

Perspectives

Teaching Legal Research and Writing

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In Our Next Issue

For the Fall 2020 issue, Perspectives is especially interested in publishing articles that address how to transition legal research and writing instruction online in light of the current COVID-19 pandemic. If you have some good ideas about how to teach legal writing, show students how to do legal research, help students find and use library resources, hold individual student conferences, conduct moot court arguments, or how to adapt any of the myriad skills and tasks we normally teach in the classroom to an online platform, please consider turning those ideas into an article for Perspectives that can be shared with our readers.

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From the Editor: A Time of Change

By James B. Levy

Professor James B. Levy is an Associate Professor of Law at Nova Southeastern University College of Law and the Editor-in-Chief of Perspectives from 2017 to 2020.

The past semester has been a time of change, to say the least. As I write this, many of us are entering our third straight month of home lockdown due to the COVID-19 health crisis with all the changes, both large and small, that it has wrought. As professors, we've had to quickly figure out how to transition from our normal face-to-face classroom teaching, to adapting those same lessons online while working from home. When the semester began a few short months ago, few of us had ever heard of Zoom. By now, we've become proficient, if not experts, with it while Zoom has also entered the daily lexicon much like Google did before it. It's been a time of great stress, anxiety, and change for all concerned as we adapt to new health protocols to stay safe in the midst of a pandemic. With time, perhaps we'll look back on this period as a bonding experience that required all of us to learn, adapt, and ultimately become more resilient together. That's what change does.

For the time being, we look toward the fall semester with a mixture of trepidation about the ongoing health crisis and cautious optimism that things will get better. We wish all of our readers, authors, colleagues, students, and everyone else in the legal research and writing community a safe and healthy year ahead. If you're sheltering in place this summer and have any ideas, tips, or advice about how to more effectively transition legal research and writing lessons to an online format, we encourage you to turn those ideas into an article that can be shared with our readers.¹ With the prediction that many law schools will still be holding classes online in

the fall, we can use *Perspectives* to support each other by sharing our online teaching ideas here.

This is also a time of change for *Perspectives*. With this issue, I will be stepping down as EIC and my time on the *Perspectives* board will soon come to an end. I took over as EIC three years ago from Professor Elizabeth Edinger who had done it longer than she had planned and was anxious to have someone relieve her. After I took over, it became abundantly clear that the existing ad hoc method for transitioning from one editor to the next was not a good model for ensuring the continued success of *Perspectives* moving forward. Change was needed.

By way of background, *Perspectives* began life almost 30 years ago in 1992 as the brainchild of Professor Roy Mersky of the University of Texas who wanted to create a published forum in which law librarians and legal writing professors could exchange ideas about the teaching of legal research and writing.² According to *Perspectives*' first EIC, Professor Steven M. Barkan, *Perspectives* was intended to fill a void in the existing scholarship on law school teaching by focusing on the practical, nuts and bolts of legal research and writing pedagogy.³ As such, *Perspectives* quickly became a leading source of invaluable, timely information and advice that professors could take with them right into the classroom. Indeed, many of us pored over each new issue as it came out in our quest to become better, more informed teachers. Keep in mind this was a time before the internet, SSRN didn't yet exist, and conferences devoted to legal research and writing instruction were few and far between. Thus, *Perspectives* played an indispensable role in helping build a discipline

“... *Perspectives* quickly became a leading source of . . . advice that professors could take with them right into the classroom.”

¹ I am using the term “legal research and writing” in this essay as a catch-all that covers the classroom work done by both law librarians and legal research and writing professors.

² Telephone interview with *Perspectives*' second EIC, Professor Frank G. Houdek, Southern Illinois University School of Law (retired) (Feb. 2019).

³ Steven M. Barkan, *From the Editor: Introducing Perspectives*, 1 PERSPS. 1 (1992).

and foster a substantial body of scholarship on legal research and writing pedagogy. In fact, *Perspectives* is the place where most of those who later became leading authorities on the teaching of legal research and writing first published their work.

But as the discipline matured over the decades, became more professionalized, and the volume of scholarship grew in step with those changes, the editorial board of *Perspectives* needed to change too. The board had never adopted bylaws, there was no formal process for inviting new members to join the board, no term limits existed with respect to board membership, nor was there any process in place for ensuring a smooth transition from one “front office” to the next. For example, it was only in the past year that the board created a managing editor position with responsibility for shepherding each new article submission through the editorial process resulting in a greater ability to draw on the collective wisdom of the board to provide constructive feedback and mentorship to prospective authors.⁴

The advisory board managerial model adopted when *Perspectives* first began publishing almost three decades ago no doubt worked well at the time as no one anticipated the changes to come that would transform the discipline of legal research and writing. But as the discipline matured and grew, with many professors now required to publish as part of their jobs, substantially increasing the number of article submissions, one person working part-time nights and weekends could no longer handle all the tasks associated with producing a quality publication twice a year.

It is also sometimes overlooked that *Perspectives* has been underwritten since the beginning by Westlaw, now Thomson Reuters, as an outreach initiative intended to support the legal research and writing community. It no longer served those interests effectively to maintain the old way of doing things when it came to editorial board membership. Thomson Reuters' outreach objectives are much better served by expanding the opportunity to

serve on the editorial board to anyone who is qualified and actively encouraging more applicants who can bring diverse experiences and expertise to the board. Thus, to better advance the original outreach objectives of Thomson Reuters, *Perspectives* was due for a change for that reason as well.

So, with this issue, the Editorial Board is pleased to formally announce that for the first time in *Perspectives*' history, it has adopted bylaws, established term limits on board membership, and created an open application process that allows anyone interested in serving on the board, who also meets the qualifications, to do so. The board adopted these changes in the belief that they will enhance and strengthen *Perspectives* moving forward as a leading forum for publishing and exchanging ideas about the teaching of legal research and writing. These changes will also enhance *Perspectives*' legacy as the most widely read, timely, and relevant publication for those interested in the nuts and bolts of legal research and writing pedagogy. Accordingly, we thank Thomson Reuters for supporting this endeavor over the decades and look forward to its continued support for many years to come.

⁴ Special acknowledgment and thanks goes to Professor Brooke Bowman, *Perspectives*' inaugural Managing Editor, who has established new policies and procedures that greatly enhance the quality and efficiency of the board's work.

“... these changes ... will enhance and strengthen *Perspectives* moving forward”

Cite as: Rosario Lozada, *Cultivate a Community in the Classroom: Lead with Values, Vulnerability, and Gratitude*, 28 PERSPS. 5 (2020).

Cultivate a Community in the Classroom: Lead with Values, Vulnerability, and Gratitude

By Rosario Lozada

Rosario Lozada is an Associate Professor of Legal Skills & Values at the Florida International University College of Law.

When I face a new class of law students, one objective supersedes all others: creating a learning community.

A learning community is distinct from a group of individual students. Individuals in a group may have common interests or goals—such as the desire to excel in law school, pass the bar on the first attempt, and practice law. But members of a learning community “share a mutual concern for one another’s welfare.”¹ As a result, students in a learning community feel supported in taking academic risks, and they are more likely to be receptive to both the discomforts and delights of learning in each other’s presence. Students who enjoy a sense of psychological safety in the classroom reap the benefits of an enhanced cognitive process and an increased motivation to learn.² In short, students in a learning community enjoy—and benefit from—a sense that they belong in the classroom.

In a law school classroom, learning communities are unlikely to sprout spontaneously;³ a professor’s

purposeful leadership is vital.⁴ Early in the semester, a professor can help to sow the seeds for growing a learning community by engaging in four practices: (1) acknowledge the presence of each individual in the classroom by respecting each student’s name; (2) lead a class exercise that safely introduces values and vulnerability—key components of a learning community;⁵ (3) show students your authenticity by sharing parts of your life experience, including not only sources of joy and satisfaction, but also setbacks and even “failures”; and (4) express gratitude to your students for entrusting you with four months of their legal education.

Step 1: Respect Names

Knowing your students’ names, how they wish to be addressed in the classroom, and how to pronounce each one of their names correctly is the first step in creating a learning community.⁶ Many professors fear the embarrassment of publicly botching a student’s name. Indeed, among every group of students, a professor will encounter names that are outside her comfort zone. A professor may even consider some of the names to be “non-traditional,” but this judgment arises from the perspective of the professor’s own tradition. If a professor fails to learn a student’s name early in a semester, one day the professor may find herself soliciting a

“Knowing your students’ names . . . is the first step in creating a learning community.”

¹ See MARGERY B. GINSBERG & RAYMOND J. WLODKOWSKI, DIVERSITY AND MOTIVATION: CULTURALLY RESPONSIVE TEACHING IN COLLEGE 75 (2d ed. 2009); CHARLES H. VOGL, THE ART OF COMMUNITY: SEVEN PRINCIPLES FOR BELONGING 9 (2016).

² Conversely, when students lack psychological safety, they may spend more energy “coping rather than learning” in the classroom. See Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 786–87 (2018). This deficit is particularly damaging to students who are underrepresented in the classroom. See generally Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016).

³ See Gerald Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 75 (2002) (observing that, for many students, the law school environment is “stressful, intensely competitive, and alienating”).

⁴ See ABA Report of Nat’l Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* 38 (2017), available at <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf> (recognizing that professors often “exercise powerful personal influence over students” and that their classroom practices “contribute enormously to the law school experience”).

⁵ VOGL, *supra* note 1, at 10, 16.

⁶ See GERALD F. HESS ET AL., WHAT THE BEST LAW TEACHERS DO 78 (2013) (“Learning students’ names is the first step in a larger effort to connect with students.”); see also VERNA MYERS, MOVING DIVERSITY FORWARD: HOW TO GO FROM WELL-MEANING TO WELL-DOING 41 (2012).

“As students volunteer sources of personal pride, the classroom space begins to honor personal experiences.”

student’s participation by either pointing to or fixing her gaze on the student. These actions may unintentionally send the message that the student is invisible or not entirely welcome in the classroom.⁷

On that first day, welcome your students to your class and enlist their expertise. Consider: “As I take attendance, I ask that you let me know how you prefer to be addressed, and that you correct me if I mispronounce your name.”⁸ As you take role, scribble phonetic spellings of each student’s name and place accents on syllables for future reference.⁹ If your knowledge of phonetics is limited, as is mine, jot down a word that rhymes with a student’s name.¹⁰

I often tell students that my name has been ill-treated over the years: “My first name is Rosario and I still remember how I felt when an elementary school teacher called me “Roh—zuh—REE—oh” in front of a classroom of peers.¹¹ In Spanish, this pronunciation makes my name sound like a river,” I tell them. I go on: “Also, because my first name ends in an ‘o,’ which suggests a masculine gender, telemarketers who call my home will inquire: ‘Could I please speak to Mr. Lozada?’”

There is a collateral beauty to sharing accounts of a mispronounced and misgendered name: these personal anecdotes connect the professor to her students, while sending the clear message that professor is determined to learn and properly pronounce their names.¹²

⁷ This message is particularly detrimental to students of color. See MYERS, *supra* note 6, at 52–53 (discussing the “conspicuous invisibility” that many minorities endure when they are noticed but not recognized).

⁸ Some law schools invite incoming first-year students to audio-record the correct pronunciation of their names into the student directory before orientation.

⁹ Without fail, at least one notation is undecipherable, even though it’s my own. I follow up with the student as soon as practicable, knowing that, as the days pass, I’ll become increasingly reluctant to approach the student.

¹⁰ Professor Shailini Jandial George of Suffolk Law School introduces herself with this guidance: “My name is Shailini. It rhymes with colony.”

¹¹ My mother named me Rosario in honor of a Marian prayer in the Catholic Church—in English, the Rosary. The correct pronunciation of both my name and the prayer is Rose-Are-E-Oh, with an accent on the second syllable.

¹² A good professor has “a capacity for connectedness,” which allows the professor to “weave a complex web of connections” among the professor, the

Step 2: Lead an Exercise in Values and Vulnerability

Next, lead your class in an exercise that creates connections by eliciting values and encouraging vulnerability. After taking attendance and briefly introducing myself, I offer this opening prompt to the students: “Please repeat your name and then share something—anything—that you are proud of.” This seemingly innocuous request induces looks of panic, and understandably so. On the first day of class, many students are self-conscious, nervous, and fear saying the “wrong” thing or letting their guard down. Articulating something they are proud of requires self-reflection, the courage to be vulnerable, and some measure of trust in their new classmates and professor.

