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Two Wrongs Can Make a Right: Introducing Flawed Samples for Effective Counter-Modeling

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As legal writing teachers, many of us live and die by our samples. This is so true for the teaching style I've developed over the years, that it is difficult for me to conceive of an effective teaching world without them. Ideally, samples bring the subject matter to life for students. They take material learned in the abstract and put it together in a concrete visual for students to grasp.[1] In other words, it is one thing for students to read educational materials and learn through lecture about the content that belongs in a legal writing piece, but it is another thing altogether to show students what effective writing looks like through a polished, well-written, thorough sample.[2] This article explores the essential nature of this ideal sample while also suggesting that flawed samples, focusing on very specific writing mistakes, provide meaningful learning beyond the basic modeling an ideal sample can offer.

I. The Ideal Sample as a Starting Point

During my first semester of teaching, I realized early on that one critical agenda item on my to-do list was to create an effective sample for each writing assignment I presented to students. This became especially clear after I failed to do so for my first ever CREAC problem. The students read all about the CREAC paradigm in their textbook, and we discussed each portion in thorough detail in class. I was certain I had practically given the answers away and that all papers would be perfect As. I could not have been more wrong. Some students applied law in the explanation. Others explained law in the application. Still, others left out the case reasoning completely. How could this be? It quickly hit me. I had told students the rules of the game without showing them game footage. Yes, I was the coach who explained what to do but didn't also show them, and they needed that visual to make the material come together. I made this fatal mistake only once.

I quickly got to work creating samples for future assignments, and because I was new to teaching, I wrote many of them myself.[3] As the semesters went on, however, I realized that I could add to my sample base by "retiring" a problem and choosing the best student-written paper to transform into a sample. After a little editing to ensure the paper met every mark, my newest example of exemplary writing was born, and I felt much more confident that my next set of students would be enlightened and would not make the same mistakes as others before them. I was wrong yet again.

II. Counter-Modeling with Flawed Samples

History has taught me that one or two samples of "ideal" writing is not enough for all students. Sure, providing samples of excellent writing is much better than providing nothing at all, and many students will get what they need from them. Others, however, need more. They need to see more than the play executed perfectly to understand the

> "This article explores the [use of] flawed samples [to] . . . provide meaningful learning beyond the basic modeling an ideal sample can offer."

1 *See* Judith B. Tracy, *"I See and I Remember; I Do and Understand": Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 TOURO L. REV. 297, 308–09 (2005) ("[I]t is legitimate and reasonable for students to want to see examples of the kinds of documents they are being asked to prepare, especially because the document is probably unlike anything that most first-year law students have previously seen or written.").

2 In practice, lawyers routinely rely on interoffice samples as they begin drafting legal writing documents, as there is no reason to reinvent the wheel with each new writing piece.

3 The others I received from more seasoned colleagues who already had some samples ready to go.

mechanics of how to get it right. They need to see it executed incorrectly, with flaws and fumbles, so they can piece it all together and avoid such blunders themselves as they begin to write.

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Providing flawed samples to students in a way that increases learning takes planning and thought. Professors should only try this if they have specific goals in mind and have thought carefully about how to execute these goals. For those who wish to take the plunge, here are a few pointers for preparing and introducing flawed samples into the legal writing curriculum.

A. Identify Common Flaws

As a starting point, professors should note common problems they see in student work. For example, suppose a professor has noticed her students regularly fail to use syllogism in the application sections of a trial brief. First, she'll want to ensure her ideal sample contains a proper example of application syllogism and that she clearly conveys to students this is the correct way to do it. When discussing that topic in class, however, she can also introduce a flawed sample to underscore her point. The sample may contain a case explanation section with key reasoning language intentionally omitted in the application. The professor could draft the application section of the sample to include only relevant client facts and a persuasive conclusion with absolutely no mention of precedent case language.[4]

The students should be made active learners in this process. Ask them what is missing from the flawed sample. Ask them to explain why the application is less persuasive and is incomplete without inclusion of the omitted reasoning language. As a final step, ask students to go back to the ideal sample and underline the precedent case's reasoning language in the application. Taking this extra step to show students *why* such language is important for the reader and asking them to actively *engage* with the sample may turn on the light bulb for some students who simply would have missed the lesson's importance at first glance.

