Perspectives
Teaching Legal Research and Writing

Vol. 27 | No. 2 | Fall 2019

## In This Issue



Published by Thomson Reuters as a service to the Legal Community.

# The Board



*Perspectives: Teaching Legal Research and Writing* is published in the fall and spring of each year by Thomson Reuters.

## Why Write for Perspectives?

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



Authors are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. The *Perspectives* Author's Guide and Style Sheet are posted at http://info.legalsolutions.thomsonreuters.com/signup/newsletters/perspectives/perstyle.aspx. Manuscripts, comments, and correspondence should be sent to:

James B. Levy, Nova Southeastern University, Shepard Broad College of Law, email: levyj@nsu.law.nova.edu

Christina Glon, Emory Law, email: christina.glon@emory.edu

Brooke J. Bowman, Stetson University College of Law, email: bowman@law.stetson.edu

Subscribe to Perspectives here:

https://info.legalsolutions.thomsonreuters.com/signup/newsletters/perspectives/

Published by Thomson Reuters as a service to the Legal Community.

Cite as: Sara F. Cates, *Beyond the Traditional First-Year Content: Using Prisoner Civil Rights Law for First-Semester Writing Assignments*, 27 Persps. 46 (2019).

# Beyond the Traditional First-Year Content: Using Prisoner Civil Rights Law for First-Semester Writing Assignments

By Sara F. Cates

*Sara Cates is a Career Law Clerk to the Honorable William I. Garfinkel, United States District Court for the District of Connecticut and an Adjunct Professor of Legal Skills, Quinnipiac University School of Law.*

Creating assignments that allow students to practice and hone their writing and analytical skills is critical for legal writing professors, but ensuring these assignments capture students' attention and expand into topics beyond the traditional first-year curriculum can also enhance their effectiveness as powerful learning tools. This Article details my experiences with a prisoner's rights problem I created and used with great success to teach objective analysis in a first-semester legal writing course. In addition to developing students' legal research and writing skills, the two objective writing assignments I prepared enabled students to consider and evaluate issues practitioners face in litigating civil rights cases, and I observed students were particularly engaged in the writing process due to the subject matter involved.

## The Importance of Engaging Writing Assignments

Students often tell me they applied to law school due to a desire to protect constitutional rights and reform the justice system, but it can be easy for them to lose sight of this amidst the general stress of tackling a new and rigorous academic environment. Providing students with the opportunity to write about civil rights and justice in their first semester of law school can help nurture new students' ambitions to fight for something greater than themselves and to seek justice for those who have little or no voice. Prisoner rights law, in particular, allows students to recall these aspirations while they also develop the research and writing skills required of attorneys. In addition, prisoner rights law is an apt introduction to the complexities—both legal and moral—of the profession. Prisoner rights law presents complicated questions regarding the rights of prisoners and the responsibilities of prison officials, and it highlights that we, as lawyers, often find ourselves in the middle of situations in which there are no simple right answers and no clear paths to just results.

On a more pragmatic level, the first assignments law students undertake should be carefully crafted to ensure students can learn and practice the skills legal analysis entails. Successful assignments require students to find, critically read, and understand how a group of legal authorities work together to create an area of the law, and then to be able to take that authority and apply it to a new set of facts. Ideally, assignments will allow students to consider the impact law has on people and institutions, and how that impact influences choices lawyers make while representing clients. While many areas of law are conducive to students achieving these aims, prisoner rights law is particularly well-suited for doing so.

## The Problem

The problem I created is based on *Almighty Supreme Born Allah v. Milling et al.* and its subsequent appeal to the United States Court of Appeals for the Second Circuit.[1] In the problem, the client is currently incarcerated in a Connecticut state prison, and he has filed a complaint under 42 U.S.C. § 1983 alleging that three state prison officials violated his Fourteenth Amendment right to substantive due process by placing him in solitary

> "Providing students with the opportunity to write about civil rights and justice in their first semester of law school can help nurture new students' ambitions to fight for something greater than themselves . . . "

1 *Almighty Supreme Born Allah v. Milling et al.*, No. 3:11-cv-668 (WIG), 2016 WL 1311997 (D. Conn. Apr. 4, 2016); *Almighty Supreme Born Allah v. Milling et al.*, 876 F.3d 48 (2d Cir. 2017).

confinement when he was a pretrial detainee. They did so because the client was previously placed in a segregation program (solitary confinement) at the same prison during a prior term of incarceration months before his newest arrest. The client's previous placement in solitary confinement was for questioning the decision of a correctional officer and requesting to speak to a commanding officer while surrounded by inmates in an open-dormitory style facility, which prison officials found to be an attempt to incite the other inmates and impede order. As a result of this finding, the client was housed alone in a cell for twenty-three hours a day, restrained any time he left the cell, and had limited visitation and telephone privileges.

"This intensive factual inquiry is perfect for allowing 1L students to robustly analogize and distinguish cases . . . "

## The Assignments

The problem was the foundation of two major objective writing assignments: an interoffice memorandum by the plaintiff's law firm and a memorandum written from a law clerk to the presiding judge. The first assignment, the initial interoffice memorandum, analyzed the likelihood the plaintiff could show a substantive due process violation. It was a closed memo, and students were given multiple Second Circuit cases addressing substantive due process rights of pretrial detainees in similar situations. The cases were not directly on point and supplied no definitive answer to the issue.

For the second assignment, students took on the role of a law clerk to a district judge in the District of Massachusetts, and they analyzed whether the plaintiff could show a violation of his substantive due process rights under federal law and whether the defendants (the three state prison officials) would be entitled to qualified immunity. I provided students with background on Section 1983 litigation prior to introducing the problem and the assignments, including an analysis of the statute itself, an introduction to immunity defenses, and an explanation of the remedies available under Section 1983.[2] In addition, the second assignment was an open memo that required students to conduct research in a different jurisdiction (the First Circuit) to complete it. I changed the jurisdiction for the second assignment to expose students to a different group of cases and introduce the idea that precedent from multiple jurisdictions can affect the outcome of a case.

## Outcome

The assignments were successful on many levels. To begin, this area of law is limited enough that the research required for the second assignment was appropriate for first-year students. Instead of a frustrating process, the relevant terms of art were specific enough that a straightforward search of "pretrial detainee" and "solitary" in the jurisdiction resulted in a manageable number of cases. Because the quantity of search results was reasonable, students could focus on meaningfully reading and evaluating cases to select the most applicable ones. Thus, students gained confidence in their legal research skills.

The relevant legal authorities were also particularly helpful in allowing students to conduct sophisticated objective analyses. In the prisoner rights context, cases generally involve a prison policy, practice, or program that an inmate challenges. What makes the cases distinguishable from each other, and therefore reflects how substantive due process law develops, are the particular circumstances of each inmate and the action being challenged. This intensive factual inquiry is perfect for allowing 1L students to robustly analogize and distinguish cases, which aids in helping them recognize the critical role of facts in legal analysis.

The assignments also exposed students to the balancing approach courts use in resolving disputes concerning competing interests. The substantive due process rights of a pretrial detainee are violated when conditions of confinement amount to punishment, because a pretrial detainee may not be punished until found guilty through the legal process.[3] In determining whether a condition of confinement amounts to constitutionally

2 I also recommended that students read Martin Schwartz, *Fundamentals of Section 1983 Litigation*, 17 Touro L. Rev. 525 (2001).

3 *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

impermissible punishment, courts must determine whether it is imposed in order to punish the pretrial detainee, or whether the condition is incident to a legitimate governmental objective.[4] Absent an express intent to punish, this determination will turn on whether the condition is rationally related to the proposed governmental purpose and whether it is excessive in relation to that purpose.[5]

This balancing approach is advantageous in helping students identify and contend with opposing interests of parties involved in civil rights litigation. Students had to weigh an individual's constitutional right to be free from punishment prior to an adjudication of guilt against prison officials' duty to implement policies and procedures that ensure the safe and efficient operation of a correctional facility. In so doing, students discovered that the world is filled with legal problems for which there are no clear answers. Teaching students to be adept in navigating ambiguity is, perhaps, one the greatest challenges law professors face. These assignments readily introduced this concept and resulted in productive discussions about tolerating, and perhaps even embracing, the idea that legal problems often do not have a single, correct answer.

Further, tackling qualified immunity in the second assignment really emphasized to students the importance of precedent. In general, a qualified immunity analysis involves two considerations: first, did the official's conduct violate a constitutional right, and second, was that right clearly established at the time of the violation?[6] Here, the second assignment had two issues: students had to determine whether the plaintiff could show a substantive due process violation, and then determine whether, if he could, the prison officials would be entitled to qualified immunity. Thus, to answer the qualified immunity question, students needed to determine whether the right at issue was clearly established at the time it was violated. A right is clearly established when the parameters of the right are defined enough such that an officer would understand that his or her conduct violated the right.[7] While a perfectly analogous case is not required, the right in question must be developed in and supported by existing precedent.[8]

Undertaking the "clearly established" analysis was a significant challenge for students, but one with great gains. The analysis presents the question of how similar the facts of the instant problem must be to the facts of the precedent for the law to be clearly established.[9] The analysis also presents the question of how narrowly or broadly the right at issue should be defined.[10] When researching the problem in the First Circuit for the second assignment, students found a factually similar case that likely established the right at issue.[11]

The following semester, the transition from objective to persuasive advocacy came easier to students because we returned to these concepts. Arguing whether or not a particular case should control the outcome of a new set of facts came more readily to students because they were able to recall how they confronted a similar concept in conducting the "clearly established" analysis. Likewise, arguing that a particular case stands for a certain proposition came more readily to students because they were already familiar with the concept of framing a case's holding narrowly versus broadly.

Additionally, the assignments gave the students the opportunity to have conversations about how constitutional law is (or is not) developed in trial courts. In practice, the two-part qualified immunity analysis is not sequential; courts can determine whether a right was clearly established without determining whether a plaintiff's rights

"Teaching students to be adept in navigating ambiguity is, perhaps, one the greatest challenges law professors face."

4 *Id.* at 538.

5 *Id.*

6 *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

7 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

8 *Id.*

9 Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 Wm. & Mary Bill Rts. J. 913, 955 (2015).

10 *See al-Kidd*, 563 U.S. at 744.

11 *Ford v. Bender*, 768 F.3d 15, 27 (1st Cir. 2014).

were violated.[12] Because courts may bypass the first qualified immunity inquiry—whether there was a violation of a federally protected right—the progression of constitutional law can be stymied.[13] Reading qualified immunity cases, and examining the reasoning courts employ in deciding them, led to enriching discussions about how substantive civil rights law is developed specifically, and of how judges decide cases generally.

"Perhaps for the first time in their law school careers, students discovered that the legal system may identify an injury for which there is no remedy."

More pragmatically, students encountered the real and sometimes difficult conversations lawyers must have with clients. In civil rights cases, the plaintiff's lawyer is tasked with explaining to the client that, although the court or a jury may find a constitutional violation, recovery may be proscribed if the specific right was not clearly established at the time of the violation. And the test for determining clearly established is, paradoxically, far from clear. Perhaps for the first time in their law school careers, students discovered that the legal system may identify an injury for which there is no remedy. This forced them to evaluate their assumptions about the profession they are entering, and the fairness of the justice system. Students were also introduced to the role lawyers play in protecting civil rights by considering the importance of lawyers taking these cases on behalf of plaintiffs even when there is little prospect of any monetary recovery.

Moreover, students found benefit in being exposed to civil rights law early in their legal education. In year-end reflections, students stated they valued exploring concepts beyond those in their first-year courses. They appreciated the complexity of the problem and the discussions it invited. In fact, the material inspired one student to volunteer at an organization aimed at reducing violence in prisons. Another student said that having to write about substantive due process and qualified immunity was helpful in understanding how to best organize a memorandum. Two years after she completed these assignments, a student informed me that Section 1983 claims appear often in cases she reads for a variety of courses, and she benefited from early exposure to the subject matter.

Lastly, though the problem I used focused on the substantive due process rights of a pretrial detainee, there are additional, related problems centered on the conditions of confinement of convicted prisoners that would work well in a first semester legal writing course.[14] For instance, topics including the right to health care, the right to meaningful physical exercise, or the right to due process in disciplinary proceedings would all make for engaging first-year writing assignments that would achieve the benefits described above. [15]

## Conclusion

Using prisoner rights law in my first semester writing class helped me achieve a variety of learning outcomes, both traditional and less so. My students used the topic effectively to develop objective legal analysis skills, which prepared them to take on the challenge of persuasive advocacy in the second semester. In addition, they were inspired by the use of a topic on civil rights and justice beyond the traditional first-year curriculum, and it introduced them to the multifaceted analysis and outcome prediction that is central to representing clients in the actual practice of law. Finally, and perhaps most practically, an assignment involving prisoner rights law prepares students for actual work they may do in the future, as attorneys on the civil pro bono panels in many district courts throughout the country are often called upon to represent prisoners in civil rights cases. When those attorneys have some prior experience in this area of the law, they will have a head start on skillfully representing their clients and working to improve the justice system as a whole.

12 *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

13 *See* Blum, *supra* note 9, at 933-34.

14 *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

15 As starting points, *see Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (deliberate indifference to an inmate's medical needs actionable under Section 1983); *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (under the Eighth Amendment, exercise is an identifiable human need); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (prisoners may not be deprived of life, liberty, or property without due process of law).

Cite as: Taryn Marks, *Feedforward Instruction in Legal Research and Writing Courses*, 27 Persps. 50 (2019).

# Feedforward Instruction in Legal Research and Writing Courses

By Taryn Marks

*Taryn Marks is Head of Research & Instructional Services at Stanford Law School*

## I. Introduction

When teaching a legal research or writing class, one of the most challenging aspects is aligning instructor expectations with student performance. We give students an assignment and are dismayed with the results, asking ourselves either how we failed to communicate our goals or how students could have failed to understand our instructions. Sometimes we ask ourselves both questions, wavering between objects of blame. For me, the largest disconnect occurred between my expectations of the level of detail needed in a research log and students' continued failure to provide it. After researching and experimenting with a variety of techniques intended to better align what I meant with what students thought I meant, to varying degrees of success, I stumbled across the concept of feedforward instruction. Utilizing feedforward instruction in an in-class exercise dramatically increased student understanding of my expectations regarding research logs. In this Article, I will explain the problem I encountered and the solution I found in feedforward instruction. I will extrapolate from my experience how to use feedforward instruction in different assignments, providing an overview of how other instructors can adapt the exercise to fit their own classrooms and assignments.

## II. The Problem

When teaching legal research, I believe that one of the most critical things for students to learn is research logs.[1] My definition of research log is expansive, as students must do more than provide an answer to a research question and explain how they arrived at it. Students must provide a detailed description of how they found that answer, essentially providing step-by-step instructions that the instructor can follow. Along with those instructions, students must also detail why they researched as they did and, for each step, comment on why they chose the source and search terms they did, why they clicked on the result they did, and why they chose to use a certain result in their answer. The research log, in essence, provides an annotated picture of how and why the student solved the research problem. I tell students that a successful research log is one that anyone, regardless of their legal research experience, could understand and replicate. As demonstrated by the sample research logs I use in my own feedforward exercise (reproduced in Appendix B), the level of detail students must provide in their research logs is quite high.

There are a variety of pedagogical reasons why I use research logs and require such a high level of detail from my students. I am especially cognizant of the need for such pedagogical foundations given that the level of detail I expect from students is unlikely to be required in practice. But whether teaching students how to research in a first-year course or improving students' research abilities in an advanced legal research course, requiring detailed research logs has significant pedagogical value. First, it forces students to slow down when they are researching. When students steamroll through the research process in favor of finding an answer, they frequently overlook critical pieces of information. Second, the research log teaches students critical analysis, as they must explain their choices and reasoning. Third, the research log introduces the students to the concept of tracking their time. Fourth, the research log ingrains in students the practice of justifying a search, which can be a critical skill when asked

"I tell students that a successful research log is one that anyone, regardless of their legal research experience, could understand and replicate."

1 I recognize the term *research log* has many different meanings and connotations that vary by instructor. I do not require students provide a research log in a specific format or organized in a specific way, such as by source or result. Rather, I ask that students provide an organized, detailed explanation of how they solved the research problem and why they chose the path, sources, and searches that they did. How students present that information is up to them.

by a partner to justify their choices and costs involved. Last, detailed and replicable research logs prevent students from becoming mired in research rabbit holes and from mindlessly clicking around on a website, because they have to monitor what they are doing and explain why they are doing it. Such critical self-evaluation helps to keep them on track while researching.

"Feedforward is evaluative information provided to a student prior to an assessment rather than after it, essentially the opposite of feedback."

Before I started using feedforward instruction, I spent significant time teaching and explaining research logs, inside and outside of class. But many of my students never provided the level of detail I wanted. I frequently did not know how students had arrived at a certain result. Students omitted multiple steps in writing their logs and did not explain why they undertook a specific step. I tried several different methods intended to increase student understanding of the level of detail that I wanted. I changed how I explained the research log; I added a rubric that detailed it; I provided a sample research log for them to look through; I told them that they should be able to hand their research log to a non-law student who should be able to replicate their process and explain the rationale behind it. Still, students struggled.