As students volunteer sources of personal pride, the classroom space begins to honor personal experiences.¹³ And many values come to the surface:

- *I am the first person in my family to graduate from college, and now I’m here in law school.*
- *I am training for my first marathon—the Boston Marathon.*
- *I’m a role model to my four younger siblings.*
- *I decided to leave the small town where I grew up to come to law school here in Miami.*
- *I’ve managed to work through my OCD.*
- *My heritage—I’m proud of my Jewish and Cuban heritage.*
- *I took the LSAT three times and now I’m here, so I’m just proud to be in law school today.*
- *I participate in mission trips with my church every summer.*
- *I have a sister with special needs, and I coach her basketball team.*
- *I’ve written a couple of songs.*

subject she teaches, and her students, who in turn will “learn to weave a world for themselves.” PARKER J. PALMER, THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER’S LIFE 11 (20th ed. 2017).

¹³ See Hess, *supra* note 3, at 84 (observing that an effective learning environment makes room for students’ personal experiences).

- *I rescue dogs.*
- *I own a citrus farm.*
- *I am proud that I'm a mom and a role model to two kids.*

As each student participates, I maintain eye contact with the speaker, nod encouragingly, and ignore the clock. I rush no one. Each person's source of pride and light lingers in the air for a few moments. In addition to showing respect to the speaker, these quasi-musical "rests" allow other students a moment to reflect and to settle into their own reactions and emotions in response to a classmate's contribution.¹⁴ Some may feel empathy; others experience awe. In the silences, connections are forged.¹⁵

(I purposefully do not, however, invite students to share where they completed their undergraduate education. Students—and often professors, too—may entertain sweeping assumptions based on a student's undergraduate institution. For example, if a law student attended an ivy league school, *she must be privileged or wealthy*. Or if she attended a top 20 school, *she must be smarter than everyone who attended a school in the next tier*. And if she is a minority student who attended an elite school, *she probably got in because she is a member of a minority group*. Regardless of whether others are making these judgments, the minority student sharing the information often silently fears that her intelligence is being judged or categorized; this fear affects the student's ability to fulfill her academic potential,¹⁶ while undermining the objective of creating connections in the classroom.)

Through this opening exercise, students discover they share many values with their peers. This discovery is key to forming the fledgling learning community.

¹⁴ *Id.* (recognizing that silence is a medium of teaching that makes space for reflection and leads to deep learning).

¹⁵ These "rests" also give the professor an opportunity to take notes on the students' experiences and values. The professor's notes are fertile soil to enrich future class discussions or conferences with individual students. See HESS ET AL., *supra* note 6, at 79 (observing that teachers who know about their students' backgrounds or experiences can draw on this information effectively to motivate them throughout the semester).

¹⁶ See generally McClain, *supra* note 2.

Step 3: Share Setbacks and Sources of Joy

Next, after students have been vulnerable and identified values, a professor can foster additional connections in the community by being vulnerable and authentic herself.¹⁷ Vulnerability, which involves "exposure, uncertainty, and emotional risk," is a catalyst for "connection and joy."¹⁸ A professor becomes more "human" to her students when she shares personal or professional sources of joy and satisfaction. Similarly, by revealing a setback or short-term "failure,"—whether experienced in legal practice, in the academy, or in another setting—the professor expresses aspects of her core identity. By openly sharing setbacks and "failures" as steps in a professional path, the professor also signals to the new learning community that such experiences are familiar precursors to growth and learning, rather than defeat or shame. Sharing at this level, which is uncommon in the law school classroom,¹⁹ strengthens the ability of the students in the class to form a learning community.

One semester, for example, I shared that I was proud that I'd hiked Montaña Machu Picchu with teenage kids in my homeland, Peru. I beamed as I described the breathtaking views on the path to the summit, which towers over 10,000 feet above sea level.

As for setbacks and challenges, personal examples abound. I don't hesitate to give the students

¹⁷ See, e.g., HESS ET AL., *supra* note 6, at 187 (students value a professor's willingness to make herself vulnerable); PALMER, *supra* note 12, at 236 ("openness and vulnerability" are virtues that "rarely receive their due in professional settings"); Heidi K. Brown, *The Emotionally Intelligent Law Professor: A Lesson from the Breakfast Club*, 36 U. ARK. LITTLE ROCK L. REV. 273, 297(2014) (teachers who show a "vulnerable, human side,"—rather than the personage of the "aloof expert"—create bonds of trust and respect with their students); Larry Krieger, *Being the Happiest, Most Effective Lawyer You Can Be: New Research*, in STEWART L. LEVINE, *THE BEST LAWYER YOU CAN BE: A GUIDE TO PHYSICAL, MENTAL, EMOTIONAL, AND SPIRITUAL WELLNESS* 3, 7–8 (2018) ("authenticity is the primary foundation of [a person's] life experience").

¹⁸ BRENE BROWN, *RIISING STRONG: HOW THE ABILITY TO RESET TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD* 275 (2017).

¹⁹ See Melissa J. Marlow, *Does Kingsfield Live?: Teaching with Authenticity in Today's Law Schools*, 65 J. LEGAL EDUC. 229, 229 (2015) (observing that "the sharing of ourselves in law school classrooms [remains] a rare occurrence").

“...by revealing a setback or short-term 'failure'. . . the professor expresses aspects of her core identity.”

“Learning demands the freedom to make mistakes.”

insight into the voice of my inner critic. (I also tell them how I respond to her unwelcome and frequent contributions.) When discussing body language and posture in the context of an appellate oral argument, I confide that scoliosis runs in my family, and that I’ve worked hard at strengthening my postural muscles. Finally, when I’m working on a writing project, I’ll frequently tell of my tussles with imposter syndrome.²⁰

The sharing of a challenge or a setback often frees the professor, while empowering the students. At the beginning of each semester, for instance, I let the students know I will make mistakes:

At some point in the semester, you will notice an error in my reasoning or my analysis or in the conclusion I’ve drawn. And one of you—maybe more than one—will tell me, ‘I don’t think that’s right, Professor. When I read that case, I understood the court’s holding to be [insert correct holding or analysis].’

In that moment, I tell them, I celebrate. Why? The learning community has internalized the message that no one has a monopoly on knowledge or understanding.²¹ Learning demands the freedom to make mistakes.

Step 4: Express Gratitude

Finally, express gratitude to your students for trusting you to guide and facilitate their learning for an entire semester of their legal education, which is nearly four months of their lives. Gratitude is an emotional strength: “a sense of wonder, thankfulness, and appreciation for life itself.”²² By expressing gratitude, the professor communicates to her students her awareness of the gift of

²⁰ Even as I work on this Article, the syndrome lurks nearby. Please go away. Elizabeth Cox’s TED-Ed lesson, which many of my students have found eye-opening, offers an excellent introduction to this phenomenon. Elizabeth Cox, *What Is Imposter Syndrome and How Can You Combat It* (Aug. 28, 2018) available at https://www.ted.com/talks/elizabeth_cox_what_is_imposter_syndrome_and_how_can_you_combat_it?language=e.

²¹ See Lain, *supra* note 2, at 795 (Legal education is “based on an intense hierarchy that places the professor as the holder of knowledge.”).

²² MARTIN E.P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT 154–55 (2002).

serving as their teacher. It also engenders hope in students; after all, if the professor—who has been teaching for some time—remains grateful, maybe some positive experiences await.²³

Conclusion

The first class comes to an end. By honoring individual names, making space for values, being authentic, and expressing gratitude, you’ve planted hardy seeds for a learning community to grow. Throughout the semester, you will engage in additional practices to strengthen and nourish it.²⁴ But for now, reflect on the work you and your students have begun; it’s an auspicious start. Will a learning community flourish and thrive in the four months that follow? Time will tell. I, for one, am optimistic.²⁵

²³ The professor, too, will draw benefits from practicing gratitude. See Nathalie Martin, *Gratitude*, in NATHALIE MARTIN, LAWYERING FROM THE INSIDE OUT: LEARNING PROFESSIONAL DEVELOPMENT THROUGH MINDFULNESS AND EMOTIONAL INTELLIGENCE 260, 260–61 (2018) (discussing the physical and mental health benefits of a gratitude practice).

²⁴ For example, a community is strengthened through inclusive practices, such as elevating diverse voices in the classroom through amplification. See, e.g., Tiffany D. Atkins, *Amplifying Diverse Voices: Strategies for Promoting Inclusion in the Law School Classroom*, 31 SECOND DRAFT: BULLETIN OF LEGAL WRITING INST. 10 (Fall 2018). Charles Vogl offers a robust text (with worksheets) on understanding and building communities. See VOGL, *supra* note 1.

²⁵ My optimism stems, in part, from the positive feelings that I experience when I connect to students. Tracy Chapman says it best: “I got a feeling that I belong. I got a feeling I could be someone. Be someone.” TRACY CHAPMAN, *Fast Car*, on TRACY CHAPMAN (Elektra 1988).

Cite as: Emily Grant, *Threading the Needle: Are We Modeling Inappropriate Use of Humor for Our Students*, 28 *PERSP.* 9 (2020).

Threading the Needle: Are We Modeling Inappropriate Use of Humor for our Students?

By Emily Grant¹

Emily Grant is a Professor of Law at Washburn University School of Law.

As law professors, we are tasked primarily with educating students on the substantive knowledge and skills needed to practice law. It's a serious challenge but that doesn't mean we should overlook the use of humor to better help our students learn. Deftly employed, humor can break down learning barriers in an otherwise intimidating environment, help students retain information, and foster an atmosphere that embraces the joy of the challenge. However, professors also have a responsibility to impart professional values by modeling appropriate professional behaviors. Students look to the front of the classroom in the earliest stages of forming their understanding of what it means to be a legal professional.

How can professors strike the right balance between these competing goals? To analyze that question, this piece surveys several different bodies of literature for relevant findings: On the one hand, humor can be an effective pedagogical tool. On the other hand, practicing attorneys are generally cautioned against using humor in the professional setting. Further, professors have a responsibility to model professionalism, in addition to teaching the substance of the law. Taken together, these findings reveal a tension in the choice to use humor as a professor.

Are the strictures of a formal profession fundamentally at odds with using humor as a pedagogical tool in the law school classroom? Does a jocular classroom atmosphere undermine the professionalism we must model for students as they make the transition from the schoolhouse to the courthouse? One quick resolution to this tension is simply to caution students to "do as I say, not as I do." This retort, however, is not fully satisfying. Instead, I submit this essay as a more thorough defense of humor, which, when delicately woven into the fabric of the classroom experience, can be consistent with modeling professionalism. Humor can also be a valuable, and perhaps underutilized, resource for professors and aspiring lawyers.

I. Humor in the Classroom

Humor as a communication tool is the subject of much theoretical conversation, having been studied by researchers in fields from psychology to communication to business.² More than whatever academic conclusions researchers draw, however, humor is a type of communication intended to evoke laughter. Laughter, in turn, is the best medicine in many contexts, an integral part of human nature, and the contagious universal language.

If skillfully employed, laughter-producing humor can be a valuable pedagogical strategy in a law school classroom because, among other reasons, it reduces student anxiety, creates an instant connection between speaker and audience, lowers inhibitions, and reduces the power imbalance inherent in the classroom. Indeed, it can be a "catalyst for classroom

“If skillfully employed . . . humor can be a valuable pedagogical strategy”

¹ With thanks to Jake Bielenberg for the research assistance and to Will Foster for editorial and style help. And with gratitude to the conference attendees at the Association of Legal Writing Directors 2019 Biennial Conference at Suffolk Law School for the encouragement, support, and brainstorming. Finally, many thanks to Washburn University School of Law for its financial support of this project both in terms of a research stipend and sabbatical approval.

² See Kevin Bruthirds, *The Impact of Humor on Mediation*, 61 *DISP. RESOL. J.* 33, 34 (2006).

‘magic,’ when all the educational elements converge, and teacher and student are both positive and excited about learning.”³

A. Benefits

Improved learning atmosphere. Humor in the classroom can bridge the gap between professors and students in a way that emphasizes shared experience and builds group rapport. Professors display their humanity with appropriate use of humor, which in turn makes them more approachable and appealing. Using humor to build and strengthen the classroom community breeds mutual confidence, respect, and trust.

Physical benefits. Humor also provides tangible physical benefits. “Physiologically, humor and laughter can aid learning through improved respiration and circulation, lower pulse and blood pressure, exercise of the chest muscles, great oxygenation of blood, and the release of endorphins into the bloodstream.”⁴ Additionally “laughter causes significant increase in catecholamines, the so-called alertness hormones that include adrenaline,”⁵ which may lead to increased retention of information.

