students in need of greater help with fundamentals. But having denied and hidden my weaknesses as a flute player only to have them resurface in a setting where I really cared to get them right, I now have a heartfelt and timely analogy upon which to draw, and that has inspired my teaching.

B. Reinvigorating a Flagging Motivation

By 10 p.m. on the Tuesday night of flute camp, I was overwhelmed. Six new pieces sat on my music stand, but I was too tired to practice. But because I could hear others playing up and down the hallway of the dorm, I felt pressured to do *something* productive. I pulled out the notebook in which I had been jotting down suggestions for practice, but now I wondered which to prioritize: Hand position? Breathing? Posture?

While flute camp for adult hobbyists was obviously not a competitive atmosphere, it still caused anxiety. It was hard to process so much information in such a condensed time frame. It was hard not to compare myself to the other “students.” It was hard to sleep in a dorm room. Tired and frustrated, I said to myself, “You could be home in six hours.”

Again, I called myself up sharply. Would you ever allow a student to react this way in LRW? The answer was certainly not. I knew it was time for “the talk” but this time (and the irony was rife), I would be having that talk with myself.

I am here to learn. Everyone is at a different stage of development. Know that you have strengths. Know too that you have weaknesses, and make progress on them every day. Rome was not built in day. Just like becoming a good legal writer, playing an instrument well requires a life-long commitment and daily practice. Make the most of this amazing learning experience, as it will soon be over. Be inspired by the others, but careful not to get caught up in a web of comparison.

The “talk” reinvigorated my flagging motivation and, reexperiencing the kind of frustration that led me to it, has inspired my teaching.

But the truly transferrable insight from this moment of clarity came later. I often tell LRW students that their law school classmates suffer from similar bouts of anxiety and self-doubt and that bonding with like-minded classmates can be a source of buoyancy. This truism can be hard to accept in the absence of concrete evidence, and I was about to find some. As I walked to dinner on the Wednesday afternoon of flute camp with two other women (both in their 60s), one of them said quietly that she felt overwhelmed, so much so that she had to have “a talk” with herself the night before. The other woman and I burst out simultaneously with, “Me, too!” This prompted us all to stop and laugh in a poignant moment of shared experience. We three were differently situated in our daily lives and in our flute playing, but we had all gone to flute camp to “grow.” And genuine growth in any setting tends to trigger moments of frustration where the goal becomes elusive and the road ahead a bit steep.

As an LRW professor, being able to say that I have had such a moment recently—as opposed to decades ago when I was in law school—gives me more credibility when counseling a student. It also inspires me to experiment with different analogies when trying to help law students navigate similar rough spots on their intensive journey.

“Those moments of vulnerability on the first day of flute camp gave me tremendous insight into how I can best counsel law students facing down similar weaknesses with fundamental writing skills.”

C. Observing a Different Kind of Teacher Handle a Difficult Question

On the Thursday morning of flute camp, each participant was given an opportunity to play with a piano accompanist. I was firmly resolved to accept the opportunity, though I knew my knees would knock from waves of performance anxiety. I have rarely played with a live accompanist, but I value collaboration and firmly believe that the advice I give students as we prepare for appellate oral argument was directly on point: no one in the room wants to see a speaker/performer fail, confidence breeds confidence, and meticulous preparation is the best method of getting a handle on one's nerves. Forcing myself to experience and survive the inevitable anxiety in a supportive atmosphere was imperative. So I played. And when I sat down, I was relieved and proud of my own mettle.

But then I realized that a profound student-teacher exchange had just taken center-stage. The next participant—a very tall young man—had immediately raised the music stand up so high only the top of his head was visible. The clinician asked him to lower it, so she could see his face as he played his flute, and a polite but palpable standoff ensued. He said he needed the stand up high to see the music, but she suspected he was masking anxiety by shielding his face. When he protested, she took the middle ground, suggesting that even if he *was* confident and *could* play the piece beautifully (and she believed he could), he had already alerted the audience that he lacked self-confidence. Such an interpretation may indeed be incorrect and even unfair, she explained, but because it exists as a possibility, a performer must avoid any behavior tending to trigger it. She asked him again to lower the music stand and the room became very quiet. “But ... he really is tall,” offered another participant.

I watched the clinician closely. Substantively, I was 100 percent behind her. How often had I had seen law students fail to realize how body language and poor eye contact undermine a show of confidence at the oral argument podium? Emotionally, I empathized with the young man. Heck, I would play

with my back to the audience to shield my nerves if I thought I could away with it! And even assuming he was not “hiding,” I could see that he was now visibly nervous from the exchange. How often, I thought, had I left a student standing at the oral argument podium as “Exhibit A” while I talked to the class?

Eventually, the young man lowered the music stand a smidgen and, after the briefest moment of locked eyes between them, the clinician nodded for him to begin. My professor antennae sensed that this exchange would continue later in private, but that the class needed to move on.

I am still analyzing this exchange, from two simultaneous perspectives, and both inspire my teaching. First, I am convinced that the clinician, as a teacher of flute and herself an experienced performer, was right to enforce the height of the music stand as a nonnegotiable item. I agree with her that the player's behavior sent a dangerous signal to the audience. To me, it was akin to reading from a script when the judges are looking at a lawyer who will not (or cannot) look up, even briefly, to establish credibility and rapport.

But even if the substantive point is infinitely debatable, I benefited from seeing a different kind of teacher handle such a dicey point of performance behavior in front of a live class. Yes, I can enhance my teaching of LRW by watching my law school colleagues teach and react to the same kinds of questions and exchanges with students that I routinely encounter. But watching a nonlaw teacher gave me ideas as to how I might draw on nonlaw analogies to repackage certain points and reach even more students. I so often hear first-year law students talk of inspirational teaching and lessons imparted by football coaches, band directors, dance instructors, and youth pastors (to name just a few) on items that directly impact performance in law school—i.e., work ethic, time management, motivation, performing under pressure, self-reliance, and commitment to excellence.⁵ As an LRW professor, I want to know more about how teachers in such contexts reach and motivate their students. Luckily,

“[W]atching a nonlaw teacher gave me ideas as to how I might draw on nonlaw analogies to repackage certain points and reach even more students.”

⁵ That I still play and get excited about adult flute camp is a tribute to the lasting influence of my own high school band director. As an LRW professor, I find myself thinking back often to his methods and infectious intensity as a teacher/conductor.

flute camp gave me the opportunity to experience that first-hand, from a uniquely dualistic perspective.

III. CONCLUSION

LRW professors should seek out different learning pursuits at different points in their teaching careers to strengthen and model their commitment to lifelong learning, to achieving a balanced professional life, and to excellence in teaching itself. I believe that law students appreciate nonlaw analogies in their

effort to navigate unfamiliar terrain and that they value genuine efforts to empathize with the student perspective. I also believe that, no matter how esoteric a lived learning experience may seem on the surface, a committed professor can find a myriad of different ways to use and be inspired by it.

“I believe that law students appreciate nonlaw analogies in their effort to navigate unfamiliar terrain and that they value genuine efforts to empathize with the student perspective.”

Micro Essay: Practice Ready

When the Shot Clock Sounds ...

“Why did I fail this assignment?” asked a semi-indignant student.

“Well, you submitted it an hour late. Remember the late policy?”

“Yes, but I was having technical issues. It was a good paper.”

“What happens when a basketball player makes an amazing shot after the buzzer sounds on the shot clock?”

“Huh?”

“Any points for the physics-defying shot?”

“Oh. No.”

“Right. I don’t want you to lose a case because of your tardiness. You need to build good habits so that you don’t cost your clients money or liberties. Get the shot in well before the buzzer sounds, OK?”

“OK.”

Mandana Vidwan, Associate Professor, Charlotte School of Law, Charlotte, N.C.

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When Should We Teach Our Students to Pay Attention to the Costs of Legal Research?

By Beth Hirschfelder Wilensky¹

Beth Hirschfelder Wilensky is a Clinical Assistant Professor at the University of Michigan Law School in Ann Arbor, Mich.

It is axiomatic in legal research pedagogy that law schools should teach students how to conduct cost-effective legal research.² To do that, we need to teach students to consider the amount of time and money their research requires, how paid legal research platforms like Westlaw and Lexis charge for their services, and how to research in an efficient and cost-sensitive way.³ But we shouldn't do those things. Or at least, we shouldn't do them at first. Instead, we should tell students *not* to worry about the costs of legal research during their first year of law school—with the possible exception of preparing them for summer employment at the end of the year. And even then, our instruction should be limited.⁴

¹ The author thanks Ted Becker and Don Herzog for helpful comments.

² Kathleen Darvil & Sara Gras, *The Missing Piece: Teaching Cost Recovery as Part of Cost-Effective Research*, 22 Perspectives: Teaching Legal Res. & Writing 107, 107 (2014) (“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.”); Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 Legal Communication & Rhetoric: JALWD 153, 156, 184-86 (2011) (Legal research instruction “should take into account the cost of conducting research . . .”). *But see* Sarah Gotschall, *Teaching Cost-Effective Research Skills: Have We Overemphasized Its Importance?*, Legal References Services Quarterly 29:2, 149 (2010).

³ By “cost-effective legal research,” I mean all of the costs, from the actual money paid to a CALR platform like Westlaw or Lexis to the attorney’s billable time spent in conducting the research. In fact, the latter might be more important, but in my experience students are often more concerned with the costs of Westlaw and Lexis in the “real world.”