Even more frustrating, students continued to misunderstand even after I provided significant written and oral feedback on their research logs, pointing out specific areas where I could not follow their research path and providing suggestions for how to include more detail. Students simply did not connect my instruction and feedback with their future performance. My anecdotal evidence[2] of students' inability to incorporate feedback into future assessments also has empirical support: studies show that students frequently fail to either adequately analyze the feedback given to them or fail to transfer it to a future assignment, despite the importance of feedback and the potential benefits students can reap from properly analyzing and implementing it in the future.[3]

Then, I stumbled across an Australian law professor's article discussing the use of feedforward in a first-year law course.[4] The challenges and solution she described aptly fit the struggles I was having with research logs and my own students. So in the fall of 2018, I decided to adapt and test one of her feedforward solutions in my Advanced Legal Research course.

## III. Implementing Feedforward

Feedforward is evaluative information provided to a student prior to an assessment rather than after it, essentially the opposite of feedback.[5] Feedback, however, can effectively operate as feedforward if students utilize the feedback provided on an earlier assessment to improve their performance on a future assessment. The concept can be used both to encourage students to utilize feedback on future assessments and to highlight instructor expectations and address common mistakes prior to an assessment.

When a student acts simply as a "passive receiver of feedback knowledge," such as occurs when a student reads comments from an instructor on an assessment, the student often cannot "close the gap between current and desired performance."[6] Both instructor and student contribute to this problem. During feedforward instruction, an instructor must clearly articulate her expectations to students and shift to a more learner-focused environment.[7] In parallel, students who participate in a feedforward

2 Along with others: many have written about the struggles students have with feedback. *See, e.g.*, Anna P. Hemingway, *How Students' Gratitude for Feedback Can Identify the Right Attitude for Success: Discipline Optimism*, 19 Persps. 169, 172 (2011).

3 Carol Withey, *Feedback Engagement: Forcing Feed-forward Amongst Law Students*, 47 L. Tchr. 319, 320–21 (2013).

4 *Id.* at 319. In Australia, law school begins at the undergraduate level, so I needed to adapt some of her discussion for a graduate-level program. In her article, Withey describes how she created a 30-page feedback guide that she required students to read. Then, after reviewing a sample exercise, students completed their own exercise and also submitted a feedback form analyzing their own work, which asked targeted questions based on the learning objectives of the course. They then received feedback from the instructors but were not provided with their grades. Then, based on the feedback, they estimated their grades before the instructors released the grade. They repeated a similar exercise before their second exercise.

5 "Feedforward evaluation refers to regulating inputs to the learning activity to ensure they meet the standards necessary for the planned learning to occur." Abby Cathcart et al., *Learner-Focused Evaluation Cycles: Facilitating Learning Using Feedforward, Concurrent and Feedback Evaluation*, 39 Assessment & Evaluation in Higher Educ. 790, 802 (2014).

6 *Id.* at 795.

7 *Id.* at 790.

exercise must actively engage with the instructor's expectations by internalizing those expectations and assessing their learning as they are doing it, allowing them to feedforward that knowledge into a future assessment.[8] Successfully implemented, feedforward exercises also encourage student self-reflection on their strengths and weaknesses, an important skill often neglected in law school.[9] Taken together, these practices strengthen students' ability to apply what they have learned to future tasks and new materials.[10]

### A. Implementing a Feedforward Exercise in the Classroom

After reading about feedforward, I created an in-class exercise for research logs that uses its principles. I purposely timed the exercise with the unveiling of the first homework assignment, so that as students started working on the first assignment, the memory of the feedforward exercise would be fresh in their minds.

To create the exercise (reproduced in Appendix B), I first pulled research logs from previous Advanced Legal Research (ALR) classes. In the current ALR class, we had just moved from a module on how to research statutes into one discussing administrative law, so I chose research logs related to a hypothetical that dealt with statutory and administrative implementation of an international treaty. I purposely chose example research logs that had earned high, middle, and low grades. I also purposely included example research logs that had used a variety of different methods and sources: one example only used Westlaw to answer the question, while another used Google and government websites.

In the in-class exercise, I provided my current students with the full research hypothetical and the questions that previous students were asked to answer based on the hypothetical. I also gave my current students the answers to the questions. Then, I duplicated four example research logs that previous students had turned in related to the questions. After each sample research log, I asked my current students to first attempt to walk through the process provided in the samples.[11] If they were confused or could not follow the process, I asked them to annotate the research log to alleviate their confusion or fill in the gaps.

On a separate sheet of paper, I gave my current students the research log rubric that I used to grade the research logs (reproduced in Appendix A). Then, I asked my current students to review the research log rubric, assign a grade to the example research log provided, provide suggestions for improvement, and explain why they assigned that grade. For a variety of reasons, I randomly paired each student with a partner to do this exercise.

As my current students tried to replicate the research process using the research log examples from former students, the primary comment I heard as I wandered through the room was, "There's not enough detail here! I don't know how they got there!" Almost every student in the class indicated in their comments ways the example research logs could be improved by adding more detail about the research process. By the end of the exercise, all of the students came to the same conclusion: the example research logs simply did not have the level of detail needed for a subsequent researcher to adequately replicate the research process.

After students had reviewed and graded each example, I collected their responses and calculated the average and range for each one. I then led a discussion of each research log, asking one pair of students to explain how they had graded the example, and what would have been needed for that example to have earned

"Almost every student in the class indicated in their comments ways the example research logs could be improved by adding more detail about the research process."

8 *Id.*

9 *See, e.g.*, Michael Hunter Schwartz, Expert Learning for Law Students 3–4 (2d ed. 2008); Linda Burzotta Nilson, Creating Self-Regulated Learners: Strategies to Strengthen Students' Self-Awareness and Learning Skills 2–3 (2013).

10 Paul Orsmond et al., *Moving Feedback Forward: Theory to Practice*, 38 Assessment & Evaluation in Higher Educ. 240, 241 (2013).

11 I asked them to try to replicate the example research logs because I had noticed that when students came to office hours to discuss their research logs, forcing them to walk me through what they had written inevitably revealed gaps in the level of detail the students had provided. Additionally, as I explain later, one of the primary purposes of feedforward exercises is to place students in the instructor's shoes. Having them replicate and then grade a research log thus mirrored what I do when I grade the research logs.

a higher grade.[12] Overall, students indicated surprise at how much detail would have been needed for them to have been able to replicate the process the example research logs had taken.

### B. Benefits of Feedforward Instruction

The benefits of the exercise were immediate and obvious: my expectations regarding research logs and student understanding of expectations regarding them were much more closely aligned than they had been in classes when I had not used this exercise. Students felt more confident going into the first assignment and I was able to reward that confidence with higher grades on the first assignment than I have previously given, which further increased student confidence for the second assignment. Almost every student received close to full marks[13] for the research log portion of the assignment, and I made almost no comments requesting additional detail, because the students' research logs contained the level of detail and specificity I had requested.

"... I made almost no comments requesting additional detail, because the students' research logs contained the level of detail and specificity I had requested."

This revealed a second, unexpected reward: it leveled the research log playing field and provided an opportunity for all students to succeed. In an earlier class, I had observed a distinct difference in research log quality between students who previously had me as an instructor and students who had not. Now, in the first assignment, almost all students provided me with the level of detail that I was seeking. For students who had previously been in my class, it reminded them of the need for a high level of detail and specificity in research logs. For all students, it both increased their understanding of my expectations and aligned their understanding with mine. When I graded the first assignment, I did not see a difference between students who had previously had me and those who had not. In fact, most of the top grades went to students I had not previously had in class.

Feedforward instruction also encouraged higher-level student reflection of both the research log and grading process. As they graded the sample research logs, students experienced the struggles that we as instructors face when grading an inadequate or weak assignment. Stepping into the role of a person unfamiliar with another's research log, my current students realized how difficult and confusing it was to follow an unclear research log. They had to grapple with figuring out what comments to give others in order to improve their research log, which in turn improved their understanding of what a research log needed to contain. I believe this ultimately led to an internalization of the level of detail I expected.

Finally, doing the exercise substantially decreased the amount of time I spent grading the research logs. Providing substantive comments regarding improvement takes significant time, as I would detail to students what steps of the research process were missing, pointing out areas where the students did not have enough detail, or asking the students to explain the reasoning behind their research choices. Having research logs that needed little or no improvement meant that I could focus instead on providing shorter, positive comments, which ultimately saved time. Additionally, it decreased student frustration with the assignment because they knew what they needed to do to earn high marks, and their efforts were rewarded when I gave them those high marks.

### C. Drawbacks of Feedforward Instruction

The biggest drawback to this exercise was the time it took to do in class: I needed about half of a two-hour class period. This time could have been decreased by having the students do the exercise as homework and then discussing the results in class. But without the benefit of a partner (as well as an instructor hovering over them), I do not think that students would have done the exercise at home as intensely as they did in class. Perhaps making it a low-stakes, graded assignment could encourage a high level of engagement at home and solve this issue. Furthermore, I gained valuable information

12 Other example discussion questions include the following: (1) explain what made the example research logs difficult to follow; (2) how could the example research logs have been improved; and (3) rank the example research logs from best to worst and explain your ranking.

13 While my class had a required curve, I do not curve individual assignments or portions of assignments, instead applying the curve at the end of the class. Students' high marks on the research log portion of the assignment thus reflect a raw score.

from listening to student comments as they tried to replicate the example research logs. Those comments provided me with some interesting fodder for the later discussion, a positive that would have been missing had the students done the exercise at home.

Another drawback was the amount of time it took to prepare the exercise. Although I had previously created a rubric for the research log, I needed to update it for the current class. I spent time sifting through the research logs from a previous class in order to find examples of differing quality that demonstrated to students both what a high and low level of detail looked like. I also wanted to ensure that the research logs reflected different methods and sources in order to demonstrate to students that the level of detail needed in a research log stayed the same regardless of whether they used Google, Westlaw, Lexis, or another source when researching. It also took time to draft the instructions for the exercise and craft questions that would lead the students through the exercise. Last, I spent time preparing discussion questions that would highlight for students the important aspects of the assignment. But the time I saved grading the assignments, especially the first one, was significantly more than the time that I spent preparing this exercise. Additionally, given the increased student confidence and strong research logs that I received, I felt the time spent before and during class was well worth it. Indeed, I recently repeated the exercise again in my upper-level Business Law Research course to identical results, and I intend to use it every time I teach.

## IV. Creating Feedforward Instruction in the Future

Because of the success of the feedforward exercise and its limited drawbacks, I will be using it again, and will also be actively looking for other opportunities to provide feedforward instruction to my students. For those readers who do not require research logs or for those seeking other feedforward opportunities, I have created general guidelines for crafting future feedforward exercises, which I describe below.

First, **identify an area of student improvement**. If possible, the area of student improvement should relate to either a learning objective or course goal. For me, one of my overarching course goals is that students learn better critical analysis through their research logs. I had already identified research logs as an area in which my students could most improve, so I focused on them first. For other instructors, areas of student improvement should be easily identifiable based on previous assessments or student evaluations. Newer instructors can consult with more experienced instructors about areas of student improvement that tend to be common across classes.

Second, if possible, **precisely identify the causes of student weaknesses**. For many of us, this will be a process of trial and error as we adjust one area of instruction to see if it affects student learning. Over time, I came to realize that students did not understand the level of detail that I wanted them to provide in their research logs in part because they were too mired in the process. Students could not step outside of their own perspective to see how confusing it was for an outsider to follow. Creating a rubric addressed some of the issues; asking students to think about how they would write the log for someone who was not a law student addressed it a little bit more. But in the midst of an assignment, students either forgot my admonitions or were too time-constrained to make effective use of the rubric. I now believe this was in part because they had not yet internalized the necessary parts of a research log. Only when students stepped outside of the role of "writer" and into the role of "replicator and evaluator" did they understand the level of detail needed. Doing the feedforward exercise forced students to internalize that process. It may take time and experimentation, but it is important to target the potential reasons for student weakness, which will help you in the next step.

Third, **identify as narrowly as possible the steps needed to be successful in the assessment**; then **identify the steps you as an instructor take when you evaluate students on that assessment**. For example, if students struggle with critical analysis, reflect on how you conduct a critical analysis, or the steps a student would need to

"Only when students stepped outside of the role of 'writer' and into the role of 'replicator and evaluator' did they understand the level of detail needed."

take to successfully critically analyze something.[14] Next, determine what criteria you use to assess student success in this area.[15] Then, as much as feasible, have the students replicate your process, both as you do it and as you grade it.

Fourth, **determine the best logistical method for feedforward instruction**. If you have the time for a full in-class exercise, draft it using either prior student examples or ones you create, highlighting different learning objectives. With an in-class exercise, determine whether pairs, groups, or individual work will be best for the exercise. Then, work through the exercise as a student (or, if possible, have a teaching assistant or prior student work through it) and think about student reactions and concerns, your goals for the exercise, and how to address all of those via an in-class discussion following the exercise. I highly recommend using class time for this instruction; it is well worth relinquishing some of your valuable class time, but I understand this will not always be feasible. If you cannot spare class time for a full exercise, have students complete it before class. In that situation, you can create a discussion board for students to post their answers so you can review them; you can also require students to work together on the assignment; or you can have students submit their reflections to you and you can then compile those reflections for an in-class discussion or a summary that you email to students. I would also welcome readers' ideas that would make this exercise more efficient.

This type of feedforward instruction would be applicable across a broad swath of instructional challenges. For example, with students who struggle to identify the holding in a case, provide them with short summaries of facts and law and then ask them to write a holding based on those summaries. Next, have them grade their answers using a rubric before showing them the actual holding in the case for comparison. Students who use ten words when two would suffice could be asked to take an example of a wordy paragraph and cut it in half without sacrificing meaning. Students who struggle to understand how the Key Number system works could be given headnotes from a case and asked to index them in the Key Number system as if they were a Westlaw attorney.[16] Ultimately, the key to feedforward instruction is to force students to approach a problem from a different perspective and internalize instructor expectations regarding the best means to solve that problem. I would also welcome any additional examples of possible uses of feedforward instruction from other instructors.

"It was gratifying to see student confidence and success increase following the research log feedforward instruction exercise described in this Article."

## V. Conclusion

Feedforward instruction is an additional tool that instructors can use to increase student understanding of instructor expectations, to create better alignment between instructors' learning objectives and student achievement of those objectives, and to foster a learner-centered environment that engages students in critical analysis. It was gratifying to see student confidence and success increase following the research log feedforward instruction exercise described in this Article. Such a feeling is one all instructors should experience. By implementing the example provided in this Article or using it as a model to create other feedforward exercises, it is my hope that other instructors are able to see similar student achievements in their classrooms.

14 An excellent resource for conducting this type of reflective, step-by-step process is Walter Dick et al., The Systematic Design of Instruction (8th ed. 2015), particularly chapters 2 and 3.

15 Note that for some processes, the two pieces of Step 3 will be essentially identical.

16 This headnote example came from a presentation at the AALL Annual Conference in 2019 by Stacia Stein, in the program, "Instruction Zone: Active Learning Ideas Showcase."

## Appendix A

### Research Log Rubric[17]

| Research process | | | | | |
|---|---|---|---|---|---|
| Explains research process, including sources chosen, search terms, search methods used, search results chosen, etc. Process description is clear and can be easily replicated by another person. (10 points) | Explains research process, including sources chosen, search terms, search methods used, search results chosen, etc., but may miss steps in the process in at least one question. Process description may not be as clear and/or cannot be as easily replicated by another person. (8–9 points) | Explains research process, including sources chosen, search terms, search methods used, search results chosen, etc., but misses steps in the process in one or more questions. Process description may not be as clear and/or is more difficult to follow. (6–7 points) | Explains research process, including sources chosen, search terms, search methods used, search results chosen, etc., but misses steps in the process in more than one question. Process description may not be as clear and/or is more difficult to follow. (4–5 points) | Explanation is cursory and lacks detail in multiple steps. Explanation may be unclear and/or difficult to follow. (2–3 points) | Little to no explanation provided. (0–1 points) |

| Research rationale | | | | | |
|---|---|---|---|---|---|
| Explains research rationale, including why used sources chosen, why used search terms, why used search methods, why chose specific search results, etc. Rationale explanation is clear and can be understood by a person unfamiliar with legal research. (10 points) | Explains research rationale, including why used sources chosen, why used search terms, why used search methods, why chose specific search results, etc., but may miss rationale explanation in at least one question. Rationale explanation may not be as clear and/or may be more difficult to be understood by a person unfamiliar with legal research. (8–9 points) | Explains research rationale, including why used sources chosen, why used search terms, why used search methods, why chose specific search results, etc., but may miss rationale explanation in one or more questions. Rationale explanation may not be as clear and/or may be more difficult to be understood by a person unfamiliar with legal research. (6–7 points) | Explains research rationale, including why used sources chosen, why used search terms, why used search methods, why chose specific search results, etc., but may miss rationale explanation in more than one question. Rationale explanation may not be as clear and/or is more difficult to be understood by a person unfamiliar with legal research. (4–5 points) | Rationale explanation is cursory and lacking in multiple questions and steps. Rationale explanation may be unclear and/or difficult to be understood by a person unfamiliar with legal research. (2–3 points) | Little to no explanation provided. (0–1 points) |

17 This is the rubric I provide to students and use when grading research logs. It is divided into two parts, one that looks at the process (the step-by-step) and one that looks at the rationale (the reasons why a specific search or database was chosen). Research logs typically constitute 25 percent of a student's final grade in my class.