Stress reduction. Psychologically and emotionally, humor in the classroom can reduce student stress and anxiety. Law school is, by its nature, a stressful environment, and a humorous interlude in class can help students relax a bit and remind them not to take things too seriously. Indeed, laughter triggers a physical response in the body that decreases stress hormones, thereby reducing physical stress.

³ Neelam Kher et al., *Using Humor in the College Classroom to Enhance Teaching Effectiveness in “Dread Courses,”* 33 COLLEGE STUDENT J. 400, 400 (1999). Humor is an “immediacy behavior,” a communication device “that improve[s] the physical or psychological closeness and interaction of two or more individuals.” Lance Askildson, *Effects of Humor in the Language Classroom: Humor as a Pedagogical Tool in Theory and Practice*, 12 ARIZ. WORKING PAPERS IN SLAT 45, 47 (2005).

⁴ R.L. Garner, *Humor in Pedagogy: How Ha-Ha can Lead to Aha!*, 54 COLLEGE TEACHING 177, 177 (2006).

⁵ James D. Gordon III, *Humor in Legal Education and Scholarship*, 1992 BYU L. REV. 313, 316; see also John J. Capowski, *Evidence and the One-Liner: A Beginning Evidence Professor’s Exploration of the Use of Humor in the Law School Classroom*, 35 ARIZ. ST. L.J. 877, 879–80 (2003).

More effective learning. Humor can make a particular concept or idea more memorable, thus increasing student retention of information. Humor in the classroom also inspires students to pay attention in class, to remain alert lest they miss something funny, and to engage with the class and the material. Students tend to take a more active role in a classroom that includes humor, and they perceive that they have learned more. As a result, humor is linked with an increase in attendance and a sustained interest in the subject matter that extends beyond the classroom itself.⁶

Humor can also increase the depth of analysis and understanding in a classroom. It creates an environment in which defenses are lowered so students may be more open to other views or values. Humor can challenge students’ usual mode of thinking in a way that can encourage dialogue, critical evaluation, and new perspectives. Students may be more receptive to difficult material, reflective of their own viewpoints, and better able to analyze contradictions or inconsistencies.

More rewarding teaching. Using humor in the classroom can also have some benefits for professors. Besides enjoying the class more, professors can get instant feedback from the laughter and reaction of students. Humorous professors are seen as more likeable and often receive higher ratings on student evaluation forms.

B. Risks

Incorporating humor into a classroom can be a double-edged sword. If done poorly, it can be really, really terrible. Students and professors, and people in general, have different senses of humor so that one person’s joke is another person’s affront. For that reason, use of humor is complicated and highly subjective, and professors cannot always predict how a particular joke or funny remark will be interpreted.

⁶ “The positive environment of a humor-enriched lecture has even been shown to increase attendance in class.” Garner, *supra* note 3, at 178; see also Zak Stambor, *How Laughing Leads to Learning*, 37 MONITOR ON PSYCH. 62 (2006); Askildson, *supra* note 2, at 55–56 (discussing results of a study showing “increased levels of interest as a result of humor usage by the teacher. This was true for both student and teacher respondents . . .”).

“Humor can also increase the depth of analysis and understanding”

At best, overdone and overused humor can be distracting and can feel to students like a waste of time. Such excessive use of humor can negatively impact student motivation and, naturally, their learning also. Humor may also be superficial, signaling to a learner that the material or the professor are not to be taken seriously.

C. How to be Funny

A typical classroom presents a variety of opportunities for injecting humor. “Humor in the classroom can take many forms . . . jokes, riddles, puns, funny stories, humorous comments and other humorous items . . . cartoons, top ten lists, comic verse, and phony or bogus experiments.”⁷ Many conferences will feature presentations about incorporating games or other fun and/or funny activities into a law school classroom. One easy way to start is to use topically relevant cartoons or memes as part of a PowerPoint slideshow—a meme from Facebook, for example, illustrating the importance of the serial comma, or a Calvin and Hobbes cartoon about how “verbing weirds language” in our class discussion about clarity in your writing. In one of my classes, I have students create memes about cases or rules we discuss, which serves dual purposes—humor for the other students in the class and comical material I can use in future semesters.

Professors should frequently examine, however, the goals and impact of humor they hope to incorporate. Humor should be “specific, targeted, and appropriate to the subject matter.”⁸ And humor should never be used to degrade or belittle any individual or group.

II. Humor in Law Practice

As a general rule, the more formal the professional setting, the more formal the professional should be, and the legal profession tends to be fairly formal. The physical spaces in which lawyers practice (e.g.,

courtrooms, conference rooms, law offices) tend to be solemn. Hierarchies are clear (e.g., partner/associate; judge/attorney) and reinforced in ways both obvious and subtle. It is no surprise practicing law can be stressful, almost like combat.

But humor can be an effective force for reducing stress and lightening the load. “[T]hose steeped in serious and complicated legal work need an outlet for expressing intellectual and emotional strain, and humor can provide a chance for release.”⁹ The benefits of humor are similar to those discussed in the pedagogy realm, but humor in practice also carries the same risks in terms of offending, alienating, or distancing other people. And in a legal context, that can have drastic consequences for clients. Representing client interests, in whatever context, is serious business, and attorneys should be wary of trivializing that situation with humor.

For lawyers who wish to inject humor into their practice, the advice is “planned spontaneity”—make it feel like jokes and clever witticisms are extemporaneous but in actuality have been thought through in advance.¹⁰ But specific strategies for employing or avoiding humor may depend on the context in which the attorney is working.

A. Legal Writing

The permanency of writing suggests attorneys might want to avoid memorializing attempts at humor in their written word because they live forever. This is especially true in the electronic age and the ever-present risk of virality. That said, if done carefully and well, humor can inject levity in an otherwise mundane brief or memo. It can convey

“... humor should never be used to degrade or belittle any individual or group.”

⁹ LAURA LITTLE, GUILTY PLEASURES: COMEDY AND LAW IN AMERICA 143–44 (2019). “[L]ighten up, lawyers! You will live longer and live better. Weighty as your legal responsibilities may be, you will enjoy your work, your life, your colleagues, your adversaries, and yourself more if you exercise your sense of humor.” Art Stroyd, *Lighten Up!*, 6 LAW. J. 4, 4 (2004).

¹⁰ Andrew J. McClurg, *Risky Business: The Dangers of Using Humor*, 45 ORANGE COUNTY LAW., June 2003, at 32, 34. Following that dictate, a number of attorneys have pursued successful comedy careers. See Whitney Meers, *The Funny Thing About Mediation: A Rationale for the Use of Humor in Mediation*, 10 CARDOZO J. CONFLICT RESOL. 657, 665–66 (2009) (discussing Paul Mercurio, Karen Bergreen, Demetri Martin, and Sean Carter). Indeed, even noted jurist Abraham Lincoln was known for “his reliance on humor, anecdotes, and stories to strengthen his relationships, to relieve stress, to strengthen an argument, and for avoidance.” Mark Withers, *Lessons from Lincoln: Including Humor in Your Law Practice*, 58 ADVOC. 45, 45 (2015).

⁷ Kher, *supra* note 2, at 400.

⁸ Garner, *supra* note 3, at 178. “The type of humor to use should be determined by the content of what the teacher teaches. It should be related to the subject matter, it should be topic related so that students can quickly make connections for effective retention of what is taught.” Jacob Omede & Noah Jimba Daku, *Teachers’ Perception of Humor and Laughter as Pedagogical Tools for Promoting Learning in Kogi State College of Education, Ankpa, Nigeria*, 4 J. EMERGING TRENDS IN EDUC. RES. & POL’Y STUDIES 706, 711 (2013).

“The United States Supreme Court Guide for Counsel admonishes that ‘[a]ttempts at humor usually fall flat.’”

the confidence of the writer, thus improving that attorney’s status and power in the legal relationship. For example, in a motion to dismiss a copyright infringement case involving a photo that a monkey took while handling a camera, an attorney noted that “[m]onkey see, monkey sue is not good law.”¹¹ The court apparently appreciated the levity, citing the language in its decision granting the motion.

B. Trial

A trial necessarily represents a serious matter for clients. Nonetheless, humor can be an effective tool for trial attorneys. Trial attorneys are not stand-up comedians, but they often assume the role of thespian or storyteller to convey their client’s position. Humor can “defuse tension, evoke a shared humanity, [and] engage a jury or judge.”¹² It can even strengthen the arguments the attorney is presenting.

On the other hand, of course, humor used during a trial can go horribly awry. The judge and the jury may not enjoy the same sense of humor as the attorney, in which case humor may anger or confuse those an attorney is hoping to persuade. “Worst of all are jokes that—purposefully or inadvertently—target either the vulnerable or the victimized, or that somehow denigrate the gravity and importance of the proceeding itself (especially to the litigants).”¹³ For example, one criminal defendant argued ineffective assistance of counsel applied to his trial when his attorney

failed at humor in his opening statement: “I am a local attorney who has been appointed by the Court to represent an indigent defendant I am happy to announce that this appointment will help me with my indigent problem.”¹⁴

C. Oral Argument

Humor in oral arguments is more common than in written work, but the conventional wisdom remains that any possible benefit may not be worth the risk. The United States Supreme Court Guide for Counsel admonishes that “[a]ttempts at humor usually fall flat.”¹⁵ Indeed, Justice Scalia, in his book with Bryan Garner, admonishes: “Never tell prepared jokes. They almost invariably bomb.”¹⁶ The classic example comes from oral arguments in *Roe v. Wade*, during which the Texas attorney general referenced his female opposing counsel with this opening joke: “It’s an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.”¹⁷ Stunned silence followed.

D. Judicial Opinions

The use of humor in judicial opinions is increasing. Although some decry judges’ attempts to be funny as inappropriate, humor can make an opinion more readable and easier to understand.¹⁸ Indeed, judges can employ humor helpfully to explain and clarify portions of the legal system or the ruling in a particular case, or just to exercise their creative writing flair. For example, in a litigation involving Kentucky Fried Chicken, the judge wrote that “[t]his case presents us with something mundane,

¹¹ LITTLE, *supra* note 8, at 149.

¹² Philip N. Meyer, *Comedy in the Courtroom: Clowning Around Is Frowned Upon, but Don’t Underestimate the Genre’s Value*, 102 ABA J., Sept. 2016, at 22, 22. “Affecting the common touch is often effective, and the role of tasteful humor is of the utmost importance.” *Humor and Zealous Advocacy in our Adversary System*, 184 F.R.D. 433, 434 (1998). “Perhaps the human mind needs a sweetener when being exposed to attempts at persuasion.” Withers, *supra* note 9, at 45.

¹³ Meyer, *supra* note 11, at 22. In fact, [s]tand-up comics are adept at “reading the room,” and they exercise judgment in deciding what material will or won’t resonate with the audience. Lawyers have to know their audience as well. Even an attempt at humor that is intended to establish rapport with a judge or jury through some shared social observation can come off as inappropriate, condescending or made at someone else’s expense. John G. Browning, *Humor in the Courtroom: No Laughing Matter*, ABA J., July 2019, available at <https://www.abajournal.com/voice/article/humor-in-the-courtroom-no-laughing-matter>.

¹⁴ McClurg, *supra* note 9, at 33.

¹⁵ GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 10 (2019), available at https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf.

¹⁶ ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 186 (2008). Occasionally an “unscripted witticism” can alleviate tension, but “[a]ll in all, the benefit is not worth the risk.” *Id.* at 187; see also LITTLE, *supra* note 8, at 152–55 (providing examples, both effective and not, of humor in oral argument).

¹⁷ LITTLE, *supra* note 8, at 152.

¹⁸ Lucas K. Hori, *Bon Mots, Buffoonery, and the Bench: The Role of Humor in Judicial Opinions*, 60 U.C.L.A. L. REV. DISCOURSE 16, 33 (2012). “[J]udicial humor can be a useful tool, allowing a judge to add personality to an opinion and pique readers’ interest.” *Id.* at 19.

something novel, and something bizarre . . . the facially implausible—some might say unappetizing—contention that the man whose chicken is ‘finger-lickin’ good’ has unclean hands.”¹⁹ But some judicial humor, particularly that which seeks to differentiate judges from the litigants or the attorneys, seems to mock the proceedings and to disrespect the people involved, the bench, and the cause of justice itself.

E. Negotiations and Mediations

Scholars have recognized recently the potential of humor to benefit mediations and negotiations.²⁰ Humor can help attorneys and parties achieve results, in part because it is a form of persuasion itself. Humor can bring participants together and calm those who feel threatened. For better or worse, humor can make an attorney the center of attention and thus the one who is dominating the negotiations.