⁴ While my focus here is on the pedagogical reasons not to teach

Why wouldn't we want to teach students to be aware of the high costs of Lexis and Westlaw? Why wouldn't we want students to think about how much time they ought to spend tracking down and fully exploring every possible legal wrinkle their client's facts might implicate? We do—eventually. There is little question that, as future attorneys, students need to know how to conduct cost-effective research.⁵ But we undermine their ability to learn how to conduct research *at all* if we ask them to think about costs—in money and in time—too early.

Students undoubtedly need to learn to conduct cost effective legal research at some point. The challenge is to determine that point and then instruct them accordingly. And that is a significant challenge since students may not be ready to focus on the costs of legal research for most or all of their first year.

A. Two Major Reasons To Wait

Why shouldn't we focus on cost-effective research strategies in the first year course? For two major reasons: First, students need to start with a lot

cost-effective research early in students' law school experience, there may be non-pedagogical reasons as well. *See generally* Sarah Gotschall, *supra* note 2 (arguing that teaching cost-effectiveness of CALR research might be less important where most students are going to work for employers that purchase flat-rate plans that give users no ability to go outside the plan and drive up costs); *see also* Shawn G. Nevers, *Candy, Points, and Highlighters: Why Law Librarians, Not Vendors, Should Teach CALR to First-Year Students*, 99 Law Lib. J. 757, 763 (2007) (observing that the popularity of flat-fee CALR contracts makes teaching cost-effectiveness less important in the first-year legal research and writing course).

⁵ Patrick Meyer, 2012 Law Firm Legal Research Requirements for New Attorneys, (Sept. 26, 2011) 3, available at <http://ssrn.com/abstract=1953437> or <http://dx.doi.org/10.2139/ssrn.1953437> (in survey of law firm librarians, 86.9% described “cost-effective research” as one of the most important research tasks for new attorneys to know); Darvil & Gras, *supra* note 2, at 107 (“In today’s market, knowing how to research an issue cost effectively is a pivotal skill.”).

“[W]e undermine their ability to learn how to conduct research *at all* if we ask them to think about costs—in money and in time—too early.”

“It might seem obvious that students are unlikely to absorb much if we try to teach them everything they need to know about a skill all at once. But that point often gets lost ...”

of practice on the foundational aspects of legal research. Second, encouraging students to consider costs feeds into the inclination many already have to look for quick, easy answers in their research.

Reason One—Managing the Cognitive Load:

Learning occurs most effectively where foundational skills are introduced first and then reinforced as more nuanced skills are introduced. It might seem obvious that students are unlikely to absorb much if we try to teach them everything they need to know about a skill all at once. But that point often gets lost in the first-year legal research and writing course that, due to syllabus constraints, frequently requires introducing multiple skills in quick succession.

Learning to conduct legal research actually requires students to learn many different things. Here is a partial list:

- The difference between primary sources and secondary sources and what each source is useful for
- How to navigate through computer-assisted legal research platforms such as Westlaw and Lexis
- What free online resources exist and what research tasks they are helpful for
- How to strategize about a legal research project: Where should I begin? What background information do I need? What is the goal of the research? What are the different ways to achieve that goal?
- How to determine what weight a particular legal authority carries for your research task
- What to do when you hit a roadblock in your research
- How to conduct cost-effective research: how much the research process costs, how much time it takes, how to do it more efficiently, how to fit the research process into a preset time limit, how to prioritize when time is limited

Plenty of recent learning pedagogy makes the point that breaking down a large learning task into smaller chunks is essential to lighten the learner’s cognitive load. The authors of one book on successful learning

strategies devote a section to the importance of breaking new material into “component skills.”⁶ They suggest that a teacher ought to “temporarily constrain the scope of the task” when introducing new material until students “develop greater fluency with component skills.”⁷ Similarly, in the recent book “Make it Stick: The Science of Successful Learning,” the authors conclude that foundational knowledge must precede deeper engagement with the skill, which must precede mastery of the skill.⁸

Foundational knowledge includes memorizing key facts necessary to learn the skill and then developing a conceptual understanding of how to use those key facts to engage with the skill.⁹ An elementary school student needs to memorize addition, subtraction, multiplication, and division facts ($7 \times 6 = 42$, $15 - 9 = 6$), because just about every math concept requires him to be able to draw on those facts quickly. If a student is learning long division but is unable to quickly divide 42 by 7, and then has to stop again to count out 65 minus 9, he will quickly become frustrated. More significantly, he is unlikely to develop competence in long division. Those math facts need to be immediately accessible in his mind.

Legal research has analogous “key facts” that need to be cemented in memory to grease the wheels of the research process. Those facts include information about how legal research systems and sources are organized, what sources are available and what information each contains, and how to navigate to specific tools on Westlaw and Lexis.¹⁰

⁶ Suan A. Ambrose et al., *How Learning Works: 7 Research-Based Principles for Smart Teaching* 99-103 (2010).

⁷ *Id.* at 116. Those of us who teach legal writing are already familiar with the importance of managing the audience’s cognitive load, since it is something we frequently teach our students to consider when writing reader-friendly documents. I often find myself telling a student that a paragraph or sentence she wrote is trying to do too many things at once, and that she is forcing her reader to work too hard to absorb each point; that makes it less likely that her reader will absorb any of them.

⁸ Peter C. Brown et al., *Make It Stick: The Science of Successful Learning* 5, 17-19 (2014).

⁹ *Id.* at 18.

¹⁰ This last item – learning how to navigate through Lexis and Westlaw—is undoubtedly an important skill for students to learn,

They need to be available instantly to a student so that she avoids getting bogged down each time she wants, for example, to use the West digest system. When she clicks into something that says “ALR” she needs to immediately recognize whether it is a primary or secondary source, how she can use it, and how she can’t. Stopping to remember or seek answers for those things undermines her ability to engage deeply with the research process. And engaging deeply with the research process requires the cognitive attention to pay attention to the details of cases, think creatively about the legal problem, cultivate a sense of which paths are likely to prove fruitful and which are likely to be dead-ends, and recognize what research tools are most promising for each aspect of the research.¹¹ Students also need to learn how to adjust their approach to each of those tasks depending on their goal.

If, on top of learning all of these “key facts” and then using them to engage with deeper skills, first-year students must think about the costs of the research, we are adding too much to their cognitive load. They are unlikely to learn to research effectively if they are simultaneously thinking about how much time their research is taking or how many cases they are clicking into in Westlaw or Lexis.

And let’s not forget that to conduct effective research, students also need a basic grounding in the legal system (e.g., sources of law; how to read, analyze, and synthesize cases; binding versus persuasive precedent). And they need some understanding of substantive legal doctrine

to conduct legal research. Experienced attorneys are likely to start a research task already having a sense of whether the topic they are researching is one of state law, federal law, or both, whether the answer is likely to be found in common law or statutes, and whether the question is primarily procedural or substantive. And they already know some substantive law that might get them started in the right direction.¹² Knowledge of all of those things contributes significantly to the cost-effectiveness of an attorney’s research, and law students in their first semester of law school don’t know any of it. The amount of time or money they spend on their research is utterly meaningless without a basic grounding in those things.

Reason Two—Incentivizing Thoughtful Research:

Promoting consideration of time and costs early also encourages students to take ill-advised shortcuts, to fall back on what they know (i.e., “Google-like” searches), and to look for quick fixes. The authors of “Make it Stick” emphasize the danger of seemingly “easy answers” to the learning process. They write that “When the going is harder and slower and it doesn’t feel productive”—an apt description of much legal research, especially for novices—“we are drawn to strategies that feel more fruitful, unaware that the gains from these strategies are often temporary.”¹³ And the current generation of law students is particularly susceptible to being seduced by the quick answers on-line platforms spit out, since students come to law school quite comfortable using technology to provide all kinds of information by typing in a few words and hitting a button.¹⁴ As one book about learning pedagogy puts it, “Students’

“Promoting consideration of time and costs early also encourages students to take ill-advised shortcuts, to fall back on what they know ... and to look for quick fixes.”

but it also might be the least important thing for faculty to teach. See Toree Randall, *Meet Me in the Cloud: A Legal Analysis Research Strategy that Transcends Media*, 19 *The Journal of the Legal Writing Institute* 127, 134 (2014), quoting Carrie W. Teitcher, *Rebooting the Approach to Teaching Research: Embracing the Computer Age*, 99 *L. Lib. J.* 555, 565 (2007) (“[M]ost electronic sources are designed to be self-taught. And because modern law students are ‘technological chameleons,’ there’s little doubt that they’ll figure it out if they believe that it’s important.”) But regardless of how students learn to use on-line platforms, they do need to learn that as a foundational part of learning legal research.

¹¹ See Randall, supra note 10, at 130 (“In short, the more students know about legal analysis, the more confidently they will approach the research process, regardless of the tools they use or the order in which they use them.”).

¹² See *id.* at 136 (“Of course, an age-old problem may persist. The less law one knows, the harder it is to know what law to find. Developing a significant substantive law foundation takes time, and this will remain a challenge without easy answers.”).

¹³ Brown et al., supra note 8, at 3.

