

# Perspectives

## Teaching Legal Research and Writing

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In March of 2020, due to the Covid-19 pandemic, DePaul University College of Law, like almost every other law school in the nation, shifted to remote learning. The courts, like the law schools, shifted to remote proceedings. Given that courts will likely continue to use at least some remote proceedings, we examine our pedagogical obligation, now that law schools have returned to in-person learning, to teach students the skills necessary for presenting effective oral arguments in a remote setting.

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

### Why Write for *Perspectives*?

*Perspectives* is for anyone who teaches legal research or legal writing, broadly defined to include the first-year and advanced LRW courses, transactional drafting courses, academic support methodologies, and courses on the American Legal system for international lawyers—in law schools, libraries, courts, and law offices. *Perspectives* articles are short, readable, and explore a broad array of teaching theories, techniques, and tools. The idea can be large or small but if it provides a fresh and creative way to teach or learn about legal research or legal writing skills, *Perspectives* editors would like to publish it. Writing for *Perspectives* allows you to add to your resume and get published quickly while reaching the people who share your passion for this area of the law.

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

### [Author Guidelines](#)

### In Our Next Issue

The next issue will be published as volume 30, issue 2. If you have ideas about how to teach either legal writing, broadly defined to include most types of law school writing, or legal research, broadly defined to include both introductory and advanced classes, please consider turning those ideas into an article for *Perspectives* that can be shared with our readers.

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## From the Editor in Chief

By Robin Boyle-Laisure

*Professor Robin Boyle is a Professor of Legal Writing at St. John's University School of Law.*

It is with great pleasure that we produce this 30th volume. For 30 years, *Perspectives: Teaching Legal Research and Writing* has provided the greater legal research and writing community with insightful articles, suggesting new ways to help our law students develop the necessary skills in meeting the ever-changing demands of law practice. This issue demonstrates how our authors have once again captured creative approaches to traditional approaches or provided new pedagogical tools.

Sarah Ricks is ahead of the curve in providing a startling percentage of federal appellate decisions that are non-precedential. Professor Ricks provides this sage advice, “Law teachers should teach students about non-precedential federal appellate decisions to better prepare them for law practice.”

Two articles address new approaches to student conferencing: Katrina Robinson suggests replacing the traditional way in which we conduct conferences with our students in the second semester with one that simulates a professional conversation attorneys would have when discussing a written draft. Cindy Thomas Archer describes Simulated Supervisor Meetings as a means to accomplish multiple goals of students’ development.

Related to working shoulder to shoulder with students, Bryan Schwartz applies a familiar concept of peer review and applies it in the context of having the professors guide a peer-review exercise. In this way, the professors can more effectively communicate what they are thinking when grading assignments.

Focusing on teaching legal research, Hadley Van Vactor suggests using a “research wish list” as a simple, yet effective, tool. Mark Cooney provides counterintuitive lessons that can help students understand and internalize legal research and writing concepts.

In a witty piece, Maryam Franzella compares casual digital communications with traditional grammatical conventions for formal writing. Building upon lessons from the pandemic, Joy Marcucci and Martha Pagliari address the pedagogical obligation to teach students skills necessary for oral advocacy in a remote setting.

*Perspectives* is unique in that academic law librarians and legal research and writing professors together serve on the Editorial Board. Our collaboration makes for a dynamic working relationship and helps to raise the bar of our publication. This issue would not have been possible without the excellent organizational skills and diligence of Brooke Bowman, Managing Editor. Another essential Executive Board member is our Assistant Editor in Chief, Nicole Downing, who helped in multiple stages of the publication process. Two teams of Editorial Board members reviewed submissions and thoroughly edited accepted articles: Jonathan Franklin, Jessica Hynes, Joe Regalia, Shannon Roddy, Judy Rosenbaum, and Michael Whiteman.

We hope you enjoy reading this issue as much as we enjoyed the articles. If you have a short article, lightly footnoted, please see our submission guidelines, and consider sending it to us for the next issue!

“For 30 years, *Perspectives* . . . has provided the greater legal research and writing community with insightful articles, suggesting new ways to help our law students develop the necessary skills in meeting the ever-changing demands of law practice.”

Cite as: Sarah E. Ricks, *Law Schools Should Teach Non-Precedential Federal Appellate Opinions*, 30 Persps. 4 (2023).

## Law Schools Should Teach Non-Precedential Federal Appellate Opinions

By Sarah E. Ricks

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Along with most law teachers, I help law students visualize the hierarchy of federal courts by using a triangle. The middle tier of the triangle represents federal appellate courts and their superiority to the lower tier of federal trial courts.<sup>1</sup> It's a helpful visual. But it glosses over the more complicated truth. The triangle we use to illustrate the hierarchy of legal authority suggests that every federal appellate decision binds the lower federal courts in its jurisdiction. In reality, only a tiny minority of appellate decisions are binding. About 87% of federal appellate opinions are non-precedential. Most law students would be shocked to learn that the vast majority of decisions by federal appellate courts bind no one but the parties themselves. Grappling with the existence, significance, and potential uses of non-precedential opinions is a challenging task that law students are not equipped to undertake without guidance from law professors. Law teachers should teach students about non-precedential federal appellate decisions to better prepare them for law practice.

### A. Existence of Non-Precedential Federal Appellate Opinions

Federal appellate courts are overworked. To more efficiently dispose of their dockets, federal appellate courts have adopted a range of administrative remedies, including the addition of law clerks and the reduction in use of oral argument. Most significantly for this essay, as an experiment beginning in the 1970s, federal

appellate courts began disposing of some appeals in “unpublished,” non-precedential opinions.<sup>2</sup>

Federal appellate court decisions labeled “non-precedential” are published electronically on court websites, commercial databases and, until 2022, even in their own reporter, the Federal Appendix.<sup>3</sup> But non-precedential federal appellate opinions do not bind future panels of the circuit, or future district courts otherwise obligated to follow the hierarchically superior court, or future litigants. Federal circuits claim to designate opinions as non-precedential when they are routine applications of settled law that have no significance for future litigation.<sup>4</sup>

Circuits that specify standards for publication for an appellate panel to designate an opinion as binding precedent flesh out that rationale. The criteria are generally similar to the Ninth Circuit *Criteria for Publication*:

A written, reasoned disposition shall be designated as an OPINION if it:

<sup>2</sup> See, e.g., Sarah E. Ricks, *A Modest Proposal for Regulating Unpublished, Non-Precedential Federal Appellate Opinions While Courts and Litigants Adapt to Federal Rule of Appellate Procedure 32.1*, 9 J. APP. PRAC. & PROCESS 17, 19–20 (2007); Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 223–27 (2006). For a fuller history of the non-precedential opinion, see, e.g., David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61 (2009); Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 35–47 (2005); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 717–18 (2004).

<sup>3</sup> The Federal Appendix ceased publication as of January 2022.

<sup>4</sup> See, e.g., 3d Cir. I.O.P. 5.3 (“An opinion . . . that appears to have value only to the trial court or the parties is designated as not precedential.”); 4th Cir. I.O.P. 36.3 (if “an opinion in a case would have no precedential value . . . the Court may decide the appeal by summary opinion”); 9th Cir. Loc. R. 32.1.(b) (orders “not published in the Federal Reporter, and are not treated as precedents”); c.f. D.C. Cir. R. 36(e)(2) (“a panel’s decision to issue an unpublished decision means that the panel sees no precedential value in that disposition”).

<sup>1</sup> The highest tier represents the Supreme Court.

“Most law students would be shocked to learn that the vast majority of decisions by federal appellate courts bind no one but the parties themselves.”



- (a) Establishes, alters, modifies or clarifies a rule of federal law, or
- (b) Calls attention to a rule of law that appears to have been generally overlooked, or
- (c) Criticizes existing law, or
- (d) Involves a legal or factual issue of unique interest or substantial public importance, or
- (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
- (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
- (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.<sup>5</sup>

If only a small fraction of federal appellate decisions were designated as “non-precedential,” the circuits’ proffered justification for producing non-binding opinions would be plausible and law schools’ tendency to ignore non-precedential opinions would be understandable. But federal appellate courts issue 87% of their merits decisions in non-precedential opinions.<sup>6</sup> More precisely, of the 32,796 federal appeals disposed of on the merits in the year before September 2020, an average of 87% were non-precedential.<sup>7</sup> In the Fourth and Ninth Circuits, over 93% of federal appellate opinions were non-precedential.<sup>8</sup> Labeling the opinion as precedent or not is the choice of the federal appellate panel. Reasons for the choice are not provided to the public. Given that federal appellate courts designate an

average of 87% of their opinions as non-binding, it strains credulity to suppose that all of these opinions are simply routine applications of settled law that would not be useful to future courts or litigants. Because non-precedential opinions are the vast majority of the federal appellate merit dispositions, law students should learn about their existence.

## B. Usefulness of Non-Precedential Federal Appellate Opinions

Consider the connection between reasoning by analogy and the towering pile of 87% of federal appellate opinions. American law evolves in part by courts selecting the most apt analogy from existing precedent. The American legal system serves “core values of stability, certainty, predictability, consistency, and fidelity to authority.”<sup>9</sup> The concept of “rule of law” and the public’s consent to be governed by the rule of law are premised on confidence that “cases [will] be decided consistently and according to preexisting authority,” and that like cases will be treated alike.<sup>10</sup> To ensure like cases are treated alike, reasoning by analogy is a core common law method. As Richard Cappalli has explained, “the true content of law is known not by the verbal rule formulations but by the application of those verbal formulations to specific settings. Astute lawyers look for cases analogous to theirs decided under abstract rule formulations.”<sup>11</sup>

As lawyers and judges regularly consult non-precedential opinions, law schools can better prepare students for law practice by teaching them how to use federal non-precedential opinions. Lawyers and judges read non-precedential authorities because they are the vast majority of federal appellate work product—87%. A circuit’s non-precedential opinions therefore are more likely to contain examples of analogous facts or rules fleshed out in the context of specific facts.

“[L]aw schools can better prepare students for law practice by teaching them how to use federal non-precedential opinions.”

<sup>5</sup> 9th Cir. Loc. R. 36-2.

<sup>6</sup> Admin. Off. U.S. Courts, U.S. Court of Appeals Judicial Business, *U.S. Courts of Appeals—Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2020* Table B-12 (2020), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b12\\_0930.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2020.pdf)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Problem?* 44 AM. U. L. REV. 757, 777 (1995).

<sup>10</sup> *Id.*

<sup>11</sup> Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 768 (2003).

“Does the decision remain simply non-binding?”

Moreover, lawyers and district courts research and rely on non-precedential authority because that vast body of cases often includes the best predictors of what an appellate court will do tomorrow. An example illustrates the point. The Sixth Circuit frequently relies on its own non-precedential authority in defining the Fourth Amendment right to be free from unreasonable police use of force. In *Kijowski*, for example, the Sixth Circuit defined a Fourth Amendment right: “the right to be free from physical force when one is not resisting the police. . . .”<sup>12</sup> In *Kijowski*, the Sixth Circuit further fleshed out the contours of that Fourth Amendment right, reasoning that “[a]bsent some compelling justification—such as the potential escape of a dangerous criminal or the threat of immediate harm—the use of such a weapon [Taser] on a non-resistant person is unreasonable.”<sup>13</sup>

*Kijowski* is a non-precedential opinion that plainly stated a constitutional right. The Sixth Circuit itself has cited *Kijowski* twenty-nine times, seven times in binding precedent.<sup>14</sup> Obviously, the Sixth Circuit’s reliance on *Kijowski* does not transform the decision into binding authority. Yet its presence in appellate reasoning is a good indication that the Sixth Circuit itself finds it persuasive. And might do so again. In fact, 96 district courts inside and outside the Sixth Circuit have cited *Kijowski*.<sup>15</sup> Certainly a district court or litigant could not responsibly ignore this case, despite its non-precedential status, both as a clue to future court reasoning and as a fruitful source of potentially useful arguments.