But humor in mediations or negotiations, as in any other setting, runs the risk of falling flat. As always, attorneys are admonished to not use humor at the expense of the other party or to single anyone out. If humor is used unsuccessfully, it can undermine the attorney’s status and bargaining power, conveying lower competence.

F. Conclusion

As a general rule, humor can certainly bring some benefits to various aspects of the practice of law.²¹ But the risk can be great. Humor can fail, backfire, fall flat, or otherwise harm the lawyer’s work and therefore the client. Attorneys wishing to incorporate humor into practice should proceed with caution, know what they want to accomplish with humor, and be aware of the pitfalls in any given situation.

III. Modeling Professionalism

The third body of literature relevant to this discussion includes articles that call on the academy to instill professionalism in our students. The practicing bar wants law schools to help develop and strengthen the profession, and not just by conveying knowledge of black-letter law. In general, there’s a sense of declining professionalism among attorneys, and so law schools are exhorted to offer practical advice for succeeding as an attorney and for developing professional identity.²²

The law school experience should continually socialize students beyond minimal standards of ethical rules to larger issues of professionalism and soft skills. Law professors arguably have a duty to model for students the type of professional behavior that is desired in the profession.

Modeling is one way to teach the rules of being a part of the profession. Professors should demonstrate the specific behaviors, language, and attitudes we wish our students to internalize as a successful attorney. Every day, we have an audience for whom we are performing the desired behaviors of our profession. We model things like timeliness, preparedness, competence, teamwork, and professional judgment. In doing so, we shape our students and impact the kind of attorney they will become.

IV. Threading the Needle: Cautiously Using Humor

The sum of these three bodies of literature results in a pedagogical tension: if we use humor in class because there are sound educational reasons for

“Attorneys wishing to incorporate humor into practice should proceed with caution”

¹⁹ *Id.* at 30.

²⁰ “The negotiation and mediation literature builds on general research about positive contributions of humor in building connections and establishing community,” which can ultimately lead to more positive outcomes. LITTLE, *supra* note 8, at 146.

²¹ Indeed, humor can even enhance legal scholarship. Gordon, *supra* note 4, at 319–20. In that vein, I offer you this joke:

Knock, knock.
Who’s there?
To.
To who?
To whom.

²² “[L]aw schools’ stakeholders . . . have called on law schools to do more than merely teach doctrine. These stakeholders have asked (or demanded) that law schools do a better job of preparing their graduates for practice.” Martin J. Katz, *Teaching Professional Identity in Law School*, 41 COLO. LAW., Oct. 2013, at 45, 45. “The organized bar continues to look to the legal academy to be a major force in solving the professionalism problem, despite the different perspectives on professionalism and the growing perception of increased separation between legal practitioners and the legal academy.” Steven H. Goldberg, *Bringing The Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414, 417 (2000). “A legal educator’s duty goes beyond teaching the law and shaping analytical minds; one additional responsibility is to model behavior desired in the profession.” Christine Cerniglia Brown, *Professional Identity Formation: Working Backwards to Move the Profession Forward*, 61 LOYOLA L. REV. 313, 314 (2015).

“... it is incumbent upon us to make ... clear ... when practicing attorneys would not use humor.”

doing so, are we also risking sending the erroneous message to our students that humor is appropriate in practice when in fact it may not be? Are we doing a disservice to the professionals we are trying to educate and, as a result, to the profession in general?

One could resolve the tension by admonishing students to “do as I say and not as I do.” But as demonstrated in this essay, humor is too valuable and important a classroom tool to either casually excuse or dismiss. Instead, we should embrace humor as a pedagogical accelerant, not a detriment. But we should do so carefully, threading the needle just so, especially given that professional signaling is one of the responsibilities of the law professor.

When we are in the classroom, we are modeling (hopefully) good professional behavior for teachers and not necessarily lawyers. Certainly, we are modeling basic good professional behavior for working adults—respecting others’ time, engaging in healthy discussions, following institutional rules, etc. But our pedagogical choices, including the decision to use humor in the classroom, stem from our professional identity as teachers and not as practicing attorneys.

It may be difficult, however, for students to fully appreciate that distinction when we are using humor to teach them how to be lawyers. The divide between the choices we make as teachers and those we want our students as aspiring attorneys may seem clear to us. But I acknowledge that it may not be for students. Perhaps we should consider that when students are practicing whatever law we are teaching them, they may think back, at least initially, to the classroom experience and the tone that was set about the material there.

Perhaps then, it is incumbent upon us to make that difference clear by explicitly noting times when practicing attorneys would not use humor or similar classroom strategies. For example, when I teach trusts and estates, I use “stirpe” as a verb to describe the process of distributing a decedent’s estate according to the per stirpe method of representation. I also caution the students that it is not a real verb and not something they should say to anyone outside of

the classroom. But it provides an easy shorthand, and one that I have seen parroted back to me on exams, for explaining the next steps of analysis. Similarly, in my legal writing class, I very clearly and consciously shift my demeanor and attitude when we discuss preparing for oral argument. I explain that oral argument is a conversation, but in a formal setting, where jokes are not appropriate.

Similarly, I spend time in my classes advising students to know their audience and the setting in which they are practicing. They should be mindful of the content and tone of their conversations, writings, or other interactions if they wish to be effective attorneys. The use of humor in the classroom, but perhaps not in practice, falls squarely within that admonishment.

V. Conclusion

Humor in the classroom depends on the personality of the professor. If successful, it can have very real and identifiable benefits on the students and their learning. In the practice of law, humor can sometimes help persuade people and develop rapport, but the risks of it going awry can be severe and often not worth taking. As we model behavior for our students in the classroom, we would be well served to keep in mind the standards of professionalism that will be expected of them as practitioners. But in doing so, we can still embrace our own humanity and style and look for opportunities to bring levity to a sometimes intimidating classroom experience.

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Write Like a Spy: Using U.S. Intelligence Guidelines to Reinforce the Lessons of Predictive Legal Writing

By Joe Fore

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I. Introduction

Legal writing professors often turn to non-legal examples to complement the things we teach in our courses. Indeed, legal writing scholars have gleaned writing and teaching lessons everywhere from politicians¹, to painting², to podcasts.³ This Article suggests another helpful—and even more direct—analogy to what we teach: the standards governing how national intelligence reports are prepared. Legal writing faculty can use these guidelines in a number of ways to reinforce key legal writing lessons and to help students reflect on their professional obligations toward their clients.

II. National Intelligence as a Legal Writing Analog

Conducting and communicating objective, predictive analysis is crucial for national intelligence analysts and lawyers alike. Consider the advisor role lawyers play. Whether it's helping a client decide to accept a settlement or take a plea, or counseling a client about a potential business deal, lawyers must frequently analyze the current state of the law and make predictions about future outcomes or consequences.⁴

¹ See Megan Boyd, *Legal Writing Lessons from American Presidents*, 15 LEGAL COMM. & RHETORIC 287 (2018) (reviewing JULIE OSEID, COMMUNICATORS-IN-CHIEF: LESSONS IN PERSUASION FROM FIVE ELOQUENT AMERICAN PRESIDENTS (2017)).

² See Beth D. Cohen & Pat Newcombe, *What Legal Writers Can Learn from Paint Nite*, 25 PERSPS. 35 (2016).

³ See Jessica Durkis-Stokes & Amy Vorenberg, *The Serial Podcast: Bringing the Real World into First-Year Legal Writing*, 29 SECOND DRAFT 10 (Fall 2016).

⁴ See Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN. ST. L. REV. 41, 43 (2018);

Now consider the role of the intelligence analyst. A decision-maker—for example, a military or political leader—approaches the analyst with a question about the current state of affairs or the possible consequences of a policy intervention.⁵ The analyst must review various intelligence sources, analyze them to answer the “client’s” question, and then report their analysis and predictions in reports that can be understood and used by others to support future decisions.⁶

Because both lawyers and intelligence analysts rely on thorough, clear, and actionable predictive analysis as a core part of their jobs, we would hope that there would be overlap in how they describe the best practices for doing that work. Fortunately, there is.

III. The Intelligence Community's Guidance for Objective Writing

Just as legal writing texts and articles have summarized the core tenets of good, clear legal writing, the intelligence community has also published best practices for conducting and communicating predictive analysis: Intelligence Community Directive 203 (“Directive 203”).

Joe Fore, “A Court Would Likely (60-75%) Find . . .”: *Defining Verbal Probability Expressions in Predictive Legal Analysis*, 16 LEGAL COMM. & RHETORIC 49, 50 (2019) (“Prediction is so central to lawyering that teaching objective, predictive analysis . . . takes up a considerable part of almost all first-year legal writing courses.”).

⁵ Federal law defines national intelligence “customers” as the President, the National Security Council, heads of Executive agencies and departments, senior military commanders, and Congress. See OFFICE OF DIR. OF NAT'L INTELLIGENCE, WHAT IS INTELLIGENCE?, <https://www.dni.gov/index.php/what-we-do/what-is-intelligence> (last visited Apr. 21, 2020).

⁶ See Jeffrey A. Friedman & Richard Zeckhauser, *Analytic Confidence and Political Decision-Making: Theoretical Principles and Experimental Evidence from National Security Professionals*, 37 POL. PSYCHOL. 1069, 1076 (2018) (describing the interactions between President Obama and intelligence officials about Osama bin Laden’s whereabouts before the raid on his compound in Abbottabad, Pakistan).

“Legal writing faculty can use these guidelines . . . to reinforce key legal writing lessons.”

“ . . . Directive 203 lays out . . . guidance on the contents and format of good analytical writing.”

Promulgated in 2007 after intelligence failures relating to September 11th and Iraqi WMDs⁷ and updated in 2015, Directive 203 established standards “that govern the production and evaluation of analytic products” by the intelligence community.⁸ Thankfully, you won’t need Top Secret clearance to read the document; it’s publicly available from the DNI’s own website and easily accessed with a Google search.

Though it’s just six pages long, Directive 203 lays out both broader themes about the goals of objective intelligence analysis and specific guidance on the contents and format of good analytical writing. Both are relevant to legal writing professors looking to reinforce the communication and professionalism lessons we are already sharing with our students in the classroom. Here are some of the lessons most applicable to legal writing:

Remain Objective and Independent

Lawyers are ethically bound to “exercise independent professional judgment and render candid advice” when counseling clients.⁹ So lawyers must guard against their own limitations, assumptions, or biases.¹⁰ They must also ensure their objective advice isn’t swayed by external pressures from clients. Clients are “entitled to straightforward advice expressing the lawyer’s honest assessment”—even when that means delivering news the client doesn’t want to hear.¹¹ And lawyers must also be willing to change their advice and their strategies when new legal or factual developments undermine their earlier judgments.¹²

⁷ See Jim Marchio, *Analytic Tradecraft and the Intelligence Community: Enduring Value, Intermittent Emphasis*, 29 INTEL. & NAT’L SEC. 159, 182 (2014).

⁸ See INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 203: ANALYTIC STANDARDS (June 21, 2007), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards%20pdf-unclassified.pdf>; INTELLIGENCE COMMUNITY DIRECTIVE 203: ANALYTIC STANDARDS (Jan. 2, 2015), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>. In this Article, all quotations and references to Directive 203 refer to the updated 2015 version.

⁹ MODEL RULES OF PROF’L CONDUCT 2.1 (AM. BAR ASS’N 2002).

¹⁰ See, e.g., Osbeck, *supra* note 4, at 71 (discussing “cognitive biases [that] may skew a lawyer’s predictions”).

¹¹ MODEL RULES OF PROF’L CONDUCT 2.1 cmt. 1.

¹² For example, under Federal Rule of Civil Procedure 11(b), a lawyer can be

sanctioned for “later advocating” a claim or factual contention when the support for that claim or contention has eroded since the time it was originally made. See also GEORGENE M. VAIRO, RULE 11 SANCTIONS § 5.04 (2004) (noting that, under Rule 11, “once it becomes apparent that the paper lacks a legal or factual basis . . . an attorney may not continue to advocate the positions taken in the paper”).

Directive 203, too, makes clear that intelligence analysts must render their best professional judgment—untainted by internal or external factors. Analysts must be vigilant to ensure their analysis isn’t skewed by their own assumptions; they “must perform with objectivity and with awareness of their own assumptions and reasonings.” And they must also guard against undue influence from their “clients” preferences; their assessments must be “[i]ndependent of political consideration” and “must not be distorted by, nor shaped by, advocacy for a particular audience, agenda, or policy viewpoint.” Lastly, while they must make judgments based on known states of affairs, analysts must remain open to changing their judgments “when new developments indicate a modification is necessary.”