¹⁴ See Randall, supra note 10, at 141 (“Because other online research seems so easy, [law students] generally underestimate the effort involved in conducting thorough legal research. Consequently, many of them come to law school saddled with a proclivity to demand quick answers and instant gratification.”); Kaplan & Darvil, supra note 2, at 175 (observing that the current generation of law students grew up with technology and the multitasking it brings with it, which “can result in a tendency to be impatient to have expectations of instant gratification”).

prior knowledge can help or hinder learning.”¹⁵ Our students’ prior knowledge of research and technology is likely to be the kind that hinders it.

Legal research often requires tracking down multiple leads to the ends of many branches of a decision tree, using multiple approaches and tools to tackle a problem, and engaging in deep reading and thoughtful analysis of legal authorities instead of just producing a list of cases. Most students have had little if any exposure to that kind of research. Telling students not to worry about how much time their research takes and how much money it would cost in the real world frees them to experiment.

That experimentation is essential to effective learning.¹⁶ We want to embolden our students to try things that are harder than the Google-like search they are used to, things that ultimately will be more effective once they learn to do them well. They need to learn—often on their own, through trial and error— what approaches are worth pursuing and what ends up being a waste of time. Students need to make mistakes in the research process. They need to learn through experimentation that consulting a good treatise avoids wasted time, that reviewing case squibs in the West Key Number system would produce many more cases than they located, that spending time thinking through their topic and reviewing the facts of their client’s situation would have kept them on track and suggested lines of analysis they missed. Of course we should provide feedback to students on their research process and depth of analysis, and we should reward effective approaches and results. But that is an insufficient replacement for creating an environment that encourages students to learn by making—and correcting—their own mistakes.

¹⁵ Ambrose et al., *supra* note 6, at 13.

¹⁶ In fact, students might benefit from experimenting with legal research even before we formally introduce that topic. See Brown et al., *supra* note 8, at 4 (“Trying to solve a problem *before being taught the solution* leads to better learning, even when errors are made in the attempt.”) (emphasis in original).

B. What Should We Do in the First Year?

My experience is that students really want to know how much CALR costs and how much time a particular research assignment “should” take. *We should discourage them from worrying about those things for most of the first year.* And it is important that we be explicit about that:

If students are expending their cognitive resources on extraneous features of the task, it diverts those resources from the germane aspects of the task. Thus, one way to help students manage cognitive load is to clearly communicate your goals and priorities for particular assignments by telling students where to put their energies—and also where not to.¹⁷

We can tell our students honestly that even seemingly straightforward legal research projects are likely to take them a lot of time right now. We can suggest a minimum number of hours they should set aside for each assignment. We might even be more specific. For example, when I assign my students their first research memo, I tell them to get started right away, to set aside at least three blocks of two or more hours over the next two weeks, and that they could easily need more time. But beyond that, we should encourage our first-year students to focus on practicing their research skills, since practice is the only way to achieve mastery. I also reassure them that, as with everything they are learning in law school that is new (such as reading a case or writing a legal memo), they will get more efficient at legal research as they gain experience. And getting better at working with cases and other legal authorities will help speed up their legal research process too, since a major part of the time that legal research takes involves reading and analyzing authorities they find.

Here is what we *should* do in the first year: encourage students to spend substantial time conducting research. We can require in-class and out-of-class exercises across a variety of substantive topics. When we do that, we should

¹⁷ Ambrose et al., *supra* note 6, at 114.

“Telling students not to worry about how much time their research takes and how much money it would cost in the real world frees them to experiment.”

make sure students practice different kinds of research tasks, from quick questions (“confirm that X doctrine is still good law in this jurisdiction”) to in-depth analysis of how a court will handle a client’s problem. We can give our students ideas for research topics they can work on. And we can urge them to play around on the paid and free research sites using topics that are interesting to them or news stories they read that suggest a legal question. (I occasionally email my students news articles I find and suggest some related research topics they might pursue when they need a break from reading their Property casebook.) We should especially encourage our students to engage in self-discovery of what approaches work best for different kinds of inquiries and different parts of the research process, and remind them mastering legal research requires practice on all of these things.

If we do ask students to account for their time or costs, we should give them some assignments in areas with which they are already familiar. Give them a scenario that requires them to take a doctrine they have studied in one of their other first-year classes and determine how it applies to a client’s problem in a specific jurisdiction.¹⁸ This helps address a major problem with teaching legal research in the first year. As discussed above, students don’t yet have the substantive background they would often have in tackling a legal research problem in the “real world.” When we ask our students to focus on cost-effective research, we should start by placing them in a situation that approximates that of a practicing attorney with some minimal familiarity in the relevant substantive law.¹⁹

¹⁸ For example, I gave my students a news article about a Little League coach who sued one of his players. The player had thrown his helmet down in celebration while scoring the winning run, and the helmet hit the coach and tore his Achilles tendon. Mike Axisa, *Little League coach suing 14 year old player for more than \$500,000*, CBSsports.com (Jan. 16, 2014, 4:59pm), <http://www.cbssports.com/mlb/eye-on-baseball/24411112/little-league-coach-suing-14-year-old-player-for-more-than-500000>. My students had already taken Torts and were familiar with the general rules surrounding negligence and sports. I asked them to research the player’s potential defenses under California law and assess their likelihood of success.

¹⁹ All of the approaches described in this section have an added benefit: they provide other ways to break up the cognitive load

C. When Should We Teach Students to Consider Costs?

Do we need to teach students to take costs into account at all during the first year? Students need a *lot* of practice in legal research before they are ready to start thinking about the amount of time and money they are spending on it. So we shouldn’t, for example, just add in instruction and evaluation on cost-effectiveness for their second major research assignment after introducing the basics with the first assignment. Rather, we should wait at least until the end of the year to provide any direct instruction about cost-effective research. At that point, our students will have had nearly a full year of (1) substantive instruction in the law and (2) practice in conducting legal research. But even then, we shouldn’t devote too much instructional or student work time—both of which are already in short supply—to it.²⁰ While conventional wisdom suggests that, at a minimum, students need this information for their summer jobs, I question how much additional instruction in cost-effective research they really need.

First, the standard legal research pedagogy already primes students to engage in cost-effective legal research. We teach students to consult secondary sources early in the research process, to rely on digests or indexes for an overview of a legal topic and speedy review of a large volume of cases, to Shepardize or KeyCite helpful cases to find additional ones, and to tailor their process to their research objectives. All of these things happen to be aids to efficient—and therefore cost-effective—legal research.²¹ In other words, there is little difference between “cost-effective research” and “effective research.” We may need to do little more than

of learning legal research. When students research many different assignments over the year, and when they practice research in smaller chunks, they are learning discrete strategies that come together to form a complete research pedagogy. As a result, they are likely to end up better researchers overall.

²⁰ See Nevers, *supra* note 4, at 763 (“The bulk of cost-effective legal research teaching can be done in conjunction with preparation for summer clerkships or in an advanced legal research course.”).

²¹ See Kaplan and Darvil, *supra* note 2, at 185 (describing cost-effective legal research as including things like using secondary sources, tables of contents, citators, headnotes, and annotations).

“Students need a lot of practice in legal research before they are ready to start thinking about the amount of time and money they are spending on it.”

“[T]here is one additional reason we can feel comfortable limiting instruction in the first year even though students might have to seek out additional information on their own later: they are highly motivated to do so.”

point that out explicitly at year-end to send our students on their way to a successful summer.

Second, in-depth treatment of cost-effective research strategies may be less important for law students' summer jobs than conventional wisdom suggests. Both Lexis and Bloomberg now allow students to use their law school login IDs to conduct free legal research for their summer jobs, bypassing the employer entirely. And even where an employer's pricing structure for CALR comes into play, most employers now use some version of “all you can eat” plans, which provide unlimited searching for certain information and clear warnings before the user can access other information outside the plan.²² As a result, summer law clerks just need to use common sense to avoid spending outrageous amounts of time conducting research or researching outside the employer's plan.²³

So we need only do a few simple things at the end of the first year to help prepare students to conduct cost-effective research at their summer jobs:

- Demonstrate some strategies for integrating free and paid online platforms. For example, if you know that you will incur a separate charge for every case you click into in Westlaw, you might use Westlaw to find a list of cases you want to read and then use Google Scholar or another free site to pull up the full text to read.
- Discuss with students the inefficiency of using inferior “free” search methods where a Westlaw or Lexis search is likely to provide quicker or better information.²⁴

²² Some employers do have more complicated pricing plans, but they can be very specific to the individual employer. Trying to teach the different permutations to law students is probably not a good use of class or student time. See Kaplan and Darvil, *supra* note 2, at 184 (“[T]eaching new associates how to research efficiently within a firm's pricing plan is a task best suited for law firms . . .”).

²³ See Gotschall, *supra* note 2, at 155-56 (observing that the rise of “flat-rate” pricing for Westlaw and Lexis makes the need to teach attorneys the intricacies of different pricing plans less necessary).

²⁴ See Darvil and Gras, *supra* note 2, at 110 (“Associates' fear of unpredictable and exorbitant costs is precisely what vendor contracts are designed to avoid. . . . When used properly, online research platforms can save significant time and improve reliability of legal research.”).