### C. Teaching Non-Precedential Opinions to Law Students

While it may be obvious to law teachers that a circuit’s reliance in precedent on the reasoning or holding of a non-precedential case does not thereby transform the non-precedential authority into binding law, students need our guidance to discern that point. After all, looking at it from

a student’s perspective, the non-precedential opinions are nearly identical to precedential opinions. Precedential and non-precedential opinions are authored by the same hierarchically superior court. Likewise, both precedential and non-precedential opinions garnered a majority of the panel, both resolved a real dispute, both invoke the same circuit’s law, and both are available in nearly identical formats on Westlaw and Lexis. The critical difference is the label, “not precedential.”

And when a federal appellate precedent relies on its own non-precedential authority, students need our guidance to navigate the consequences for the weight of that non-precedential authority. Does the decision remain simply non-binding? Or has the non-precedential authority gained persuasive value from being invoked or relied on in a circuit’s precedent? If so, would that persuasive value increase if the non-precedential opinions were invoked or relied on by multiple circuit court precedents? Would a non-precedential authority similarly gain persuasive value if it were invoked once—or often—by recent non-precedential decisions? All of these are subtle questions of weight of authority with no clear or “right” answer. Students deserve our guidance on these tricky questions in the law school classroom.

In addition to discussing all of the above issues in my own legal writing classroom, I purposefully assign a spring brief problem that requires students to grapple with non-precedential opinions. Students quickly realize the non-precedential opinions are useful tools to identify current binding precedent and to flag relevant legal issues. Because the larger pile of non-precedential authority (87%) is more likely than the smaller pile of precedent to contain factual scenarios analogous to the pending case, students mine the non-precedential opinions for potential analogies to the key facts in their own briefs. If the students choose to cite a non-precedential case in their appellate briefs, I show them how to bolster the

<sup>12</sup> *Kijowski v. City of Niles*, 372 F. App’x 595, 601 (6th Cir. 2010).

<sup>13</sup> *Id.* at 600.

<sup>14</sup> See, e.g., *Browning v. Edmonson Cty.*, Ky., 18 F.4th 516 (6th Cir. 2021).

<sup>15</sup> Westlaw KeyCite report as of December 6, 2022.

persuasive value of the case by demonstrating it has been relied on (or followed or quoted) by a binding precedent. Whether or not the students choose to cite non-precedential authority in their appellate briefs, I am confident that exposure to non-precedential opinions helps prepare them for their summer jobs.

In my upper-level course on *Current Issues in Civil Rights Litigation*, we delve further into questions raised by the federal appellate courts' choice to label the vast majority of their decisions on the merits as "non-precedential." If the label "non-precedential" connotes lack of importance, why has the U.S. Supreme Court granted certiorari from appellate decisions so labelled?<sup>16</sup> Does disposing of 87% of cases in non-precedential opinions that bind no one apart from the parties introduce arbitrariness into federal appellate decision making and undermine predictability? Is the practice consistent with the common law values of treating like cases alike and avoiding relitigation of issues decided by the hierarchically superior court? Should individual panels of appellate judges retain the power to label their opinions "non-precedential" without explaining why—as they now do?

Rather than first encountering non-precedential federal appellate opinions in the more pressured environment of law practice, law students need to learn about them while still in school. Although the first-year legal writing curriculum already is crammed, students need warning before their first summer jobs that the vast majority of federal circuit decisions on the merits are non-precedential. Students need to learn how non-precedential opinions provide useful guidance in predicting the outcome of a legal analysis governed by that circuit's law. Students also need to learn that non-precedential opinions are a rich resource for potentially winning arguments. To best prepare our students to be lawyers and judicial law clerks, law teachers should educate students about the existence and role of non-precedential federal appellate cases.

“[N]on-precedential opinions are a rich resource for potentially winning arguments.”

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<sup>16</sup> See, e.g., *Torres v. Madrid*, 141 S. Ct. 989 (2021).

Cite as: Katrina Robinson, *Let Them Lead: Professional Identity Formation in Student Conferences*, 30 Persps. 8 (2023).

## Let Them Lead: Professional Identity Formation in Student Conferences

By Katrina Robinson

*Katrina Robinson is an Assistant Clinical Professor of Law at Cornell Law School.*

Student-faculty conferences are a hallmark of first-year legal writing courses. The predominant view in the legal writing community is that the individualized feedback that flows from a student's in-depth conversation with their professor about their writing is critical to the student's growth as a legal writer.<sup>1</sup> But the efficacy of this one-to-one exchange depends on the student's willingness to actively engage in the process.

To address the challenge of student engagement, legal writing professors continue to refine the pedagogy for successful student conferences. But typically, they have done so within the confines of the traditional roles of student and professor. This Article advocates for changing that approach in the second semester of the first-year legal writing course so that conferences resemble a professional conversation attorneys would have about written work product.

After enduring lackluster conferences during my first semester of teaching legal writing, I made this very change and was delighted by the results. For the second semester, I replaced the traditional student-faculty conference with a simulation of a meeting between two attorneys about how to

revise a written draft, and I graded students on their ability to lead that meeting. Changing my approach to conferencing in this way not only prevented students from participating passively during their conferences, but also, it gave students the opportunity to begin cultivating their professional identities in the role of an associate leading a meeting.<sup>2</sup>

Whether you are interested in increasing students' active participation in conferences or you are searching for an exercise that satisfies the ABA's recent revisions to Standard 303(b),<sup>3</sup> I hope you will find this approach to conferencing useful. My experience with it was overwhelmingly positive, and I am excited to "conference" with students in this format again.

### I. The Traditional Student-Faculty Conference

Legal writing professors have long recognized the value of the student-faculty conference,<sup>4</sup>

<sup>1</sup> See, e.g., AMY VORENBERG, STRATEGIES AND TECHNIQUES FOR TEACHING LEGAL ANALYSIS AND WRITING 25, 30 (2012) (advocating for professors to conference with students at least once per semester and noting that most students say that conferencing with their professors was one of the most helpful forms of feedback they received); David I. C. Thomson, *What We Do: The Life and Work of the Legal Writing Professor*, 50 J. L. & EDUC. 170, 204–06 (2021) (describing the uniqueness and value of legal writing student-faculty conferences); AMY VORENBERG, STRATEGIES AND TECHNIQUES FOR TEACHING LEGAL ANALYSIS AND WRITING 25, 30 (2012). But see John A. Lynch, Jr., *The New Legal Writing Pedagogy: Is Our Pride and Joy a Hobble?*, 61 J. LEGAL EDUC. 231, 234–35 (2011) (acknowledging the value of conferencing with students but arguing against holding mandatory conferences for all students more than once per year, as part of a broader critique of the labor-intensive "new legal writing pedagogy").

<sup>2</sup> Providing students opportunities to develop the skills they will need to thrive in practice is an important goal of modern legal education. See ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 332 (1992); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 8 (2007). Legal writing professors have been devoted to reworking their syllabi and curriculum to ensure that students receive opportunities to develop such skills in first-year legal writing courses. See, e.g., Sheila F. Miller, *Are We Teaching What They Will Use? Surveying Alumni to Assess Whether Skills Teaching Aligns with Alumni Practice*, 32 MISS. COLL. L. REV. 419 (2014).

<sup>3</sup> The ABA requires law schools to offer students opportunities to develop their professional identity; and the ABA defines "professional identity" to include the "values, guiding principles, and well-being practices considered foundational to successful legal practice." REVISIONS TO THE 2021–2022 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 3 (eff. Feb. 2022), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2021-2022/21-22-standards-book-revisions-since-printed.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/21-22-standards-book-revisions-since-printed.pdf) [hereinafter ABA REVISIONS TO THE 2021–2022 STANDARDS]; see also Mem. from Scott Bales & William Adams to Interested Persons and Entities, *ABA Standards and Rules of Procedure—Matters for Notice and Comment—Standards 303 and 508 and Rules 2 and 13* (Mar. 1, 2021), <https://taxprof.typepad.com/files/aba-16.pdf>.

<sup>4</sup> See generally, Robin Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255 (2004).

“Changing my approach to conferencing in this way not only prevented students from participating passively . . . , but also, it gave students the opportunity to begin cultivating their professional identities . . . .”

describing it as potentially the “most effective means” of developing students’ legal writing<sup>5</sup> and as “essential” to the legal writing course.<sup>6</sup> This is in part because the conference helps legal writing professors convey “effective feedback,” which has been described as feedback that “engages students in active learning exercises that help them learn the concept, self-monitor by assessing their understanding, and build self-motivation.”<sup>7</sup>

Most legal writing professors require or strongly encourage students to conference with them at least once each semester.<sup>8</sup> Such conferences can occur at any time in a student’s writing process, but traditionally, legal writing professors require students to conference with them as part of a four-part schedule for a major writing assignment.<sup>9</sup> A simplified explanation of that four-part schedule appears below.

- **Draft:** The student works independently on a first draft of writing, such as a memorandum or brief, based on what they have learned from reading assignments and class sessions.
- **Comment:** The professor provides written comments on the draft for the student to review.
- **Conference:** The student and professor meet to discuss the student’s understanding of the professor’s written comments and the student’s ideas for incorporating that feedback in their writing going forward.

5 Sheila Rodriguez, *Using Feedback Theory to Help Novice Legal Writers Develop Expertise*, 86 U. DETROIT MERCY L. REV. 207, 209–10 (2009).

6 JOEL ATLAS ET. AL, A GUIDE TO TEACHING LAWYERING SKILLS 59 (2012).

7 Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227, 230–31, 234 (2015).

8 See ASS’N OF LEGAL WRITING DIR./LEGAL WRITING INST., ALWD/LWI 2015 SURVEY REPORT, LEGAL WRITING INSTITUTE 13, 104 (2015), [https://www.alwd.org/images/resources/2015%20Survey%20Report%20\(AY%202014-2015\).pdf](https://www.alwd.org/images/resources/2015%20Survey%20Report%20(AY%202014-2015).pdf) (noting that in every ALWD/LWI survey since 2010, over 95% of responding schools have reported that legal writing faculty give feedback to students during conferences; and for the 2014–2015 academic year, conferencing with students was the second most common method for providing feedback, leading legal writing faculty to spend an average of 47.5 hours in the fall semester and 44 hours in the spring semester conferencing with students). The annual ALWD/LWI surveys after 2015 did not collect similar data about conferences.

9 See Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Clinics*, 17 CLINICAL L. REV. 285, 316 (2010) (outlining contemporary legal writing programs’ typical schedule of draft, comment, conference, and rewrite).