## Appendix B

### Research Log Feedforward Exercise[18]

### Purpose and overview

The purpose of this exercise is to familiarize you with my grading criteria and research log rubrics. Every assignment and the final project will be graded using a rubric. Fifty percent (50%) of your grade for each assignment will be based on your research log, so it is important that you understand my expectations for the research log. This exercise will require you to grade sample research logs, effectively putting you in my shoes. Doing so will hopefully familiarize you with both how I grade the research logs and what you need to do in order to be successful when writing your research log.

### Instructions

1. Review the research log rubrics (provided on a separate document). The key to remember about research logs is that they should provide sufficient detail to show exactly what you did when you researched and why you did what you did while you researched.
2. Read through the sample hypothetical, answers, and the sample research logs. These samples are from another class that I taught and represent (according to how I graded them) high, average, and below average examples of research logs (although not in that order).
3. For each research log, try to replicate how the student arrived at the answer that they did. As needed, annotate the sample research log with suggestions for improvement.
4. Consult the rubrics, and assign points for each portion (process and rationale). Explain why you assigned the points that you did.
5. I will then review my assessment of each of the research logs. As I do so, compare your results with my own, noting where you differed in your assessment. When you are writing your own research logs, look back to this exercise to guide you in writing a research log that will get you the grade that you want.

### Sample hypothetical[19]

A repeat client, James Walker, called you last night, very distressed. James owns an insurance agency in Gainesville, Florida. His business is on the third floor of an office building, which also has a Chinese restaurant, a tax company, a printing company, and a quilt store; the building is owned and operated by Sam Pacer.

In June of this year, a pair of geese built a nest in the flower bed just to the right of the building's entrance. Mama goose laid eggs, while Papa goose stood guard and hissed at anyone who came too close; James once saw Papa goose charge a car that he deemed to be parking too close to the nest (Papa goose won that fight).

The next day, James noticed two eggs in the nest when he arrived at work at 7:00 a.m. When he left his office around 1:00 p.m. to grab lunch, James was dismayed to see a man destroying the nest. The man held off the geese with a hockey stick, and smashed the eggs and threw away

18 I have duplicated the in-class exercise as I provided it to students. All of the directions are the same ones given to students. As I described above, I provided the students with four example research logs after giving them a sample hypothetical and the answers to it. The research logs duplicated on the following pages represent examples that earned high, medium, and low grades, and that took a variety of different approaches to the research problem. It may be useful to review Part III.A of this Article in conjunction with this exercise.

19 Hypothetical adapted from Jennifer Wondracek, Advanced Legal Research Assignment 6, Administrative Law, Summer 2014. The blue text immediately below the questions are the answers.

their contents. The man then covered the nest with netting and a traffic cone, presumably to stop the geese from returning to the nest. James did not recognize the man, but took down the Florida license plate number of the truck the man drove away in, 123 XYZ.

After the office closed that night, James snuck down and removed the cone and the netting, getting hissed at and chased by Papa goose in the process. That's when he called you.

James is almost positive that the geese are Canada Geese; they are definitely wild geese. He wants to know what he can do about the nest wrecking and destruction of the eggs.

**a. What treaty governs this issue? Where is the treaty codified? (2 points)**

Migratory Bird Treaty Act, codified at 16 U.S.C. § 703.

**b. Who handles claims related to these birds? (Hint: the answer isn't in the statute). (3 points).**

U.S. Fish & Wildlife Service

**c. What laws might govern this situation? How would they apply to this situation? (8 points)**

50 CFR § 21.26, Special Canada goose permit—allows only state wildlife agencies to obtain a permit, so clearly man violated law;

50 CFR § 21.50, Depredation order for resident Canada geese nests and eggs—allows only landowners to implement, and they have to register with FWS before they do it, they can also suspend the authority for a certain person. So, unless the person destroying the eggs was the owner and had a permit, not allowed;

50 CFR § 21.52, Public health control order for resident Canada geese—the local public health organization had to determine that there is a health problem in order for this to apply, so again the man likely wasn't allowed

50 CFR § 21.61, Population control of resident Canada geese—applies only to state governments, who can only conduct these activities in August.

**d. Please describe your research process for this question. (6 points)**

### Sample Research Log #1

In Westlaw, I typed Canada Geese, then looked under statutes. Taking, possessing or killing migratory birds was the second result. The notes of decision mentioned the Migratory Bird Treaty Act. I found the treaty under treatises, in 38 CJS Game sec. 27, the fourth result, prohibited act. The treaty cited to 16 USCA sec. 703, so I knew this was right.

Answer the following questions as they apply to Sample Research Log #1

1. Attempt to replicate the process used by the student to find the answer.
   Annotate as needed with any missing details of the process.
2. Assign a grade for the research log using the research process rubric.
3. Explain why you assigned the grade that you did.

### Sample Research Log #2

Googling "Canada treaty to protect Canada geese" led me to the Environment and Climate Change Canada website, which talked about Canada geese and why they are protected. Next I search "Migratory Birds Convention Act," which led me to a 2004 bill and from there to the codification of the treaty.

Then I searched enforcement of migratory birds treaty in the US. On the U.S. Fish and Wildlife service page (third link) talked about the treaty and program that implements the treaty. Two tabs (regulations talked about wildlife laws and other regulations) and the executive order tab had information. On regulations.gov I found regulations about hunting after searching migratory birds convention.

### Answer the following questions as they apply to Sample Research Log #2

1. Attempt to replicate the process used by the student to find the answer. Annotate as needed with any missing details of the process.
2. Assign a grade for the research log using the research process rubric.
3. Explain why you assigned the grade that you did.

### Sample Research Log #3

A. In Westlaw, I found the USC and scrolled through the titles to see Conservation, since Canadian geese are protected species. A chapter called Protection of Migratory Game and a section called migratory bird act seemed useful. I googled the act, the fish and wildlife website said it was codified at 16 USC 703-12.

B. Florida Fish and Wildlife says it handles enforcement after I searched in Google for the act.

C. In the CFR, I went to 2015 and then to title 50 (Wildlife and Fisheries). Skimming I saw US fish and wildlife service and under that, taking, possession, transportation in parts 10-24. Part 21 was migratory bird permits. In Part 21, I saw section 21.50, depredation order for resident Canadian geese nests and eggs, and section 21.26, special Canada goose permit, plus 21.52, public health control order and 21.61, population control of Canada geese.

### Answer the following questions as they apply to Sample Research Log #3

1. Attempt to replicate the process used by the student to find the answer. Annotate as needed with any missing details of the process.
2. Assign a grade for the research log using the research process rubric.
3. Explain why you assigned the grade that you did.

### (If time) Sample Research Log #4

I googled using a search that involved migratory birds. The US Fish and Wildlife website talked about the migratory bird treaty act, and I went to the Permits site. From there, I saw the link for law and treaties, and on that list was the migratory bird treaty act. The secion was 50 CFR part 21, on ecfr.gov. Looking at the table of contents showed me it involved migratory bird permits and I confirmed this was the right treaty and gave me the correct regulations, 21.26 and 21.61.

Cite as: Amy B. Levin & Joe Regalia, *The Feedback Feeding Frenzy: Some Thoughts About Doing Feedback Differently*, 27 Persps. 60 (2019).

# The Feedback Feeding Frenzy: Adding Audio and Technology to the Mix

By Amy B. Levin and Joe Regalia

*Amy B. Levin is an Associate Clinical Professor of Law at Loyola Law School in Los Angeles, California. Joe Regalia is an Associate Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas.*

"*What is the shortest word in the English language that contains the letters: abcdef? Answer: feedback. Don't forget that feedback is one of the essential elements of good communication.*"
–Anonymous

Well-developed research confirms that feedback and regular formative assessments are key to better learning outcomes.[1] But how that feedback is communicated is just as important as the feedback itself. We are teaching a new generation of students—digital natives—for whom traditional written feedback does not seem to resonate in the same way it did for most of us as baby boomers and Gen Xers. Our students' attention spans are shrinking, many of them struggle with criticism, and they prefer to communicate on anything but paper.

So, doesn't it make sense to rethink how we provide feedback these days? Doing feedback better does not mean drastic changes—or even much extra work. Instead, a few tweaks to our existing methods may dramatically improve our feedback and how students use it.

One exciting tweak is to incorporate some audio into your feedback. Written comments allow professors to provide detailed, easily accessible suggestions about writing style—for example, punctuation, word choice, and sentence-level organization of words. But audio feedback allows professors to dive deeper and connect differently—opening up new channels of communication to address high-level organization and analysis and to provide more detailed explanations for critiques. At the same time, audio recordings are more personal and engaging (and, perhaps, a bit better received) because students can hear the professor's tone and inflections.

In this Article, we will explore some of the learning characteristics and expectations of this current generation of students, why we think audio plus written feedback is worth trying, and how professors can incorporate audio recordings (and even some other new types of feedback) into their teaching.

> "In this Article, we will explore some of the learning characteristics and expectations of this current generation of students . . . "

## Know Your Audience

We, as professors, have a different audience now from ten or twenty years ago. The millennial and Gen Z students are digital natives. They do not know a world without the Internet. Technology is an everyday, all-consuming part of their personal and professional lives and will forever remain so. So if we want to reach them, we need to understand and use it, too.

Because our students have grown up in a world permeated with technology, they receive and digest information differently from prior generations. They are saturated with audio and visual information, delivered instantly, continuously, and in small bites. To keep up, they have been conditioned to process this information quickly and often superficially, and as a result have developed shorter attention spans and less patience for detailed, longer-form reading. It therefore behooves us to deliver feedback in a way that captures their attention and maintains it. If we use the technologies they have grown accustomed to, then we have a better starting point.

Our students' expectations have changed as well. The "ubiquitous red pen" worked well for baby boomers and Gen Xers, who make up most of the

1 *See* Susan M. Brookhart, How to Give Effective Feedback to Your Students 89 (2d ed. 2017).

current legal writing faculties. These generations hand-wrote notes and papers in school and learned by reading in print. Only in the last twenty years or so have they begun to rely on computers and electronics for writing and reading. Baby boomers and Gen Xers accept lengthy detailed feedback and criticisms of their writing because they have been schooled and have worked in top-down hierarchies in which there is organizational loyalty.[2] They have sent their work up the ladder for review and have received the final word from above.

But detailed written feedback, without more, does not work as well for our students now, who prefer flat rather than hierarchical models.[3] Our students want to be mentored, guided, and *shown* how to succeed rather than *told* how to do so, and they are as concerned—perhaps even more so—with what they did right as with what they did wrong.[4] In their view, written comments are a one-way "monologue" allied to power and authority.[5] Instead, they seek a reciprocal, dialogic approach centered on discussion, detailed feedback, and mentoring, one in which the professor is an ally and collaborator rather than a superordinate figure.[6]

As the "everyone receives a trophy" generation, our students may also need more praise and positive feedback to learn and excel. They crave feedback in the form of detailed guidance and expectations before they write (hence, the new focus on grading "rubrics"), and they expect thorough feedback after they write. But, when professors provide copious written comments, the students often become overwhelmed and shut down rather than embracing the suggestions. As focused as they are on receiving detailed feedback, they are more sensitive to critical feedback. This may be because they find the comments impersonal and irrelevant to their submitted assignment,[7] too short or written in a way they do not understand,[8] or difficult to implement in their future work.[9] If they do not think the comments benefit them, they may simply ignore them.

> "We thus need more efficient and effective methods for providing meaningful feedback, and students need a method for receiving that feedback that fits with their shorter attention spans . . . "

## Professors Are No Longer Teaching in the Same Environment

Not only have our students changed, but the practicalities of teaching have changed. Tuition revenue has shrunk along with faculty sizes, which has resulted in increased student load at some schools. That means, for many, there is simply less time to provide detailed written feedback for every student. And live grading, which has the enhanced benefit of one-on-one interactions with the students, is not practical with larger class sizes. It is difficult to reflect on the spot, and this difficulty is magnified with students who are nervous and sensitive to critical feedback.

We thus need more efficient and effective methods for providing meaningful feedback, and students need a method for receiving that feedback that fits with their shorter attention spans, their desire for detailed feedback but sensitivity to criticism, and their penchant for technology.

## Meeting Our Students Where They Are: Enhancing Feedback with Audio Comments

We now have incredible tools to craft feedback that will better resonate with our students. Perhaps the most exciting is our ability to incorporate audio—our own voice. Professors can simulate

2 *See* Arin Reeves, *Generational Diversity: Are Generational Differences in the Workplace a Greater Issue Now? Increasing Diversity in Age Groups Calls for Added Awareness of Multiple Communication Styles*, San Diego Law., Nov./Dec. 2010, at 22, 23.

3 *Id.*; Kate Rockwood, *The Largest Generation in Today's Workforce Is Forging its Own Path—And It's Wrong to Call Them Lazy*, 104 ABA J., Jan. 2018, at 52, 53.

4 *See* Minority Corp. Counsel Ass'n, Workplace 2020: What Gen Y Attorneys Experience and Expect 10, 21 (2014), *available at* http://www.mcca.com/wp-content/uploads/2017/04/Book12-Red-Orange.pdf; Susanne Voelkel & Luciane V. Mello, *Audio Feedback—Better Feedback?*, 22 Bioscience Educ., July 2014, at 16, 26.

5 Gareth Norris & Alexandra Brookes, *Audio Versus Written Feedback* (n.d.), *available at* https://www.heacademy.ac.uk/system/files/hub/download/e5_-_st4.8_-_norris.pdf.

6 *See* Minority Corp. Counsel Ass'n, *supra* note 4, at 10, 21; Voelkel & Mello, *supra* note 4, at 26.

7 *E.g.*, David Nicol, *From Monologue to Dialogue: Improving Written Feedback Processes in Mass Higher Education*, 35 Assessment & Evaluation in Higher Education 501, 512–13 (2010), https://www.tandfonline.com/doi/full/10.1080/02602931003786559.

8 Graham Gibbs, *Using Assessments to Support Student Learning* 4–10 (2010), https://portal.uea.ac.uk/documents/6207125/8588523/using-assessment-to-support-student-learning.pdf.

9 Melanie R. Weaver, *Do Students Value Feedback? Student Perceptions of Tutors' Written Responses*, 31 Assessment & Evaluation in Higher Educ. 379, 390 (2006), https://www.tandfonline.com/doi/abs/10.1080/02602930500353061.

many of the benefits of an in-person meeting, without some of the drawbacks, all by incorporating some audio into their feedback practices.

Audio feedback fills many of the needs felt by both professors and students. For example:

- For busy professors, audio comments save time, especially if the professors are proficient with the technology needed to produce the comments.
- There is less "physiological intensity" over time in terms of concentration, stress, and marking ennui.[10]
- The comments are more detailed and explanatory than written comments in margins and summative letter grades, so the professors provide more benefit for their students in less time.
- Professors have the opportunity to explain both what the students did correctly and what they can improve rather than focusing merely on what the students did wrong.[11]
- And, professors can blunt critical feedback with tone of voice and by providing more in-depth explanations for the suggestions, which benefits our students, who are more sensitive to criticism.

Audio comments better simulate a live meeting or classroom than written comments. Professors have more of a social presence with the students and seem more interested in the students' learning through audio feedback.[12] Professors can "speak" to students and convey a more nurturing tone than they can with a red pen. The tone is more spontaneous and less guarded, so the comments feel less threatening and more "approachable." Because live grading and lengthy meetings are more difficult with larger class sizes, audio feedback is an effective compromise because students and professors get the feel and depth of a live meeting, but professors can provide this in less time. The students also tend to have fewer questions after receiving the feedback than they do with written comments because audio comments are generally clearer and more detailed than written ones.

From the students' perspective, audio comments are more explanatory and motivating.[13] Audio may convey the feeling that professors have devoted more time to them, and some students may be more willing to engage with professors after hearing their comments. The students understand what they need to do to improve because the professors offer explanations and suggestions rather than just correcting errors without further explanation. Students appreciate the advising and how to avoid similar mistakes in the future; they are being *shown* what to do instead of *told* what to do, which is what this generation wants. And, because they can hear the professor's tone, they can better detect social cues and nuances from audio feedback. Writing may be more difficult to understand and open to misinterpretation, or students may just accept tracked changes without truly understanding the feedback.

"Audio may convey the feeling that professors have devoted more time to them, and some students may be more willing to engage with professors after hearing their comments."

## Putting Audio Feedback into Practice

Hopefully we have convinced you to incorporate some audio into your feedback. But how do you do that? To make the change easy, we have put together some best practices and ideas for you to consider at the outset.

### 1. Audio feedback can synergize with written feedback

Our love of audio does not mean professors should forego written feedback altogether. There is value in brief, written comments with a purpose: like showing students how to rewrite a troublesome sentence, illustrative examples, or some tracked changes to offer ideas about formatting or organization.

For example, to help students spot a sentence with passive voice, a brief written comment in the margins of the document (or in a Word comment)

10 *See* Martha Marie Bless, *Impact of Audio Feedback Technology on Writing Instruction* 103 (2017) (unpublished Ph.D. dissertation, Walden Univ.), *available at* http://scholarworks.waldenu.edu/dissertations.

11 Voelkel & Mello, *supra* note 4, at 26.

12 Bless, *supra* note 10, at 85, 87.

13 *Id.* at 96.