- Remind students to consult with their employer's law librarian, if it has one.
- Require or suggest that students take the Lexis and Westlaw classes on cost-effective legal research offered at most law schools towards the end of the year.
- Encourage students to ask questions about their employer's CALR pricing plans and cost-recovery policies when they arrive at their summer jobs.
- Remind students to take advantage of the Westlaw and Lexis research help lines, both at the initial planning stages of a research project and when they get stuck.

It is true that the first-year legal research and writing course might be our only opportunity to require students to learn cost-effective legal research.²⁵ But there is one additional reason we can feel comfortable limiting instruction in the first year even though students might have to seek out additional information on their own later: they are highly motivated to do so. The cost of legal research is a major concern for students. They particularly want to know how much searching online costs. They have heard horror stories of junior attorneys racking up astronomical research costs and want to avoid being that attorney. In fact, they often seem obsessively focused on how much a search would have cost their employer or client in the “real world”—and as I discuss above, that focus can undermine their ability to learn how to conduct research effectively at all. But when it is time for them to learn cost-effectiveness, they are likely to have the internal motivation to do so even absent formal instruction as part of a legal research and writing class.

²⁵ Kaplan & Darvil, *supra* note 2, at 155 (“Research instruction is generally mandated only in the first year of law school . . .”).

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Legal Writing Professor's Lament (or, Because, Your Briefs)

By Kathryn S. Fehrman,

Kathryn S. Fehrman is an Associate Professor of Legal Analysis, Writing and Skills at Southwestern Law School in Los Angeles, Calif.

My heart is rent asunder.
My eyes are crossed and red.
Your briefs are testimony
That you heard little I said.

Why, why, why have you forgotten
The format that we teach?
I-R-E-A-C is simple
It's not so out of reach.

What demon grabbed your keyboard,
To make you spell that way?
Don't you own a dictionary?
Then use it, please, I pray.

And why can't you remember
That your nice Bluebook said
To write out every number
Under one hundred?

Facts, things that happened, aren't a bunch
Of unrelated stuff.
They have some legal consequence;
How can that be so tough?

And oh, my sweet forgiveness
Is tried as your verbiage swells.
Those adjectives and adverbs!
Show me facts, and don't just tell.

Apostrophes and commas
Are now my big pet peeves.
I want to call the Panda—
The one who eats, shoots, leaves.

But worst of all: the rubric
I posted to help you write,
Says "Put this rubric with your brief,"
Yet only one of forty might.

But yes, my 1L students,
Even though your English ain't plain,
I'll stand with you until you learn
Or 'til I go insane.

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Cite as: Joel Atlas, Estelle McKee, and Andrea J. Mooney, *The Final Legal-Writing Class: Parting Wisdom for Students*, 24 Perspectives: Teaching Legal Res. & Writing 48 (2016).

The Final Legal-Writing Class: Parting Wisdom for Students

By Joel Atlas, Estelle McKee, and Andrea J. Mooney

Joel Atlas is the Director of the Lawyering Program and Clinical Professor of Law, and Estelle McKee and Andrea J. Mooney are Clinical Professors of Law at Cornell Law School in Ithaca, NY.

The last class of a legal-writing course is a beginning rather than an end for our students. Soon, they will have the opportunity to employ, in real life, the skills they have learned in the course. And professors want their students not only to succeed, but to excel, in practice. To help realize this goal, and as a fitting finale to the course, a professor may choose to provide students with tips for the immediate and long-term future in their profession. Below are some of these tips:

1. Learn about the policies and culture of your office. Follow the writing guidelines covered in your legal-writing course, but be attentive to any writing and style guidelines used by your workplace. Ask a supervisor to see well-regarded sample documents and any style guides, but be sure not to create “boilerplate” documents.
2. Observe and take cues from the relationships among the senior and junior attorneys, including interactions in person and in writing. Err on the side of formality, both in terms of your dress and in terms of the way you address people. Follow the general work hours and attire of others in your job position.
3. Begin to develop a strong professional reputation. Your professional reputation begins from the moment you enter the office. Act respectfully at all times. Meet all deadlines; if you cannot, seek extensions as early as possible.
4. Find a way to work with all others, even if your personalities clash. Colleagues need not be friends. And avoid drama and gossip. Be courteous: say “please” and “thank you.”
5. When speaking with a supervisor about a problem, be prepared to offer two or three possible solutions. A top-notch employee does not just “dump” problems in a supervisor’s lap.
6. Treat support and court staff well—they deserve such treatment. If you do so, they will do more, and better, work for you. Do not ask support staff to do personal tasks for you. Respect their work and responsibilities, and do not assume that they exist solely to serve you. Do not expect that they will be able or willing to drop other tasks to handle something for you.
7. Find a balance between being self-sufficient and dependent. When you have a question, consider whether you should first independently research the issue, or whether your supervisor would prefer that you save time by simply asking someone. Then, before you ask, consider who would be the most appropriate person to answer your question. For example, does your question concern formatting? An administrative assistant would probably be able to answer that question. Does your question concern the scope of the assignment? Your supervisor would probably be the best person to ask. Most importantly, if you are struggling with a project, seek help early on rather than at the last minute.
8. When you have meetings, either one-on-one or as a group, be ready to take notes—do not arrive empty handed. Also, be wary of using technology in these contexts, and consider using a legal pad, particularly with senior colleagues. Even if using technology is the norm in your office, be sure to turn off all chat, email, appointment, and similar notifications, which can distract others—and potentially embarrass you.

9. Do not be lured into submitting a draft to your supervisor. Re-write and polish every document before submission. Be sure to use proper citation form; follow any local citation practices.
10. Show confidence, and, to the extent practicable, be sure that your memoranda take a stand. Attorneys are paid to provide concrete, useful advice.
11. Receive feedback gracefully. Do not be defensive about your work. If it is necessary to provide some context for your conduct, do not try to explain away, or shift blame for, your errors. Your reputation will be hurt, and in the end you will receive less feedback. Likewise, acknowledge mistakes, offer to remedy them, and learn from them. Ask specific questions to obtain feedback if too little is provided. The more specific you can be in your questions, the more specific the supervisor will likely be with answers. For example, rather than asking, “How did you like my memo?” you might ask: “Did I provide the proper amount of background law?” Questions such as this will help you to refine your future work and learn what supervisors expect from you.
12. Engage in professional battles rarely, and choose them carefully. In an office, you often do not set the rules. You may privately disagree with decisions made by your supervisors, but do not publicly do so unless circumstances warrant (such as if you are asked to accept a project that you are unable to accomplish or asked to act unethically). Likewise, accept that you will receive inconsistent advice (even from the same person), and react professionally.
13. Be human. Although the life of an attorney is intellectual, remember that attorneys work with and are trying to help real people who have, or wish to avoid, problems.
14. Volunteer for assignments, and apply for positions that interest you. Let your supervisor know if you are interested in a particular area of law—supervisors like enthusiastic attorneys. As an attorney, you will have multiple opportunities to work on a particular team, project, or case. Do not rule yourself out up front (your lack of experience, for example), and do not get overly discouraged by rejections. Pro bono opportunities can be great learning opportunities—seek them out.
15. Use self-reflection as a means to improve your work. After you complete major tasks, consider the choices you made and why you made them. Consider your internal reactions to and your comfort level with the work that you completed. Ask yourself whether you are satisfied with your performance and how you could improve it.

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Toward a Writing-Centered Legal Education

By Adam Lamparello

Adam Lamparello is an Assistant Professor of Law, at Indiana Tech Law School in Fort Wayne, Ind.

Introduction

The future of legal education—and experiential learning—should be grounded in a curriculum that requires students to take writing courses throughout law school. Additionally, the curriculum should be one that collapses the distinction between doctrinal, legal writing, and clinical faculty, as well as merges analytical, practical, and clinical instruction into a real-world curriculum.

The justification for a writing-intensive program of legal education is driven by the reality that persuasive writing ability is among the most important skills a lawyer must possess, and a skill that many lawyers and judges claim graduates lack.¹ Part of the problem is that law schools dedicate less than six credits to required legal writing courses and treat legal writing faculty as if they are second-class citizens.² That should stop now. In doing so, law schools can help struggling students to become competent writers, cultivate an educational environment in which good writers can become great writers, and bridge the divide between legal education and law practice.³

¹ See Suffolk Law School, Institute on Law Practice Technology and Innovation, *The Most Important Knowledge and Skills for Recent Law Grads*, available at <http://lawpracticetechnology.blogs.law.suffolk.edu/2014/04/08/the-most-important-knowledge-and-skills-for-recent-law-grads/>.

² See ASS'N OF LEGAL WRITING DIRECTORS & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2014), available at <http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf/>. The survey notes that, in 2014, the average number of required legal writing credits rose from 5.65 to 5.71. See id. at p. vi.

³ See New York Times, “What They Don’t Teach Law Students: Lawyering,” (Nov. 19, 2011), available at http://www.nytimes.com/2011/11/19/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0 (one recent graduate stated that “[t]he big problem for many people is that law school and the practice of law are so different

I. The Justification—Legal Writing is the Foundation of Law Practice and Should Be the Cornerstone of Legal Education

Law students must learn to write effectively if they are to succeed in law practice. A recent survey by LexisNexis that included 300 hiring partners and law faculty revealed that 41 percent of attorneys and 51 percent of law faculty believe that writing is among the most important skills needed to successfully practice law.⁴ Unfortunately, most attorneys—and judges—criticize graduates’ writing skills.⁵ The skills considered most lacking among graduates “consisted of writing and drafting documents, briefs and pleadings, and skills beyond basic legal research.”⁶ Thus, for law schools to be *truly* experiential, they cannot merely increase the number of clinical offerings or externship opportunities. They must devote more credits and resources to a comprehensive, real-world legal writing program.