- **Rewrite:** The student works independently to rewrite the draft in light of the feedback they received both from the written comments and the conference.

Each step in this schedule represents a unique pedagogical opportunity to advance a student’s legal analysis and writing.<sup>10</sup>

In particular, the one-on-one conference allows the student and the professor to focus only on the student’s learning and to work together to improve the student’s progress to-date. This individualized attention cannot be achieved in the classroom where instruction is general and answers to follow-up questions during class may not be relevant to every student. And the real-time collaboration during a conference is more efficient, if not more impactful, than the revision relay of the professor working independently to comment on the student’s draft and then, the student working independently to understand the comments and rewrite their draft in light of the professor’s comments. For these and many other reasons, legal writing professors place significant value in conferencing with students.

But many students have never talked in depth about their writing one-on-one with a professor before. As a result, students may not know how to prepare for or participate during a conference in a way that takes advantage of the opportunities this forum presents. Legal writing professors have observed that some students “tend to view the conference experience as one in which they must learn what the professor ‘wants,’ and what they must do to satisfy the professor’s idiosyncrasies.”<sup>11</sup> Relatedly, legal writing professors have noticed that some students see the steps leading up to

10 Of course, there are many ways to create these pedagogical opportunities and not every legal writing professor follows this four-part schedule. For example, some professors find the conference so effective that they eliminate the intermediate step of providing written comments on students’ papers and just provide live feedback to students during the conference. See, e.g., Alison Julien, *Going Live: The Pros and Cons of Live Critiques*, 20 PERSPS. 20 (2011); Anne Hemingway & Amanda Smith, *Best Practices in Legal Education: How Live Critiquing and Cooperative Work Lead to Happy Students and Happy Professors*, 29 SECOND DRAFT 7 (Fall 2016); Patricia Grande Montana, *Live and Learn: Live Critiquing and Student Learning*, 27 PERSPS. 22 (2019).

11 Wellford-Slocum, *supra* note 4, at 312.

“Each step in this schedule represents a unique pedagogical opportunity to advance a student’s legal analysis and writing.”



“Because students did not meaningfully prepare for their conferences, the exercise felt artificial and unnecessarily academic, which was antithetical to the course’s mission to use practice-like exercises whenever appropriate.”

and including the conference as mere busywork students must complete before the professor will tell them what to write. These misunderstandings lead students to underprepare for their conferences and then arrive at their conference only ready to *receive* instruction, not to *contribute* to a conversation about improving the written draft.<sup>12</sup>

To prevent such passive participation, legal writing professors often take time during a class session that precedes conferencing to explain to students what steps they should take to prepare for their conference, as well as how the professor expects them to participate during their conference. Additionally, some professors require students to complete preconference exercises like a self-reflection, a self-edit, or a “revision task.”<sup>13</sup> Although these methods to prevent passive participation have merit, their success is often hamstrung by the power dynamic that arises when a student conferences with a professor.

#### A. Reflecting on the Traditional Student-Faculty Conference

During my first year of teaching legal writing, I followed the traditional four-part schedule and required students to submit partial drafts of their closed memos. I wrote extensive comments on those drafts. And before conferences began, I devoted some class time to trying to convince students not to be discouraged by the comments and instead to commit to grappling with the feedback until they understood it well. Specifically, I instructed students to review each comment carefully, to reflect on all the comments comprehensively, and to reexamine their drafts holistically in light of the feedback. And I provided a list of questions for students to consider before their conferences:

- Do you know how to execute the recommendations I made?
- Do you know why I suggested the changes?
- Can you answer the questions I asked in some of the comments?
- Do you understand why I asked those questions?

When I started conferencing with students, I fully expected the conferences to run smoothly—students would have read my comments and have clarifying questions about some of my suggested edits, or they might have ideas to discuss about reworking their analysis for the final draft of the closed memo. I can almost hear the snickering of veteran legal writing professors as they read this paragraph . . .

Needless to say, that is not how the first round of conferences went. Instead, most students started their conferences by accurately summarizing some comment or several comments I had made on their drafts, but most students would not otherwise indicate that they understood the underlying problem that prompted my comment or that they had reflected on how to resolve the problem my comment had flagged for the next draft. Because students did not meaningfully prepare for their conferences, the exercise felt artificial and unnecessarily academic, which was antithetical to the course’s mission to use practice-like exercises whenever appropriate.<sup>14</sup>

Worse still, whenever I sensed a student was faltering during their conference, I would swoop in for the save—I would start explaining the issues I was seeing in the draft and sometimes I would not stop explaining until the conference had ended.<sup>15</sup> By doing so, I inadvertently turned many of those first conferences into a cram session of everything I had already taught students in class. The combination of the students’ subpar participation and my overzealous participation made me worry

<sup>12</sup> See, e.g., *id.* (“[W]hen students perceive their role as passive, . . . [this perception] not only misleads students as to the pedagogical purpose of the conference, but does not serve as an effective motivator.”).

<sup>13</sup> See, e.g., Christy DeSanctis & Kristen Murray, *The Art of the Writing Conference: Letting Students Set the Agenda Without Ceding Control*, 17 PERSPS. 35 (2008) (noting that first-semester law students need direction in agenda setting for one-on-one writing conferences and advocating for professors to provide a preconference questionnaire with high-level questions to promote self-reflection and conference preparation); Wellford-Slocum, *supra* note 4, at 284 (describing the self-edit and revision task exercises).

<sup>14</sup> See ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 2.

<sup>15</sup> See Wellford-Slocum, *supra* note 4, at 275 (discussing observations from a systematic review of videotaped student conferences and noting a common pitfall by legal writing professors was “too much time talking during most conferences”).



that this experience of conferencing could cause students to learn bad habits rather than to hone the skills they would need to prepare for practice. And if my worry proved true, that would mean I had unintentionally undermined the important goal of providing a “practical legal education,” which others have described as “all about putting the student in the role of the lawyer and setting high expectations for behavior and product.”<sup>16</sup>

Eager to revamp conferencing before the second semester began, I brainstormed how to create guardrails that would prevent me from interjecting unnecessarily. I wanted the students to do most of the talking—and thinking—during our conferences. I considered what I had experienced in practice and how it might translate to conferencing with students, and that’s when I realized what I needed to do: I needed to let them lead.

When I was in practice, I had often asked first- and second-year associates to present at or lead our team meetings. It was one of the few opportunities junior attorneys had to take ownership of a task in our often-hierarchical work culture. And whenever I created the space for these junior attorneys to present at or lead team meetings, they would fill that space—always rising to the occasion of facilitating a productive meeting for our team. I decided to try to replicate this experience with my students.

## II. The Simulated Meeting: Letting Them Lead

Like my syllabus for the first semester, my syllabus for the second semester originally included a note that directed students to “attend a one-on-one conference.” Before the second semester started, I replaced that note with a graded assignment: “Lead a Meeting.” In the directions for this new assignment, which appear at the end of this Article, I explained that by completing this assignment, students would practice organizing, preparing for, and leading a one-on-one meeting with a mock supervisor to help the students process the feedback they had received on the drafts of their briefs.

Because I wanted to signal to students that my expectations for this assignment were different from my expectations for the first semester’s conferences, I emphasized that I had redesigned the second semester’s conferences to simulate a meeting in legal practice. I encouraged students to use the assignment as an opportunity to begin forming their own professional identities.<sup>17</sup> I told students that they would be the “meeting organizer,” which meant they would be responsible for completing the following tasks:

- Scheduling the meeting.
- Emailing the supervisor an agenda twenty-four hours before the meeting.
- Starting the meeting on time.
- Managing the conversation during the meeting to cover all topics on their agenda in the allotted time.
- Ending the meeting on time.
- Sending the supervisor a follow-up email within twenty-four hours of the meeting that summarizes the conversation and identifies their next steps in writing the brief.

For some students, this assignment would be the first time they would write an agenda or summarize a meeting, so I provided samples of the initial email with an agenda and the follow-up email with a meeting summary. I also explained that, when writing an agenda for any meeting, the organizer’s goal should be to give attendees a sense of what will be discussed at the meeting so that the attendees can prepare. I also suggested a process for creating an agenda for a meeting about feedback:<sup>18</sup>

“I wanted the students to do most of the talking—and thinking—during our conferences.”

<sup>17</sup> See ABA REVISIONS TO THE 2021–2022 STANDARDS, *supra* note 3, at 3.

<sup>18</sup> I intended this process to build on the guided questions I had offered students in the first semester to use in evaluating their own work. By offering a flexible process, my goal was to move students from practicing cognitive skills of answering specific guided questions about one draft to practicing metacognitive skills of becoming an effective self-editor for any draft. See Bloom, *supra* note 7, at 234–35 (distinguishing between cognitive skills and metacognitive skills); Wellford-Slocum, *supra* note 4, at 311–12 (discussing the benefits of encouraging students to assume the role of critical self-editor).

<sup>16</sup> See Thomson, *supra* note 1, at 195.

“The assignment led students to ask thoughtful questions about workplace routines and norms.”

- First, students should review the feedback they received on their drafts and make a list of questions they might like to discuss.
- Then, students should rank their questions in order of importance—by doing so, students could prioritize the most important questions for the twenty-minute meeting and save any extras for a subsequent “meeting” (also known as office hours). The ranked questions would be the basis for the agenda and students could summarize the topics their questions addressed, or they could share the exact questions they intended to ask in a bulleted list.

And finally, I explained that when writing a follow-up email for any meeting, their goal should be to help the meeting’s attendees keep a record of what was discussed and the plan going forward.

The assignment led students to ask thoughtful questions about workplace routines and norms. Their questions, in turn, prompted me to devote an entire class at the end of the second semester to continuing our discussion of professional email etiquette and culture with an eye towards additional instruction about professional identity formation.<sup>19</sup>

#### A. Reflecting on the Simulated Meeting

The results of the simulation blew me away: Thirty-seven meetings in three days. Every single “associate” started and ended their meeting on time. Every single associate talked for the majority of their twenty-minute meeting. And every single associate asked questions that showed they had internalized the feedback they had received and were thinking critically about how to improve their briefs. I took this as proof positive that I was no longer working with passive students but with people who were actively engaged in their legal education and invested in preparing for their legal careers.

Some of the success of this assignment relates to the timing of the meetings. They took place in the second semester when students were

more familiar with the rigors of law school and more comfortable meeting one-on-one with a professor. But timing alone could not have caused the full transformation I saw.

There was some magic buried in the assignment. For some students, the magic was knowing that they would have to preselect a list of topics or questions to create an agenda, share that agenda in advance of the meeting, and then manage twenty minutes of conversation to cover that predetermined agenda. This responsibility was different from the first semester’s mere obligation to “prepare for” and “attend a conference.” Having this responsibility motivated students to invest the time into reflecting on the feedback, using the feedback to evaluate their own work, and brainstorming ways to improve the draft going forward.

For other students, the assignment ignited their interest because it allowed them the opportunity to explore their own style and professional identity as a “meeting organizer.”<sup>20</sup> Having the permission—indeed, the responsibility—to drive the discussion about their writing made a significant difference for students who otherwise would not feel comfortable doing so given the power dynamics at play in a traditional student-faculty conference.