"To get more advanced, specialized programs allow you to take your audio feedback to the next level."

can be clearer than audio feedback.[14] As another example, one of the authors often rewrites a couple of the student's sentences as a model to demonstrate writing style moves like places of emphasis.[15] In sum, written feedback might be best for things like

- Examples of specific writing styles, like demonstrating the active voice;
- Short points to emphasize your audio commentary (much like a PowerPoint slide helps by anchoring the audience on a concept);
- Anywhere else that you are having trouble verbally explaining a concept such that a bit of writing will make your point clearer.

Audio feedback is great for the dense, complicated commentary that often fills up the margins of a student's paper (or is summed up in confusing shorthand). This includes any lengthy discussion of substantive points, authority, organization—and anything else that in a live meeting you would discuss with your student.

### 2. Audio feedback can be as simple or as advanced as you are ready for

There is both an easy and advanced option when it comes to audio feedback. The easy option is to simply run an audio recorder (a handheld one or an app on your smartphone, tablet, or computer) as you review your students' papers—and comment out loud. At the end, you will have a single audio file that you can send to your student (enlist your IT support if you do not already have a simple shared drive or online classroom to share big audio files).

If you go this simple route, we recommend that you read through the student's paper once without recording, perhaps while making some notes for yourself. This ensures that you do not ramble and keep the conversation on point for your student. To make things easier on you and your students, consider using a program that allows you to easily pause and restart the recording. That way you can think about what to say, hit record, and keep your comments concise. This is a big benefit of pre-recording comments rather than giving them in a live meeting. In person, you have to speak off the cuff (and it is much easier to get off course). With a simple recording app, you can take all the time you need to say precisely what you want. If you use a nifty recording app like Kaizena,[16] Apple's Voice Memo,[17] or Audacity,[18] this process will be simple and intuitive.

Another point to keep in mind is that (unless you use a program that does this for you, which we discuss more below) you will likely want to give your students audio cues so that they can link up what you are telling them with the specific parts of the document for which you are offering feedback. So if you are discussing some ideas for writing more persuasive headings, you could point the student to the page and paragraph of a problematic heading in the brief so that the student has some context for your comments.

To get more advanced, specialized programs allow you to take your audio feedback to the next level. For example, Kaizena allows you to easily link mini audio comments to specific points in a paper. This will help your students immensely in figuring out which sentence, paragraph, or section your audio comments relate to. Kaizena also has many other feedback features, like the ability to color-code your audio comments.

Another great option is Screencastomatic, which allows you to record your screen as you give your audio feedback. This approach allows you to make your feedback even more dynamic by producing an audio-visual. You can point out features in the student's paper as you voiceover your comments.

14 *See* Nicol, *supra* note 7, at 503 (discussing benefits of some written feedback).

15 For examples of the sort of sentence-level written feedback one of the authors commonly gives students, see Joe Regalia, *The Art of Legal Writing: The Sentence*, Appellate Advocacy Blog (May 19, 2018), http://write.law/blog/power-of-words.

16 Kaizena can be found at https://www.kaizena.com.

17 Apple's Voice Memo can be found at https://chrome.google.com/webstore/detail/simple-audio-recorder/hopfkembkmkllehkacjjbncmpdnnlogg?hl=en-US.

18 Audacity can be found at https://www.audacityteam.org.

### 3. Reach out to your IT support to make the process easier

Regardless of the approach you take, you may need some help. Audio files are big; video files are even bigger. So get strong IT support and shared network space so that you can easily send your upgraded feedback to your students.

Your IT folks may also have some great solutions to carry out the recording itself. As law schools jump to increase their online capabilities (particularly in the wake of the ABA's revised standards), many have created sophisticated online environments. Platforms like Moodle allow you to easily record and share audio or video feedback directly to students.

### 4. Audio feedback and student dialogue

For those wanting to take audio feedback one level further, consider allowing your students to respond to you. You can either ask your students to respond to your feedback with an audio recording of their own or ask them to respond to a few particular points that are most pressing in their writing. It will take a bit longer to review your students' commentary, but just getting them to think hard enough to respond can be helpful to their learning. This approach really leverages all the benefits of in-person or live feedback without having to meet up.

If you are open to using a program like Kaizena, the platform can handle this student-teacher dialogue for you. Kaizena allows your students to insert recorded responses to your specific comments that are linked to portions of the paper. This allows you to ask the student questions as part of the feedback process. So you could say, "Can you come up with another way to write this?" and actually get the student to respond.

### 5. Audio feedback, like any feedback, should be S.M.A.R.T.[19]

Like any other feedback, audio feedback works best when it is given thoughtfully. There is great research on best practices for giving feedback. Perhaps the most important is that audio comments should be specific, measurable, achievable, relevant, and time-based—also known as S.M.A.R.T. feedback.

*Specific* means that you should strive for feedback that is specific enough for the student to grasp and work on fixing now. Generic comments like "be more concise" are hard, if not impossible, to put into practice.

*Measurable* is about giving feedback that you and the student can keep track of—making formative assessment possible.[20] This can be as simple as giving students a sense of where they are and where they should be for specific skills you teach.

*Achievable* means that you should aim to deliver feedback that the student is ready for.[21] Telling a student who is struggling with basic grammar all about alliteration is not going to do much.

*Relevant* means showing students how feedback is relevant to their overall writing or advocacy goals. This can be as simple as telling students in a sentence or two why they should consider writing a sentence in a different way (say, to be clearer so their reader does not stumble).

*Time-based* means you should give students a sense of when they are expected to incorporate a piece of feedback.[22] Another time-based point best practice is to give feedback as soon as possible after students turn in their papers. Because audio feedback is often much quicker than the written kind, that should help here.

### 6. Audio is the beginning; consider other ways to bridge the generational divide

Although much of this Article has focused on improving professor feedback by incorporating audio, there are other tools that might help, too. For example, some professors, including one of the authors, provide video feedback either as links in documents or as a supplemental file. These can be screencasts of your live editing—or a video of the professor talking. Videos of the professor

"Perhaps the most important is that audio comments should be specific, measurable, achievable, relevant, and time-based . . . "

19 *See* Sema Burney & Karl More, *Giving S.M.A.R.T. Feedback to Millennials*, Forbes, https://www.forbes.com/sites/karlmoore/2014/12/04/giving-s-m-a-r-t-feedback-to-millennials/#71dbb38971d3 (last visited July 22, 2019) (discussing research on SMART feedback).

20 *See, e.g.*, Dai Hounsell et al., *The Quality of Guidance and Feedback to Students*, 27 Higher Educ. Res. & Dev. 55 (2008), https://www.tandfonline.com/doi/full/10.1080/07294360701658765.

21 *See* Beth R. Crisp, *Is It Worth the Effort? How Feedback Influences Students' Subsequent Submission of Assessable Work*, 32 Assessment & Evaluation in Higher Educ. at 571, 572-73 (2007), https://www.tandfonline.com/doi/full/10.1080/02602930601116912.

22 G. P. Wiggins, Assessing Student Performance: Exploring the Purpose and Limits of Testing (Jossey-Bass Educ. Series 1993).

help students measure tone and affect even better than audio comments because the students can see the professor's expressions while listening to the comments. And screencasting live edits lets students see your written suggestions in real time.[23]

Another helpful tool is to link to supplemental readings in your feedback comments, directing students to resources to help improve a specific problem area. This provides more explanation for your comments without the need to write more.

Finally, professors can easily color-code their feedback to help students prioritize their review and avoid feeling overwhelmed. One of the authors uses green colors to point out substantive feedback, blue for writing style, red for citations, etc. This lets the students compartmentalize the feedback and tackle one big category at a time.[24]

Even though we are not diving into the details of these other feedback practices here, we encourage you to consider incorporating different tools into your feedback and formative assessments that help bridge the gap with younger generations.

> "... jumping on the technology bandwagon by trying even one of these suggestions will make a huge difference to your students."

## Concluding Thoughts: Audio Is Worth a Try

We believe that jumping on the technology bandwagon by trying even one of these suggestions will make a huge difference to your students. We have been doing this a while, and neither of us would go back to relying on written feedback alone. There has been the occasional hassle—like when you accidentally delete an audio file or when students have technology issues of their own.

But on balance, our students have overwhelmingly said that they prefer hearing our voice. And although we have not yet done anything empirical here, anecdotally, audio feedback seems to be more effective. Students appear to take more feedback to heart in later drafts. And they appear more likely to follow up with questions. So give it a try. And if we can be of any help in setting things up, please don't hesitate to reach out to us.

23 A great tool for live-editing by video is Screencastomatic, available at https://screencast-o-matic.com.

24 Kaizena does this color-coding automatically.

Cite as: Heather Baxter, *Using* Hamilton's *"Farmer Refuted" to Teach Oral Argument*, 27 Persps. 66 (2019).

# Using *Hamilton*'s "Farmer Refuted" to Teach Oral Argument

By Heather Baxter

*Professor Heather Baxter is a Professor of Law at the Shepard Broad College of Law, Nova Southeastern University.*

You don't have to be a regular in the New York theater scene to have heard of the Broadway musical *Hamilton*. Arguably one of the most popular Broadway shows of all time, especially among younger generations, *Hamilton* has captivated audiences around the country.[1] Broadway veteran Lin-Manuel Miranda wrote the lyrics and music and starred in the original production of this show that chronicles the life of our first Secretary of Treasury, Alexander Hamilton. The production won 11 Tony Awards in 2016 and has launched several regional productions and tours, bringing the show to millions around the world.[2]

Although I have been a fan of the musical almost since its inception, I first saw the show in 2017—and, yes, it was worth all the hype. But my pedagogical interest in *Hamilton* began soon after I was first introduced to the original cast recording. One day, while walking the dog and listening to the music, I realized that the sixth song in the production, entitled "Farmer Refuted," was a virtual blueprint on how to conduct an effective oral argument. So, as I listened to it "nonstop,"[3] a plan began to form about how I could use that song to teach oral argument to my first-year legal writing students.

## I. "Farmer Refuted"

The song "Farmer Refuted" gets its name from an essay written by Alexander Hamilton.[4] The essay was penned in response to letters circulated by Reverend Samuel Seabury that expressed concern about the upcoming Revolutionary War. A staunch loyalist, Rev. Seabury signed his letter, "A.W. Farmer," hence the title of Hamilton's response, "Farmer Refuted."[5] Lin-Manuel Miranda's song takes some poetic license and pits Hamilton against Rev. Seabury in a debate, in the street. But what makes this applicable to oral argument is how Hamilton attacks Rev. Seabury. He doesn't necessarily attack the substance of the argument; instead, he mostly attacks the forensics by which it is delivered. It is these attacks that make the song a virtual blueprint of how to—or, in some cases, how not to—conduct an oral argument.

## II. First-Year Oral Arguments

Like in most law schools, Nova's first-year legal research and writing (LRW) course has a mandatory oral argument requirement for students that is the capstone of their first-year legal writing experience. While most 1Ls are familiar with speech and debate competitions, or have seen an opening statement on *Law and Order*, very few have seen an appellate oral argument before they came to law school. First-year students do not understand that appellate arguments are more formal, nor do 1Ls understand that the advocate will be asked questions by the bench. Many are surprised to learn that policy and the implications of a future ruling might be discussed more than

"First-year students do not understand that appellate arguments are more formal, nor do 1Ls understand that the advocate will be asked questions by the bench."

1 *See Tony Awards Live Updates 2016*, L.A. Times: Ent. & Arts, http://www.latimes.com/entertainment/arts/culture/la-et-cm-tony-awards-live-updates-20160612-htmlstory.html (last visited Aug. 7, 2019).

2 Robert Viagas, Hamilton *Tops Tony Awards with 11 Wins*, Playbill (June 12, 2016), http://www.playbill.com/article/tony-time-its-broadways-biggest-night.

3 Forgive my pun—the First Act of the musical ends with a number entitled, "Non-Stop."

4 Alexander Hamilton, *Farmer Refuted*, *in* The Papers of Alexander Hamilton: Volume I: 1768–1778, at 81 (Harold C. Syrett & Jacob E. Cooke eds, Columbia University Press 1961) (1775).

5 Samuel Seabury, Free Thoughts, on the Proceedings of the Continental Congress 30 (1774); Samuel Seabury, Letters of a Westchester Farmer, 1774–1775, at 44 (Da Capo Press 1970) (1930).

the facts of the very case under consideration. When they discover they must complete an oral argument exercise, many students become anxious and approach it with trepidation. Therefore, many LRW professors spend quite a bit of time preparing their students for this capstone experience by helping to alleviate their anxiety. I use a variety of teaching tools to do this, such as bringing in Moot Court students to do a demonstration, giving numerous handouts, and providing lots of time for practice. But it is no secret that students learn better when we show them something they are already familiar with and how it applies to the new skill they are learning. Therefore, my most recent addition to the oral argument preparation pedagogy is using the *Hamilton* song to demonstrate it.

"Although most of an oral argument should be flexible and organic, the introduction is an exception to this rule—it should be memorized, although it should not sound written and rehearsed."

## III. The Lesson Plan

I always play a song at the beginning of class, and "Farmer Refuted" is the song for this day. But once the song is played in its entirety, I break it down and pick apart the lyrics to show the students how to conduct an effective oral argument. Each line that I have plucked from the song has its own slide, and I trim the audio to play just that part of the song when each slide changes. I then take each lyric, almost line by line, to show how it applies to oral argument. The first several lines are from Samuel Seabury's narrative:

### "Hear ye, Hear ye! My name is Samuel Seabury."[6]

At the beginning of the song, Rev. Seabury introduces himself to the audience. Accordingly, I use this to illustrate to the students that the first thing speakers must always do in an oral argument is introduce themselves, just as they would in any type of speech or debate. They should give their name and explain who they represent.

### "And I present free thoughts on the proceedings of the Continental Congress!"

Next, the speaker should tell the Court why she is there, what the speaker is going to argue, and who she represents. This is commonly referred to as the "roadmap of an argument." Although most of an oral argument should be flexible and organic, the introduction is an exception to this rule—it should be memorized, although it should not sound written and rehearsed. To this end, the beginning of an oral argument is very much like a speech. The speaker must situate the bench for what will follow and frame the issues. More specifically, she should indicate who she represents, how she wants the court to rule, and list the arguments she is going to make.

### "Heed not the rabble who scream revolution, they have not your interests at heart."

Although Rev. Seabury has a strong opening, he does make some mistakes. These non-examples are still effective teaching tools. One of the most ineffective things that Rev. Seabury does is start off by attacking his opponents, rather than setting out his points persuasively. Furthermore, this language is somewhat inflammatory and insulting to the other side. As can be seen from Hamilton's response below, the language only serves to put the opponents on the defensive, which is not particularly persuasive, and certainly not a way to begin an argument. Instead, a speaker should start with the strongest argument for her side.

### "Chaos and bloodshed are not a solution."

Again, Rev. Seabury has chosen to talk about why the other side is wrong, rather than argue his own points. I explain to the students that his speech is actually descending into chaos, the thing he is asking us to avoid, because the speech does not have any sort of roadmap to let the audience know where it is going. Instead, the speaker should clearly outline her points, and stick to that format if possible, starting with the strongest argument.

### "Don't let them lead you astray."

One of the biggest differences between a speech and an oral argument is that a judge will interrupt an oral argument with questions. This is usually one of the scariest things for beginning oral advocates. I tell them that they need to practice how to answer the question effectively and then transition back into their argument. Further, it is important to understand that they must be prepared to vary the argument in light of the Court's stated

6 Original Broadway Cast of Hamilton, *Farmer Refuted*, *on* Hamilton: An American Musical (Atlantic Records 2015).

concerns. But a good speaker always knows how to implement "controlled flexibility." She knows how to answer the question asked and appear flexible, but she can also use a judge's question to connect with arguments she was going to make anyway. A good way to implement this is to begin the answer with, "Yes (or no, depending on the question), and that brings me to my second point . . . ." Then the speaker can answer the question and show the Court that she is following her roadmap.

**"This Congress does not speak for me."**

I use this statement to talk about facts. It is important that if speakers represent the appellant, they should give a short version of the facts from their perspective. However, if they represent the appellee, it is completely appropriate to point out any incorrect facts or misleading statements made by the appellant.

**"They're playing a dangerous game. I pray the king shows you his mercy. For shame. For shame. . . ."**

This is the end of Rev. Seabury's narrative, and although it is important to end persuasively, it is not necessary to degrade the other side. I remind the students that it is always important to remember their opponents are professionals, just like them, and in both Moot Court land and real life, opposing counsel may not always have control over which side they represent or who their client is.

Once Rev. Seabury's character finishes his speech, it's Hamilton's turn. The following lyrics are spoken by Hamilton's character.

**"Honestly, look at me, please don't read!"**

This was the first line in the song that made me start thinking about using this song in class, and it may be the most instructive thing Hamilton says. The importance of eye contact cannot be overstated. It allows a speaker to create a rapport with the judges, and it keeps the judges focused on the speaker. When a speaker looks down at her outline, the judge tends to look down or away as well, and the speaker has lost the attention of the panel. Many first-year students rely too heavily on their notes, and therefore lose that connection with the bench that is created through eye contact.