B. Ensure the Flawed Samples Are Clearly Marked as Such

There is always a concern that students may mistake the flawed sample for the correct one when they begin writing. It is important the flawed sample is clearly marked as such so students don't erroneously model their writing after it. If the professor provides the flawed sample and wants students to read it and determine for themselves if it is flawed, she likely won't label it as such before providing it to students. In this situation, make a note to instruct students to clearly label the sample as flawed after discussing its shortcomings. If the professor intends to tell her students from the beginning the sample is inadequate, she should label it as flawed before providing it to students.

C. Introduce the Flawed Samples in a Piecemeal Fashion

I suspect most professors teach the various legal writing assignments by discussing them in smaller segments. In other words, we break down an assignment into easily digestible pieces so students can understand the design and purpose behind each separate portion of the assignment. For example, when teaching memo writing, a class discussion may focus specifically on drafting the Question Presented portion of the assignment, but it will not bleed into a discussion about drafting a case explanation for the Discussion section. These are separate sections with different purposes, and they should be addressed accordingly. When introducing flawed samples to underscore a teaching point as noted above, I recommend doing so in a piecemeal fashion, providing a flawed sample containing *only* the specific section of focus at that particular time. Thus, on the date the professor teaches students how to draft an effective Question Presented, after discussing it using the ideal sample, introduce a flawed sample (or two) to demonstrate mistakes students commonly make when drafting it.

At The University of Tulsa College of Law, we utilize the "under-does-when" format in drafting the Question Presented, in which the "under"

4 *See* Appendix A for a trial brief sample that contains a flawed application section with the court's rationale intentionally omitted. Appendix B provides an ideal sample for this same passage but with the omitted language included.

includes the applicable area of law, the "does"[5] provides the specific legal issue, and the "when" is for the client's legally significant facts.[6] Students often find themselves writing the "when" portion in a conclusory fashion, throwing in rule language where only objective case facts should be, and thus a professor can introduce a flawed sample to showcase this common mistake.

For example, suppose the legal issue for the ideal sample is whether a rider in a vehicle qualifies as a "guest" under the Alabama Automobile Guest Statute[7] and is therefore barred from pursuing damages for the driver's negligence in causing a collision.[8] The sample contains a Statement of Facts explaining that the rider was injured in a car accident when her boyfriend, who was driving the vehicle, wrecked the car. The rider entered the vehicle voluntarily for the purpose of taking a drive to discuss the relationship, but during the drive the boyfriend began driving erratically. When the rider asked to exit the vehicle, she was prevented from doing so because the driver engaged the child locks. Shortly thereafter, the driver caused an accident.

The ideal sample's central rule, synthesized from case law, is:

> **A rider is considered a "guest" when the ride is purely social in nature and she does not pay for the ride.[9] However, an individual's status changes from "guest" to "passenger" when she protests the operator's driving and is held captive in the vehicle.[10]**

Under this rule, a rider can begin a ride as a guest and therefore forfeit the right to pursue damages against the driver for his negligence, but her status can change during the course of the ride. If she protests the driver's driving and is held as a captive in the vehicle against her will, she is no longer in the car for a purpose that benefits her, and she becomes a "passenger" who is not subject to the Guest Statute.[11] The ideal sample contains the following Question Presented, which includes the proper information under each of the "under-does-when" categories:

> **Under the Alabama Automobile Guest Statute, is a rider considered a "guest" in a vehicle when she originally agrees to get in the car, but during the drive asks the driver to stop driving erratically and is prevented from exiting the vehicle due to the driver setting the child locks?**

Focusing specifically on the "when" category of the Question Presented, the professor can explain that this section contains facts, as one cannot simply ask a legal question without including the case's key facts.[12] It is the facts that determine a case's outcome when the precedents are applied to them, and therefore they are an indispensable part of the Question Presented. The professor can further explain that a common mistake students make when drafting this portion is incorporating rule language where *only* objective facts should be. Doing so is problematic because it removes the question entirely. Consider the following flawed sample, which incorporates rule language where the legally significant facts belong:

> **Under the Alabama Automobile Guest Statute, is a rider considered a "guest" in a vehicle when she enters the car for a social reason and does not pay for the ride, but is later held captive after protesting the operator's driving?**

Recall that the sample's synthesized rule provides that a rider's status changes from "guest" to "passenger" when she **protests** the operator's driving and is **held captive** in the vehicle. Thus, it is easy to spot the flaw in this example. Because the author included this language when describing

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5 This portion of the Question Presented can be phrased with "does," "is," or "can." LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK § 5.9.2 (1993).

6 *Id.*

7 ALA. CODE § 32-1-2 (1975).

8 *Id.*

9 McDougle v. Shaddrix, 534 So. 2d 228 (Ala. 1988).

10 Roe v. Lewis, 416 So. 2d 750 (Ala. 1982).

11 *Id.* at 753.

12 OATES ET AL., *supra* note 5, at § 5.9.2(c).

"When introducing flawed samples, it is important to focus on only one category of flaws at a time . . . ."

the case's events, she left nothing open for analysis. The answer must automatically be "no" per the rule's requirements.[13] With the answer as a foregone conclusion, the Question Presented is faulty.

To really showcase this error, the professor can ask students to grab two different colored highlighters. With one color, students should highlight the objective case facts following the "when" in the ideal sample, and with that same highlighter, highlight the case facts that match up to those within the ideal sample's Statement of Facts. With the other highlighter, the students should highlight the standard rule language in the ideal sample's central rule. Now ask the students to highlight that rule language they see repeated in the flawed sample's Question Presented.

With these colors as a guide, students should now recognize the presence of facts in a Question Presented versus rule language. Based on this clarified understanding, the professor can hope that her students won't draft the Question Presented section of their own Memorandum assignments in the same conclusory fashion as many did before them.

D. Avoid Combining Substantive and Mechanical Flaws

When introducing flawed samples, it is important to focus on only one category of flaws at a time so that students can focus on one specific lesson and avoid the distraction of other issues. Suppose, for example, that a professor wishes to showcase the importance of persuasive rule drafting in a trial brief, and assume her ideal trial brief sample argues in support of a plaintiff in an invasion of privacy tort action. The legal issue is whether the defendant's intrusion upon the plaintiff's private space occurred in a "highly offensive" manner. Consider the following flawed sample, in which a rule for this legal issue is noted:

> **An intrusion is not "highly offensive" unless its serious enough to constituting an egregious breach of social norms.**[14]

This sample combines both substantive and mechanical flaws. The mechanical flaws of "its," in which the author includes a possessive where it should not be, and "constituting," in which the incorrect verb tense is used, jump off the page. While including these flaws is useful in showcasing grammatical errors or demonstrating the importance of thorough proofreading, they also distract the reader from the substantive issue of persuasive rule writing. The reader, through grammatical distractions, may have difficulty noticing that this rule is drafted in a way that helps the defendant rather than the plaintiff,[15] which is the point in presenting a sample containing unpersuasive rule language. Thus, it is best to separate the issues and include one flawed sample focusing on the unpersuasive rule language and another with mechanical grammatical errors to keep students focused on the specific lesson at hand.

E Utilize New Material When Introducing a Substantive Skill but Familiar Material for Mechanical Lessons

When students read a sample focusing on substantive law with which they're unfamiliar, they do so as a reader, and they "will react as the audience whom the author set out to educate."[16] Thus, if the professor's objective is to demonstrate through a flawed sample that a case's reasoning language is underutilized in the application section of a trial brief, she will get her point across more clearly by providing a sample with new material that will leave the student-readers confused or underwhelmed. If the material is new to students, they will expect the brief sample to properly educate them, and if the sample fails to do so, they can more easily see its deficiencies. Furthermore, if students are already familiar with the specific reasoning language that

13 Of course, the sample will contain a rule application in the Short Answer that applies the rule's language to get to this conclusion, but such application does not belong in the Question Presented, which is essentially a statement of the issue.