Either way, the assignment led the students to meaningfully prepare for the meetings and think critically about their writing, as an attorney would do in practice. The students enjoyed the meetings, I enjoyed the meetings, and most importantly, the students learned more from the meetings than they could have in a traditional student-faculty conference—more about their legal writing and more about their professional identities. I call that a huge success.

<sup>19</sup> Although the details of that end-of-semester class are beyond the scope of this Article, I mention it in case this new approach to conferencing I am proposing in this Article might dovetail nicely with a class on professional email you already have in your course curriculum.

<sup>20</sup> Perhaps my decision to have students create the meeting invitation through Zoom and then serve as the “host” of the Zoom meeting contributed to students’ feelings of truly leading the meeting. I could see how for some students, some of these feelings might be dampened if they had to lead a meeting in their professor’s office. But I would not hesitate to try this assignment in an in-person format because, in practice, students will often have to lead a meeting in the office of a supervisor, colleague, or client.

### B. Grading the Simulated Meeting

If you're thinking that's all well and good, but what about grading the meetings? Happily, I can report that it wasn't too bad, perhaps because much of it was based on satisfying basic criteria: starting on time, sending timely emails, and editing the emails carefully.

During each meeting, I marked whether the student started and ended their meeting on time, and I jotted down some substantive notes about each student's preparedness, the quality of their questions, their ability to manage the conversation, and their overall professional demeanor. Once all the meetings were over, I used the time-stamped emails to determine whether each student had sent their initial email twenty-four hours before their scheduled meeting and their follow-up email within twenty-four hours after their scheduled meeting. Finally, I reread each email and commented on whether it was professional and error-free.

Most students received full points for managing the conversation during their meeting—the “leading” the meeting part of the assignment. Many students, however, lost points for untimely emails, unprofessionally formatted agendas, and/or error-laden emails. All in all, it was the easiest assignment to grade all year.

From my perspective, this assignment is nearly “plug and play” for next year.<sup>21</sup> The only tweaks I plan to make are to include more instruction about how to write a professional email before meetings begin and to require each student to complete a self-reflection after their meeting so that they have more time to consider the professional identity they are forming.

Reframing the student-faculty conference as a simulated meeting that the students lead confirmed a lesson I had learned from working with junior associates in practice: If I create the space, they will fill it. Simply put, I needed to get out of the way and let them lead.

“If I create the space, they will fill it.”

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<sup>21</sup> I would not recommend adopting this style of “conferencing” during the first semester of a first-year legal writing course for fear of cognitive overload.

## Directions for Project 2: Lead a Meeting

Graded (10%)

This graded assignment will allow you to practice professional skills of organizing, preparing for, and leading a one-on-one meeting with a mock supervisor (Professor Robinson). Additionally, it will help you process the feedback you received on the draft of the first half of your brief.

You will meet with me for twenty minutes via Zoom sometime between Monday, February 28 to Friday, March 4. You will be the “meeting organizer,” which means you will do the following:

- Schedule a time for us to meet;
- Prepare an agenda for the meeting;
- Share the agenda before the meeting;
- Lead the meeting once it begins;
- Manage the conversation during the meeting; and
- Send a follow-up email summarizing the meeting and identifying next steps.

To accomplish those goals, you should do the following:

- Review the feedback you received on the first half of your brief and make a list of questions you would like to discuss with me;
- If your list of questions is long, rank the questions in order of importance;
- Create an agenda based on your questions (an agenda should give your supervisor a sense of what you plan to talk about so the supervisor can be prepared; to prepare your supervisor, you can summarize the topics your questions address, or you can share the exact questions you intend to ask);
- In real life, you should send a calendar invitation to hold the meeting time, but for our class, you will sign up for one of the appointment slots available on Canvas’s “Calendar” page;
- Typically, its best to include the agenda in your calendar invitation; but because you will not send a calendar invitation, you will draft a professional email to me that includes your agenda at least twenty-four hours before your scheduled meeting;
- You will “lead” the meeting once it begins, which means you will start the meeting, manage the conversation during the meeting so that you cover the material planned on the agenda in the allotted time, and you will end the meeting on time<sup>22</sup>; and
- You will send a follow-up email within twenty-four hours of your scheduled meeting with a summary of what we discussed during the meeting and a description of the next steps you plan to take in light of our conversation.

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<sup>22</sup> If you have more questions than can be covered in twenty minutes, you can discuss those questions with me and the tutors during office hours at length. You are not limited to twenty minutes of feedback. The purpose of this assignment is to give you the chance to practice leading a meeting, which includes practicing time management.

## Sample email with agenda:

Hi [Supervisor],

I look forward to meeting with you at 9:00 a.m. on Monday, February 28. The Zoom link we will use is: [insert link].

I appreciate the feedback you offered on my partial brief. I would like to discuss some of that feedback with you. And I would like to talk through a sentence-level outline I prepared for the second half of the brief. Here is my proposed agenda for our meeting:

- Discuss feedback on the partial brief:
  - How to revise my introductory paragraph to have better flow between the high-level governing law and the standards of review; and
  - How to write more persuasive and readable point headings.
- Talk through the sentence-level outline:
  - Whether I have effectively integrated my plan to anticipate and undermine my opponent's argument; and
  - Whether my policy argument has enough content.

Best,

[Supervisee]

## Sample email with summary and next steps:

Hi [Supervisor],

Thank you for meeting with me yesterday to discuss my partial brief and sentence-level outline. I appreciate the feedback you offered. And I look forward to implementing the advice you gave as I work on my final brief.

For your records, here is a summary of what we discussed:

- Beginning the introductory paragraph by describing the crux of the issue, then describing the high-level governing law, and then starting a new paragraph to explain the standards of review.
- Revising my point headings so that they are shorter and have a consistent format (assertion, followed by main support).
- Anticipating and undermining my opponent's argument as part of my own affirmative argument without discussing it at length or making the argument for the opponent.
- Tightening my policy argument so that it takes up fewer pages but retains its persuasive power.

Going forward, I plan to do the following:

- Finish incorporating the line edits you provided on my partial brief today;
- Spend the next few days drafting the second half of the brief as we discussed;
- Set aside my completed draft brief for a day;
- Spend a few days editing, polishing, and refining the draft before submitting it by 5:00 p.m. on Wednesday, March 16.

Best,

[Supervisee]

## Rubric for Project 2

Criteria	Comments
Demonstrated that you had carefully reviewed and reflected on the feedback on the first half of your brief by crafting thoughtful questions about that feedback	
Sent a reminder email with an agenda at least twenty-four hours before the scheduled meeting	
Drafted a professional and error-free email to your supervisor that included an agenda and reminded your supervisor of the time and Zoom link for the meeting	
Included content in the agenda that could be covered in a twenty-minute meeting	
Drafted a professional and error-free agenda	
Began the meeting on time	
Managed the conversation during the meeting to cover the material listed on the agenda	
Ended the meeting on time	
Sent a follow-up email to your supervisor within twenty-four hours of the scheduled meeting	
Drafted a professional and error-free email to your supervisor that included a summary of what was discussed during the meeting and a description of the next steps you plan to take in light of the conversation.	
Score:	



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# Taking the Simulated Supervisor Meeting Online and Making It a Collaborative and Inclusive Practice Experience

By Cindy Thomas Archer<sup>1</sup>

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## A. Introduction

In a Lawyering Skills course, a Simulated Supervisor Meeting<sup>2</sup> is an important part of the first-year curriculum because of the myriad ways it produces practice-ready students. And through thoughtful planning, it can be used for a variety of assignments and even in groups to promote collaborative learning between students and their “supervisor.” Moreover, taking the simulation online prepares our students to integrate technology into their professional toolbox. Having students communicate the results of their research through a Simulated Supervisor Meeting (“SSM”) is not a new idea. A 2014 article in the *Second Draft* explained some of the mechanics and listed many of the benefits.<sup>3</sup> Other teaching resources have been created since then that are easily accessible: videos,<sup>4</sup> grading tools, even a recording of senior attorneys’ perspectives on oral presentation of research results.<sup>5</sup>

Building on those resources, this article first explains how the SSM can be used at any stage of the research and analysis process, not just for reporting final research results. Then it explains how I use it to promote collaborative learning by facilitating the meeting with a small group of students. Next it explores why an *online* SSM is an important tool to prepare students for aspects of practice that many of us never experienced—the online legal practice environment. This article also suggests ways that the SSM can be used to promote healthy professional identity development by creating safe inclusive learning environments. Finally, it offers a step-by-step approach to preparing for and implementing SSM exercises for any class.

## B. Simulated Supervisor Meetings at Any Stage of Analysis

For almost two decades, I have used SSMs as a method for students to report the results of their research. The many benefits include the opportunity to practice oral communication beyond oral arguments;<sup>6</sup> another avenue to synthesize ideas and organize them “on their feet”;<sup>7</sup> a way to model good supervisor behavior; and finally, for students who have never worked in a “professional setting,” a chance to explore their own professional identity formation in context.<sup>8</sup> Over the years, I have incorporated SSMs at

“For almost two decades, I have used SSMs as a method for students to report the results of their research.”

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<sup>2</sup> Also known as an oral research report.

<sup>3</sup> See generally, Sarah Morath, *From Awkward Law Student to Articulate Attorney: Teaching the Oral Research Report*, 27 *SECOND DRAFT* 6 (Fall 2013/ Winter 2014).

<sup>4</sup> Sarah Morath, Professionalism, YouTube (last visited Apr. 24, 2023), <https://www.youtube.com/playlist?list=PLw3H9KjkoihUGQ7YjlnrPTzgG4Fi60-R>

<sup>5</sup> Wash. Univ. Sch. of L., *Oral Presentation of Research Results*, KALTURA (last visited Jan. 12, 2023), [https://www.kaltura.com/index.php/extwidget/preview/partner\\_id/2480991/uiconf\\_id/43717111/entry\\_id/1\\_zj3jbd5/embed/dynamic](https://www.kaltura.com/index.php/extwidget/preview/partner_id/2480991/uiconf_id/43717111/entry_id/1_zj3jbd5/embed/dynamic).

<sup>6</sup> Morath, *supra* note 3, at 6 (citing Henry Peritt, Jr. Taking Legal Communications Seriously, 33 U. Tol. L. Rev. 137, 139 (2001)); Jennifer M. Cooper, *Let Them Talk: Cognitive & Social Benefits of Elaboration*, 45 *NOVA L. REV.* 329, 329 (2021).

<sup>7</sup> Cooper, *supra* note 6, at 337–38.

<sup>8</sup> E. Scott Fruehwald, *Developing Law Students’ Professional Identities*, 37 U. LA VERNE L. REV. 1, 29–31 (2015); 2022–2023 STANDARDS FOR APPROVAL OF LAW SCHOOLS standard 301(c).

“Because the benefits of collaboration are so important to practice, I no longer do this exercise one-on-one.”

various stages of the research and analysis process; I generally assign one, sometimes two, in a semester.