**"Don't modulate the key then not debate with me!"**

I use this opportunity to reiterate that students must be prepared to answer every possible question the panel could ask. When asked a question, it is important that the speaker maintain composure and avoid looking startled, even if the answer does not occur to her immediately. I tell the students to stop, take a breath, and think about an answer before jumping in and risk spouting nonsense. Further, if students bring up a case, I tell them it is important to make sure they know the facts, holding, and reasoning of that case because the Court might ask those questions. Additionally, it is imperative to stop speaking the second a judge begins to ask a question, and make sure to listen carefully to the question.

**"I'd rather be divisive than indecisive . . . ."**

This is a perfect line to illustrate the importance of always giving a yes-or-no answer to a question, even if it appears to hurt the argument. The trick is to be direct, but then turn the answer around or distinguish the case. For example, I tell the students they can say, "Yes, Your Honor, it is a large burden to overcome, however, . . . ." Or, "Yes, Your Honor, that case does appear to help the other side, but if you look at the reasoning, the case might actually help my client because . . . ." I explain to students that the important thing is not to give vague answers. The judges will pick up on the fact that the speaker is trying to avoid the question, and it will reflect poorly on them. And while they should be direct, I tell them to make sure not to be defensive and not to argue with the Court or ask a question of the panel.

**"Look at the cost, n' all that we've lost n' you talk about Congress?"**

Although we've just discussed how students should answer questions with an effort to get back to their outlines, it is also important to show the students that there are times when the speaker must go where the Court takes her, even if that was not what was planned. Sometimes students prepare heavily for a discussion of Issue A, but the panel is clearly more concerned with Issue B or the policy implications. Therefore, although

"When asked a question, it is important that the speaker maintain composure and avoid looking startled, even if the answer does not occur to her immediately."

the speaker should try to control the flow of the argument, it is also important to discern when an argument is not persuading a panel and be willing to abandon that argument and move on to something that will be more effective.

"A strong theory of the case focuses the arguments and gives a framework around which to structure the entire case."

### "Why should a tiny island across the sea regulate the price of tea?"

Theories and themes are not just for trials. A strong theory of the case focuses the arguments and gives a framework around which to structure the entire case. The theory created by Hamilton's character, and stated in this line, encapsulates everything the revolution stood for in one sentence: England was not in tune with what was going on in the colonies because it was "across the sea," and this "tiny island" should not dictate the colonists and their daily lives, such as "the price of tea." In addition, this line has the hallmarks of a good theme: it rhymes and is memorable.[7] Some academics and practitioners suggest that speakers even announce the theme at the beginning: "This case is about a woman who just wants to get her daughter back." Instead, I suggest to the students that the best theory is the one that is woven throughout each argument and is obvious without being announced at the beginning.

### "If you repeat yourself again, I'm going to scream."

This lyric shows the students that their argument should move in a linear fashion, if at all possible, and should not be repetitive. But if a judge asks a question about a topic that has already been discussed, the speaker should answer the question again without saying something like, "As I said earlier, Your Honor." That kind of response is condescending and suggests that the speaker wasn't listening.

Additionally, the conclusion of the argument should be brief. Though it should remind the court how the speaker wants it to rule, the conclusion should not be a repetition of the arguments. This is another exception to the no-memorizing rule; I tell the students to know their conclusion and be ready to recite it when the time is up.

### "Silence! A message from the King!"

Finally, when the timer says, "stop," I tell the students they must stop. If they are in the middle of their concluding sentence, finish the sentence, thank the Court, and sit down. If they are in the middle of making a point, however, and haven't gotten to their conclusion yet, I tell them to say, "Chief Judge/Justice, I see that my time has expired, may I briefly conclude?" If the request is granted, thank the Court, abandon the point, and give a one-sentence, no longer than 10-second, conclusion. I tell the students if they are in the middle of answering a judge's question, however, they should say, "I see that my time has expired, may I finish answering the question and briefly conclude?" If the request is granted, I tell the students to thank the Court, answer the question, and then give a one-sentence, no longer than ten-second, conclusion.

## IV. Conclusion

Using familiar references, such as *Hamilton*, demonstrates to students that what we are teaching has roots outside the legal writing classroom and transcends the Bluebook and CREAC.[8] Iconic references images also help the students remember the concepts later if they can connect them with something they've seen in the "real world." And if it encourages them to expand their cultural horizons or piques their interest in one of the Founding Fathers, there's nothing wrong with that, either.

7 *See* Camille Lamar Campbell & Olympia Duhart, Persuasive Legal Writing: A Storytelling Approach 57–58 (2017). This theme is reminiscent of the famous O.J. Simpson theory: "If it doesn't fit, you must acquit!"

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

Cite as: Charles R. Splawn, *Teaching Legal Analysis: A Tale from the Front*, 27 Persps. 70 (2019).

# Teaching Legal Analysis: A Tale from the Front

By Charles R. Splawn

*Charles Splawn is the Assistant Director of Academic and Bar Support at Elon University School of Law.*

## I. Introduction

Legal analysis is the foundational skill of lawyering, and it is at least part of what captivated us as law students. But because legal analysis is as much art as science, explaining it—now as teachers—can be a somewhat elusive process. Inspired by a colleague's simple but effective presentation at a conference I attended four years ago,[1] and armed with a great textbook,[2] I have embarked on a teaching journey that has been remarkably fulfilling—for my students and for me.

While the specific approach I have developed is not earth-shattering, it nonetheless offers some solid techniques and addresses some of the difficulties in cultivating singular focus and intense scrutiny in our millennial law students. I hope that sharing my teaching experience will be helpful to those charged with the task of teaching legal analysis. I note also that the principles explored herein could fruitfully be applied in other contexts. For instance, an abbreviated series of legal analysis exercises deployed in a pre-1L program could provide a wonderful foundation for more effective 1L learning. Similarly, the course content I describe below could be parceled out in academic support workshops or one-on-one meetings, giving the academic support professional a tried and true, turn-key platform to develop students' analytical skills.

This Article will explore four key aspects of the course I have entitled "Mastering Legal Analysis."[3] The first key aspect is the necessity of introducing (or at least re-introducing) students to the classification of information and the examination of inferences, both of which are essentially ways of figuring out the relationship between the concepts that lurk behind our terminology. Second is the deliberate and thorough deconstruction of the process of legal analysis itself—breaking an often-inscrutable monolith into discrete, manageable tasks. Third is a summary of the overarching strategy and specific techniques by which my students are challenged to move through a wonderfully practice-oriented textbook. Finally, I describe how student engagement in this cumulative process culminates in a longish office memorandum that serves both as proof of the skills they've acquired and a template for the union of thinking and communication that will help them in law school, on the bar exam, and in the practice of law.

## II. Teaching Classification and Inferences

First, regarding classification, I often encounter in students a laziness about, or even a reluctance toward, categorizing information precisely. Perhaps it stems from a distaste for restrictive definitions or a sense of moral ambiguity, but many students tend to shy away from any process that imposes rigid classifications.[4] The value in adopting such tendencies in a social or psychological sense is debatable. But the inability or unwillingness to separate information into appropriate categories based on similarity and

"I note also that the principles explored herein could fruitfully be applied in other contexts."

1 John F. Murphy, Assoc. Professor of Law at Tex. A&M Sch. of Law, Developing a Targeted Class to Improve Academic Performance, Presentation at Third Annual Southwestern Consortium of Academic Support Professionals Workshop (Mar. 6, 2015).

2 Cassandra L. Hill & Katherine T. Vukadin, Legal Analysis: 100 Exercises for Mastery (2d ed., Carolina Academic Press 2017).

3 Developed by the author and taught to second- and third-year students at the Elon University School of Law since 2016.

4 Offering a sobering sociological study of Generation X that reveals significant, yet casually adopted, moral laxity, see Christian Smith et al., Lost in Transition: The Dark Side of Emerging Adulthood (2011).

dissimilarity is poison to legal analysis. Indeed, the heart of legal analysis requires students to analogize and distinguish. They simply cannot think like, and of course *be*, lawyers without it.

"Without exposing and testing the inferences in an assertion or a fact pattern, students are doomed to an incomplete analysis on account of incomplete information."

So how to get potentially reluctant students comfortable with hierarchies and the method of analogy and distinction by which those hierarchies are actualized? A game, of course[5]—and specifically what I call the "Categories Game." In the first or second class, I introduce the basic assignment reproduced below, instructing students to create a system of categories that show the relationship between the items listed in each set. First, all of us work together through the "Ice Breaker" described below. Then I split the class into small groups and require them to tackle either the Group 1 or Group 2 exercise. After a few minutes, each group depicts its categorization schema on the whiteboard, and we discuss. Not only does this exercise typically produce "aha" moments with respect to categorization and hierarchy, but it also confirms the role of creativity that is inherent in many elegant legal arguments. For each of the three sets below, students are required to recognize that they need to create at least one umbrella category not already provided to them: for instance, some version of "participants" for the Ice Breaker and Group 2 sets and some version of "enforcement" in the Group 1 set in order to account for "tax lien."

THE CATEGORIES GAME

Ice Breaker:

- Double-dribble, NCAA, LeBron James, NBA, lay-up, collective bargaining, basketball, referee, guard, Title IX, foul, slam dunk.

Group 1:

- IRS, capital gains, taxation, deduction, audit, tax lien, dependents, state, federal, income, charitable gift.

Group 2:

- Search warrant, district attorney, police officer, parole, embezzlement, aggravating factor, criminal justice, plea bargain, fourth amendment, fingerprint, judge.

A sample schema is provided[6] to illustrate how students might define the relationships in the Ice Breaker, wherein the students must not only recognize similarities and differences, but also develop the inferred hierarchical categories that explain and order them. The inferred categories are displayed in burgundy font in the samples. Obviously there are judgment calls to be made in creating and ordering categories, so variation among student schemas is to be expected.

A second, related prerequisite to legal analysis is the ability to recognize hidden or implicit inferences, to explain the basis for these inferences, and finally to evaluate them. Without exposing and testing the inferences in an assertion or a fact pattern, students are doomed to an incomplete analysis on account of incomplete information. Similar to my approach with classification, I find that a game-like exercise best demonstrates the art of decoding inferences. For that purpose I typically let students work in pairs or small groups to identify and evaluate simple (and often stereotypical) inferences such as these:

1. John will vote for a Republican because John is a gun shop owner.
2. Sally will vote for a Democrat because Sally is a Hollywood movie producer.

These simple assertions are ripe with multiple assumptions and are falsely absolute in ignoring the possibility of other voting factors. Unmasking and discussing the meaning (and accuracy) of the assumptions always leads to a lively class discussion.

## III. Elucidating the Legal Analysis Process

Perhaps a preliminary question is whether it is advisable for law teachers to decode law school learning at all. Certainly one camp of faculty would argue that the onus should be on students

5 For thoughtful treatment of game- and group-based student learning, see 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 (1995).

6 For three sample options, please see Appendix C.

to figure out how to learn law largely on their own. After all, a lawyer's primary super power is precisely that: figuring things out for others (e.g., establishing a client's rights, obligations, and options, as well as the practical means to address them). In my experience, it is absolutely true that many of today's law students need to improve their resourcefulness and become more self-reliant. But it is also my experience that, for whatever reasons (hello, high schools and universities), too many law students falter at deep doctrinal learning unless we in the academy proactively instill in them the foundational thought processes of legal analysis.

So, from beginning to end, this course essentially analyzes "analysis." What better way to teach analysis, the process of breaking things into their component parts, than to break legal analysis into *its* component parts? Thus, I introduce students in sequence and somewhat in crescendo to this fairly standard model of legal analysis:

1. Deconstruction of rules (whether from cases, statutes, or regulations) into their separate elements or conditions;
2. Fact-matching, which I describe (and demonstrate) to students as determining the legal significance of the facts presented in a hypothetical by matching each specific fact to the rule element(s) or condition(s) to which the fact appears to relate—this is a separate, distinct precursor to *using* facts to prove elements or satisfy conditions (i.e., argument-building, immediately below);
3. Argument-building, which consists essentially of identifying which facts tend to prove or disprove each rule element or condition and, most importantly, explaining how and why each fact (and the inference(s) drawn therefrom!) supports a specific assertion;
4. Evaluation of arguments, which is assessing the strengths and weaknesses of each argument and counterargument, reaching and expressing sub-conclusions based on the arguments for and against each element or condition, and then adding up the sub-conclusions to determine the grand conclusion that resolves the question presented; and
5. Communication of reasoning and result. Most of the writing assignments are in a memorandum format with which the students are already familiar, so the main goal is to inject into their writings the superior organization, clarity, and robust reasoning we achieve together in class, such that a think first/write second protocol becomes more and more second nature to students.

This basic pattern is intentionally repeated, modeled, and practiced in every single class, as together we explore progressively more complex legal questions. The curricular perspective is described more fully in the next section, but I would like to share several specific insights from my classroom experiences in applying these fundamental analytical steps.

First, I make the point to my students that if fact-matching seems somewhat cold and impersonal, then you are certainly doing it correctly. The multitude of impressions or even emotions that a narrative can involve (we are built for stories, right?) are counterproductive to converting the facts of a story to the fodder of legal analysis. This is law and not literature, so fact-matching is essentially narrative deconstruction, somewhat akin to rule deconstruction (step 1, above).

Next, I suspect that the speed of accessing and processing information in the digital age is at least partly to blame for two common student difficulties. The first difficulty is an overzealous transition from fact-matching (step 2) to argument-building (step 3). The second difficulty is the near-instantaneous adoption of one argument to the virtual exclusion of consideration of the counterargument.

Those of you nodding your heads right now will probably agree that these two difficulties stem from two closely-related causes: failure to carefully consider all available information, and failure to work methodically through multiple possible outcomes. In a vicious feedback loop, a student not accustomed to focusing very intently, or for very long, on dense factual information may skip over the very facts that should lead her to discover a plausible (if not winning) counterargument to

"What better way to teach analysis, the process of breaking things into their component parts, than to break legal analysis into *its* component parts?"

the conclusion that first leaped to her mind after a somewhat casual reading of the hypothetical. In fact, as I admit to my students, devilish law professors more often than not design questions precisely to expose the pitfalls of inadequate attention to detail and lazy attachment to first impressions. Likewise, bar examiners require careful reading, attention to details, and fine distinctions, especially on the MBE portion of the bar exam.

Lastly, regarding the evaluation of arguments (step 4), I have learned never to underestimate the tendency of some law students to forego expressly stating sub-conclusions, perhaps thinking that their law professors should be able to infer them. Why waste the time and effort, they may think? (But as noted above, exposing inferences is prerequisite to accurate and complete analysis.) I have somewhat successfully counter-argued that (1) their grades will most definitely suffer with such an approach, and (2) expressly stating sub-conclusions can reveal to students flaws in their reasoning while there is still time to fix those flaws.

"Say what you will about the ills of social media, but the connectedness it apparently generates can be useful in the classroom—and beyond."

## IV. Course Strategy and Classroom Techniques: A Whole Lot of Doing

There is a macro and a micro aspect to the course. The overarching macro pattern, facilitated by the structure of the textbook, is to engage students in exercises of increasing legal and factual complexity. Students start with a few very basic rule-to-fact application exercises, where the "rule" is not even a real rule of law. This critical first step is to ensure students focus on the foundational, five-step analytical process described in the previous section. As the course progresses, the analytical process sequentially involves actual legal rules (provided in the question), then rules that must be extracted from a single case, next rules that must be synthesized from several cases, and finally rules composited from both statutory interpretation and case synthesis.

Within the macro view outlined above, students receive a heavy dose of practical application before, during, and after every class. These micro components consist essentially of the following: (1) pre-class exercises from the textbook that students must be prepared to present in class; (2) working through at least one exercise together in class; and (3) post-class writing exercises that are graded.

As to the pre-class work, the students obviously have to complete it or things go awry quickly in class. Including pre-class work in their participation grade component certainly helps, as does periodically collecting their written pre-class summaries. More interesting, though, I have found that the thought of presenting one's work to one's classmates is an effective motivator. In fact, nearly all of my students enjoy communicating and sharing with each other. Say what you will about the ills of social media, but the connectedness it apparently generates can be useful in the classroom—and beyond.[7] In sharing the pre-class work, I rotate a variety of presentation methods from class to class, including solo oral or board-written summaries of a student's analysis, small group peer review, and break-out groups assigned to develop and advocate for competing positions. A particularly effective device, which incorporates peer connectedness, is an in-class exercise I call "Rule Deconstruction Face-Off," in which several student volunteers go to the whiteboard and simultaneously deconstruct the rule we will be analyzing.[8] After discussing each student's elemental expression of the narrative rule, two helpful things usually happen. First, as a group we achieve a better composite rule statement, drawing from the strengths of each student's individual contributions. Second, the natural and acceptable variations in expression of the rule illustrate what the students will try to achieve in

7 *See, e.g.*, Janet Weinstein et al., *Teaching Teamwork to Law Students*, 63 J. Legal Educ. 36 (2013) (arguing that the legal profession's shift to a more collaborative working environment necessitates more attention to development of teamwork skills in law schools).

8 This game occurs early in the semester and involves three or four volunteer students separately deconstructing a narrative rule statement from one of their textbook exercises at the (fortunately) massive whiteboard in my classroom. Once finished, we all examine and discuss each student's elemental expression of the narrative rule. Inevitably a more correct composite becomes apparent from considering the separate deconstructions, but the exercise is also useful in showing natural and acceptable variations among the students' schema. I believe this game is helpful in setting the stage for what comes later in the course: the delicate and complex balancing between legal correctness on the one hand and logical creativity in argument on the other.

law practice—i.e., the delicate balance between legal correctness and legal creativity in argument.