14 Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 293 (2009).

15 One way to draft a persuasive rule is to explain the rule from the client's perspective and to make the default result favor the client's position. JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES 163–66 (2016).

16 Tracy, *supra* note 1, at 316.

should be included in that section, they will notice its absence as a matter of form rather than substance, and the professor's objective will be undermined.

There are times, however, when including familiar material to underscore a substantive point is appropriate. As an example, the flawed Question Presented sample noted above utilizes familiar material to underscore the point that reasoning language does not belong in a Memo's Question Presented. Including familiar reasoning language is helpful in that situation because students are already acquainted with the ideal sample's rule and can easily see such language included in the flawed sample where it does not belong. If the professor, instead, chooses to include new material within such an example, she should add the step of familiarizing her students with that new sample's rule so they can observe the rule's language used where it should not be.

However, if the professor's goal is to demonstrate common shortcomings with grammar, punctuation, style, or citation, she should present these infractions within material the students already know and understand. This will avoid the extraneous cognitive load[17] that students encounter when actively engaging with substantive analysis while also looking for more superficial problems.

F. Recognize When to Use Flawed Samples Sparingly or Not at All

Before creating a flawed sample to support a specific teaching objective, professors should reflect on whether a flawed sample is even necessary for that objective and whether such a sample could actually interfere with student learning rather than aid it. At The University of Tulsa College of Law, our first legal reasoning assignment is the CREAC. Students complete this assignment merely three weeks into their first semester of law school, and their exposure to legal analysis is quite minimal at that point. For this reason, I use flawed samples sparingly, focusing nearly all the attention on the components of the ideal sample to build the students' most basic legal analysis skills. I introduce only one flawed sample while teaching the CREAC, which focuses on avoiding unnecessary repetition when comparing facts in the application section. I introduce this sample after the students have had time to process each section of the CREAC. This is a situation in which using flawed samples sparingly is appropriate.

Furthermore, there are times I have realized that using a flawed sample would interfere with or distract from the lesson at hand and have chosen not to include one. This typically occurs when I teach an assignment that requires substantive skills the students have already mastered. For example, at The University of Tulsa we assign a short Email Memorandum during the students' second semester legal writing class. By this time, students have already drafted a CREAC, two full Memorandums, and a Client Letter. They already have the basic "explain and apply" method down, and because the Email Memorandum assignment is simple from a substantive analysis standpoint, an ideal sample is all students need to learn the new skills the assignment seeks to develop—proper organization and structure of an emailed legal response. Including a flawed sample here would distract from the lesson the ideal sample easily gets across, and thus choosing to not include one is wise.

> "... there are times ... that using a flawed sample would interfere with or distract from the lesson."

III. Conclusion

While ideal samples clearly lead the way for effective modeling of proper organization and analysis, flawed samples may add more depth to the legal writing teacher's curriculum if designed to pinpoint very specific shortcomings. Professors should clearly convey such shortcomings after asking students to actively engage with the flawed samples to identify and correct their errors. Such an exercise could make a real difference for students who need to see both what to do and what *not* to do as they approach the new skills required of legal writers.

17 Ton De Jong, *Cognitive Load Theory, Educational Research, and Instructional Design: Some Food for Thought*, 38 INSTRUCTIONAL SCI. 1 (2010), available at https://doi.org/10.1007/s11251-009-9110-0 ("The basic idea of cognitive load theory is that cognitive capacity in working memory is limited, so that if a learning task requires too much capacity, learning will be hampered. The recommended remedy is to design instructional systems that optimize the use of working memory capacity and avoid cognitive overload.").

Appendix A

*This sample includes an excerpt from the Argument section of a trial brief, in which the author contends that the Plaintiff is a limited purpose public figure for purposes of a defamation action. It explores the first prong of a legal test, focusing on whether the topic leading to the Plaintiff's purported public figure status involves a "public" controversy. The application portion of this sample is flawed, in that it contains a persuasive conclusion and relevant client facts, but it does not tie in reasoning language from the case explanation section.