While I and others have traditionally used the SSM as a type of “capstone” research report in the spring semester after students have learned to report their research in writing for other assignments, I have also used the SSM as an early assignment in the first weeks of school as well as later in the year. For example, I now assign an SSM in the first month of classes. Instead of asking them to do any research, since the first assignment is a closed universe memo, I ask them to assume that they have done research on the topic for the first memo and that their research has identified the five cases provided to them for their closed memo. Then I ask them to report in the SSM about how each case could be useful to them in writing the memo. While, like most students, they brief the cases and we discuss them as a class, it is sometimes difficult to determine how much individual students really understand based on the large class discussions. This assignment works well for discussing the cases that will be used in the closed memo because its benefits are not in researching and finding sources but in encouraging students’ clear communication of their understanding and application of the law. In addition, this particular SSM allows me to test their understanding of the law before they write their memo. This SSM has accomplished my goals because I have seen improvements in their memos since I started using the SSM at this stage.

I still use the SSM at other stages in the research and analysis process. I assign students to research in a scaffolded manner, generally in three-parts:

- Initial question (often a quick, turn-around assignment): The students are given only a limited number of facts and are asked, “Is there any law that provides relief?”
- Follow-up question: Students are given all the facts and asked, “What are the legal sources you would use to address the client’s issue?”
- Final question (sometimes): Students are given new facts and are asked, “Now that we have new information, does this change your analysis or the applicable law?”

The SSM can be used at any of these stages, to report students’ findings, to present their understanding of the law, or to discuss their predictions based on their application of the law. And by giving them more than one bite at the apple, they are able to try the process multiple times and also clarify their understanding of the law before drafting a complete analysis.

### C. Simulated Supervisor Meetings in a Group Setting

While many of the resources discussing SSMs assume a one-on-one student to supervisor setting, I find facilitating meetings with two or more students allows me to focus on another important lawyering skill—collaboration. My experience in legal practice was a collaborative environment, and I use SSMs to prepare students for that by assigning SSMs either in law firm groups<sup>9</sup> of four-to-five students or in two-person partnerships. The multi-student environment has two key benefits. First, it is more representative of the collaborative process lawyers use to think through issues and present their analysis.<sup>10</sup> Because the benefits of collaboration are so important to practice, I no longer do this exercise one-on-one. (Did I also mention meeting with more than one student at a time helps in scheduling multiple SSMs throughout the year?)

Second, SSMs give me an opportunity to model effectively how to work within a team. Because of equity concerns, I use group assignments judiciously, and I am thoughtful about how I set up the assignment and how I assess the students’ participation. Two of the issues I am trying to avoid in the group project setting are (1) the influence of the self-appointed leader, and (2) group-think/peer pressure that causes the participants to ignore valid input because the majority of students

<sup>9</sup> Before the start of classes in fall, I randomly assign students to law firm groups. Before the first SSM, I assign low-stakes, in-class exercises to the student law firms to familiarize students with each other. In the second semester, I assign groups based on my knowledge of student personalities and abilities, balancing good working relationships with the opportunity for them to productively challenge each other.

<sup>10</sup> Clifford Zimmerman, “Thinking Beyond My Own Interpretation”: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum, 31 ARIZ. ST. L.J. 957, 959 (1999).

are comfortable with an idea.<sup>11</sup> Unlike sending students off unsupervised for a group project, as the facilitator/supervisor of SSMs, I can guide the group through the process and, at the same time, model effective collaborative processes that students can duplicate when working later in unsupervised groups.

I use the law firm group SSM for the first open memo early in the research process because the goal of this SSM is to help students organize and interpret what they have found, i.e., practice reading and synthesizing the law and organizing it around fact-based issues. I facilitate the discussion priming them to synthesize and not merely report their findings. Having students orally present their analysis at this stage forces them to think clearly and succinctly. Because it is a conversation, I can guide and gently correct in the moment rather than proving feedback a week later in response to a written report. I also really like that students can hear each other's responses and my conversation with other students. Hearing other students respond correctly but differently lets them know there is not just "one right way" to accurately communicate the law. Having them hear another student respond incorrectly but be guided gently by me to the correct response lets them know it is okay to try. Again, with my guidance, I can create a safe inclusive learning environment within a professional setting.

In the second semester or when I think the students are ready for a further challenge, I use SSMs with two-student partnerships. I assign partners based on what I perceive to be similar skill levels and complementary personality traits. Because it is the second semester, I am less of a facilitator and more of an inquiring attorney supervisor. And because students have experience from at least one prior SSM, they are prepared for the inquiries and the conversational tone. Although they know who their partner in the meeting will be, I do not "assign them roles" or specific issues; they are expected to each be prepared to answer questions about the entire analysis. They are required to do their research independently before the SSM and

then to be prepared to engage as they are asked different questions about the law and the issues in the meeting. They are often surprised to learn that their partner in the meeting has arrived at a different result or relied on different sources. When that happens, I have them each explain their process, and we try to resolve it together. As much as this is about students reporting their findings and analysis, it is also about exposing them to what they can learn from each other and training them to be comfortable with the collaborative process. In law school, it may be about the individual grade; in practice, it is about everyone rowing in the same direction to meet the client's need.

#### D. Taking Simulated Supervisor Meetings Online

Before 2020, the meetings took place in my office with students prepared to explain to me, the supervisor, what they had found, how it would likely affect the client, how they reached that conclusion, and what they suggested for further legal research or fact investigation. In fall 2020, I pivoted to *online* simulated supervisor meetings ("OSSM") because of the pandemic. At first, I was frustrated because I had used this teaching tool many times in the past, and I knew it worked well—in person. Since 2020, however, I have conferred with students about their online summer internships and with former colleagues and alumni who now not only meet online with colleagues but appear online before judges and in depositions. And studies are clear; fewer and fewer lawyers are returning fully to in-person practice.<sup>12</sup>

Accordingly, while my original intent was to return to in-person simulations, I quickly realized the need to prepare students to transition to the online environment. Although adding new substantive units to already comprehensive syllabi is always challenging, transitioning old content and exercises to new contextual environments, like online,

“They are often surprised to learn that their partner in the meeting has arrived at a different result or relied on different sources.”

<sup>11</sup> Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577, 588–89 (2018) (muted group theory in power relationships).

<sup>12</sup> Dan Roe, *Want to Thin Your Law Firm's Head Count? Mandate 3 or More Days of Office Attendance*, ALMLAW.COM (May 5, 2022), <https://www.law.com/2022/05/05/want-to-thin-your-law-firms-head-count-mandate-3-or-more-days-of-office-attendance/?slreturn=20220911173647> (reporting young lawyers are leaving firms if required to practice in-person, full-time).

“Students are often so focused on substantive content that I need to remind them of logistical issues that can affect their communication.”

may be more easily achieved. OSSMs provide such an opportunity to allow students to practice using technology in a professional setting while reporting the results of their research or analysis.

While the substantive legal content in the SSM is essentially the same whether in person or online, facilitating the meetings online gives me the opportunity to discuss how to effectively participate in online meetings and to address the professional and ethical concerns unique to the online environment. While some of these issues are important in person as well as online in legal practice, the following considerations are highlighted or exacerbated in an online environment. Students are often so focused on substantive content that I need to remind them of logistical issues that can affect their communication. Below are some of the issues we discuss:

- *Confirm where and when you will meet online.* I tell students that tardiness, without notice, is generally unacceptable in professional environments. For emphasis, I inform them that for our meetings, tardiness, without notice, results in an automatic 50% deduction in points.
- *Test your equipment ahead of time.* I want them to know that they need to know which device they'll use and how it works. I remind them that the device must be updated with the platform we'll use. To drive home this point, I note that I have a desktop computer, a laptop, an iPad, and a smartphone, and the camera location is different on each. I also remind them that they need to test these things out before the time set for our meeting. To illustrate this point, I mention that there have been multiple times that I have gone onto Zoom for a meeting and the first thing Zoom wants to do is update “NOW.”
- *Consider your online background.* I observe that attending school from home can be a challenge, just as it can be in practice. I ask students to use background filters to blur their physical background which could be distracting, but not facial filters.<sup>13</sup>

- *Dress camera ready.* We discuss “traditional professional dress” separately, but I also ask them to practice camera angles, especially considering what they will wear when we meet given that certain angles can hide eyes, emphasize cleavage, or create glare on their glasses.
- *Address your connection challenges.* Not all students have strong connectivity. For example, if a student's connection never works while video is on, they need to alert me, their supervising attorney, ahead of time, rather than just assuming it is fine to turn off the camera. Further, while wireless earphones look “cool,” they often have connectivity issues. I also encourage them to use a secure line.<sup>14</sup>
- *Sharing content.* Because small things like “sharing content” can be a challenge for students who have not done so in a professional business setting, I do not have students share visual content in the OSSM. Rather, we discuss how and when in practice it might be appropriate to share or to have information that might be requested available to share.<sup>15</sup>

## E. Creating an Inclusive Professional Environment

Part of the work in creating effective simulations is preparing an inclusive learning environment that does not merely duplicate “traditional” practice environments. The most effective way to prepare students for practice is not to throw them into uncontrolled practice spaces, but instead to create safe<sup>16</sup> inclusive learning environments that simulate

<sup>14</sup> While our simulations do not technically contain confidential attorney information, raising the idea of using a secure line is an entryway to discussing professional responsibility concerns related to lawyers, technology, and client confidences.

<sup>15</sup> We discuss the following: (1) the most effective use of visual tools like PowerPoint/Keynote presentations or even the Zoom whiteboard or Teams functions; (2) the format and specificity of content that should be included in a presentation, *i.e.*, synthesized rules with cites, not lists of cases that can be emailed separately, if requested; and (3) materials to have available for discussion based on questions they anticipate. No supervisor wants to wait for them to login to online research platforms, case files, or documents they have drafted; those screens should be available and ready.

<sup>16</sup> Erin Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 786 (2018); Kinda L. Abdus-Saboor, *Lessons from Pandemic Pedagogy: Humanizing Law School Teaching to Create Equity and Fairness*, 69 J. LEGAL EDUC. 621, 628–29 (2020) (advocating for continuing pedagogical choices professors made during the pandemic to respond to student trauma because it created a safe environment students can benefit from beyond the pandemic).

<sup>13</sup> “I’m Not a Cat”: Lawyer Gets Stuck on Zoom Kitten Filter During Court Case, YouTube (last visited Apr. 24, 2023), <https://www.youtube.com/watch?v=IG0ofzZOyl8>.

practice experiences. Further, simulated exercises are an opportunity not only for students to practice skills, but also to train young lawyers who will create safe spaces themselves as supervisors in practice.

More important, inclusive learning environments are tied to healthy professional identity formation.<sup>17</sup> While all facets of legal education cultivate aspects of professional identity formation, simulation exercises can have an out-sized effect because some students interpret their success in these simulations as forecasting their ability to “fit” in future practice environments. The healthy inclusive environment is important because there is a risk that simulations like SSMs/OSSMs can do more harm than good when students cannot practice and work through issues related to their professional identity in a safe, inclusive learning environment.<sup>18</sup>

To create simulations that provide truly *safe inclusive learning environments* and plant seeds for our students to create future *safe inclusive practice environments*, the simulations need to emphasize accessibility, not ableism; respect for individual identity over legal practice traditions; and equity, as well as fairness. While we are preparing students for practice that can sometimes be less tolerant than the academic environment, I hope to promote inclusivity with this assignment to give students a safe space to integrate their personal identity into their professional identity. Some things I use to create a safe, inclusive space for students to see *their* unique identity characteristics as part of *their* professional identity are

- modeling humility and curiosity in pronouncing student names; and

- *discussing* the harsh limitations of traditional professional dress, i.e., class-influenced, gendered dress.<sup>19</sup>

And in the online environment, some things I use include the following:

- having a consistent policy requiring names and pronouns in Zoom box;
- using tools that provide equitable access for differently abled students, e.g., captioning; and
- requiring<sup>20</sup> use of a background filter to avoid exposing differences in living circumstances.