The second half of each class is typically devoted to a hypothetical they have read before class but not yet analyzed—if there are cases involved, they must brief the cases before class. Nearer the beginning of the course, I take the lead in modelling the analysis for their assigned in-class exercise.[9]

Using the whiteboard from left to right, I solicit the students' help in building a chart that starts with rule deconstruction, then, for each rule element or factor, progresses to fact-matching, argument and counterargument development, evaluation, and finally, conclusions. This is a very interactive process, in which I am constantly requiring their input, making corrections, and helping them see how an analysis-empowered mind thinks (and communicates) "like a lawyer." Once we move on to multiple case rule synthesis and analogical reasoning, I introduce a modified analysis chart in class and encourage students to use it as a blueprint for their out-of-class writing exercises. Sample charts for a Negligent Infliction of Emotional Distress multiple-authority exercise are presented in Appendix A (blank template) and Appendix B (completed in class).

As the course progresses, the students take on more of the in-class analytical work, and I might have several students step into my role as facilitator at the whiteboard. I should note here that I do not use PowerPoint or any other pre-packaged presentation tools in class. Consistent with the primary goal of this course, *doing* legal analysis, we spend the entire class thinking, analyzing, and evaluating together. I have found that the process of building an analysis together from scratch is very engaging and effective, even if it sometimes exposes a flaw in *my* reasoning process. After all, honesty and humility are not bad traits for lawyers (and teachers) to cultivate.[10]

Finally, as part of their summative assessment, I require students to perform a self-assessment of several of their graded post-class exercises—doubling down on feedback, so to speak. I do not require a particular format, but I encourage them to make the connection between the analysis charts we create in class and the discussion or argument sections of a typical legal writing document, such as a memorandum or brief. The point I hope to drive home is that legal writing is first and foremost the written record of the logical, ordered, and thorough thinking process that should precede it.

## V. Putting it All Together

The capstone project for Mastering Legal Analysis, which I typically weight about 50 percent of the final grade, is an eight- to ten-page memorandum that follows the format from their 1L Legal Writing course. This writing project is released three to four weeks before the last class and requires students to utilize virtually all of the skills they have developed to date. The final memorandum revisits their 1L legal writing training in the context of our course's amplified exposure to legal analysis, specifically requiring statutory interpretation involving seven or eight cases, complex rule synthesis, and thorough analysis of a fact-rich hypothetical. I have used an Americans with Disabilities Act problem to good effect several times. That was my law review write-on topic, and I figure that shared pain can be a good bonding experience.

## VI. Conclusion

Students have consistently given this course high praise in evaluations, and many have shared with me the same two insights. First, they recognize

"... legal writing is first and foremost the written record of the logical, ordered, and thorough thinking process that should precede it."

9 For a thorough treatment of using classroom modeling (and other techniques) to segment complex tasks and reduce cognitive load, especially for relatively novice law students, see Terrill Pollman, *The Sincerest Form of Flattery: Examples and Model-Based Learning in the Classroom*, 64 J. Legal Educ. 298 (2014).

10 For a very insightful discussion of the value—and challenges—of being honest, and even vulnerable, in the classroom, see Melissa J. Marlow, *Does Kingsfield Live?: Teaching with Authenticity in Today's Law Schools*, 65 J. Legal Educ. 229 (2015).

that the foundational skills they hone in Mastering Legal Analysis translate directly to a better understanding of what they need to do to write better exams (or papers) in other courses. Second, they make the excellent—and related—argument that this course might be even more beneficial to them if positioned in their 1L year instead of at the beginning of their 2L year. Similarly, what I have learned most from this experience are the foundational primacy of legal analysis, the potential opportunities for better nurturing this skill in connection with doctrinal courses, and lastly the value of transparency in teaching, learning by doing, and meeting law students where they are (culturally and socially, as well as academically).

"... the foundational skills they hone in Mastering Legal Analysis translate directly to a better understanding of what they need to do to write better exams (or papers) in other courses."

## APPENDIX A

CASE ANALYSIS CHART

| THE LAW | | | |
|---|---|---|---|
| RULE ELEMENTS | Case #1 Supplemental Definition | Case #2 Supplemental Definition | Case #3 Supplemental Definition |
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |
| **APPLICATION OF THE LAW (ELEMENTS OR FACTORS) TO THE FACTS = HOLDING** | | | |
| Case #1 | Case #2 | Case #3 | Your Case/Hypothetical |
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

## APPENDIX B

CASE ANALYSIS CHART

Ex 19

| THE LAW | | | |
|---|---|---|---|
| RULE/ELEMENTS (Thing) | Case #1 (Thing) Expanded/Applied Definition(s) | Case #2 (Scher) Expanded/Applied Definition(s) | Case #3 (WILKS) Expanded/Applied Definition(s) |
| 1. close rlnshp | ⟷ | same | same |
| 2. "present" at the injury-producing event | ⟷ | Actually and contemporaneously witnessed the injury + the event; contemporaneously "perception" (not just visual) | visual perception not required; P must be at scene and "sensorially" aware of both event + injury |
| 3. "then-aware" the event is causing injury | ⟷ | | |
| 4. P suffers serious E.D. as a result | ⟷ N/A | N/A (not just a high probability of injury) | N/A |
| 5. | | | |

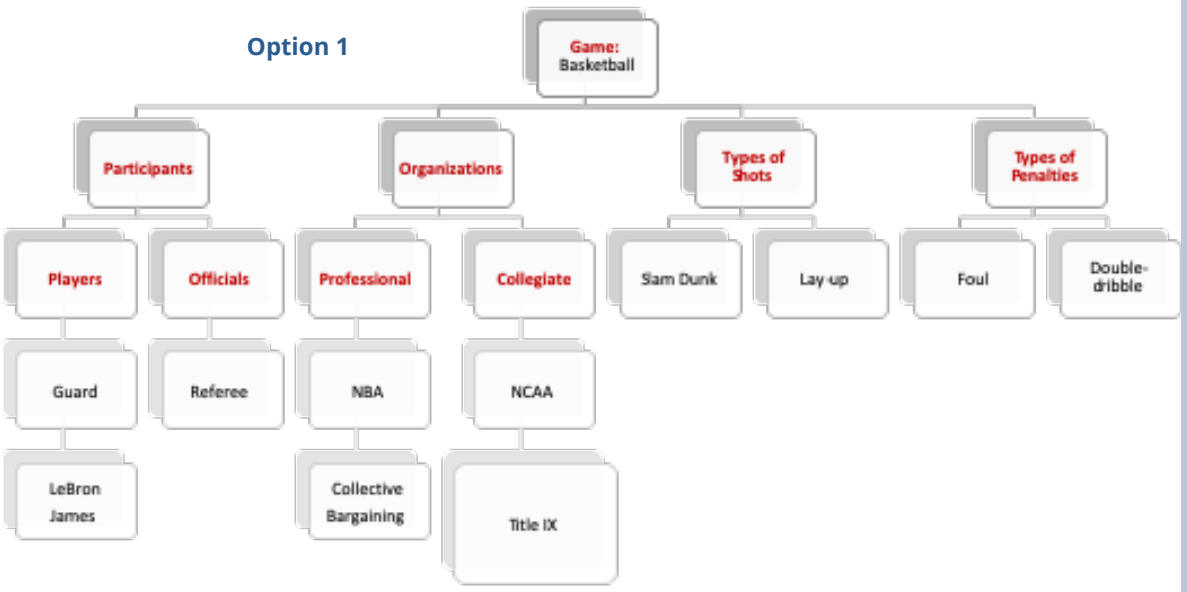
| APPLICATION OF LAW (ELEMENTS) TO FACTS = HOLDING | | | |
|---|---|---|---|
| Case #1 (Thing) | Case #2 (Scherr) | Case #3 (WILKS) | Your Case/Hypothetical |
| 1. mother/child | spouses | mother/child | Father/child |
| 2. P Not present until after auto accident | P in L.A.; husband (not present) in LAS VEGAS | P present at scene of home explosion | P away from home but watching/listening on PC via baby monitor |
| 3. not aware until after the accident | AWARE VIA NEWSCAST of possibly injurious hotel fire, but not of actual injury | No visual perception of injury; but heard explosion + knew it's quite certain injurious result | couldn't see (dunk) but could + did hear crib collapse + son's cries as it happened, awareness |
| 4. N/A | N/A | N/A | N/A |
| 5. | | | |

★ not physically present, but "contemporaneous" + "sensorial"

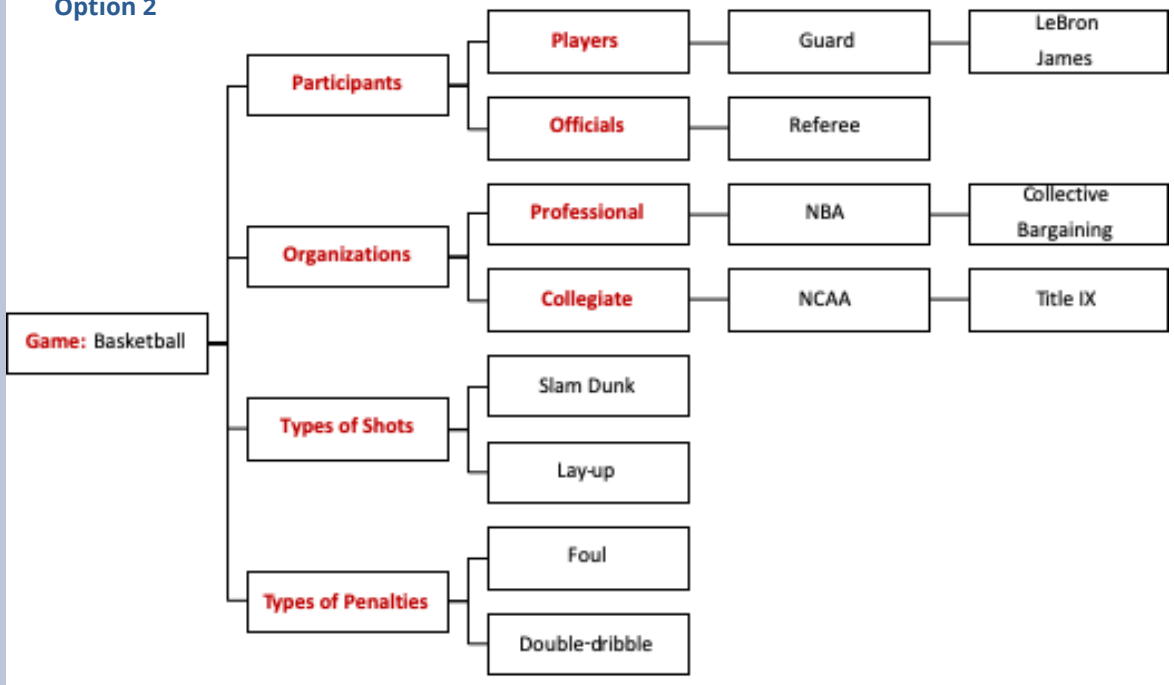
## APPENDIX C

The Categories Game, Ice Breaker Diagram Samples

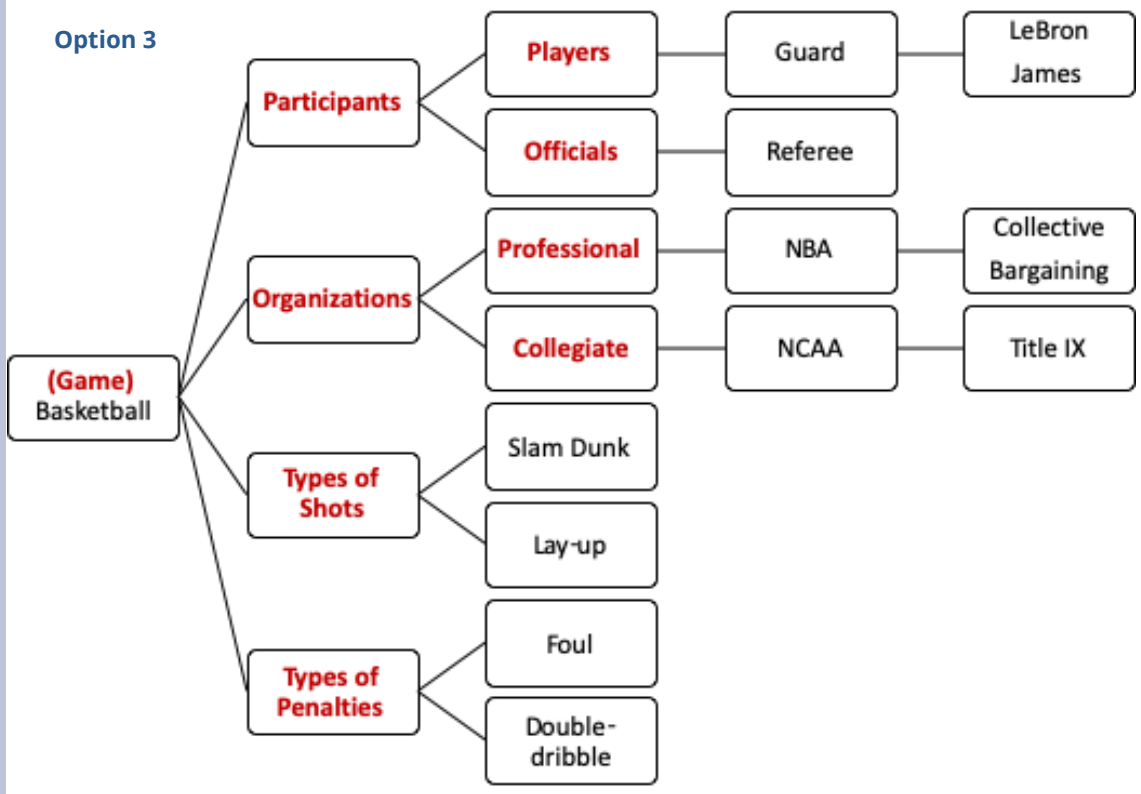
### Option 1



**Option 2**




**Option 3**



Cite as: Cecilia A. Silver, *Breaking News: Drafting Client Alerts to Prepare for Practice*, 27 Persp. 78 (2019).

# Breaking News: Drafting Client Alerts to Prepare for Practice

By Cecilia A. Silver

*Cecilia Silver is an Assistant Professor of Legal Writing at Brooklyn Law School.*

Extra, extra—read all about it! Incorporating a client alert drafting exercise into the first-year legal writing curriculum readies students for the pace and complexity of practice!

While client alerts fulfill an important business development function for employers, they also can be used for pedagogical purposes: summarizing the law, predicting its implications, managing time pressure, striking a proper tone, conforming to real-world expectations, and conveying a sense of professionalism.

## I. Hallmarks of Client Alerts

Let's start with the basics. Client alerts, at their core, are a low-cost marketing tool. They are short news bulletins that inform clients (and the general public, when posted on firm blogs) about recent developments in the law; they should contain "hard facts" as well as an analysis of how those facts affect clients' businesses.[1] Given the short shelf life of the news as well as the competition to be the first to file, client alerts must be issued before they get stale. Also, the ability to crank out client alerts while the news is still urgent and actionable "sends a message that client service matters."[2]

In terms of a taxonomy, client alerts are brief (usually fewer than 1,000 words), feature short paragraphs, and often rely on visual setoffs like bulleted or numbered lists.[3] Compelling headlines command the reader's attention.[4] Topics are clear, crisp, and uncluttered. The tone is confident to convey mastery, yet approachable given the informal medium. Grammar and punctuation are impeccable. They're the client advice letter for the internet age.

## II. Why Client Alerts?

Exposing students to the genre of client alerts can reinforce and build on many of the lessons students learn in "traditional legal writing"—being concise, using headings for visual accessibility, cutting jargon.[5] What's more, client alerts can serve as great models for how to take a complicated question, boil it down, and sum it up.[6] From an organizational standpoint, students can draw from the useful and familiar paradigms of IREAC and CREAC by setting up an issue, giving the relevant

"... client alerts can serve as great models for how to take a complicated question, boil it down, and sum it up."

1 *See, e.g.,* Ami Zweig, *New #MeToo and Pay Equity Laws Expand Protections Against Harassment and Discrimination in New York State* (July 2019), *available at* https://www.weil.com/~/media/publications/alerts/2019/employer-update--july-2019.pdf (updating clients on the new requirements imposed by revisions to New York's employment discrimination and harassment laws and suggesting that employers revisit their policies to ensure compliance); Terri Seligman, Rayna Lopyan & Kelly O'Donnell, *It's Blowing Up: Lessons from Two Recent Social Media Promotions* (May 10, 2019), *available at* https://fkks.com/news/static_print/its-blowing-up-lessons-from-two-recent-social-media-promotions (recommending that companies adopt structuring and advertising guidelines for their social media promotions in the wake of Sunny Co Clothing's failure to cap and clarify the terms of its swimsuit giveaway).

2 Susan Beck & Aric Press, *Why Your Client Alerts Fail; Three Ways to Fix Them*, Bloomberg L., https://news.bloomberglaw.com/us-law-week/insight-why-your-client-alerts-fail-three-ways-to-fix-them (Dec. 3, 2018).