II. The Commitment to a Writing-Centered Curriculum is Essential To Developing Competent Graduates

No graduate can truly be practice-ready, whatever that means, but graduates should acquire a minimum level of skill to ensure that they can represent clients

[com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0](http://www.lexisnexis.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0) (one recent graduate stated that “[t]he big problem for many people is that law school and the practice of law are so different

⁴ See BarBri State of the Legal Field Survey, available at: http://www.thebarbrigroup.com/files/white-papers/220173_bar_research-summary_1502_v09.pdf.

⁵ See Sharon D. Nelson and John W. Simek, *Why Can't Law Graduates Write?* 36 ABA J. 6, available at http://www.americanbar.org/publications/law_practice_magazine/2012/november-december/hot-buttons.html (when asked to identify the most glaring weakness in young lawyers, judges and senior attorneys argue that “[t]hey can't write.”

⁶ LexisNexis, White Paper: *Hiring Partners Reveal New Attorney Readiness for Real World Practice* 3 (2015), available at https://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf.

“[F]or law schools to be truly experiential, they cannot merely increase the number of clinical offerings or externship opportunities. They must devote more credits and resources to a comprehensive, real-world legal writing program.”

competently. A writing centered curriculum—complete with a fully staffed writing center and a required legal writing course in every semester of law school—is necessary to remedy the problems many graduates face when they enter the legal profession. The criticism of recent graduates should come as no surprise. Most legal writing programs devote less than six credits to *required* legal writing courses, which can be completed in two or three semesters.⁷ As Bryan Garner states, “the biggest failure at most law schools is the dearth of seriously good skills courses, especially training in legal writing.”⁸ The solution, as Garner explains, is to require more legal writing courses, particularly in the upper-level curriculum:

[T]he second and third years of law school ought to include much more research, writing, and editing, with three to six short papers required in each course. Each paper should be subjected to rigorous editing, then rewritten and resubmitted . . . Short of such reform, the future for new law school graduates looks dismal . . . Law schools should get their priorities straight and better meet the needs of their students’ future employers.⁹

The lack of intensive legal writing programs at law schools has three lasting implications for graduates. First, students are not afforded the time or opportunity to develop basic writing skills.¹⁰ Second, students do not understand the role and purpose that litigation and transactional documents play in the litigation process, because writing assignments are not sequenced to mirror the order in which they are drafted in law practice.¹¹ For example, students do not draft a

motion to dismiss after drafting a complaint, or draft interrogatories after drafting an answer. Third, students are not required to draft many of the documents they will encounter in practice. For example, some students may never have heard of a motion to compel or a motion for injunctive relief until a partner assigns it to them at their first job. As a result, law students graduate without the skills necessary to practice law competently—regardless of how many clinics or externships they completed—and law firms are forced to incur substantial costs training new associates.

A. Skill Deficiency: Insufficient Time and Commitment to Developing Basic Writing (not Legal Writing) and Rewriting Skills

Students must acquire basic writing techniques and learn how to become good writers before they can be competent legal writers.¹² This includes instruction in, among other things, grammar, style, sentence structure, organization, flow, and clarity.¹³ Particularly for students with poor writing skills, two or three semesters of legal writing courses—will not address these deficiencies. Schools that devote six credits or less to legal writing will not have invested the time or resources to develop students’ core writing skills.

In addition, students will not learn the art of rewriting, which is a neglected and often overlooked skill. Too many students collapse the writing, rewriting, and revision phases, believe that their first draft is their *last* draft, and think that rewriting and revision simply means performing a spelling and grammar check on their computer. In addition, many students truncate the writing, rewriting, and revision phases into a single draft that lacks organization and structure. Given these facts, it should come as no surprise that graduates are not prepared to practice law. As stated above,

“[S]ome students may never have heard of a motion to compel or a motion for injunctive relief until a partner assigns it to them at their first job. As a result, law students graduate without the skills necessary to practice law competently ...”

⁷ See REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2014), *supra* note 2.

⁸ Bryan Garner, “Three Years, Better Spent,” (July 25, 2011), available at <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better>.

⁹ *Id.*

¹⁰ See Adam Lamparello and Charles E. MacLean, *Beyond the Rules: Training Great Writers, Not Just Legal Writers*, 39 Canadian Law Library Review 12 (2014), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2363128.

¹¹ See, e.g., Adam Lamparello and Megan E. Boyd, *Show, Don't*

Tell: Legal Writing for the Real World (LexisNexis 2014) (using a fictitious case, the authors assume the role of attorneys for the opposing parties and proceed to ‘litigate’ the case from the complaint to appellate brief).

¹² See Lamparello and MacLean, *supra* note 9, at 14.

¹³ See, e.g., Murray Sperber, We Must Overhaul College Writing, (June 21, 2011), available at <http://www.popecenter.org/commentaries/article.html?id=2539>.

law school should focus on designing a broader curriculum that integrates thinking, writing, and doing across and throughout the curriculum. The deficiencies in graduates' writing skills are impossible to ignore, and are traceable to lack of sequencing, context, and comprehensiveness.

B. Legal Writing Education Does Not Mirror Law Practice

1. *Lack of Sequencing: No Understanding of the Role Litigation and Transactional Documents Play in the Dispute Resolution Process*

Most graduates do not understand how disputes are resolved in the real world, and do not understand the role and purpose that litigation and transactional documents play in the judicial process. In fact, in a majority of law schools, the most common writing assignments are a predictive memorandum, client letter, and appellate brief, although pretrial and trial briefs are becoming more common.¹⁴ As revealed in the LexisNexis survey, students are not gaining a practical understanding of the litigation and transactional process:

Attorneys particularly noted that new attorneys' lack of understanding of how a litigation or transactional matter actually happens in real life, requires them to review this foundational knowledge to increase an associate's immediate value. These skills allow new attorneys to immediately address real-world client matters and to more quickly bridge the gap between legal concepts and doctrines and practical application. In short, they would enter the practice of law armed with the skills they need to be of immediate value to their employers and to their clients.¹⁵

Furthermore, even if students did draft most of the documents they were likely to encounter in actual practice, a curriculum that devotes less than six credits to legal

writing would give students insufficient time in which to develop and refine their skills.

Importantly, one approach that could remedy this problem, particularly if the number of required writing credits remained unchanged, is integrating more assignments into the curriculum. For example, at Indiana Tech Law School, in addition to a six-semester, thirteen-credit writing program, students are required in the first three semesters of law school to draft the most common litigation documents as they would in practice. Specifically, in their first semester, students receive a multi-issue fact pattern containing issues from all first-year courses, and proceed through each stage of the litigation process beginning with the initial client interview, up to and including an appellate brief. Legal writing and doctrinal professors from all first-year courses collaborate to ensure that each drafting assignment involves a legal issue that is simultaneously being taught a doctrinal course. This requires students to apply the legal concepts they are acquiring in class, and it enables the faculty to assess assignments for writing proficiency *and* substantive legal knowledge. The table below summarizes sequencing during the first three semesters, which is designed to ensure that assignments are not duplicative, and that students are not overburdened.

Assignment Sequencing in the First Year First Semester

Course	Assignment and Due Date
Criminal Law	Client Meeting (Sept. 8)
Contracts	Retention Agreement (Sept. 17)
Legal Research	Research—Offer and Acceptance and/or Personal Jurisdiction (Sept. 24)
Experiential legal writing/ Lawyering Skills/Legal Research and Writing	Predictive Memorandum (Experiential legal writing (Oct. 8)
Civil Procedure	Complaint (Civil Procedure) (Nov. 10)

¹⁴ See REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2014), *supra* note 2, at 13.

¹⁵ See LexisNexis, *Hiring Partners Reveal New Attorney Readiness for Real—World Practiced* available at: http://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf (emphasis added).

Second Semester Assignment Sequencing (Courses Will Vary Depending on the School)

Course	Assignment and Due Date
Experiential legal writing// Lawyering Skills/Legal Research and Writing	Motion to Dismiss
Property	Answer
Torts	Discovery (interrogatories and Document Requests)
Property	Motion in Limine
Constitutional Law	Motion for Summary Judgment

Experiential Legal Writing III (fall semester, second year): The Appellate Brief (with rewrite)

The above model, or whatever variation a law school or legal writing program adopts, would give students a contextual and practical understanding of how law is practiced.

2. Lack of Context: Failure to Understand How Predictive and Persuasive Writing Techniques Apply to Different Documents and Factual Contexts

a. LEGAL CONTEXT

As stated above, most students draft a predictive memorandum and appellate brief in their required legal writing courses. Most students do not, however, get the opportunity to draft a complaint, answer, motion to dismiss, motion for summary judgment, motion in limine, and trial brief. Put simply, they do not have the opportunity to draft documents they will encounter in practice, learn the legal context within which various real-world documents are drafted, or understand the purpose that each document plays in the litigation or transactional process.