Beyond providing space for students’ individual identity traits, I also want to be sure that exercises that simulate practice are fair to students, such as first-generation students who have neither legal practice experience nor exposure to the legal practice environment. In particular, I try to ensure that the exercises do not unfairly favor and are not perceived to unfairly favor students with experience or access to lawyers in their lives. The law school setting itself often rewards privilege over ability and effort, and law school simulations that seem to imply advantage for those with familial, educational, or employment advantage can easily prime a student for the deleterious

“[I]nclusive learning environments are tied to healthy professional identity formation.”

<sup>19</sup> At this point or some earlier point in the semester, we have a discussion about what is expected in “traditional professional business attire.” We discuss the impact of expectations created by clients, employers, and our own life experiences. We talk about how these expectations have been used to oppress people and how faulty assumptions about professionalism can interfere with their ability to build trust with their client. See generally Rebekah Hanley & Malcom Williamson, *Model Dress Code: Promoting Genderless Attire Rules to Foster an Inclusive Legal Profession*, 34 J. CIV. RTS. & ECON. DEV. 125 (2021); see also CROWN ACT, CAL. GOV. CODE ANN. § 12926(w)-(x) (Westlaw through 2022 Reg. Sess.) (prohibiting discrimination against employees for wearing “natural hairstyles” connected to African/African diaspora culture); see generally Shannon Cumberbatch, *When Your Identity Is Inherently “Unprofessional”: Navigating Rules of Professional Appearance Rooted in Cisheteronormative Whiteness as Black Women and Gender Non-Conforming Professionals*, 34 J. CIV. RTS. & ECON. DEV. 81 (2021).

<sup>20</sup> Requiring students to use similar video backgrounds can promote equity. A muted background means no particular student’s living situation is emphasized and social and economic class differences reflected in living environments can be de-emphasized. But requiring students to use filters without knowing more about their connectivity resources can emphasize the difference in students’ access to similar technology. To help, before requiring anything that depends on student access to technology, I begin the year with a short survey asking students about their physical learning environment and access to technological resources.

<sup>17</sup> Lain, *supra* note 16, at 786; Abdus-Saboor, *supra* note 16, at 628–29; Culver, *supra* note 11, at 588–89.

<sup>18</sup> It is challenging enough for a student to analyze and communicate their research findings and their analysis without having to also deal with a professor and other students mispronouncing their names or misgendering them in the conversation. The tendency to normalize names with western European pronunciations and to mispronounce or comment on the “exotic nature” of a name from a different ethnic group, for example, Xiaohan, further marginalizes the student and confirms their sense of a lack of belonging in legal practice.



“While supervisor meetings are second nature to many of us . . . , for many students they are still a mystery . . . .”

impact of stereotype threat or imposter syndrome.<sup>21</sup> Students impacted by stereotype threat already use significant cognitive load trying not to act in ways that fulfill perceived stereotypes. Students with imposter syndrome are already challenged by the specter that they will be “found out” as not belonging in the profession, adding the further perceived disadvantage of not having the legal experience or familial resources that others have. If imposter syndrome arises, it can make a simulation experience not just intimidating but harmful.

To mitigate the impact of these perceived disadvantages, I try to

- emphasize the learning experience as the accomplishment;
- avoid assumptions about practice experience and legal practice knowledge; but instead, clearly communicate expectations and make success attainable based solely on information learned in class, not outside legal experience; and
- center discussions about the goals of the assignment in not only legal practice but in other disciplines where students may have experience conferring with supervisors.<sup>22</sup>

Essentially, I am trying to level the playing field, or at the very least, to correct the perception that first-generation or students without legal experience are at a disadvantage.

## F. The Simulated Supervisor Meeting

In this final section, I will explain my process for preparing for and implementing Simulated Supervisor Meetings whether in-person or online.

### 1. Preparing for the Simulation

While supervisor meetings are second nature to many of us as Lawyering Skills professors because of our practice experience, for many students they

are still a mystery, and thus, preparing the students is necessary. Unlike preparing students for oral arguments, where there are live public arguments students can attend or watch online, as well as recordings of lawyers presenting their arguments to courts,<sup>23</sup> there are no recordings of actual meetings with supervisors because of confidentiality concerns. Instead, there are scenes from movies and television that generally present an unrealistic picture, and as noted in the first paragraph of this article, there are additional tools available through the Lawyering Skills community. I tell my class about the availability of these resources and also about why the number of available options is so limited. I also try to point out that while scenes from television and movies may shed a little light, these scenes are often inaccurate or unrealistic.

In addition, I prepare students by setting out clear expectations of what I am looking for in a successful SSM and what I will grade. My grading takes into account preparation, accuracy in stating the facts and law, and clear and concise responses to questions. I also review the grading rubric with the students, and I answer questions about how I will use it.

In discussing how they present their research results in the SSM, I cover four points in the walk through before the meetings start. First, we discuss the order in which they should present their results. Next, we discuss whether they should include citations when explaining the law to the supervisor. Then, we discuss whether they should quote the sources or summarize them. Finally, I discuss the method of presenting, explaining that our meeting should be more of a conversation than a formal, prepared presentation.<sup>24</sup>

In discussing with students the order for what they discuss in an SSM, I tell them most of the time they should use a “IRAC” as a loose organization, but at times the focus of the meeting could be narrower. I mention they should know the focus by the phrasing of the prompt. For

<sup>21</sup> See generally, Russell McClain, *Helping Our Students Meet Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016) (tracing the impacts of stereotype threat from admissions through law school).

<sup>22</sup> See generally TERI McMURTRY-CHUBB, *LEGAL WRITING IN THE DISCIPLINES: A GUIDE TO LEGAL WRITING MASTERY* (2012).

<sup>23</sup> E.g., *United States v. Windsor Oral Argument*, C-SPAN (Mar. 27, 2013), [www.c-span.org/video/?311686-1/united-states-v-windsor-oral-argument](http://www.c-span.org/video/?311686-1/united-states-v-windsor-oral-argument).

<sup>24</sup> Explained more in the Stages of the Simulation subsection below.



example, in response to a supervisor inquiry, “So tell me what you found;” they could respond,

The issue you asked us to address is if our client has a viable claim for intrusion upon seclusion when her supervisor accessed her email without her permission. The law in California requires an intentional intrusion into a private place in which the plaintiff had a reasonable expectation of privacy, and the defendant’s action must have been highly offensive. In particular, in a case before the court of appeals in June interpreting what is an intentional intrusion, the court held if the access to the private area was granted by plaintiff’s actions, there was no intrusion. Here, our facts provide our client made her password easily accessible. Because the defendant gained access to the email partially because of our client’s actions, arguably there was not actual intrusion.

While most research will be a direct application of law to fact, in some limited circumstances, I may ask them merely to update the law, review legal history, or explain the legislative history of a particular source, etc. In those instances, I tell them that they should always begin by clarifying what they were asked to address—the issue--and then offer their findings as a “synthesized” rule, not merely a list of cases. And of course, I remind them to be prepared to clarify.

In thinking about whether to provide full citations when referencing sources, we discuss the supervisor’s goals for the meeting and how those goals might dictate what information from the citations would be helpful. We discuss what the supervisor most likely wants to know is if the authority is binding and if it directly applies to the issue being addressed. So, I tell them to give enough of a cite to clarify these issues. As the supervisor, I am not always interested in the name of the case, unless it is a seminal case upon which a doctrine is based. Rather, I am most interested in the jurisdiction and the level of court. I also would like to know whether the rule is still evolving or whether it is the jurisdiction’s final word on the issue. So, I tell students they might say,

In the Second Circuit, the courts have consistently held there is a privilege when

[insert legal test]. Because our matter is in the Eastern District of New York, this opinion is binding. There is no evidentiary statute/code addressing this issue. Rather, it is only provided for in the common law.

That said, if the supervisor asks for a citation because she wants to read the case herself, I tell students that they should have the information readily available.

In response to questions about directly quoting the source, I give them the following rules to follow. First, accuracy and precision are always paramount in explaining the law, so quote when necessary to ensure accuracy. On the other hand, only quote if you cannot say it better or equally as well as the original source. I explain the second rule by noting a listening audience comprehends information differently than a reading audience. When reading, I can comprehend more complex language much more quickly than when listening. So, in an oral report of the law, they must balance accuracy with the ability of their audience to comprehend. When they must quote, they should speak slowly and with emphasis ensuring the listener is comprehending the necessary parts of the law, and they should consider providing a visual representation when communicating particularly complex information.

To give students a concrete sense of what to expect, we practice in class, with an “all-class SSM.” I ask the class preliminary questions about their research like those I would ask in an SSM, and I critique the responses of several students, explaining how the responses would or would not meet the goals of the actual simulated supervisor meeting. Finally, we discuss what they can expect to be the loosely organized “stages” of an SSM. These stages are explained in the next section of this article.

## 2. Stages of the Simulation

Just as an oral argument has a loose organization that consists of an introduction, prepared remarks, answers to questions, and transitions back to the argument, an SSM also has a loose organization that consists of a prompt, student preparation, the conversation, and the evaluation and follow up. And just as the stages of oral

“To give students a concrete sense of what to expect, we practice in class, with an ‘all-class SSM.’”

“I emphasize three steps for students to prepare for the SSM: Research and Analyze, Prepare to Engage, and Consider the Big Picture.”

argument generally do not occur sequentially but blend into one another in practice, so the stages of an SSM also tend not to occur sequentially but instead blend into one another.

#### a. The Prompt

As we have previously discussed in class, supervising attorneys are not professors and do not always communicate their directions in neat little packages on Canvas. And so, for realism, I tell students the assignment begins when they receive the prompt, usually by email. Below is an example of one I have used:

Thank you for your research regarding if the employer breached the employee's right to privacy when the supervisor used our client's password to get into her email without her authorization. Before you prepare the written draft of your predictive memo, I want to check in to get a sense of what you have found, why you made the choices you did, and how you plan to use your research results. Please access my online calendar to schedule a time for us to meet. We can use my Zoom account at <https://zoom.us/j/1234567890>.

In response to this email, they should immediately seek clarification of the issue if there is an area they do not understand.<sup>25</sup> If they are clear about what they have been asked to do, they designate one member of their team to sign them up on Canvas for a time to meet. Meetings are generally 30 to 40 minutes.

#### b. Student Preparation

I emphasize three steps for students to prepare for the SSM: Research and Analyze, Prepare to Engage, and Consider the Big Picture.

Research and Analyze: Because the SSM is an oral report on the students' research and analysis, the best thing they can do to prepare is to research thoroughly and effectively the issue they have been asked to address. Further, I stress that the supervisor is not looking for a list of sources, but

for an understanding of the sources' use in context. Students must have already "synthesized" the law and analyzed the impact on the client's facts.