3 *Supra* note 1.

4 *See, e.g.,* Clarence M. Belnavis, *Just (Don't) Do It: Oregon Supreme Court Warns Against Cat's Paw Retaliation* (July 24, 2019), *available at* https://www.fisherphillips.com/resources-alerts-just-dont-do-it-oregon-supreme-court (engaging in wordplay by using Nike's slogan to describe a whistleblower retaliation suit against the company); David C. Fischer & Norwood P. Beveridge, Jr., *An ICO Means Never Having to Say You're Sorry* (Nov. 2018), *available at* https://www.loeb.com/en/insights/publications/2018/11/an-ico-means-never-having-to-say-youre-sorry (recounting the SEC's decision to use a "light touch" in settling two initial coin offerings); Nicole Hyland, Ronald Minkoff & Tyler Maulsby, *Bits or Mortar: Will New York Continue to Require Non-Resident Lawyers to Have Physical Offices?* (Apr. 9, 2015), *available at*, https://fkks.com/news/bits-or-mortar-will-new-york-continue-to-require-non-resident-lawyers-to-ha (punning in an alert addressing whether a nonresident can work virtually or needs to maintain a physical office in New York).

5 *See* Jennifer M. Romig, *Legal Blogging & the Rhetorical Genre of Public Legal Writing*, 12 Legal Comm. & Rhetoric: JALWD 29, 35 (Fall 2015) (noting that some of the features of good public legal writing overlap with those of good traditional legal writing).

6 *See* Ted Becker, *Transactional Drafting: Using Law Firm Marketing Materials as a Research Resource for Teaching Drafting*, 15 Transactions: Tenn. J. Bus. L. 149, 159 (Fall 2013) (proposing using client alerts to provide students with free, practical advice on cutting-edge topics).

legal and factual background, discussing the implications, and offering recommendations. But they do so with a journalistic twist: what happened or what changed? How does that affect the client's business? What should the client do about it?

Because it is typically non-billable work, client alerts often become the province of junior lawyers or summer associates. And because time is money in the legal industry, it is essential to train students to prepare accurate and succinct analyses in short order so that they are poised to tackle the challenges of practice.

"... it is essential to train students to prepare accurate and succinct analyses in short order so that they are poised to tackle the challenges of practice."

The process of crafting client alerts forces students to compress the analytical and writing processes. Because readers can freely click away if they feel a twinge of boredom, students should start vividly to grab—and hold—the reader's attention.[7] Besides considering their varied audiences' (likely short) attention spans, students should cater to the reader's viewing preferences and organize client alerts accordingly because most emails are now opened and read on mobile devices.[8] So students need to condense legal rules and refinements into concise, coherent prose because we live in a world conditioned to bite-sized content and tweet-length missives.

Client alerts also can provide useful examples of professionalism. If well done, client alerts tell clients what they need to know and what they should do in the face of change. Yet alerts tend to be cautious, avoiding hyperbole and highlighting what remains unresolved. This is how careful lawyers should assess the impact of a new law and advise clients.[9]

Strong client alerts display business acumen as well as legal expertise. So, having students draft client alerts necessitates adopting a client-centered lawyering approach to show an understanding of clients' businesses, industries, and competitive landscape.[10]

## III. Parameters of the Exercise

Given their utility and ubiquity, I have designed an in-class client alert drafting exercise for the first-year writing class at Brooklyn Law School (BLS). As of this year, BLS's spring semester Gateway to Lawyering curriculum will center on developing students' statutory reading and interpretation skills. The goal is to acquaint students with how statutes are organized and constructed as a whole, and how statutory provisions function within a broader framework.

After the students learn the fundamentals of parsing statutory language, I'll roll out the client alert exercise, which will ask students to examine the interplay of concurrent workplace lactation accommodation statutes at the federal, state, and local levels.[11] The students will have to describe how New York Labor Law Section 206-c and New York City's Administrative Code Sections 8-102 and 8-107(22) layer onto The Reasonable Break Time for Working Mothers Amendment to the Fair Labor Standards Act, 29 U.S.C. § 207(r). These laws strive to reduce stigma, support female employees, and normalize pumping at work. Besides outlining the statutory requirements cogently, students will need to consider the consequences of the statutes for various types of clients. To familiarize the students with the genre, I'll distribute several examples of well-written client alerts.[12] And to simulate practice conditions, I'll have the students get cracking during the first half of our two-hour class session.

For the rest of class, the students will peer review their classmates' papers to assess whether their classmates achieved the aims of a client alert, and we will debrief their writing process.[13] My hope is that the exercise promotes good time management habits, compels the students to adapt their writing to the needs of their audience, and introduces them to a type of writing they'll likely encounter in practice.

7 Romig, *supra* note 5, at 60.

8 Robert Thomas & Jayne Navarre, *How to Produce Effective Client Alerts & Newsletters*, May 24, 2017, https://www.slideshare.net/jaynenavarre/how-law-firms-can-produce-more-effective-newsletters.

9 Becker, *supra* note 6.

10 Depending on time constraints, the subject of client alerts also provides an opportunity for willing alumni practitioners to visit the classroom to discuss their role in business development. Students always enjoy tangible connections to practice, and these interactions can create a synergy between the legal writing faculty and the school's development office.

11 *See* Appendix A for sample instructions for a client alert in-class exercise.

12 *Supra* nn.1, 3 & 4 (providing examples of real-life client alerts).

13 A sample peer-review worksheet is included in Appendix B.

## IV. Takeaways

The benefits of incorporating client alerts into the legal writing classroom are multifold. By having students practice generating client alerts before they're on the job, we're equipping them to succeed when they're given this type of short-form, public legal writing assignment. Students, too, will become more mindful of their tone and audience. And they'll grapple with the all-important skill of distilling complex analyses into accessible language that informs without shortchanging or overloading.

You heard it here first.

"The benefits of incorporating client alerts into the legal writing classroom are multifold."

## Appendix A

### Sample Client Alert In-Class Exercise Instructions

You'll have roughly forty minutes to synthesize the attached statutes into a coherent, pithy client alert informing your New York–based clients of their legal obligations to provide lactation accommodations to working mothers. In your drafting, aim to exemplify the tenets of strong client alerts we discussed earlier. You also may consult the sample alerts I distributed and the peer review form to help guide your writing.

Once you are finished, please proofread your work carefully. You will then share your client alert with a partner, and you will use the peer review form to critique each other's papers. Toward the end of class, we will come together to discuss your writing process, any challenges you faced, and the lessons you learned.

## Appendix B

### Sample In-Class Client Alert Peer Review Form

Reviewer: _____ Author: _____

Complete each section using as much specific detail as possible. Please answer every question.

#### Overall Impression

1. What is your overall impression of the client alert? Is it neat, professional, and informative? Does the presentation inspire confidence in the author's underlying analysis? Why or why not?

#### Content

2. Does the client alert integrate and condense the statutory language into clear rules and refinements? Identify and explain any gaps.
3. Does the client alert accurately reflect the statutory provisions? Why or why not?
4. Does the client alert follow a logical progression (What is happening? Why should I care? What should I do about it?)? Why or why not?
5. Does the client alert provide concrete advice? Does it flag areas that remain unresolved?
6. Does the client alert describe the business as well as legal implications for the client?

#### Structure

7. Does the client alert use compelling and attention-grabbing titles, headings, and topic sentences? Identify any that are particularly strong and any that could be improved.
8. Does the client alert consist of short paragraphs, each narrowly focused on one topic?
9. Does the client alert use bulleted or numbered lists, as appropriate, to convey information? If not, note any spots where a visually set-off list would enhance the alert.

### Tone

10. Is the client alert succinct, free from jargon, and understandable to a lay audience? Identify any phrases that could be revised to be more conversational.

11. Is the tone cautious, yet authoritative?

### Polishing/Formatting

12. Does the client alert look like law firm–quality work? Does it have any grammatical or punctuation errors?

13. Is the client alert formatted so that it is easily viewable on a smartphone or other mobile device?

14. Does the client alert end by providing the author's contact information?

Cite as: Margaret Hannon, *Spoiler Alert: When the Supreme Court Ruins Your Brief Problem Mid-Semester*, 27 Persp. 82 (2019).

# Spoiler Alert: When the Supreme Court Ruins Your Brief Problem Mid-Semester

By Margaret Hannon

*Margaret Hannon is a Clinical Professor of Law at the University of Michigan Law School.*

Partway through the winter 2019 semester,[1] the Supreme Court ruined my favorite summary judgment brief problem while my students were working on it. I had decided to use the problem despite the Court granting cert and knowing it was just a matter of time before the Court issued its decision. In this Article, I share some of the lessons that I learned about the risks involved in using a brief problem based on a pending Supreme Court case. I conclude that, while I have not typically set out to base a problem on a pending Supreme Court case, doing so has some meaningful benefits, and those benefits outweigh the disadvantages.

I'll start by providing some background about the brief problem I used, which involved a dispute between a broadcasting and entertainment company and one of its former employees over the rights to a song that the employee wrote during the time she was employed by the company. The song was written from the perspective of a person very similar to one of the characters that the employee played on the company's sketch-comedy program. Before performing the song on the show, the employee quit and began performing the song elsewhere. The company sought to register a copyright in the song with the Copyright Office on the grounds that the employee created the song as a work for hire. A few weeks after filing its copyright application and after the employee left the show, the company sued the employee for copyright infringement.

The case raised two issues under federal copyright law. The first was whether the company was entitled to bring an action for copyright infringement before the Copyright Office acted on the company's copyright application. The Copyright Act requires that a copyright be "registered" as a prerequisite to filing suit for copyright infringement,[2] but the Act doesn't provide a clear definition of "registration."[3] As a result, a circuit split developed, with some circuits finding that registration occurred upon submission of the application materials to the Copyright Office (the "application approach"),[4] and others finding that registration occurred only after the Copyright Office issued a certificate of registration or a denial of registration (the "registration approach").[5]

Assuming that the suit could proceed upon submission of the application to the Copyright Office, the second issue was whether the company owned the copyright to the song under the work for hire doctrine.[6] I teach two sections, so I assigned one section to represent the company (which advocated for the application approach) and the other to represent the employee (who advocated for the registration approach).

Why was this my favorite brief problem? Because it was the Goldilocks of brief problems. So many aspects of the problem were "just right": it had fairly balanced arguments for each side; there was enough authority for students to find but not so much that it would overwhelm them; the statutory

"Why was this my favorite brief problem? Because it was the Goldilocks of brief problems."

1 Some schools call it the spring semester. In Michigan, we call it the winter semester.

2 17 U.S.C. § 411 (2012).

3 17 U.S.C. § 101 (2012).

4 *See, e.g.*, Cosmetic Ideas, Inc. v. IAC/Interactivecorp, 606 F.3d 612, 619 (9th Cir. 2010); Apple Barrel Prods., Inc. v. Beard, 730 F.2d 384, 386-87 (5th Cir. 1984).

5 *See, e.g.*, Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 856 F.3d 1338, 1341 (11th Cir. 2017), *cert. granted* 138 S. Ct. 2707 (2018), *aff'd*, 139 S. Ct. 881 (2019); La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1205 (10th Cir. 2005), *abrogated by* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

6 *See* 17 U.S.C. § 201(b) (2012).

interpretation issue was accessible to first-year students and wasn't too dry (even for students not interested in copyright law); the statutory interpretation issue fit nicely with the work for hire issue; students enjoyed working on it;[7] and it was a realistic and significant issue for parties in copyright infringement suits, as confirmed by the Supreme Court granting cert. Indeed, I learned about the issue because it came up in one of my husband's copyright cases. Finally, the brief problem had sentimental value, as it was the first problem I had ever created from scratch.[8]

> "I crossed my fingers that the timing would work out, though I thought that even if it didn't, it might provide some good teaching moments."

In the fall, as I was trying to decide which brief problem to use in the winter semester, I discovered that the Supreme Court had granted cert in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*.[9] The case directly raised the issue of when a copyright is considered registered, making it likely that the Court would resolve the issue.[10] The oral argument was set for January 2019, making it possible that the Court would issue its decision during the semester.[11]

Because it was my favorite brief problem, I decided to take advantage of the last chance to use it before it was ruined. I crossed my fingers that the timing would work out, though I thought that even if it didn't, it might provide some good teaching moments. As it turned out, the Court issued a unanimous decision in March 2019, after the students had submitted their brief drafts but before they submitted their final briefs or completed their oral arguments. In its decision, the Court unanimously adopted the registration approach, holding that registration occurs only after the Copyright Office registers a copyright or refuses registration.[12]

What did I learn? I'll start with some of the disadvantages of using the problem, followed by some of the advantages.

### A. Disadvantages

There were two main disadvantages: the unpredictability of the Court's decision (as to both timing and substance) and the availability of additional resources that might be overwhelming for the students or provide the students with too much of a head start on the writing process.

The first disadvantage is that the Court's granting of cert made the semester unpredictable because of the possible timing of the Court's decision as well as its impact on the pending assignments. I knew that if the decision was issued during the semester, it would affect the students' work. But I couldn't predict when during the semester the decision would be issued or what the outcome would be, which made it hard to pinpoint what effect it would have. If the decision was issued before the students completed their briefs and oral argument, I decided that that the best alternative would be to pretend that the decision hadn't been issued, even if that felt artificial. A mid-semester decision would also likely make what had previously felt like a balanced issue no longer feel that way because there would now be a "right" answer.[13] And that is what happened—the Supreme Court's decision favored the students representing the employee. Even though we were pretending that the decision hadn't been issued, it made the students representing the company lose faith in their arguments.

7 So much so that two of my students wrote and recorded the hypothetical song that was the subject of the dispute.

8 With the help of an outstanding teaching assistant, David Maas.

9 856 F.3d 1338 (11th Cir. 2017), *cert. granted*, 128 S. Ct. 2707 (2018). In *Fourth Estate*, a news organization sued a news website for copyright infringement of articles that the news organization had previously licensed to the website. Fourth Estate Pub. Benefit Corp, 139 S. Ct. at 887. The license agreement between the parties required the website to remove the news organization's articles before canceling the license agreement, but the website continued to include the articles on its website after cancellation of the license agreement. The news organization sued the website for copyright infringement, alleging that it had filed applications to register the copyrights for the articles at issue. The district court dismissed the complaint because the Copyright Office had not yet acted on the applications, and the Eleventh Circuit affirmed. Id.

10 In contrast, in a previous case, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010), the Court resolved the question of whether registration was a jurisdictional requirement without addressing when registration actually occurred.

11 "No one knows exactly when a decision will be handed down by the Court in an argued case, nor is there a set time period in which the Justices must reach a decision. However, all cases argued during a Term of Court are decided before the summer recess begins, usually by the end of June." Supreme Ct. of United States, *Visitor's Guide to Oral Argument*, Sup. Ct. of U.S., https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx (last visited Nov. 20, 2019).

12 Fourth Estate Pub. Benefit Corp., 139 S. Ct. at 892.

13 Especially if the decision is 9-0, which it was.

Second, the additional resources arising from the Court granting cert resulted in potentially too much material available to the students. As a result, I spent quite a bit of time thinking about what limitations to place on the resources the students were allowed to consult. Ultimately, I decided to let the students listen to the oral argument and read the oral argument transcript, but I did not permit them to review the parties' briefs.[14] After the Court issued its decision mid-semester, I allowed the students to read the decision but did not require them to do so.

The Court granting cert created additional and easily accessible authority, including the parties' briefs, numerous amicus briefs, and the oral arguments. If I had not imposed limitations on the types of resources available to the students, students who used those authorities in their research process would have had an advantage, particularly if not all students found them. Even if all of the students were aware of the additional authorities, there was a possibility that some students would feel overwhelmed by them or that students would have difficulty prioritizing the authorities worth relying on. I was also concerned about the possibility of the students relying on the parties' briefs or the amicus briefs while they were writing their own briefs. (These risks may exist for any brief problem, and some are pedagogically necessary or acceptable, but the Court's grant exacerbated these risks.)

I have always prohibited students from reviewing briefs in the course of their writing, with the exception of the samples that I provide, because of the difficulty novice writers have distinguishing good briefs from not-so-good ones. In addition, I wanted the students to work through the writing process on their own so that they could gain experience in making the judgment calls required along the way. As I explained to the students, it's hard to unsee a brief—once a writer sees a piece of writing on the same topic; it's hard not to be influenced by it, even if the writer is doing his or her best to avoid copying it.

On the other hand, I allowed students to review the oral argument transcript or listen to the oral argument in spite of my initial instinct to the contrary. I decided that the oral argument might give the students ideas for arguments or strategies (similar to a secondary source), but was less likely to unduly influence the way the students communicated their arguments in their briefs. Given the nature of oral argument, particularly in the Supreme Court, it's harder to use the structure of an oral argument as a basis for a brief. Along the same lines, it was unlikely that students would be able to replicate the arguments made during oral argument in their briefs (or in their own oral arguments) without independently identifying the relevant authorities to support those arguments or without independently thinking about how to articulate those arguments.

Once the Supreme Court issued its decision, I decided to allow the students to read it. First, for fairness reasons—because I hadn't told them ahead of time not to read it (perhaps because I was hoping that I wouldn't have to), I knew that it was possible that students would read about the decision or read the decision itself before I imposed any restriction on it.[15] Second, by the time the Supreme Court issued its decision, the students had already submitted their drafts, which reduced its impact on the students' drafting process. Third, it felt unfair to prevent the students from reading a recently issued Supreme Court case that would more generally be of interest to law students.