The problem with this approach is that students do not understand how to apply predictive and persuasive writing techniques based on the specific document being drafted. For example,

in a complaint, factual allegations should be stated concisely to survive a motion to dismiss and, if accepted as true, support a finding of liability. In a motion to dismiss, however, the statement of facts should be a compelling and detailed narrative that shows the court why it should rule in a party's favor. Likewise, in a summary judgment brief, a party's statement of facts should only be comprised of undisputed material facts. Not knowing these differences, and the writing techniques that apply with particular force in each context, leaves students without the tools to be effective persuasive writers.

Moreover, this model would allow students to continuously refine and improve their legal research, persuasive writing, and analytical skills, all of which are vital to competency as an attorney. In the LexisNexis Survey, responding attorneys stated:

Drafting pleadings and motions and advanced legal research skills were both highly important skills upon hiring and often lacking. It is also important for new attorneys to be competent drafters of trial level briefs, discovery documents, and deposition questions or summaries; familiarity with e-discovery and conference briefs is also important.¹⁶

Furthermore, even if students did draft these documents in law school, they are not given sufficient time to receive individualized feedback, reflect on their performance, and rewrite based on such feedback. As a result, many students spend the last two or three semesters of law school without refining their writing skills, and enter practice without the writing skills necessary to succeed.

b. FACTUAL CONTEXT

Even if students did draft some or all of the above documents in law school, they are not given sufficient opportunity to draft such documents in factual contexts that implicate a variety of legal issues. For example, in upper-level writing courses, students should be given hypothetical or actual fact patterns that require them to research issues in different jurisdictions and draft documents

“[T]his model would allow students to continuously refine and improve their legal research, persuasive writing, and analytical skills, all of which are vital to competency as an attorney.”

¹⁶ See LexisNexis, *supra* note 9.

“The focus should be on developing critical thinkers and persuasive writers that can solve real-world legal problems.”

involving those issues. This would force law students to do precisely what lawyers do: research an area of the law with which the student is unfamiliar, and draft a document applying the law to a new—and likely incomplete—set of facts. Professor Kirsten Holmquist explains the benefits of a context-based legal writing curriculum:

Our pedagogy and curriculum—an over-reliance on neatly edited cases to the exclusion of working with messy, human facts, in ways that real lawyers might—obscures the interdependence of knowing and doing that is at the heart of thinking like a lawyer. It obscures the context and content that lawyers work within while, together with their clients, solving problems. Students’ lack of applied learning opportunities may deny them the ability to write a fantastic brief.¹⁷

Most importantly, it would teach students how to be problem-solvers and self-sufficient learners, which

is particularly valuable in an era where law firms no longer train young lawyers, and clients increasingly refuse to pay for hours that new associates bill.

Conclusion

The future of legal education should bridge the divide between learning and practicing the law. No school should resist infusing more practical skills training into the curriculum. This does not mean that law schools should focus on adding clinics and externships to the curriculum. The focus should be on developing critical thinkers and persuasive writers that can solve real-world legal problems. The days when students graduate lacking the skills necessary to practice law at a minimally competent level should soon be over.

¹⁷ Kirsten Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 356 (2012)

Micro Essay: Practice Ready

Practice Ready = Competence + Value

Is practice-ready possible? Maybe. Absent residency programs for lawyers like doctors, the idea of “practice ready” comes down to two words: competence and value. Clients want to know that their lawyer is good at what they do and right about the law and gives value. Nothing else matters but the bottom line. As such, the real parties in the practice-ready analysis are the ones writing the check, not the law schools. So what do law schools need to do? Simple: They need to teach the “how-to-do” within the “how-to-think.” Practice ready = competence + value. Schools can provide the competence and firms taking on new lawyers can help provide the value.

Alisa Levin, Esq., Levin Law, Ltd., Chicago, Ill.

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Practice Makes Proficient: Writing Classes for Struggling Students

by Peter Nemerovski

Peter Nemerovski is a Professor of Legal Writing at the University of Miami School of Law in Coral Gables, Fla.

With the days of “look to your left, look to your right” long gone, law schools recognize that the majority of students who struggle academically during their first year will continue to pursue their degrees.¹ To their credit, law schools have developed a wide array of programs and courses to help these students succeed in law school and beyond. At Miami Law, one of those courses is Writing and Editing for Lawyers, a two-credit summer course for rising 2Ls (and some 3Ls) who performed poorly in their first-year courses. My colleague, Alyssa Dragnich, developed the course in 2010, and I taught it for the first time in the summer of 2015.

Teaching a writing course for struggling students was the most challenging, but also the most rewarding, experience I’ve had in six years of teaching. In this article, I’ll share what I learned from teaching this course and offer advice to anyone contemplating a similar course.

The Student Population

There are three general categories of students who take Writing and Editing for Lawyers.² First, our

Academic Support personnel strongly encourage students on academic probation or oversight to take the course.³ Second, students who are not on probation but who did poorly in their first-year writing courses are eligible for the course. These students self-select into the course, but I check with their legal writing professors to confirm that these students are good candidates for the course. Third, students who did not complete two semesters of Miami’s first-year legal writing course, Legal Communication and Research Skills (LComm), are eligible for the course. This includes students who transferred to Miami from other law schools, students who transferred into the J.D. program from our international LL.M. program, and students who missed part of LComm for personal reasons.

I started the semester with 22 students, but only 17 finished the course. Two students were academically dismissed from the law school when spring-semester grades came out; the other three just stopped showing up. Of the 17 who finished the course, at least four were nonnative English speakers, and nearly half were or had been on academic probation or oversight. To my surprise, three or four of the students had what I consider excellent writing and analysis skills coming into the course. For whatever reason, those skills had not yet translated into grades reflecting their abilities.

Because the course drew such a diverse population, I realized early on that I had to get to know each student and, to the extent possible, tailor

“Teaching a writing course for struggling students was the most challenging, but also the most rewarding, experience I’ve had in six years of teaching.”

¹ Ralph D. Clifford, *What Has Happened To Law School Attrition?*, The Faculty Lounge (Feb. 2, 2013, 11:49 AM), <http://www.thefacultyounge.org/2013/02/what-has-happened-to-law-school-attrition.html> (concluding based on ABA data that since 1994, attrition at accredited law schools has been around ten percent).

² When she first taught the course, Professor Dragnich deliberately gave it a vague title. Over the years, we have been careful to avoid publicly referring to the course as “remedial.” Our goal is to avoid any stigma associated with taking the course. See [Dionne L. Koller, *Legal Writing and Academic Support: Timing Is Everything*, 53 Clev. St. L. Rev. 51, 65 \(2005-06\)](#) (discussing concerns about stigma in the context of designing an upper-level writing course for struggling students).

³ Miami’s rules on probation and oversight are complicated, but probation generally means the student’s cumulative GPA is below 2.0, and oversight generally corresponds with a cumulative GPA between 2.0 and 2.5. See Miami Law Student Handbook & Honor Code, pp. 23–25 (2015–16) (available at <http://media.law.miami.edu/current-students/pdf/2015/student-handbook.pdf>).

“My focus throughout the semester was on writing—including grammar, punctuation, and style—and legal analysis.”

my instruction to their individual needs.⁴ For weaker students, my written feedback and in-person meetings focused on basic grammar and sentence structure, clarity, and the organization of a legal document—for example, the importance of thoroughly explaining the law before applying it to your facts. For stronger students, I focused more on more advanced topics like working with cases effectively and anticipating and refuting counterarguments.

Equally important was setting realistic goals for students based on their starting points. A student who is still learning English is not going to produce a professional-quality summary judgment motion by the end of the eight-week semester.

The Substance of the Course

The students in the course wrote a total of six assignments. The first two assignments arose from the same fact pattern. For Assignment 1, the students wrote an office memo on a substantive criminal law issue. For Assignment 2, the students revised their first assignment based on my comments and added a second section that dealt with a criminal procedure issue. Assignments 3 through 5 were a judicial opinion, a motion to dismiss, and a memorandum of law in opposition to a motion to dismiss. For Assignment 6, the students were required to rewrite an earlier assignment of their choosing.

I deliberately chose a variety of assignments, including several that are not typically given in first-year courses, so that students would not feel like they were just repeating their first-year legal writing courses.⁵ In addition, I made the course very rigorous, with six written assignments, all graded, in an eight-week semester. I wanted students in the

course who were committed to improving their writing and willing to put in the work necessary to do that. In my meetings with the three students who dropped the course, it became clear that they simply did not want to put in the time that the course required. One student in particular was just looking for an easy two credits so he could graduate later that year; he ended up having to look elsewhere.

While the students had to work hard to complete the course, they were generally rewarded with decent (B or higher) grades. I deliberately gave higher grades in this course than I do in other courses. While no one is required to take Writing and Editing, most students in the course are there in part because someone working in Academic Support or I strongly encouraged them to enroll. It would be profoundly unfair to steer a student into a remedial writing course and then give him a C or D because he does not write well.

My focus throughout the semester was on writing—including grammar, punctuation, and style—and legal analysis. In my first-year courses, I teach legal research, professionalism, legal citation, oral advocacy, client communication, and other topics relevant to the practice of law. But in Writing and Editing, I wanted students to concentrate exclusively on improving their writing. Therefore, all of the assignments were closed-research, and I told the students to use any citation format that got the reader to the right page.