Prepare to Engage: I tell students that I do not want them to write out a report and then read it during the meeting. Rather, they must prepare to engage in a conversation. Further, if they merely prepare to "present" rather than engage, they will only have prepared what they thought was relevant and will probably focus too much on delivery instead of answering questions. Like oral arguments, they should anticipate and be prepared to answer questions, but unlike an oral argument, where a judge has read the brief, generally in supervisor meetings, the supervisor generally has not read their analysis prior to the meeting and is instead depending on the young attorney to "teach" the law they have found.

Because the end goal of the performance aspect of the assignment is exposure and not competency, I tell them while they *may* meet with their team/partner ahead to compare notes, I do not want them to "practice" their delivery before the SSM. Practicing would be contradictory to the of sense spontaneity and give and take that are typical of these meetings in a real practice setting.

Consider the Big Picture: The SSM is intended to mirror the way lawyers in practice analyze problems. One aspect of analyzing problems and thinking like a lawyer is recognizing that research in practice is not merely a theoretical pursuit applying law to a hypothetical as it often is in law school. Thus, when lawyers research they always have in the back of their mind the larger context of the matter. Is the research for a potential motion, for a demand letter, for drafting a provision in a contract, or for drafting a provision in an employers' policy manual? I tell my students that there is always the chance that their supervisor will ask them not only for the results of their research but will also ask them to contribute their thoughts on the next steps. Those next steps may be areas for further factual inquiry to strengthen the case, suggestions for a novel argument for a motion, analysis about whether filing the motion makes sense for the client, or even suggestions for language for a contract provision.

<sup>25</sup> This is a follow-up to another simulation we do, entitled, "Getting the Assignment."

For example, when asked what the client's challenges might be in making their claim based on the research, I am expecting students to be able to explain the counterarguments applying the law, *e.g.*, the client's attempt to give notice was not reasonable. In response, I might ask, "Given those challenges, do you have any ideas about how we might address that practically?" A student might say, "Maybe we can do more fact investigation, meaning, maybe we can ask the client if the email was really the only way notice was given or find out if there are provisions in the contract stating notice will be sent by email only. That would not change how the notice was given, but it may help our argument that it was reasonable." I do not need them to be right. I just want them thinking about the broader context and recognizing their thoughts and analyses make a valuable contribution.

### c. The Conversation

I always start the SSM in character. I generally begin with the same question:

Thank you for looking into this issue for me. I really did not have time to do the research myself, but this is a very important issue for our client, so I will be relying heavily on your analysis. What did you find, meaning what is the governing rule in this area?

The other questions follow based on how they have responded. I let students know that while this is a conversation that could go several different directions depending on their supervisor's knowledge base, to encourage fairness, for our purposes, they can always anticipate I will ask some combination of the following five questions:

- What is the governing rule/test and its source? How did you get there?
- Are there any limitations/exceptions?
- What are the strengths of our client's case based on your understanding of the law?
- What are going to be our client's biggest challenges based on your understanding of the law?

- Are there other issues or facts you think we should follow up on?
- [Then lots of "How did you get there?"; "Explain."; "What is your support for that?"]

If it is an SSM early in the year, I am more of a facilitator, than a supervisor. As a facilitator, I ask the same questions but generally must follow up more to get to the answers. In an SSM early in the year, students are still struggling with rule synthesis and understanding holdings, so I usually must ask the question multiple ways to get a sense of the complete governing rule. In other words, they might give me an incomplete rule about how the court defines intent, and I will follow-up by asking, "Is that the only definition of intent?" or "Is that the only consideration the court will analyze in addressing intent?"

Because there are multiple students in the meetings, I ask the same five questions, but I ask each student about a different sub-issue. For example, "Kara, can you explain the governing rule for intent?" "Caleb, given that rule, will our client be able to meet the test?" "Sam, what will be our client's greatest challenges in meeting the test?" "Khalid, considering the strengths and challenges of our client's case, what is likely to happen here? Do you have any suggestions for further information we might need?"

For the next issues, I begin with another student and ask similar questions until we get through a complete analysis. Students are asked to be prepared to address all questions for every issue. If it is an SSM later in the year, I try to act as much like another lawyer as possible asking the same questions, but as a curious lawyer with less guidance, rather than a professor/facilitator.

### d. The Evaluation and Follow Up

I always end each SSM back in professor mode, debriefing the experience. I begin by answering students' questions and soliciting their reactions to the meeting and affirming their experience in the exercise. Then I give oral feedback focused on the three areas I told them I would assess: preparation, accuracy, and clear and concise responses to

"I always start the SSM in character."

“Using Simulated Supervisor Meetings, either in-person or online, provides a way to address many practical skills in one exercise . . . .”

questions, so no student is rewarded for being a more natural “performer.” This immediate feedback is helpful in promoting transfer.<sup>26</sup> Further, because students work with partners, both participants hear the feedback I give to the other student. As with peer reviews, students learn in part from hearing me provide feedback to another student.

I also generally ask students for two forms of follow-up: a self-assessment and an email memo addressing the same assignment as the oral report. The self-assessment asks students to think about their preparation and how effective what they communicated would be in a practice setting. I ask them to include in the self-assessment three things that went well and three that could have gone better with explanations for both categories. I use these assessments because I think it is just as important for students to understand why they did what they did as it is to do it well. While one of my original goals in creating this assignment was to avoid the written research report/log/memo, sometimes I still assign a research report in the form of an email memo. The written report not only gives students another bite at the apple, but it tests other skills integral to written assignments, such as, citation format. Finally, I grade the research report anonymously to avoid any bias I may have based on how they did in the SSM.<sup>27</sup>

## G. Conclusion

Using Simulated Supervisor Meetings, either in-person or online, provides a way to address many practical skills in one exercise, e.g., legal analysis and oral communication, collaboration in a safe environment for professional identity formation, and preparation of the next generation of lawyers for successfully using technology in practice. While there are many aspects of my class that I hope return to “normal” as we move into the next phases of the pandemic, this is one change that will be part of the new normal in my class and one of the many lessons I learned that I will use to prepare myself and my students for the future.

<sup>26</sup> See generally, Shaun Archer et. al, *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. LEGAL EDUC. 258 (2014).

<sup>27</sup> While I am not always a proponent of anonymous grading, here the anonymity mitigates my biases triggered by my prior experience in the SSM as well as other unconscious biases. See generally John M. Malouff & Einar B. Thorsteinsson, *Bias in Grading: A Meta-Analysis of Experimental Research Findings*, 60 AUSTL. J. EDUC. 245 (2016).

Cite as: Bryan Schwartz, *Making It “Click”—Tailoring a Professor-Specific Peer Review Exercise*, 30 Persps. 27 (2023).

## Making it “Click”—Tailoring a Professor-Specific Peer Review Exercise

By Bryan Schwartz

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As a legal writing professor, we are constantly looking for new ways to make our lessons and teaching objectives “click” for students. We lecture and guide them through class for several hours a week. We provide comments and edits both orally and in writing on their written work product. We meet with students for office hours and one-on-one conferences. All with the same goal: Trying to make it all “click.”

Even professors have moments where it finally “clicks.” Recently, I deployed a timed writing exercise for my students. Initially, my intent behind this assignment was simply that—a timed writing exercise, simulating a final exam under time constraints, while focusing on one of the issues from their final graded brief. However, as I thought more about it and considered how the students could benefit from immediate feedback,<sup>1</sup> I decided I wanted to incorporate peer review feedback into this exercise.

Everyone likely uses or has used a peer review exercise in the past. It gives the students an opportunity to review their colleague’s work and serves several pedagogical benefits.<sup>2</sup> However, in the past, I had not considered using a peer review exercise as a way for me to specifically show the students what I think about when grading each part of their written work. It “clicked” for me that I could

tailor a professor-specific peer review exercise that guided them through my thought process.<sup>3</sup>

### A. Tailoring Your Professor-Specific Peer Review Exercise

A good starting place is to decide what you want to focus on: such as organization, specific parts of the writing formula, or any other writing style and flow concepts.<sup>4</sup> These will vary depending on what stage of the semester you plan to use this exercise. Additionally, this exercise can also be used for other sections of a typical first year memo, such as the Statement of Facts.

After identifying what you would like to focus on, reflect on how you will grade these portions. What questions do you ask yourself to ascertain what grade a student should receive on one of these different areas? Do you look for anything specific that alerts you to errors or confusion within these different areas? Begin writing down these questions as a guide for the students to ask themselves when they review their peer’s written work. Ideally, when answering these questions for their peer, the students should engage in the same mental process that you will eventually engage in when grading their assignment.<sup>5</sup>

When drafting your exercise, pay particular attention to the word choice you use for each question. I aimed to use consistent word choice that I had previously used in class, as

“It ‘clicked’ for me that I could tailor a professor-specific peer review exercise that guided them through my thought process.”

<sup>1</sup> See Sophie M. Sparrow & Margaret Sova McCabe, *Team-Based Learning in Law*, 18 LEGAL WRITING 153, 187 (2012) (addressing, in the context of Team-Based Learning, how “student learning is enhanced when students receive immediate feedback on their learning...”); Lindsey P. Gustafson, *Reflections on Five Years of Team-Based Learning in First-Year Property*, 66 S.D. L. REV. 29, 35 (2021).

<sup>2</sup> Jo Anne Durako, *Brutal Choices in Curricular Design . . . Peer Editing: It’s Worth the Effort*, 7 PERSPS. 74, 74–75 (1999).

<sup>3</sup> This “click” may already be something that you as a professor routinely think about as you draft your peer review exercises. If so, this article will also provide some insight on other considerations for peer review exercises, including the professional identity formation benefits and some minor tweaks that could improve the experience for students and professors.

<sup>4</sup> We use the TREAT acronym for our legal writing organizational formula. MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS 23 (3d ed. 2021).

<sup>5</sup> Reviewing your grading rubrics will also yield important information for your guided peer review questions.



“This tailored peer review exercise proved to be a wonderful alternative way to teach.”

well as on my written feedback on their prior assignments. If possible, try to mirror the words used within the actual grading rubric that you will utilize. This consistent terminology will be easier for a first-year law student to digest and provides less opportunity for confusion.

I used this exercise about four weeks before the end of the fall semester. As such, I focused on the skills and teaching objectives that I expected them to employ within their final memo. I organized the questions with headings that clearly indicated what skill or teaching objective the question focused on. These skills and teaching objectives also mirrored the grading rubric that I will use for their final memo. I have attached my tailored professor-specific peer review form focusing on the Discussion section, as Appendix A, and my peer review form focusing on the Statement of Facts, as Appendix B.

The only other component of this peer review exercise is to create a writing exercise that will generate written work for the peer review. Essentially, any exercise will work that creates a work product that will contain the skills and teaching objectives you want the peer review to focus on. As I mentioned, I started this assignment with a 60-minute timed exercise during which they were asked to write a “TREAT” using two provided sources.<sup>6</sup>

### B. A New Way to Teach

This tailored peer review exercise proved to be a wonderful alternative way to teach. As professors, we teach in a variety of ways. We orally explain or define a term. We demonstrate examples to illustrate a skill. In the end, this exercise provided another option for how to teach. It teaches the evaluator the material by forcing them to evaluate another student’s understanding of the material

through the specific mindset of the audience, in this case, the professor. The evaluator will then apply this process to their own work.<sup>7</sup>

### C. Focusing on Specific Skills

The exercise can also be narrowed and limited to focus on specific skills. For example, if you want to focus on the specific skill of rule synthesis for the proposition of an “E” section, you will first reflect on how you taught this skill in class and what you ask yourself when evaluating to what extent a proposition is synthesized. Perhaps you taught your class that a proposition should “illustrate the rule’s operation” and show the reader what a court looks at when addressing the rule.<sup>8</sup>

Once you identify the way you would evaluate the issue, phrase it as the question: “Does this proposition tell the reader what a court looks at when addressing this rule?” By incorporating your thought process into the question, it becomes a much more effective teaching and learning tool than simply asking if there is a proposition or if the proposition is synthesized. To further evaluate their understanding, follow each question with “please explain why or why not.”