Be Competent and Accurate

Lawyers have a professional duty of competence; indeed, it’s the very first rule in the ABA Model Rules of Professional Conduct.¹³ When advising clients, “[l]awyers need not be clairvoyant; they’re not liable for well-reasoned predictions that turn out to be wrong.”¹⁴ But lawyers are expected to use their training, experience, and research to seek out all sources of relevant information to render the best advice possible. Intelligence analysts are, likewise, expected to use the information at their disposal to make the best possible judgments. Directive 203 expressly states that intelligence analysts “should apply expertise and logic to make the most accurate judgments and assessments possible, based on the information available and known information gaps.”

Recognize and Convey Uncertainty

Of course, when trying to make predictions and render competent and accurate analysis, both lawyers and intelligence analysts face numerous sources of uncertainty. Lawyers, for example, may be asked to

sanctioned for “later advocating” a claim or factual contention when the support for that claim or contention has eroded since the time it was originally made. See also GEORGENE M. VAIRO, RULE 11 SANCTIONS § 5.04 (2004) (noting that, under Rule 11, “once it becomes apparent that the paper lacks a legal or factual basis . . . an attorney may not continue to advocate the positions taken in the paper”).

¹³ See MODEL RULES OF PROF’L CONDUCT 1.1 (AM. BAR ASS’N 2002).

¹⁴ Fore, *supra* note 4, at 50.

opine on unsettled area of law, or they may need to consider the idiosyncrasies of political actors or judges.¹⁵ To reflect these uncertainties and to indicate the lawyer’s best estimate of the likelihood of a given outcome, legal writing guides encourage legal writers to use modifiers like “unlikely,” “probably,” or “almost certainly” when delivering legal analysis.¹⁶

Directive 203 also recognizes the importance of assessing and conveying uncertainty in intelligence products. Intelligence reports “should indicate and explain the basis for . . . uncertainties,” including

(a) the causes of uncertainty (for example, the amount or quality of information available), (b) how the uncertainties affect the analysis, and (c) factors that “would alter the levels of uncertainty.” Like lawyers, intelligence analysts use probabilistic language to provide estimates of the likelihood of an event happening—for example, the likelihood that a terrorist is located in a given area. But while these terms lack established meanings in legal contexts, Directive 203 provides a specific vocabulary that ties each probability term to a specific numeric range:

| | | | | | | |
|------------------|-------------------|-----------------------|----------------------|-------------------|-----------------|--------------------|
| almost no chance | very unlikely | unlikely | roughly even chances | likely | very likely | almost certain(ly) |
| remote | highly improbable | improbable improbably | roughly even odds | probable probably | highly probable | nearly certain |
| 1–5% | 5–20% | 20–45% | 45–55% | 55–80% | 80–95% | 95–99% |

Consider Audience Needs

As legal writing professors and texts routinely preach, good legal writing requires an awareness of the readers’ needs and expectations.¹⁷ The kind of in-depth legal analysis—replete with footnotes, citations, and detailed discussions of precedent—that might be needed for an internal office memo may not be helpful in an email to a client who’s looking for bottom-line conclusions, recommendations, and actionable next steps. Directive 203 echoes this audience-focused approach, insisting that intelligence products should “[d]emonstrate customer relevance” and “provide information and insight on issues relevant to customers of U.S. intelligence.” Lastly, just like lawyers who must adhere to court- or client-imposed deadlines, the Directive recognizes even the best analysis is useless if it’s late. “Analysis must be disseminated in time for it to be actionable by customers,” and analysts should be aware of “customer activities and schedules, and of intelligence requirements and priorities, in order to provide useful analysis at the right time.”

Write in a Clear, Precise Way

As legal writing professors and practitioners preach over and over, legal writing must be clear and precise to convey its message to the reader. And whether we promote IRAC, CREAC, or TREAT, we also know that rigorous legal analysis demands an organized, logical structure. Intelligence officials also prize clarity and precision, and Directive 203 reflects that viewpoint: “[T]he analytic message a customer receives should be the one the analyst intended to send. Therefore, analytic products should express judgments as clearly and precisely as possible.” The Directive also echoes legal writing guidance about reasoning and organization by insisting that intelligence products “use[] clear and logical argumentation.” Indeed, the Directive gives an edge to those of us who preach the CREAC/CRAC formulation for legal analysis: it urges analysts to “present a clear main analytic message up front.” The use of the word “argumentation” is also telling. While intelligence reports are clearly intended to be objective documents—laying out various options for decision-makers—even “objective” analysis needs to take a position about the most likely outcome or state of affairs and then explain (or “argue”) why that position is the most probable one. In the same way, objective legal analysis also

“... good legal writing requires an awareness of the readers’ needs and expectations.”

¹⁵ See, e.g., *id.* at 51; Osbeck, *supra* note 4, at 71–72 (discussing the role of “non-doctrinal considerations” on case outcomes).

¹⁶ See Fore, *supra* note 4, at 52 nn.21–22 (collecting sources).

¹⁷ See, e.g., ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 6 (2016) (discussing how lawyers can have multiple audiences with “widely differing needs” and that a key task for a lawyer “is to figure out what your readers want to read”).

must take a position to be of use to a client, as mere equivocation is largely useless to readers.¹⁸

Use Visual Aids

Lawyers have long known the power of visual aids; photos, diagrams, and charts can make it easier for a reader to digest complicated concepts or facts.¹⁹ The intelligence community knows, too, that sometimes a picture is worth a thousand words. According to Directive 203, intelligence reports “should incorporate visual information to clarify an analytical message and to complement or enhance the presentation of data and analysis.” The Directive also lists specific situations that might call for visual aids, suggesting that “spatial or temporal relationships” might be conveyed more effectively in “tables, flow charts, [or] images.”

IV. Using Directive 203 in the Legal Writing Classroom

There are numerous ways a legal writing professor could use Directive 203 to help students reflect on the writing, analytical, and professional lessons they’ve learned in class. Here are just a few ideas for incorporating the document into the legal writing classroom:

- **Compare legal memos and intelligence reports.**

While legal memos and intelligence reports are both works of objective analysis, they differ in purpose, tone, and stylistic conventions. Most contemporary intelligence reports are—obviously—unavailable for public viewing, but many historical national intelligence estimates have been declassified and are available on the CIA’s own website.²⁰ So students could look at

¹⁸ See CHRISTINE COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 181 (3d ed. 2018) (“[S]imply saying that a court could decide one way or a court could decide another way is not helpful to your colleague who has asked you to research a legal question.”).

¹⁹ See, e.g., Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 J. LEGAL WRITING INST. 57, 64 (2015).

²⁰ See, e.g., DIR. OF NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE 92-7: SADDAM HUSAYN: LIKELY TO HANG ON (1992), https://www.cia.gov/library/readingroom/docs/DOC_0000469141.pdf.

examples of the two different document types and compare them using a genre-discovery approach.²¹

- **Consider the professional obligations of lawyers and intelligence analysts.** In addition to the documents themselves, students could be asked to compare the professional and ethical obligations faced by intelligence analysts and lawyers. Why are the values of objectivity, candor, and independence so crucial to both lawyers and intelligence analysts? How might the lawyer’s obligations to a client resemble or differ from the obligations faced by an intelligence analyst reporting to a higher-up or to a political actor?
- **Create a “Legal Writing Community Directive 203.”** One of the most interesting aspects of Directive 203 is its ambition: the document purports to summarize the core tenets of good, objective analysis and clear communication in just a few pages. Using the Directive as a starting point, students could be asked to create a similar document summarizing the key features of legal writing. What “guidelines” would they issue to lawyers or to legal writing students for delivering objective and helpful legal analysis to clients?
- **Assess Directive 203 as a work of legal writing.** Directive 203 is, itself, a type of legal document—a set of rules and standards promulgated by a governmental body to dictate future behavior. Students could be asked to assess how well the document does its job. Are there ambiguities in the guidance? Is it easy-to-read? Does the document use elements of effective writing and formatting—such as cohesive paragraphs, headings, and visual aids—to enhance understanding? Are there ways in which it could be improved?

While there are many possible ways to use it in the classroom, Directive 203 and the national intelligence context presents a promising way to reinforce lessons that we are teaching in legal writing courses.

²¹ See CHEW & PRYAL, *supra* note 17, at 3–8; see generally Katie Rose Guest Pryal, *The Genre Discovery Approach: Preparing Law Students to Write Any Legal Document*, 59 WAYNE L. REV. 351 (2013).

“... a legal writing professor could use Directive 203 to help students reflect on the ... lessons they’ve learned in class.”

Cite as: Gina Nerger, *Two Wrongs Can Make a Right: Introducing Flawed Samples for Effective Counter-Modeling*, 28 PERSPS. 19 (2020).

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

By Gina Nerger

Gina Nerger is a Professor of Legal Writing at The University of Tulsa College of Law.

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

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.

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

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

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

“Providing flawed samples to students in a way that increases learning takes planning and thought.”

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.

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 Statute⁷ 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

“... a professor can introduce a flawed sample to showcase this common mistake.”

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. Hillside, 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 load¹⁷ 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.

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.

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

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 WFAA-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 WFAA-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.

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More Than IRAC: Acronyms to Support the Writing Process

By Karen J. Sneddon

Karen Sneddon is a Professor of Law at Mercer University School of Law.

Writing is a complex task. The writer is faced with a number of choices and considerations about content, organization, phrasing, and style. New writers, those who are still developing their writing skills, can find support, direction, and reassurance with acronyms, a type of mnemonic device, that are commonly used throughout education to facilitate learning.¹ An acronym is a word formed from the initial letter of a series of words² and identifies key information in a memorable manner to promote comprehension and recall.³ Math teachers often introduce the order of operations (e.g., add, subtract, multiple, divide, square) using PEDMAS (**P**arenthesis **E**xponents **D**ivision **M**ultiplication **A**ddition **S**ubtraction) while English Language Arts teachers regularly introduce coordinating conjunctions using FANBOYS (**F**or, **A**nd, **N**or, **B**ut, **O**r, **Y**et, **S**o).⁴ In the context of writing, acronyms can provide writers with reminders about content, suggestions about structure, and guidance on alterations.

1 See generally JOHN MITCHELL, 100 IDEAS FOR SECONDARY TEACHERS: REVISION 77 (2016) (“Acronyms, mnemonics, and acrostics are fabulous ways of training memory.”).

2 Although acronyms are examples of mnemonic devices, not all mnemonics are acronyms. Mnemonics may consist of multiple phrases or rhymes. For example, the mnemonic “every good boy deserves fudge” helps novice musicians learn the lines of the treble clef, while acronyms are abbreviations that form a new word such as IRAC. See generally ROD L. EVANS, EVERY GOOD BOY DESERVES FUDGE: THE BOOK OF MNEMONIC DEVICES: HOW TO REMEMBER ALL THE STUFF YOU EVER WANTED TO KNOW (2007).

3 Cognitive science can provide guidance on how to promote student engagement, comprehension, and recall. E.g., Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. L. ETHICS 355 (2016).

4 See generally ANDY GRIFFITH & MARK BURNS, OUTSTANDING TEACHING: ENGAGING LEARNING (2002); Adam L. Putnam, *Mnemonics in Education: Current Research and Applications*, 1 TRANSLATIONAL ISSUES IN PSYCHOL. SCI. 130, 130–13 (2015) (publication of American Psychological Association).

Professors who teach legal writing already recognize the value of acronyms as teaching tools.⁵ IRAC, or one of its variations, provides a common organizational paradigm for legal writers⁶ and serves as a reminder about the typical content of written legal analysis and the order in which that content is presented.

This essay shares four acronyms drawn from K-12 writing instruction⁷ that can also be implemented into the legal writing classroom to support the work of developing student legal writers.⁸ These acronyms can be presented during the initial weeks of instruction in any legal writing course. The acronyms can then be referenced throughout the course. While at first glance, these four acronyms may strike the law professor as redundant or inappropriate given the skill level and experience of law students, they do, however, offer two benefits.

First, these acronyms help law students navigate the transition to our specialized form of expression—legal writing. Students come to law school from various academic backgrounds, such as mathematics, philosophy, engineering, criminal justice, and

5 The transition to legal writing can be difficult for students of all ranges of writing experience. See generally Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING 223 (2010).