### B. Advantages

On a big picture level, the Supreme Court granting of cert—and ultimately, its decision—forced me to adapt, in a good way: I adjusted some of my teaching strategies, revised some of my class materials, and developed a new class session to discuss the parties' briefs and oral arguments. In addition, the granting of cert confirmed

"... I wanted the students to work through the writing process on their own so that they could gain experience in making the judgment calls required along the way."

14 I gave them this instruction at least three times: once in the assignment materials; a second time in class, before the students started their preliminary research and before they knew about the granting of cert; and a third time in class, after we discussed the Supreme Court's granting of cert for the first time.

15 This included some students who were taking Copyright Law as a first-year elective.

"It was fun to think about how the granting of cert would affect the semester, even if it did make the problem and the semester more complicated."

the significance of the statutory interpretation issue that the students were analyzing, making them more engaged with the problem. Finally, the granting of cert provided valuable teaching moments with respect to the importance of thorough research, and, on a personal level, gave me more confidence in my ability to teach a problem outside of my area of expertise.

It was fun to think about how the granting of cert would affect the semester, even if it did make the problem and the semester more complicated. While the additional planning was time-consuming, it was energizing to approach the semester with a new variable. My sense is that students can tell when a professor is teaching the same thing over and over again, and that they don't like it. When the Supreme Court granted cert, it meant that I couldn't fall back on the "same old thing," and not only am I okay with that, but I think that many of the changes I made ultimately enriched the students' experience.

For example, after the students completed their oral arguments, their next assignment was a negotiation exercise. I have always connected the negotiation exercise to the brief problem so that the progression of assignments is comparable to practice. I require the students to attempt to settle the parties' dispute, and I give each party a set of confidential instructions. In the confidential memo to the students representing the defendant, I explained that the Supreme Court had issued its decision. In the confidential memo to the students representing the plaintiff, I explained that not only had the Supreme Court issued its decision, but that the Copyright Office had finally issued a registration certificate for the song at issue. This arguably made the copyright registration issue moot.[16] To the extent that the students representing the defendant had previously felt advantaged by the Supreme Court's decision, even though we were pretending that it hadn't happened, the students representing the plaintiffs felt that the Copyright Office's action finally gave them an advantage. And it showed in the negotiations—several of the teams representing the company reported that they felt that their receipt of the copyright certificate gave them a negotiation advantage, and many of the teams representing the employee conceded ownership shortly after learning that information.

While I did not allow the students to read the parties' briefs, I did promise them that we would review them as a class once the students' briefs were complete. Among other things, we discussed the overall themes of each brief, the organizational strategies used, what was most and least effective in each, what was most surprising about the briefs, and for one of the briefs, its tone. The students were especially engaged during our discussion of the parties' briefs because of their familiarity with the issues. Over the course of the semester, the students had grappled with the same strategic choices as the parties, such as weighing the relative value of the arguments and trying to identify the most persuasive theory of the case. Seeing similar arguments and strategies in the parties' briefs helped validate the students' strategic choices. In a few instances, the students disagreed with the parties' choices, which gave us an opportunity to discuss the basis for those choices.

In addition to the parties' briefs, we discussed portions of the oral arguments, as did another professor who used my brief problem with her students. The students analyzed the judges' reactions and evaluated how the reactions might be used to predict future decisions. This helped the students prepare for oral argument by making them more attuned to their audience's reaction to their arguments. Similarly, with my students, I identified portions of the oral arguments that were referenced in the Court's opinion, which helped reinforce the role and value of oral argument.

The granting of cert also validated the importance and significance of the statutory interpretation issue: it was significant enough for the Supreme Court to address it, which made it more exciting for the students. For example, one student commented that the student "really liked getting to work on a problem that [the Supreme Court] was actively working on." It "felt like [the student] was actually doing something real as a law student even though obviously our problem was fake."

16 Subsequent cases have raised procedural questions about how to proceed when a registration certificate is issued after a complaint has already been filed. *See, e.g.*, Izmo, Inc. v. Roadster, Inc, No. 18-cv-06092-NC, 2019 WL 2359228 (N.D. Cal. June 4, 2019).

The Supreme Court's granting of cert provided a valuable, and hopefully memorable, teaching moment in class when we talked about research strategy and the importance of thorough and up-to-date research.[17] I assigned the problem without disclosing to the students that cert had been granted on the statutory interpretation issue. After asking the students to do some preliminary research, I wanted to make sure that all of them were aware that cert had been granted.[18] We started our class discussion by identifying section 411(a) of the United States Code as the section most relevant to the registration requirement. We then reviewed the Notes of Decision following the statute, where *Fourth Estate* was the first case listed under the topic "Application for registration" with a notation that cert had been granted. The students' reactions made clear that this was new information for some but that others had already discovered that cert had been granted.

The parties' briefs and oral arguments also confirmed my ability to teach a problem outside of my area of expertise. I do not have practice experience in copyright law, and while I was pretty confident in my understanding of the issues and arguments, it was still validating to see that the parties' arguments mirrored the ones that I had emphasized in discussions with the students.

Now that the semester is over, it's time to retire the brief problem—or at least the statutory interpretation portion of it. But even that has some benefits. Now that I will no longer be using it as a brief problem, I can turn my teaching materials into examples and exercises to use in the future when teaching statutory interpretation. Another option would be to convert the non–statutory interpretation portion of the brief problem into a future memo problem.

Would I do it again? As I often say to my students: it depends. I don't think I would design a problem knowing that a Supreme Court decision would be imminent. But with a statutory interpretation problem based on a circuit split, there is always the risk that it will be resolved—either by the Supreme Court or in the applicable jurisdiction.[19] If that happens, even mid-semester, there are numerous positives. Here, even though the timing of the Court's decision and the decision itself were unpredictable, many of the challenges were ones that I could anticipate and plan for, making the Supreme Court's granting of cert more of a positive than a negative. Ultimately, I think it was a memorable and valuable experience for the students.

"Now that I will no longer be using it as a brief problem, I can turn my teaching materials into examples and exercises to use in the future when teaching statutory interpretation."

17 The granting of cert also meant that there was enough secondary and primary authority to give students a good starting point for their research and arguments, unlike with less-developed circuit splits.

18 Another option would have been not to discuss the granting of cert in class until later in the research process, which would potentially have given the more diligent students an advantage. I decided not to wait because I wanted to explicitly reiterate the restriction on reviewing the parties' briefs before students had a chance to review them. I also hoped that it would make the students more excited about the assignment and that it would be helpful information as they moved forward in their research process.

19 To my chagrin, it is happening again in the October 2019 term, in a case raising a statutory interpretation issue that is the subject of another one of my favorite brief problems. The Court granted cert in *Romag Fasteners, Inc. v. Fossil, Inc.*, No. 18-1233, 2019 WL 1317084 (U.S. June 28, 2019), on whether the Lanham Act requires a showing of willful infringement for a plaintiff to be awarded an infringer's profits in a trademark infringement suit.

Perspectives: Teaching Legal Research and Writing | Vol. 27 | No. 2 | Fall 2019

Cite as: Kimberly Y.W. Holst, *Not Your Grandparents' Grammar Guide—A Review: Benjamin Dreyer,* Dreyer's English: An Utterly Correct Guide to Clarity and Style, 27 Persp. 87 (2019).

# Not Your Grandparents' Grammar Guide—A Review: Benjamin Dreyer, *Dreyer's English: An Utterly Correct Guide to Clarity and Style*[1]

By Kimberly Y.W. Holst

*Kimberly Y.W. Holst is a Clinical Professor of Law at Arizona State University, Sandra Day O'Connor College of Law.*

"As a legal writer, this chapter served as an affirmation; as a legal writing professor, it made me consider dropping my textbook and assigning this guide instead . . . "

*Dreyer's English* is a surprisingly entertaining read for a book about grammar. I thought about ending my review there—as it fully summarizes my thoughts on the book. And, I think that Dreyer would approve of the concise summary.[2] While there are many books that claim authority on all things related to writing style and clarity, few are presented with Dreyer's level of humor and wit. *Dreyer's English* manages to be a helpful resource and enjoyable to read.

Benjamin Dreyer is a copy editor. Specifically, he's the vice president, executive managing editor, and copy chief of Random House. He has been working in the editing business for nearly thirty years. In his capacity as a copy editor, he has learned and unlearned many rules of style. This guide presents his current[3] thoughts on writing clarity and style. Dreyer clearly articulates that many of the views are his personal peeves or crotchets,[4] but even when they are his personal views, he confirms the acceptability of the practice based on the work he's done. As a result, this guide exudes an air of expert authority with a personal touch.

The guide begins with a chapter on tidying up your prose.[5] As a legal writer, this chapter served as an affirmation; as a legal writing professor, it made me consider dropping my textbook and assigning this guide instead, due to its concise and clear articulation of suggestions for common issues of writing style.[6] The guide moves quickly into a chapter about rules and "nonrules." This chapter will likely offer members of our field fodder for debate. Dreyer pushes back on nonrules like never splitting an infinitive, never ending a sentence with a preposition, never using contractions in formal writing, and always dropping the "or not" after "whether." The third chapter on sixty-seven things related to punctuation is the only one that dragged a bit—Dreyer makes punctuation as interesting as it can be, but there's only so much that can be done to spice up that subject matter. The remainder of the book entertainingly glides through numbers, foreign-language words, grammar, fiction writing, misspelled words, pet peeves, easily confused words, proper nouns, redundant phrasing, and a handful of miscellaneous issues.

There are many things to like about this guide. First is its ability to provide comprehensive coverage while maintaining a relatively slim presentation. Dreyer suggests that this guide should be used as a resource that the writer or editor could easily grab for reference, but that it should coexist with other more comprehensive resources, which he helpfully suggests at appropriate points

1 Benjamin Dreyer, Dreyer's English: An Utterly Correct Guide to Clarity and Style (Random House 2019).

2 Though, I am not as certain about his approval of my starting this sentence with *And*. To be sure, he wouldn't overrule it outright, but he'd question it necessity. He might also question my nominalization of *read* in the first sentence. *See id.* at 9, 150.

3 It is clear in reading the book that Dreyer believes that writing style does and should change over time.

4 His characterization, not mine. *Id.* at 147–65.

5 A contemporary nod to the Marie Kondo craze. *See* Marie Kondo, The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing (Ten Speed Press 2014).

6 Or at least assigning it as a recommended text. (I wouldn't normally use a sentence fragment like this, but Dreyer would likely give it a pass. *See* Dreyer, *supra* note 1, at 15–16).

throughout. Second is its emphasis on the use of plain English—and the author's adherence to that advice. For the most part, Dreyer avoids jargon and terminology that the average reader is unlikely to recall (or may only dimly recall from their elementary education). When Dreyer uses these terms, he explains what they are so that the reader can easily digest the advice he presents.

Third, and perhaps the most likable aspect of this guide, is Dreyer's voice.[7] His humor is evident from the first page and carries enjoyably throughout.[8] For example, in Chapter 4, "Foreign Affairs," when comparing the British and U.S. practices for using dashes, he states, "*In British books you'll often see feckless little namby-pamby freestanding excuses for dashes – something like this – where we interrupt ourselves—definitively—with real dashes. Ours are better.*"

Finally, Dreyer offers a variety of anecdotes as illustrations—many pulled from his work as a copy editor for works by the likes of Shirley Jackson, Richard Russo,[9] and Norman Mailer.[10] Each is used to highlight the problem or solution Dreyer is suggesting. He also sprinkles a number of pop culture references throughout the guide—from *Downton Abbey* to Wookiees[11] to Guns N' Roses.[12] The guide is also surprisingly political—mining a particular twitter account for some fantastic examples of what not to do.[13]

Aside from what felt like a bit of a slog through Chapter 3 ("67 Assorted Things to Do (and Not Do) with Punctuation"[14]), there were only a handful of quibbles I had with the guide. The first is that it may not be particularly handy as a guide—in the traditional sense. While there is a comprehensive index and Table of Contents, it is not easy to find a specific rule when needed.[15] Second, if you are not a fan of Dreyer's humor or turns of phrase, you may grow weary of his presentation of the rules.[16] Third, from an academic standpoint, there are moments when the suggestions are very specific to fiction writing or are only interesting and applicable to those in the publishing world.[17] However, Dreyer does acknowledge the differences in the use of certain rules in other contexts. Finally, while Dreyer carefully selected the typeface for the book,[18] he uses small caps throughout the book and then regularly asks the reader to note something presented in lower case, which is easier said than done.[19]

In conclusion, what this guide lacks in utility of use, it makes up for in utility of purpose. From the perspective of a legal writing professor, the guide offers many helpful suggestions for better writing and tips for identifying and correcting writing issues.[20] If my students could adopt a majority of these suggestions, I would be much happier while grading papers. As a writer, the guide was a fresh reminder of many things I already knew (with some I didn't), but that I don't always employ. All in all, *Dreyer's English* disproves the notion that discussions of grammar and style are destined to be dull or stiff. Dreyer makes amusing what often feels tedious.

"... what this guide lacks in utility of use, it makes up for in utility of purpose."

7 Not surprising, given Dreyer's emphasis on the importance of an editor understanding the author's voice. This is most evident in Dreyer's recounting of his efforts to edit a collection of works by Shirley Jackson that was published after her death. *See id.* at 114-16.

8 Hopefully, you're a fan of conversing with footnotes, as Dreyer engages in this with great frequency throughout the guide and they are one of the key methods that the author employs for humor.

9 His recommendation of *Straight Man* by Russo is particularly on point for academics. *See id.* at 121.

10 He was actually a freelance proofreader in the Mailer anecdote. *Id.* at 99.

11 This is the correct spelling. *Id.* at 235.

12 To be sure, he doesn't neglect those who might be more comfortable with pop culture references from earlier decades, including broad-ranging references such as Tinker Bell, Tolkien, and *The Wizard of Oz* (or *The Wonderful Wizard of Oz*, if you prefer the book to the movie).

13 This could be a pro or a con, depending on your political views.

14 Dreyer even infuses humor here when he reveals in a subsequent chapter about numbers that there were only 66 things—he omitted number 38.

15 To be sure, I thoroughly tested this while writing this review.

16 To be sure, in addition to numerous conversations in the footnotes, he, arguably, overuses one of his (apparently) favorite phrases—to be sure (in case you were not sure of the phrase I was alluding to).

17 Did I need to know that frontispiece illustration is redundant because a frontispiece is an illustration facing the title page of a book? *Id.* at 246.

18 *See id.* at colophon.

19 E.g. Post-it—note the lower case *i*. *Id.* at 239. Also, "by zombies." *See infra* note 20.

20 Personal favorite—add by zombies to the end of a sentence to identify passive voice. If it makes sense, the sentence was written in passive voice (by zombies). *Id.* at 14.

# Quick tips to make the most of Westlaw Edge

As a law professor, you now have access to the most intelligent legal research service - ever. You can now feel even more confident in your results with new analysis and research tools found exclusively on Thomson Reuters Westlaw Edge™.

## BE RESPONSIVE WITH WESTSEARCH® PLUS

**Begin typing *character evidence admissibility* in the global search box.**

See how our expanded predictive search recommends questions you can choose from to arrive at legal answers quickly.

## BE STRATEGIC WITH LITIGATION ANALYTICS

**Type the name of a federal judge in the global search box to uncover new insights and trends.**

Discover how to build the strongest case strategy with access to the largest collection of data-driven insights on judges, courts, attorneys, law firms, and case types with Litigation Analytics on Westlaw Edge.

## BE AWARE WITH KEYCITE OVERRULING RISK

**Type the case citation *187 F.R.D. 83* in the global search box to see the new orange warning icon displayed atop the document.**

Observe how KeyCite® Overruling Risk cautions you when a point of law in your case has been implicitly undermined based on its reliance on an overruled or otherwise invalid prior decision.

## BE INFORMED WITH STATUTES COMPARE AND REGULATIONS COMPARE

**Type *26 U.S.C.A. §812* to pull up tax law on a life insurance company tax deductions updated statute to compare to previous versions.**

Learn precisely how a statute or federal regulation has changed over time with the ability to easily compare any two versions with Statutes Compare and Regulations Compare on Westlaw Edge.

**To learn more, contact your Academic Account Manager or visit lawschool.tr.com/westlaw-edge.**

The intelligence, technology and human expertise you need to find trusted answers.

the answer company™
THOMSON REUTERS®

Perspectives
Teaching Legal Research and Writing

## PUBLISH YOUR ARTICLE IN *PERSPECTIVES*.

Share your knowledge and insights about legal research and writing by authoring an article for *Perspectives*.

Our editors and editorial board are looking for readable manuscripts on practical topics that will help *Perspectives'* readers teach and learn. Readers include law school professors, librarians, instructors of paralegal and other students, practitioners, and court personnel.

Most articles are approximately 1,500 to 7,000 words in length. Submission deadlines are January 15 for the Spring issue and August 15 for the Fall issue.

For the *Perspectives* archive, Author's Guide, and other details, please go to: **http://info.legalsolutions.thomsonreuters.com/signup/newsletters/perspectives/**





THOMSON REUTERS™



Published by Thomson Reuters as a service to the Legal Community.