EXPLANATION:

A controversy is considered "public" if there is more than a general concern or interest in it and people are actively discussing some particular question relating to it. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 572 (Tex. 1998). Specifically, in determining if the first *Trotter* prong is satisfied, Texas courts consider whether the media was covering the controversy in order for the public to formulate some judgment on the issue and whether others may be impacted by the newsworthy controversy. *Id*. In *WFAA-TV*, the plaintiff sued WFAA-TV, alleging that its news reports regarding his role as a reporter during a failed raid by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") damaged his reputation. *Id*. at 569. During the raid, the ATF descended upon a compound but was met with gunfire. The plaintiff was the only reporter at the scene of the raid, and WFFA-TV began broadcasting reports that the ATF blamed the local media present at the scene for the failure. *Id*. The Court held that because "numerous commentators, analysts, journalists, and public officials were discussing the raid" and "the press was actively covering the debate over why the ATF raid failed," the controversy surrounding the raid was public. Further, the Court noted that people other than the raid participants were likely to feel the impact of its failure. Because of these reasons, the first part of the *Trotter* test requiring a "public" controversy was satisfied. *Id*. at 572.

APPLICATION:

The facts of the present case clearly meet the first *Trotter* prong. Plaintiff's patients were speaking with others about his procedures, and the medical board also debated the ethics of Plaintiff's practice. In addition, Plaintiff spoke about his IVF practices at his many seminars, and a News 6 representative attended a seminar and later wrote about Plaintiff's apparent inability to properly diagnose his patients' IVF failures. Further, if the Texas Medical Board suspends Plaintiff's medical license, he can no longer serve patients in the local area. Therefore, this Court should find that the controversy was public and hold that the first *Trotter* prong is satisfied.

Appendix B

*This excerpt contains the same substantive content as Appendix A's sample, but the application section is not flawed, as it properly ties in reasoning language from the case explanation section. Such reasoning language is underlined to pinpoint its use.

EXPLANATION:

A controversy is considered "public" if there is more than a general concern or interest in it and people are actively discussing some particular question relating to it. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 572 (Tex. 1998). Specifically, in determining if the first *Trotter* prong is satisfied, Texas courts consider whether the media was covering the controversy in order for the public to formulate some judgment on the issue and whether others may be impacted by the newsworthy controversy. *Id*. In *WFAA-TV*, the plaintiff sued WFAA-TV, alleging that its news reports regarding his role as a reporter during a failed raid by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") damaged his reputation. *Id*. at 569. During the raid, the ATF descended upon a compound but was met with gunfire. The plaintiff was the only reporter at the scene of the raid, and WFFA-TV began broadcasting reports that the ATF blamed the local media present at the scene for the failure. *Id*. The Court held that because "numerous commentators, analysts, journalists, and public officials were discussing the raid" and "the press was actively covering the debate over why the ATF raid failed," the controversy surrounding the raid was public. Further, the Court noted that people other than the raid participants were likely to feel the impact of its failure. Because of these reasons, the first part of the *Trotter* test requiring a "public" controversy was satisfied. Id. at 572.

APPLICATION:

The facts of the present case clearly meet the first *Trotter* prong. The controversy surrounding Plaintiff's IVF practices and procedures was publicly discussed on numerous occasions. Not only were Plaintiff's patients speaking with others about his procedures, but the medical board also debated the ethics of Plaintiff's practice. In addition, Plaintiff spoke about his practices publicly at his many seminars, and the news media showed interest in the subsequent controversy after a News 6 representative attended a seminar and later wrote about Plaintiff's apparent inability to properly diagnose his patients' IVF failures. Thus, the publicity surrounding the controversy in the present case is analogous to that in *WFAA-TV*, as numerous patients, medical professionals, and the media were all discussing the controversy surrounding Plaintiff's IVF procedures, and the press, namely News 6 and The Dallas Tribune, was actively covering the legitimacy of Plaintiff's IVF procedures. Further, Plaintiff's former and current patients will undoubtedly be impacted by a resolution of whether Plaintiff's IVF procedures were legitimate and whether the Texas Medical Board suspends his medical license. Therefore, this Court should find that the controversy was public and hold that the first *Trotter* prong is satisfied.