The class meetings tended to focus on two things. First, we discussed the substance of whatever assignment was due next. We discussed the applicable cases in-depth, and we made charts to help students keep track of which facts were relevant to which legal issues and which conclusion on that issue each fact supported. I wanted the students to have a clear idea of the legal analysis so that they could use their limited time focusing on how to communicate that analysis in writing, instead of brainstorming to come up with arguments.

Second, once the students started turning in assignments, I used a fair amount of class time discussing their work with them. I went over common problems I saw on the most recently

⁴ See Melissa J. Marlow, *It Takes A Village To Solve Problems In Legal Education: Every Faculty Member's Role In Academic Support*, 30 U. Ark. Little Rock L. Rev. 489, 504-05 (Spring 2008) (emphasizing the importance of individualized instruction when working with struggling students).

⁵ See Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 Dick. L. Rev. 245, 285 (Winter 1996) (arguing that legal writing courses should expose students to as many different types of legal documents as possible).

submitted assignment. On several occasions, we did an exercise called “What’s Wrong With This Sentence?” where I put an actual sentence written by a student on the previous assignment up on the screen—anon­y­mously, of course—and we discussed how to improve it.

Success, or Something Like It

What I want for the students I taught in Writing and Editing for Lawyers—and what I want for all my students—is for them to graduate from law school, pass the bar, and go on to successful and fulfilling careers as practicing attorneys. By that measure, it’s obviously premature to declare the course a success.

A more modest and more realistic goal for this particular course is to produce students who are proficient in legal writing. What I mean by this is that the students, while perhaps not outstanding writers, can write well enough that they can succeed as practicing attorneys if they work hard and adhere to high standards of ethics and professionalism. Based on my experience practicing law in California and Florida, this is not a particularly high bar to clear.

By that measure, I believe the course was a success for most of the students. Either they were proficient legal writers by the end of the course, or they came away with a clear sense of what they must do to get there, and a commitment to do it.

Some of the students in the course, including most of the nonnative English speakers, simply need more writing training than they could get in a two-credit, eight-week summer course. I did what I could with these students—low-performing students in a class for low-performing students—but in the end I had to send them on their way with a recommendation to take several more writing courses in whatever time they have left in law school.

Regrets, I Have a Few

While the course generally achieved its modest goals, there are several things I wish I had done differently. First, I should not have let any students into the course after the first class meeting. This course, more than any other one I’ve taught, required a strong commitment on the student’s part, a commitment I found lacking in the students who joined late. I faced some pressure from the administration to accept students after the first week—“this student *really* needs the help” or “he’s trying to graduate soon and needs the credits”—but I could and should have resisted that pressure. This same logic applies to students who know in advance that they will have to miss multiple class meetings. I wish I had told these students to choose a different writing course or take Writing and Editing for Lawyers some other semester when they are fully available.

Second, I probably allowed too many students into the course. The school would have let me teach the course with as few as 8-10 students. While it’s hard for me to turn away students who genuinely want and need to work on their writing, a course like this should have no more than 12-14 students, as opposed to the 17 students who finished my course or the 22 who were there for at least part of it.⁶ The course required me to give a substantial amount of individualized feedback on student writing—probably about three times as much as I normally give during a first-year writing course. The draft-and-revision process, an important element of the course, requires that the professor comment on and return student papers quickly so they can incorporate the professor’s feedback into their final versions. At several points during the semester, I simply did not have time to give as much feedback as I wanted to.⁷

⁶ See John F. Murphy, *Teaching Remedial Problem-Solving Skills to Underperforming Law Students* 15 (Last Revised Feb. 24, 2015) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508037) (recommending that sections of remedial courses be limited to no more than fifteen students).

⁷ See Koller, *supra* note 2, at 73 (noting the importance of “direct, constructive written feedback” when teaching struggling students); Murphy, *supra* note 6, at 14 (emphasizing the difficulty, but also the importance, of grading student papers in courses with a lot of written assignments).

“What I want for the students I taught ... is for them to graduate from law school, pass the bar, and go on to successful and fulfilling careers as practicing attorneys. By that measure, it’s obviously premature to declare the course a success.”

“A ... regret ... is that I let too many students with good writing skills into the course.”

A third regret, which relates to the second, is that I let too many students with good writing skills into the course. This happened because students on academic probation or oversight are automatically allowed into the course, and students with good writing skills sometimes get bad grades and end up on oversight. This problem can be fixed quite easily by no longer automatically accepting anyone on academic probation. Rather, I would talk to each student’s legal writing professors and analyze each student’s overall academic record to determine whether he or she is a good fit for the course. Last summer I only did this analysis with students whose qualifications for the course were “borderline,” meaning they were not on probation or oversight but there was some reason to think they might need additional writing training.

Fourth, while I stand by my decision to give relatively high grades, I should not have told students up front of my intention to do so. I essentially made a deal with my students the first week of class: If you work hard and behave in a professional manner, you’ll get at least a B-minus in the class. A few students took this to mean that it was OK if their papers were not very good, as long as it looked like they were trying. A class like Writing and Editing inevitably includes some students who don’t work as hard as they should. It’s important that the professor not give such students any reason to do less than their best.

Finally, I wish I had done more to address the unique needs of the students who were not native English speakers. For example, many ESL students struggle with articles—when you need one and which one (a/an versus the) to use when you do.⁸ In contrast, article usage comes quite naturally to the vast majority of native English speakers. Therefore, I could not justify devoting any class time to discussing articles. Ultimately, I’d like to see my law school offer a separate upper-level writing course for nonnative English speakers. Until that

happens, anyone teaching a course like Writing and Editing should educate themselves about the unique challenges these students face. Professors should also be prepared to hold extra class sessions to cover grammar topics of interest to these students but not to the general population of struggling law students.

Conclusion

I mentioned above that teaching Writing and Editing for Lawyers was the most rewarding experience I’ve had in six years of teaching. What I found most rewarding was the improvement I saw in the students’ writing from the beginning of the course to the end.⁹ The following student comments from the course evaluations demonstrated this improvement and the overall success of the course:

- “I took this course to improve my writing. I wasn’t sure how much I could even improve in a summer course, but my improvement exceeded my personal expectations.”
- “This has been one of the most useful classes I have taken in law school. It helped me fill in the serious gaps about legal writing that I did not get out of LComm. My writing has improved exponentially thanks to this class.”
- “The course helped me address some problem areas from LComm I and II, which is what I wanted to achieve when I took the class.”
- “This class was exactly what I was hoping for. I wanted to become fluent in CREAC and I did. I understand it much better now.”

Teaching a writing course for struggling students is not easy, but I would encourage any legal writing professor with the time and the patience to give it a try. Those who do will fulfill an important responsibility to some of our most vulnerable students, and have a unique opportunity to make a difference in these students’ professional lives.

⁸ Anne Enquist and Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 259 (3rd ed. 2009) (“Unfortunately for most ESL law students, many of their native languages do not use articles, and others use articles in ways that are different from English.”).

⁹ See Murphy, *supra* note 6, at 12 (describing the joys of teaching a remedial course, including “the ‘a-ha’ moment; the little epiphanies; the steady progress toward competence, if not excellence; the rise in students’ GPAs; [and] grateful students thanking you for taking the time to change their academic trajectories”).

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Analytical Search Strategies: A Tip Sheet with Examples for Teachers and Students

By Roberta Freeland Woods

Roberta Freeland Woods is a Reference and instructional Services Librarian at the University of Hawai‘i at Mānoa, William S. Richardson School of Law in Honolulu, Haw.

An analytical search strategy is not browsing. Browsing is opportunistic and requires one to recognize relevant information. So, browsing, in general, is not a strategy so much as it is an informal and interactive process, like scanning a result set for relevant information. Analytical strategies, on the other hand, require careful planning, but the result sets lead one to a certain level of confidence in the thoroughness of the research.

One uses an analytical search strategy to get the best results or when the result set is confusing because another term is similar to the concept you are researching. For example, imagine you are researching St. Augustine, the priest. The first Google results are to sites about St. Augustine, Florida. Ideally, you need a search strategy to get rid of the results about St. Augustine, Florida. In this example you would use the Boolean NOT operator or similar to remove the Florida results. The Google search would look something like this: St. Augustine -Florida. (The dash in front of the word Florida is equivalent to the Boolean NOT operator.)

Index Method

Using an index to find the target is a very basic search strategy. This is essentially a single-word search, similar to looking up the definition of a word in a dictionary. The strategy is to search for the most specific term first and if you don't find it, broaden until you do find something. Using a resource index is much more efficient in print, if you have one available, than online.

Hypothetical Example: Can I create a family cemetery on my land in Hawai‘i?

Check the index to the Hawai‘i Revised Statutes.

First, I looked in the online index for the word “cemetery.” No results. Next, I searched for “burial.” That led me to “cemeteries.”

Had I conducted a print search, I would have seen the word “cemeteries” on the same index page where I searched for “cemetery,” which would have saved me an additional step. I eventually found the section that addressed my question in Family Burial Plots, Haw. Rev. Stat. § 441-5.5.