6 See, e.g., Laura P. Graham, *Why-RAC? Revising the Traditional Paradigm for Writing About Legal Analysis*, 63 U. KAN. L. REV. 681 (2015); Diane B. Kraft, *CREAC in the Real World*, 63 CLEV. ST. L. REV. 567 (2015); Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 ME. L. REV. 239 (2004); Tracy Turner, *Flexible IRAC: A Best Practices Guide*, 20 LEGAL WRITING 233 (2015).

7 Various instructional techniques and learning strategies developed for K-12 classrooms can be adapted to the law school classroom. See, e.g., Debra Moss Curtis, *Everything I Wanted to Know About Teaching Law School I Learned from Being a Kindergarten Teacher: Ethics in the Law School Classroom*, 2006 B.Y.U. EDUC. & L.J. 455; 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).

8 Developing writers may especially find these four acronyms helpful, but these acronyms will also be of interest to writers of varying levels of experience and expertise.

“This essay shares four acronyms drawn from K-12 writing instruction that can also be implemented into the legal writing classroom”

English, and have a range of writing experiences and perspectives. Some law students may have not had formal writing instruction for years. For example, some may have earned AP credit in high school for college freshman composition and, therefore, not have taken any college level course that included writing instruction. Other students may have developed bad writing habits because their previous academic course work did not require them to create any significant writing projects. The acronyms discussed in this essay provide starting points for students who may lack confidence or experience with the writing process in general. Alternatively, even students with extensive writing experience may struggle to recognize how their strengths and weaknesses as writers relate to legal writing and therefore may benefit from these acronyms as well.

These acronyms also present law students with the opportunity to create connections between legal writing and their previous writing experiences. They can help law students recognize that the principles of good writing apply across all disciplines which, in turn, allows them to focus on translating their previous writing experiences to this new context. Dealing with a range of new law students with different writing experiences, the legal writing professor may struggle to provide a common base for classroom conversations and feedback.⁹ The acronyms discussed in this essay provide a common vocabulary students can reference during class, help them formulate questions to the professor during the writing process, and can help them better process feedback from the professor.

Second, these acronyms provide guidance on how to systematically approach a legal writing project, regardless of whether students received specific instruction about creating a particular project. Writing instruction, whether in K-12 or the professional school context, typically focuses more on the writing process than the final written

product.¹⁰ With the ever-increasing specialization of the law, it would be impossible for legal writing courses to anticipate and provide instruction on the creation of every possible document students will be expected to draft in practice. These flexible acronyms may provide guidance and confidence to students to help them navigate any project they may encounter in law school or in practice.

The following four acronyms correspond to the work a writer must complete during the five traditional stages of the drafting process. Accordingly, the professor can introduce them in class at each stage of the writing process. The five stages include: (1) prewriting, (2) writing, (3) revising, (4) editing, and (5) publishing. The first acronym below, **RAFT**, helps structure the prewriting stage, which is often a stage writers tend to skip. The second acronym, **MEAL**, supports the generation of text during the writing or drafting stage. The third acronym, **ARMS**, facilitates the revising stage by providing students with parameters that help them distinguish “revising” from “writing” and “editing.” The fourth acronym, **CUPS**, promotes student focus during the fourth stage of editing and further distinguishes “editing” from “revising.” All of these acronyms can be used to help students feel confident that they have reached the final stage of the writing process—publishing, also known as submission.

A. RAFT: A Systematic Inquiry to Support Prewriting

When approaching a new writing project, students are faced with a number of choices relating to content and presentation. The prewriting stage requires writers to brainstorm approaches, identify challenges, and recognize opportunities. To promote a methodical approach to the pre-writing stage, students can

“The acronyms discussed in this essay provide a common vocabulary students can reference during class”

⁹ For strategies on how to share meaningful feedback by developing a shared vocabulary between teacher and students see Jessica Clark & Christy DeSanctis, *Toward a Unified Grading Vocabulary: Using Rubrics in Legal Writing Courses*, 63 J. LEGAL EDUC. 3 (2013).

¹⁰ See, e.g., Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from Product to Process*, 24 REGENT UNIV. L. REV. 83 (2011).

use the acronym **RAFT**.¹¹ The acronym stands for **R**ole, **A**udience, **F**ormat, and **T**opic.¹²

Role underscores a key initial consideration of every writing project. A writer must consider both what the writer's role may be and what the role needs to be. For example, the writer should consider whether the writer is aiming to persuade, to inform, or do both. In the context of legal writing, the writer must also consider whether the writer is acting in the role of advocate, evaluator, advisor, or a combination thereof.

Audience, like role, is a key initial consideration of every writing project. First, the writer must identify all of the potential audiences including the primary audience, any potential secondary audience, and even the possibility of unintentional audiences. Once the audiences have been identified, the writer can then evaluate their experiences, knowledge, needs, and expectations. These considerations then inform the writer's subsequent decisions about format, content, tone, voice, and stylistic conventions. For instance, when writing an advice letter to a client, the writer must take into account the client's familiarity with the legal issue and knowledge about courses of action.

Format reminds the writer that legal documents must adhere to a number of formal conventions. The document may need to include the particular components or sections typical of that type, such as the need to include a table of authorities or a certificate of service in an appellate brief. Furthermore, the format choices a writer must assess when it comes to legal briefs must also adhere to court rules. However, writers should also leverage their formatting choices in a

manner that increases the readability of the text. For instance, the writer may consider the use of headings, the selection of font, typeface, and margins and line spacing. Format affects presentation, perception, and can help or hinder readability.

Topic concentrates the writer on determining what topics or content the writer should develop given the writer's role, the potential audience(s), and the format. After determining what content the project requires, the writer can determine the depth of coverage necessary. Only after the writer has made these two decisions should the writer explain, expand, analyze, summarize, or streamline the content as appropriate. When writing a purchase & sale agreement, for example, the writer needs to identify what provisions must be included, such as a financing contingency, and then customize those provisions as appropriate for the particular transaction.

Thus, the acronym **RAFT** facilitates structured brainstorming and thoughtful development of all legal documents, whether office memoranda, client letters, or court filings. Consequently, when introducing a new document, **RAFT** provides student legal writers a solid starting point for approaching the assignment.

B. MEAL: A Blueprint to Build Complete, Cohesive, and Unified Paragraphs

When moving to stage two of any drafting project—the actual writing stage—writers acknowledge that strong paragraphs are essential to creating a strong text. Paragraphs must be complete, cohesive, and unified. The acronym **MEAL**¹³ stresses the key content and typical organization of a well-constructed paragraph the writer should be referencing often during this stage. **MEAL**, sometimes described as the **MEAL** plan, stands for **M**ain idea, **E**vidence, **A**nalysis, and **L**ink.¹⁴

¹¹ See generally BEST PRACTICES IN LITERARY INSTRUCTION 355 (Lesley Mandell Morrow & Linda B. Gambrell eds., 4th ed. 2011). For research about the use of RAFT in a secondary English classroom, see, e.g., Cathy Smith Simon, *Using the RAFT Writing Strategy*, READWRITETHINK, <http://www.readwritethink.org/professional-development/strategy-guides/using-raft-writing-strategy-30625.html> (a web publication of the National Council of Teachers of English) (last visited May 8, 2020).

¹² Some writing instructors will use the strong RAFTS, which stands for **role**, **audience**, **format**, **topic**, and **strong verbs**. E.g., LORI JAMISON ROG & PAUL KROPP, THE WRITE GENRE: CLASSROOM ACTIVITIES AND MINI-LESSONS THAT PROMOTE WRITING WITH CLARITY, STYLE AND FLASHES OF BRILLIANCE 22 (2004).

¹³ Another helpful paragraph building acronym is **PEEL**. The acronym stands for **P**oint, **E**vidence/examples, **E**xplanation of examples/evidence, and **L**ink to the next paragraph.

¹⁴ For an examples of handouts explaining the **MEAL** plan, see, e.g., The KSU Writing Center, *Organizing Paragraphs with the MEAL Plan*, https://writingcenter.kennesaw.edu/resources/handouts_print/MEAL_PLAN%20Accessible.pdf (last visited May 8, 2020) and Thompson Writing Program: Duke University, *Paragraphing: The MEAL Plan*, <https://twp.duke.edu/sites/twp.duke.edu/files/file-attachments/meal-plan.original.pdf> (last visited May 8, 2020).

“Audience, like role, is a key initial consideration of every writing project.”

For example, the first sentence of each paragraph should showcase the paragraph's **main idea**. The pairing of "main" and "idea" reminds the writer that the paragraph's first sentence must highlight the value of the paragraph as relates to the document's overall purpose and audience. In other words, the writer must formulate a thesis sentence.

To support each paragraph's main idea, the writer must present **evidence** to the reader. In legal writing, that usually includes legal authorities, facts, policy considerations, statistics, or hypotheticals. The writer selects the appropriate evidence to ensure the main idea or thesis of the paragraph is supported.

MEAL also reminds the writer that a paragraph is not a mere compilation of evidence but must convey an **analysis** of the significance, meaning, and relevance of that evidence. The cited cases become curated illustrations of the reasoning of courts. Statutory terms are defined. Policy considerations are expanded upon. Hypotheticals are examined.

And finally, just as the first sentence of a paragraph should convey critical information to the reader about the content that follows, the last sentence should convey critical information as well. The last sentence should provide a **link** between the ideas advanced in one paragraph and those advanced in the next. By focusing on these links, the writer creates thoughtful, appropriate sequencing and establishes connections between these ideas that furthers the document's overall purpose.

It is important to note that this acronym should not be interpreted by students as mandating the length of paragraphs. Instead, the acronym is intended to facilitate the construction of strong paragraphs, regardless of length, that highlight the four components of a well-constructed one.¹⁵ **MEAL** reminds students of the power of the paragraph to bundle together like information, showcase the writer's analysis, and move the reader through the text toward a well-supported conclusion.

¹⁵ For an in-depth scholarly examination of paragraphs and paragraphing, see IAIN MCGEE, UNDERSTANDING THE PARAGRAPH AND PARAGRAPHING (2018).

C. ARMS: A Strategy for Purposeful Revision

All writers know the recursive writing process typically requires the creation of multiple drafts. Once the writer creates an initial draft, also described as a "sloppy copy," the writer must move to stage three where the revision process begins. Revision, also described as rewriting, can pose problems for developing writers. Novice writers may fall into the trap of manipulating the text rather than substantively enhancing or refining it.¹⁶ The acronym **ARMS** provides guidance for writers during the revision process. **ARMS** stands for **A**dd, **R**emove, **M**ove, and **S**ubstitute.¹⁷

When evaluating a draft during the revision process, the writer should consider whether **adding** additional substantive content is necessary given the document's audience and purpose. In the context of legal writing, additional content may take the form of a new case illustration in the rule explanation or another analogy in the rule application section of IRAC. The focus on adding relevant substantive content also prompts the writer to consider including additional sentences in the thesis, linking sentences, or transitions that also enhance the draft.

While some content should be added during this phrase, the writer also needs to consider whether other information should be **removed**. For example, a writer may decide to cull tangential policy consideration from the rule explanation section or eliminate a contrived factual inference from the rule application section. The writer may consider whether to delete marginal arguments or over-reaching counterarguments. The "R" reminds the writer that extraneous or duplicative information distracts the reader and therefore detracts from the document's overall purpose.

Next, **move** acknowledges the sequence of information in an initial draft may be geared

¹⁶ The **ARMS** acronym can also provide guidance to students during an in-class peer review exercise. For information about using peer review and peer editing in the classroom, see Cassandra L. Hill, *Peer Editing: A Comprehensive Pedagogical Approach to Maximize Assessment Opportunities, Integrate Collaborative Learning, and Achieve Desired Outcomes*, 11 NEV. L.J. 667 (2011).

¹⁷ Countless examples of creative posters and handouts for **ARMS** and **CUPS** may be found on Pinterest, for example, TpT Pins, PINTEREST, <https://www.pinterest.com/pin/541206080192932274/> (last visited May 8, 2020).

“... just as the first sentence of a paragraph should convey critical information to the reader ... the last sentence should convey [it] as well.”

“The writer should be selecting each word for accuracy, precision, and proper connotation.”

more toward the writer’s preliminary thought process rather than the reader’s ultimate needs. For instance, the writer may realize that a thesis sentence is residing in the middle of a paragraph instead of being located at the beginning of the paragraph. The initial parsing of terms in a statute may have cropped up in the rule application rather than the rule section where the text belongs. Words, sentences, and paragraphs are rearranged to improve the meaning and flow of the text.