Doing this search online required that I use the correct term, “cemeteries.” I got to it via the word “burial,” but it’s important to know that sometimes using a print index is more efficient, or, if you cannot think of another word that leads you to the correct place try using a print index if you have one readily available to you.¹

Print Index	Results	Online HRS Index	Results
Cemetery	See cemeteries	Cemetery	0
Cemeteries (same page)	HRS § 441-5.5	Burial	Cemeteries
		Cemeteries	HRS § 441-5.5

Building Blocks

Before embarking on concept oriented search strategies, please review this YouTube video, “What the Heck Is Boolean Searching?” at <https://www.youtube.com/watch?v=QfvDPpnV0Pg>, which explains Boolean searching.

¹ Often statutory code publishers will sell you the index volume(s) separately without having to purchase the complete set.

Take your topic and break it down into three different “building blocks.” One of the blocks should be the area of law that you are researching. Think about different ways to describe your topic.

- Write down a **concept or concepts** in each concept block.
- **Combine** similar concepts with ORs; use no more than two ANDs.
- **Encase** every OR'd term within parentheses (term1 OR term2).
- E.g. (ham OR turkey OR chicken OR “roast beef”)
- **Truncate** the terms.
- **Refine the query** using connectors or other proprietary syntax.
- E.g. (ham OR turkey OR chicken OR “roast beef”) AND (wheat /2 bread OR white /2 bread OR rye) AND (mustard OR mayonnaise OR ketchup)

For example, take a topic or thesis statement like this one: How U.S. legal policy on terrorism (“the war on terror”) is linked to the international narcotics trade and the U.S. “war on drugs” and the effect on U.S. immigration law. It can be parsed like this:

- How *U.S. legal policy on terrorism* (“the war on terror”) is linked to the
- *international narcotics trade* and
- the U.S. “*war on drugs*” and
- the effect on U.S. *immigration law*
- Create three groups:
- Narcotics; Illegal drugs; Drug trade; Drug cartel; U.S. “War on Drugs”

- Terrorism; U.S. “War on Terror”; Violence; Crime
- Immigration law
- Create the Boolean search argument by combining similar terms with ORs and encasing them in parentheses.
- (“*war on drugs*” OR *narcotics* OR “*illegal drugs*”)
- (*terrorism* OR “*war on terror*”)
- “*immigration law*”

Next, insert ANDs between the three blocks.

- (“*war on drugs*” OR *narcotics* OR “*illegal drugs*”) AND (*terrorism* OR “*war on terror*”) AND “*immigration law*”

Depending on the database you are searching, you may not need all three concept groups in one search argument. If your search results are too few, try removing one or more concept groups. Then, browse your search results for other terms that might yield more precise results. In this example, “narco-terrorism” showed up in the result set the first time and the revised search argument became (“war on drugs” OR “war on terror”) AND (“immigration law” OR “narco-terrorism”). I used HeinOnline’s Law Journal Library for this search.

Fish Net Strategy²

In this strategy one searches broadly in a database making sure that your search is broad enough to “capture” all of the results about your primary topic. Then search within your large result set for your other concepts. This is a strategy one would use when searching for prior art for a patent filing. It ensures thoroughness provided the initial result set is large enough.³

² In information science this strategy is known as “successive fractions,” but that sounds too much like math so I call it the “fish net strategy” since we are going to search with the idea of creating a very large set to look within to find our search terms. Using the fishing analogy, first get all of the fish in the South Pacific with a very large net, then look through the catch for the ahi tuna or mackerels or whatever you want and send the rest back to the sea.

³ It used to be used as a cost effective strategy on Westlaw Classic and Lexis Classic because those systems allowed you to create a large result set that you could search within as many times as you wanted in a 24-hour time period. But that has changed with WestlawNext and Lexis Advance.

Hypothetical Example: How U.S. legal policy on terrorism (“the war on terror”) is linked to the international narcotics trade, the U.S. “war on drugs,” and the effect on U.S. immigration law.

Search Within

Create a result set that will “capture” all of the results for your topic, i.e. the broadest topic. Here, you might begin with “immigration law.”⁴ Next, choose one of the other concepts and using appropriate synonyms for that concept, enclose your search terms within parentheses () connecting the synonyms with ORs. For example, searching within the immigration law results set, next search for (terrorism OR “war on terror”); then **search within** the original result set for (“war on drugs” OR narcotics OR “illegal drugs”); finally search within the original result set for “narco-terrorism.”

Pearl Growing or Follow the Footnotes⁵

First, find the “pearl.” The “pearl” is the journal article or treatise section that is on point and completely relevant with footnotes. Follow the footnoted citations in it. Many database vendors create clickable links in the footnotes to make using this strategy easy to adopt. Finally, if it is a cited article, meaning that more recent articles cite to the “pearl,” follow the articles that cite it and their relevant footnotes.

Unique Word or Term⁶

When you notice that you have a unique word or term that will probably only be found in very few places, use it, by itself, in the most appropriate database.

In the example, above, the unique term is “narco-terrorism.” Depending on the database you are searching, you may need to include “immigration law” in the search argument.

ALR Annotations are notorious for having titles with unusual facts. This strategy works well with a quirky fact in an ALR Annotations database.

⁴ You may think it is faster and easier to do a subject or thesaurus search for “immigration” or “immigration law” first, but it will result in a smaller set; one that has been classified as “immigration” or “immigration law” only in the metadata. Not all relevant results will be so classified. It just depends on when the database vendor began the classification.

⁵ In information science this is also called “known item instantiation strategy.”

⁶ In information science this is also called “most specific facet first.”

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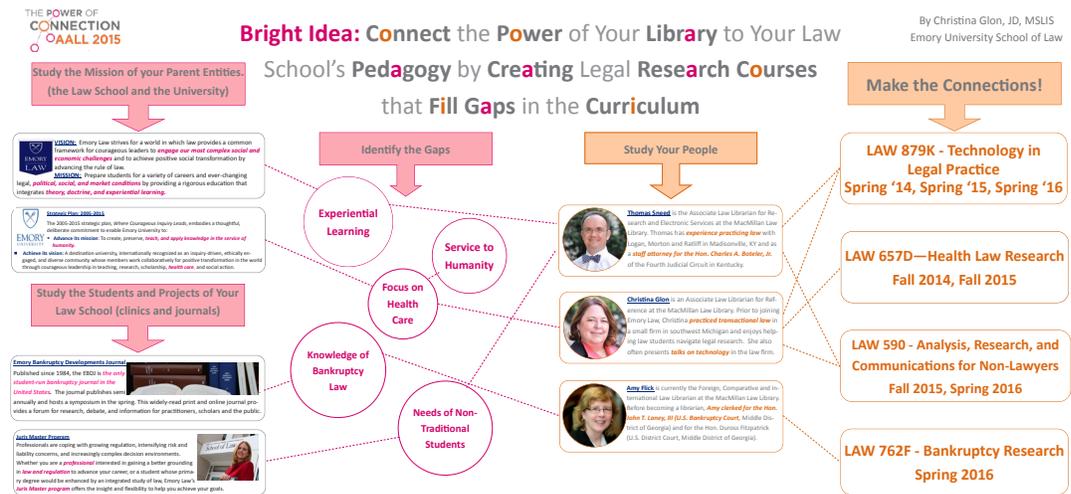
Bright Idea: Connect the Power of Your Library to Your Law School's Pedagogy by Creating Legal Research Courses that Fill Gaps in the Curriculum

By Christina Glon

Christina Glon is an Assistant Law Librarian for Reference at Emory University School of Law in Atlanta, Ga.

The theme of the 2015 AALL Annual Conference was “The Power of Connection.” In my law library, we are always thinking about ways we can add value to our parent law school through the use of the unique resources. This poster focuses on how we used the unique legal backgrounds of a few of our librarians to propose and teach one-credit, competitively-graded classes that provide real world experience to the students, add value to the law school curriculum, and allow the law school to show our parent institution how it is playing its part in meeting the goals of the university. For example, Emory University is globally known for its expertise in medicine. The law school

has been actively recruiting faculty with the goal of creating a Health Law specialty within Emory Law. Health law research is heavily regulatory in nature and, in practice, I was exposed to several areas of regulatory research. Our Director saw the opportunity and made the connection and proposed the library teach a class on health law research (regulatory research) that I could specifically design for Emory Law. This poster includes three other examples where we discovered an opportunity to add value to the law school and made the connection with one of our librarians' unique legal backgrounds and successfully implemented a brand new research course. The connections are there—all you have to do is look for them.





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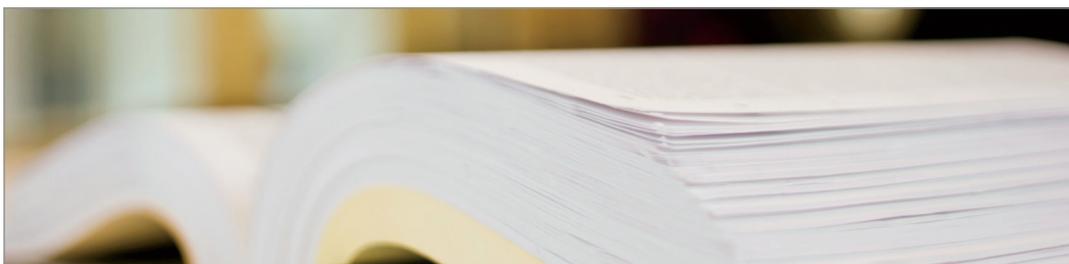
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