Like move, **substitute** focuses on strengthening the existing text. The writer may recognize the need to swap authorities to use the most relevant legal authority for the point being advanced. The writer may also choose to flip sentence constructions from passive voice to active voice. Perhaps the writer clarifies ambiguous pronouns like “it” and “they.” The writer should be selecting each word for accuracy, precision, and proper connotation. Whether constrained by a word limit or acknowledging a reader’s limited attention span, substitute strives to ensure each word contributes toward the document’s purpose.

The revising stage can be overwhelming for a developing student writer. Revising with purpose (and with the **ARMS** acronym) can help prevent students from making changes solely for the sake of making changes. Just because a text can be rewritten does not mean it should be. **ARMS** provides guidance on how to effectively approach revising and keep the revising stage distinct from both the writing stage and the editing stage.¹⁸ Using **ARMS** ensures students make changes to the text that are purposeful.

D. CUPS: A Framework to Facilitate Focused Fine-Tuning

The fourth stage of writing, also described as proofreading, ensures the writer produces a polished final work product. Proofreading is most efficient when the writer reviews the text with a focus on fine-tuning the details. Making appropriate corrections, therefore, should be the

writer’s focus during this stage. The acronym **CUPS** identifies proofreading pointers and facilitates student focus during the editing stage. **CUPS** stands for **C**itation, **U**sage, **P**unctuation, and **S**pelling.¹⁹

Proper **citation** format offers the writer the opportunity to foster the writer’s credibility with the audience by ensuring citation convention is followed. During the writing process, the details of legal citations, such as what words should be abbreviated and how reporters should be designated, can be neglected. By requiring students to focus on citation format during this stage, the writer confirms the accuracy of the citations in order to produce a polished, professional final work product.

Usage in this context refers to the proper conventions of grammar and style. When focusing on usage, the writer verifies subject-verb agreement throughout the text as well as accommodates the stylistic conventions particular to legal writing. The writer also evaluates the tone and voice as well during the proofreading stage.

Reviewing for proper **punctuation** separately allows the writer to focus on the wayward placement of apostrophes and the existence of comma splices. Correct punctuation enhances the meaning of the text while incorrectly placed punctuation can severely undermine the integrity of the document and the writer.

Spelling reminds the writer that spellcheck may not have been activated and, even if activated, does not necessarily identify all spelling issues. Not only may it not distinguish between words like “statue” and “statute,” spellcheck cannot verify the accurate spelling of the parties’ names and case names. Spelling mistakes distract readers and interfere with their engagement with the text.

Finally, the editing stage requires the writer to focus on the details of their draft. After developing and revising a text, a developing writer may have little energy left for editing. **CUPS** highlights key details the writer must review and correct during this final stage. Facilitating focused

¹⁸ See generally LES PARSON, REVISING & EDITING: USING MODELS AND CHECKLISTS TO PROMOTE SUCCESSFUL WRITING EXPERIENCES (2001).

¹⁹ See, e.g., ROG & KROPP, supra note 12, at 18, 24.

fine-tuning of their text helps students produce a more polished final written product.

Conclusion

Acronyms, like all mnemonic devices, facilitate learning. For a writer faced with a multiplicity of choices when it comes to substance, form, and technical issues, acronyms provide useful prompts and reminders. IRAC is widely recognized as an invaluable acronym for developing legal writers, but IRAC is not the only writing-related acronym that can support the legal writing process. The acronyms shared in this essay can be used to support the writing process from grade school writing instruction to law school legal writing courses. Whether these

acronyms are recalled by law students from their pre-law school writing instruction or they are being learned for the first time in a legal writing course, the students consistently find these acronyms valuable. Additionally, regular use of these acronyms supports the student's transition to the professional expectations of legal writing, may reinforce previous writing instruction, provides a common vocabulary between teacher and student, and increases student confidence. Long after the law school grades have been posted for a legal writing course, law students can and hopefully will remember and use these acronyms to support the writing process.

“... IRAC is not the only writing-related acronym that can support the legal writing process.”

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A New Way to Teach Secondary Source Research: Source Discovery

By Elizabeth Sherowski

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I. Introduction

I recall with little fondness my own first-year legal research instruction, which consisted of sitting on uncomfortable seats in a darkened classroom, looking at overhead projections of various sources of legal authority, while the instructor droned on about the material contained in each source. Thankfully, my students today will be spared that experience, because legal research pedagogy has mostly moved away from this type of “source-based” instruction, in which the instructor describes each source and how it’s used, toward a more holistic legal research pedagogy that focuses on teaching students how to use each resource as part of a strategy for solving legal research problems.²

However, there is one area of legal research where many instructors still resort to a source-based model of instruction: teaching students how to use secondary sources. In fact, this method of instruction seems baked right into the name. After teaching students that secondary sources are not the law, but can be a great place to start research in an unfamiliar area, we dive right back into our source-based roots: Here’s a legal encyclopedia, this is what’s in it, this is how you use it. Here’s a treatise, this is what’s in it, this is how you use it,³ and so on.

In part, we do this because secondary sources are such a varied set of research tools. Each secondary source contains different types of information organized in different ways, making it difficult for

professors to find a uniform, process-oriented way to present these materials to students. Given this broad range of materials, information, and organization, we resort to the easiest (for us) and most efficient method we know: the source-based method.

Unfortunately, this source-based instructional method does our students a double disservice. First, like my long-ago first-year course, it eliminates any chance of active learning. Students are often reduced to passive participants in the research process, as they sit quietly while we tell them what they need to know. Even if we later provide exercises in which they can practice using secondary sources, these exercises are useless without the preparatory source-based introduction. By the time we get through the source-based lecture, we’ve already lost half the class. Second, this method only teaches students how to use secondary sources that are currently available and doesn’t equip them to use new or unfamiliar sources (or sources we didn’t have time to cover in class).

There is a better way to teach secondary sources (and, as we will see shortly, other research materials): the source discovery method. This method allows students to discover and evaluate the sources for themselves, and then put those discoveries into practice.

II. The Genre Discovery Method

The source discovery method of legal research instruction is modeled on the “genre discovery”⁴ method of legal writing instruction, which was pioneered by Alexa Chew and Katie Rose Guest Pryal at the University of North Carolina School of Law.⁵ Genre discovery treats legal documents as distinct genres, and theorizes that, just as literature students can be taught to identify the essential

¹ This Article was written while the Author was a Visiting Assistant Professor at the Mercer University School of Law.

² See, e.g., ERIC VOIGT, *LEGAL RESEARCH DEMYSTIFIED* xv (2019).

³ See, e.g., DEBORAH A. SCHMEDERMANN ET AL., *THE PROCESS OF LEGAL RESEARCH: PRACTICES AND RESOURCES* 59–85 (9th ed. 2016).

⁴ Alexa Z. Chew & Craig T. Smith, *Border-Crossing: Genre Discovery and the Portability of Legal Writing Instruction*, 25 PERSPS. 8 (2016).

⁵ The Author spent a year at UNC as a Visiting Clinical Assistant Professor.

“Each secondary source contains different types of information organized in different ways, making it difficult for professors to find a uniform . . . way to present [them] . . . to students.”

elements of a sonnet or fable, law students can be taught to identify the essential elements of an office memo or appellate brief. In the genre discovery method, students explore samples of a document type (a genre), analyze multiple samples to discover what they have in common, and then use those insights to draft their own legal documents.⁶

In a way, genre discovery mirrors the Socratic method used in doctrinal classes, where students “discover” the rule by reading and analyzing relevant legal authorities. In the same way that the Socratic method teaches students a process they can use to figure out an unfamiliar rule of law, genre discovery teaches students a process they can use to figure out how to write an unfamiliar document.

For example, students discover a genre of legal writing, such as demand letters, by exploring multiple samples. After reading several samples, students determine the requirements of the demand letter genre by constructing document maps.⁷ On the document map, students note common features and elements between the samples and how those elements are constructed. Students then synthesize their observations and make judgments about how they should construct their own documents.⁸

Genre discovery takes the place of professors or textbooks telling the students the “right” way to write a document. Rather than the instructor lecturing to the students, “these are the parts of an office memo, and this is how you write those parts,” students investigate sample office memos, determine the requirements of the genre, and decide how they will apply those genre conventions to their own work.

One of the most attractive features of genre discovery is that it is a transferable skill that can be applied to documents not traditionally covered in the first-

year LRW course.⁹ Where most students leave their first year knowing how to write an office memo, trial motion, and appellate brief, students taught using the genre discovery method are able to use that process to discern the patterns, contents, and organization of any legal document, even those they haven’t yet been exposed to. As a result, genre discovery empowers students to tackle any kind of legal drafting project.

This discovery-based method of instruction shouldn’t be limited to legal writing. The same method can be applied to teaching legal research, especially secondary sources. The method allows students to actively discover how various secondary sources work while also providing them with a process they can use in the future when they are confronted with unfamiliar sources. I call this method “Source Discovery.”

III. Using the Source Discovery Method

In a source discovery classroom, students work in small groups to investigate a variety of secondary sources and evaluate their usefulness in different research situations. Prior to class, they may have read the section in their legal writing or legal research textbook about what secondary sources are in general, but they have not been exposed to specific types of secondary sources.

To prepare for the class, the instructor obtains hard copies of the secondary sources they want the students to explore. For example, I use treatises, desk books, state-specific and general legal encyclopedias, and *American Law Reports*. To determine how many sources will be needed, divide the number of students in the class by four or five, depending on the size of small groups the instructor wants to use. The instructor should assemble four or five volumes of each source (again, depending on the size of the groups), as well as any indexes or other finding aids needed to use each source.

During class, each group receives one source, plus any finding aids. The groups examine the

“[This] method allows students to actively discover how various secondary sources work.”

⁶ ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* xvii (2016).

⁷ Chew and Pryal’s document map is a three-column table. In the first column, students identify the parts of the document; each document part becomes a row in the table. In the second column, they note in each row how the part is structured or worded. In the final column, they make inferences as to how they will write the document themselves. *Id.* at 30-31.

⁸ Chew & Smith, *supra* note 4, at 9-10.

⁹ CHEW & PRYAL, *supra* note 6, at xv.

“The source discovery method of research instruction has several advantages over traditional ways of teaching secondary sources.”

source while completing a “source summary,” which is source discovery’s equivalent of genre discovery’s document map. To complete the source summary, students answer the following questions about their source:

- Where does this source come from? Who wrote/edited it?
- What jurisdictions does the source provide information for?
- What information does this source contain?
- How is the information organized?
- What finding aids help you navigate the information?
- How often is the source updated?
- What updating tools does the source use?

Once their source summary is completed, the instructor asks students to come up with research scenarios where the source would be useful or, conversely, not useful. For example, students discovering *Strong’s North Carolina Index*, a state-specific legal encyclopedia, note that it is focused on North Carolina law, provides references to both primary and secondary sources, and is organized alphabetically by topic. So, one possible use of *Strong’s* would be providing a researcher with background information on an unfamiliar area of law and directing the researcher to the leading primary sources on that topic. However, *Strong’s* would be less useful to a researcher who had already located the leading primary law on a familiar topic.

Each group then reports out to the class on what their assigned source contains, how it’s organized, and what it’s useful for. After all the groups have reported out, each group selects another group’s source and, based on what they learned from that group, they use the new source to perform a short research project. By the end of the class, students are familiar with five types of sources, have had hands-on experience with two of them, and, most importantly, have learned a method they can use whenever they encounter an unfamiliar secondary source in the future.

IV. The Advantages of Source Discovery

The source discovery method of research instruction has several advantages over traditional ways of teaching secondary sources. First, the source discovery method promotes better learning. Students using this method must become active learners, discussing the assigned sources with members of their group, and collaboratively creating the source summary. After they have learned about their assigned source, they share their knowledge with the rest of the class. This provides a deeper learning experience for students compared to a traditional, instructor-led source-based method. Empirical studies show that students learn more when they actively participate in the learning process.¹⁰ Additionally, having students teach their newfound knowledge to their classmates further deepens their own learning because it causes them to reflect on their own understanding and integrate the material with their prior knowledge.¹¹

Second, the source discovery method promotes a crucial competency for legal professionals: information literacy. Information literacy teaches students to evaluate information by gauging its authenticity and reliability, and assessing its strengths and weaknesses.¹² The source discovery method teaches students not only what the sources contain, but challenges them to extrapolate that knowledge to scenarios where the source could be helpful in the future. This provides an opportunity to evaluate the source, not just for its reliability, but for its usefulness to a practitioner. This source evaluation skill is important because it can be transferred to other legal research sources, which will continue to evolve and develop over time due to technology.

Finally, source discovery is a flexible method which can be applied to primary sources as well.

¹⁰ Louis Deslaurieus et al., *Measuring Actual Learning Versus Feeling of Learning in Response to Being Actively Engaged in the Classroom*, 116 PROC. OF NAT’L ACAD. OF SCI. 19251, 19251 (2019), available at <https://www.pnas.org/content/116/39/19251>.

¹¹ Logan Fiorella & Richard E. Mayer, *Role of Explanations and Expectations in Learning by Teaching*, 39 CONTEMP. EDUC. PSYCHOL. 75, 76 (2014).

¹² Richard A. Danner, *Focus on Information Literacy: Law Schools Face Challenges Posed by Students’ Reliance on Online Material for Research*, NAT’L L. J., July 17, 2000, at C9.

For example, early in their first semester my 1Ls do a similar exercise to discover how statutes are organized. The students compare volumes of *Statutes at Large*, the *United States Code*, and the *United States Code Annotated* to look for underlying patterns in the sources' contents and structure. I ask a pared-down version of the questions on the source summary,¹³ leading the students to discover for themselves that codes, arranged by topic, are much more useful than chronological statutory compilations, and that annotated codes, with case notes and research references, provide more useful information than unannotated codes.

V. Conclusion

Like its predecessor genre discovery, source discovery allows students to teach themselves essential legal research skills. By giving students a framework within which they can think critically about each research source, we can promote more effective learning, encourage information literacy, and increase student confidence in their research skills across all resources. Just as genre discovery prepares students to write any document, source discovery prepares students to use any research source competently and confidently.

“By giving students a framework with which they can think critically about each research source, we can promote more effective learning”

¹³ “Where does this source come from? What does it contain? How is it similar to or different from the other sources?”

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Getting the Most Out of the Last Five Minutes of Class

By Austin Martin Williams

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I. Introduction

ABA Standard 303 requires accredited law schools to offer a curriculum in which students complete one or more experiential courses totaling at least six credit hours.¹ ABA Standard 304 defines and sets forth the requirements for experiential courses, including the requirement that law schools provide opportunities for student performance, self-evaluation, and feedback.² Over a three year period, a colleague and I modernized the so-called “minute paper” to create an easy-to-implement tool for providing students with regular opportunities for self-evaluation— in under five minutes!³ Called the 3-2-1 Classroom Assessment Technique (“3-2-1 CAT”),⁴ it maximized the last five minutes of our class, and instructors can use it in any type of course. This article discusses the benefits, drawbacks, and lessons learned using this exercise in a Law Practice Technology course.⁵

II. The Method

3-2-1 CAT provides students with a framework for reflecting on their comprehension of course materials and encourages them to think about how

they may employ what they learned in the future.

⁶ In our course, we required students to respond briefly in writing to the following statements during the last five minutes of each class:

- (1) List *three* things that you learned;
- (2) List *two* things that are still kind of confusing; and
- (3) List *one* way you will apply what you learned.

If we ran out of time to do 3-2-1 CAT in a given class, we posted the exercise online after class and gave students up to two days to respond. Whether completed inside or outside of class, the students were told to spend no more than five minutes on the exercise. Completion of 3-2-1 CAT was part of the overall class participation and professionalism score, and students who did not complete it lost points in that portion of their course grade.

In 2017, our first year using 3-2-1 CAT, we provided students with a handout for writing and submitting their responses at the end of class. In 2018, we utilized the quiz functionality in our course management system, TWEN, to allow students to submit their responses online. While handwritten responses ensured that students turned in the exercise before leaving class, the online collection method made it much easier for us to view and compare responses to a question. In 2019, we utilized an electronic survey platform, Springshare’s LibWizard, to collect responses over the course of the entire semester, which allowed us to better filter responses by student and by topics.

III. 3-2-1 CAT Benefits

While 3-2-1 CAT does not assess if a student has mastered a given concept or skill, it does provide many benefits that will enhance a variety of courses, including legal research and legal writing courses.

¹ ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. 303(a)(3) (2019–2020).

² *Id.* at 304(a)(4).

³ For more discussion on the “minute paper,” see Herbert N. Ramy, *Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 CAP. U. L. REV. 837, 873–76 (2013); see also Jodi S. Balsam, Susan L. Brooks & Margaret Reuter, *Assessing Law Students As Reflective Practitioners*, 62 N.Y.L. SCH. L. REV. 49, 51–52 (2018).

⁴ MELISSA BOWLES-TERRY & CASSANDRA KVENILD, CLASSROOM ASSESSMENT TECHNIQUES FOR LIBRARIANS 66–69 (2015).

⁵ The Author co-taught this course with Professor Nichelle Perry at North Carolina Central University School of Law from 2017–2019. The topics covered in the course included E-Discovery, Legal Analytics, Microsoft Word, and Practice Management Systems.

⁶ See BOWLES-TERRY & KVENILD, *supra* note 4, at 66–67.

“3-2-1 CAT provides students with a framework for reflecting on their comprehension of course materials”

First, this exercise provides students with an opportunity to proactively identify areas of concern prior to completing more formal formative or summative assessments. Since 3-2-1 CAT is ungraded, has no right or wrong answers, and is merely a tool to provide student feedback to the instructors, students will not feel excess pressure or alarm when completing it. Instead, we found that students were very open to identifying and confronting their challenges. This helped empower the students to take ownership over their own learning outcomes in the course.

Second, the open format of the exercise allows students to bring forward questions or concerns from all aspects of the course, including in-class discussions, assignments, and readings. During the three years we used 3-2-1 CAT, we received many responses about topics from the readings that we did not get to in class. Opening up 3-2-1 CAT to the full set of course materials provided us with the opportunity to identify all areas of confusion and address them in class as needed.

Third, brief student responses enable instructors to review the responses quickly, which allows for a fast turnaround time in addressing student issues and concerns.⁷ There were many times when we had to take a step back and spend more time on a topic than planned due to the student responses from 3-2-1 CAT. The ability to do a quick review of the responses allows instructors to adjust their course plans if more time is needed to cover a topic, which is valuable for novice and experienced instructors alike. This also benefits the students by enabling them to have a more active role in the delivery of course content.

Fourth, 3-2-1 CAT allows instructors to more easily identify trends and outliers within the class, including flagging individual students who are struggling before they fall too far behind. For students who needed more assistance, either with the course as a whole or with certain subject matter, we intervened in the form of individual meetings with them and recommendations for additional resources to assist them, such as articles or videos. If the majority of

the class seemed to be struggling with a given topic, we provided explanations and additional review at the beginning of the next class period and posted supplemental resources and explanations to our course management system. Such situations also provided us with valuable feedback on how well we communicated the material. If the majority of students were struggling with a topic, we, as instructors, were able to reflect on how to better present the topic in future semesters.

Fifth, 3-2-1 CAT helps satisfy ABA Standard 304's requirement that experiential courses provide students with opportunities for self-evaluation. Much like the journaling assignments or reflection papers often used in clinical offerings and legal writing courses, 3-2-1 CAT requires students to step back and reflect on their experience. Not only do students identify current areas for improvement, but they must also consider how they will apply what they have learned in the future. This requires the students to make a connection between what they learned in the classroom with how they expect to use it in practice.

IV. 3-2-1 CAT Drawbacks and Lessons Learned

While 3-2-1 CAT provides many benefits for students and instructors, it does have some potential drawbacks that instructors must consider and address in order to see the full benefits of the exercise.

First, in order for 3-2-1 CAT to work effectively, students must buy into the method and take ownership over their learning outcomes. As an ungraded exercise, some students may dismiss 3-2-1 CAT out of hand or provide unproductive responses. To help combat this, instructors should provide clear explanations about why they are using 3-2-1 CAT and then actively incorporate the student responses they receive into subsequent classes. By doing so, students will see the *present benefit*—instructors making adjustments in real time to help students—as well as the *future benefit*—how taking time to self-reflect can help them identify and resolve areas of concern or confusion as quickly as possible. In our course, we also made a connection for students between the type of self-reflection they did with 3-2-1 CAT and the type of self-reflection they will need to employ as practicing attorneys when determining if they are competent to take on

“... 3-2-1 CAT allows instructors to more easily identify trends and outliers within the class ...”

⁷ See Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. LEGAL EDUC. 418, 421 (1999); Ramy, *supra* note 3, at 852–53.

“[The exercise] . . . helped our students learn the importance of self-reflection, which they will need as practicing attorneys”

a client matter under Rule 1.1.⁸ Just as students need to be able to identify and admit when they are struggling with a concept, practicing attorneys need to be able to admit when a matter is outside their capabilities or requires more deliberate training, as can often be the case with technology competence.

Second, as referenced earlier, 3-2-1 CAT is not an objective measure of whether a student has grasped a skill or core concept in the course. Instead, it is an exercise that relies entirely on the students' self-perception about how well they understand the material. As such, it may not be as effective in measuring student comprehension as a more objective exercise. That's because students, like most novices, often have great difficulty accurately assessing how well they understand the material. Therefore, it is important for instructors to understand this limitation and know that effective employment of this exercise requires its use *in conjunction* with other assessment tools that measure student comprehension more objectively. Ideally, an instructor should compare responses on 3-2-1 CAT with a student's performance on formative and summative assessments in the course to see if the student had indeed accurately flagged areas of confusion or concern.

Third, even with the brief student responses typical of the 3-2-1 CAT exercise, it may be difficult for instructors to stay ahead of the feedback in order to provide timely follow-up to larger classes or ones that meet multiple times a week. Therefore, if class size or frequency is an issue, it may be wise to consider implementing one or both of the following strategies: (1) assign the exercise less frequently, such as at the end of the week, or after finishing a topic or course unit, or (2) utilize a teaching assistant who can review the responses for trends the instructor can address. After using 3-2-1 CAT for two years, we determined that we needed to scale it back in order to more effectively address student questions. The risk

is that if instructors are not responsive to student feedback because they cannot keep up, they will lose credibility with students or, worse, students may come to resent the exercise or the instructor. Thus, starting in 2019, we used 3-2-1 CAT only at the end of a unit, which was after every two class periods in our course. Our course met on Mondays and Wednesdays, so using 3-2-1 CAT during the last five minutes of each Wednesday class gave us sufficient time to collect, review, and address responses prior to the next class the following Monday.

Fourth, students noted in our 2018 course evaluations that they often felt obligated to provide full responses to each of the 3-2-1 CAT questions, rather than restricting their responses to no more than five minutes. For example, for certain topics, multiple students noted that they did not always have two items to list for areas of confusion. To address this, we prefaced the 2019 exercise by telling students that we wanted responses up to the stated number. This took the focus away from filling out the exercise just to get it done and put the focus back on providing us with the information we needed and giving the students the benefits of a meaningful self-reflection process.

V. Conclusion

For three years, we used 3-2-1 CAT as a simple self-reflection exercise to help us identify where students were struggling in our Law Practice Technology course. 3-2-1 CAT enabled us to respond to student concerns in a timely manner and identify trends and outliers in the course. In addition, it helped our students learn the importance of self-reflection, which they will need as practicing attorneys and throughout their legal careers. Just as importantly, 3-2-1 CAT provided valuable feedback to the instructors on how effectively we were delivering the course material, allowing us to take corrective action to address student confusion and to improve the course going forward. While instructors should not use this exercise to gauge student mastery of topics or skills, it can serve an important role in empowering students to take responsibility for their own learning and teach them how to engage in meaningful self-reflection.

⁸ MODEL R. PROF'L CONDUCT 1.1 (AM. BAR ASS'N 2016) (Rule 1.1 states that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").



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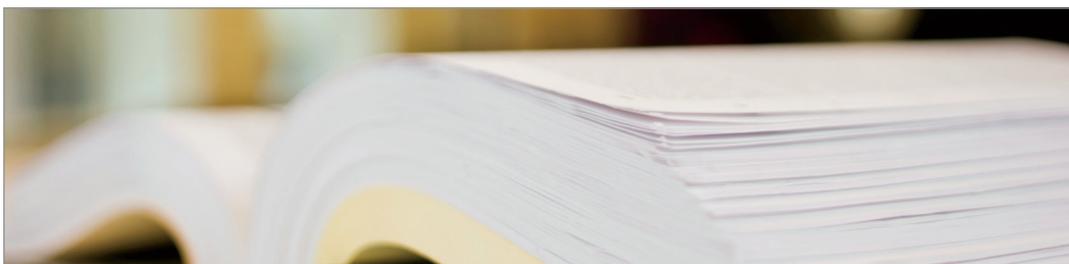
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