### D. Additional Benefits

Reflecting on my time as a law student, I now wish I had simply asked my professors more often what they were looking for on our final exams. Fortunately, most legal writing professors take care of this issue for the students by providing them with a rubric for how they will grade the assignment. This exercise builds upon this valuable benefit and provides the student with detailed insight on how you will specifically evaluate and grade each part of the assignment.

<sup>6</sup> A research exercise could also be used in conjunction with the writing and peer review exercise. I initially had the students follow a guided research exercise, which exposed them to the various types of primary and secondary sources on Westlaw and Lexis. After that, the students conducted their own research and presented their findings to each other in small groups, selecting their top sources for each issue. Then, as a class, we discussed their top sources. Two of these sources then became the two sources used in the writing exercise.

<sup>7</sup> Similar to many of the advantages of Team-Based Learning, this exercise promotes the students’ understanding of material, provides them with an opportunity to apply their understanding, and allows for immediate feedback their work. See Sparrow & McCabe, *supra* note 1, at 162–87; Anne E. Mullins, *Team-Based Learning: Innovative Pedagogy in Legal Writing*, 49 U.S.F. L. REV. F. 53, 58–59 (2015); Gustafson, *supra* note 1, at 30–36; Melissa H. Weresh, *Uncommon Results: The Power of Team-Based Learning in the Legal Writing Classroom*, 19 LEGAL WRITING 49, 77–80 (2014).

<sup>8</sup> MURRAY & DESANCTIS, *supra* note 4, at 126.



Moreover, it provides another opportunity for the material to “click” for students.<sup>9</sup> Even though you have likely taught this material to them several times and provided wonderful examples and in-class exercises, there will always be instances when it still hasn’t clicked. This simply provides another opportunity.<sup>10</sup>

This proposed exercise also creates a different way for the material to “click.” As we all know, people learn in a variety of ways. Some are visual learners. Some need examples. Some learn by doing. And the list goes on. As professors, we implement a variety of exercises and teaching methods in an attempt to reach everyone. Thus, using this active learning exercise provides you another tool in your professor toolbox for reaching students who are having trouble getting the material to “click.”<sup>11</sup>

### E. Promoting Professional Identity Formation

This exercise also provides the students with an opportunity to develop their professional identity. After a 2021 proposal, the ABA changed its rule to require law schools to provide “substantial opportunities” for students to develop their professional identity.<sup>12</sup> It further indicates that students should have “frequent opportunities” to work on this and that it should come from a variety of courses and activities within the law school curriculum.<sup>13</sup>

<sup>9</sup> See also Libby A. White, *Brutal Choices in Curricular Design . . . Peering Down the Edit*, 16 PERSPS. 160, 160 (2008) (noting that other responses to a positive peer review exercise may include “seen the light!” and “now understands”).

<sup>10</sup> After completing this exercise, one of my students told me that this exercise finally made the Application section “click.”

<sup>11</sup> Studies have shown that students are more likely to be successful in a class based on “active learning.” Lindsey P. Gustafson, *SUPRA* note 1, at 30.

<sup>12</sup> 2022–2023 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS standard 303(b)(3) [hereinafter ABA STANDARDS]; see also *id.* at interpretation 303-5 (defining professional identity as including “the values, guiding principles, and well-being practices considered foundational to successful legal practice”). While this ABA standard is new, the concept of incorporating professional identity formation into the law school curriculum has been a suggested component for years. Sparrow & McCabe, *SUPRA* note 1, at 166 (citing BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (Roy Stuckey et al. eds., 2007)).

<sup>13</sup> ABA STANDARDS, *SUPRA* note 11, at interpretation 303-5.

Specifically, this exercise exposes students to receiving both encouraging and critical feedback from colleagues.<sup>14</sup> As a summer associate and new lawyer, our students will frequently be confronted with supervisors and colleagues critiquing their work product. Thus, it is important for them to be able to handle feedback in a professional and appropriate manner. Similarly, our students will also need to be able to successfully work with other lawyers on projects.<sup>15</sup> Fortunately, just like other lawyering skills like writing and research, students will improve on their ability to accept feedback and work with others through practice.<sup>16</sup>

Similarly, the exercise also provides the reviewer with an important professional identity development experience. In addition to recognizing the legal writing concepts and thinking about improvements, the reviewer must communicate their feedback to their colleague in a professional, respectful, and productive manner. This type of professional written communication is necessary for lawyers on a daily basis when interacting with colleagues, supervisors, opposing counsel, and judges.<sup>17</sup>

This professor-specific peer review also encourages the student to focus on writing for a particular audience, another important skill for lawyers. This exercise reinforces the importance of knowing what your audience will be looking for and how you can craft your writing to be more persuasive with the intended audience.

Lastly, a major component of forming and improving one’s professional identity development

<sup>14</sup> See also Sparrow & McCabe, *SUPRA* note 1, at 164–65 (noting that Team-Based Learning teaches students how to work and learn together, incorporate a variety of ideas, and resolve conflict).

<sup>15</sup> Gustafson, *SUPRA* note 1, at 30 (revealing that a 2016 national study found that “three in four [legal employers] . . . believed it was necessary that their new hires have the ability to work collaboratively as part of a team”); Weresh, *SUPRA* note 7, at 54; Mullins, *SUPRA* note 7, at 55–59.

<sup>16</sup> See also Mullins, *SUPRA* note 7, at 59 (noting that working effectively with others in a group setting is a “learned skill”).

<sup>17</sup> See also Sparrow & McCabe, *SUPRA* note 1, at 171 (stating that communicating with a peer about a professional issue can often be difficult for new law students, but better that it occurs in the classroom than on the job for the first time).

“[T]his exercise exposes students to receiving both encouraging and critical feedback from colleagues.”

“This exercise allows for students to reflect on the . . . professional identity attributes that this exercise embraces.”

is the opportunity for self-reflection. This exercise allows for students to reflect on the above professional identity attributes that this exercise embraces. Ideally, this reflection will prompt them to identify areas they want to improve on as they continue through law school.

#### F. Overcoming the Cons

Consistent with what we teach our students about the law, there are two sides to the peer review story. Many professors are hesitant about implementing peer review exercises, while others have removed them completely from their pedagogical exercises.<sup>18</sup> Students complain that they don't know enough to be effective reviewers for their peers. Professors worry that some students take it seriously while others don't, generating inconsistent benefits for students.

While this exercise cannot eliminate all concerns about peer review exercises, it does uniquely address these concerns. Your professor-specific questions seek to limit the “guesswork” for students and develop consistency in what their edits address.<sup>19</sup> Without fail, some students will provide more effort than others; however, your pointed questions are intended to lead them to the exact analysis that should answer whether the tested skill was successfully achieved.<sup>20</sup>

Similarly, your guided step-by-step mental process and the requirement to explain their reasoning seeks to limit the amount of “incorrect” or “unhelpful edits” that a student may receive from a peer. Thus, in the end, the students should all receive edits that easily indicate whether that skill was or was not accomplished.

<sup>18</sup> Durako, *supra* note 2, at 73–74; White, *supra* note 8, at 160.

<sup>19</sup> Durako, *supra* note 2, at 74 (explaining that using “specific criteria” for peer reviews will “minimize the training” and “make[ ] the process both easier and more effective for editor and writer”); *see also* White, *supra* note 8, at 162 (suggesting that a checklist for each section eliminate many peer review exercise concerns).

<sup>20</sup> Durako, *supra* note 2, at 75 (noting that criteria for students can “help focus the review on a limited range of essential features of the writing”).

#### G. Additional Important Considerations

After conducting my own reflection on this exercise, there are a few considerations that I suggest for anyone interested in using a peer review exercise: Messaging, Anonymity, and Ungraded Assignments for a Grade.

##### 1. Messaging

First, a successful peer review exercise requires clear messaging before implementing. One message I recommend emphasizing is the purpose and intention of this professor-specific peer review. This exercise can serve as their guide to use on their own work moving forward. Further, it provides them with a clear answer on whether they are grasping and implementing the covered topics.

Additionally, depending on what type of writing exercise you use, you should message your expectations to the students. For example, since I paired my peer review exercise with a 60-minute timed writing exercise, some students were frustrated that their written product, which was subjected to peer review, was not as polished as it would have been without time constraints. Thus, I should have messaged to the students that I expected their draft to be “rough.” I should have explained the reasoning—that it will provide great examples of passive voice, poor sentence structure, and wordiness in their own writing. I could have emphasized the importance of being able to write clearly under time constraints for final exams. Moving forward, this may be reason enough to use a peer review exercise on a non-timed written product, to avoid that frustration altogether.

Finally, as addressed above, this exercise provides practice for important professional identity skills. However, without appropriate messaging, the students will not consider how this exercise could serve them in the “real world” as a practicing lawyer. Thus, I'd suggest messaging the above professional identity benefits to the students in order to emphasize the career benefits. This should also increase the students' level of effort and engagement in the exercise.<sup>21</sup>

<sup>21</sup> *See also* Mullins, *supra* note 7, at 58–59 (finding that the students were more engaged and committed to their Team-Based Learning experience when they saw that it would help them in practice); Gustafson, *supra* note 1, at 44.

## 2. Anonymity

I recommend conducting your peer review exercise using an anonymous format. This will prevent students from blindly disregarding feedback based on who reviewed their paper. It further promotes a “safe space” for the reviewer. Many of my students apologized to their colleagues when they returned the peer reviews,<sup>22</sup> indicating that the paper was good and that they were just making suggestions. Anonymity allows for more honest feedback and prevents the reviewers from worrying about being too harsh or critical.

## 3. Ungraded Assignment for a Grade

I suggest implementing your peer review exercise on an ungraded assignment. As discussed above, this type of exercise inherently provides feedback that is unequal in quality. However, the above guidance on crafting your questions strives to lead the students in a way should yield more equal results. Ultimately, I want my students have equal opportunities for success. Even though professors will certainly have pedagogical reasons for using a peer review on a graded assignment, I suggest an ungraded assignment to ensure that students do not receive unequal assistance on an assignment that makes up a portion of their final grade.

However, students are motivated by grades. Thus, to ensure that your students provide maximum effort to their colleague’s feedback, I recommend clearly instructing your students that you will be grading their effort on this assignment.<sup>23</sup>

## H. Peer Review vs. Self-Review

Still not convinced on using a peer review exercise? Luckily, this exercise can provide similar benefits as a self-review.

I chose to make this a peer review and not a self-review because it is often easier for students to spot errors in other’s work rather than their own, a comment several students made to me afterward, and for the additional professional identity

benefits. However, as the students become more experienced with legal writing, I plan to use it as a self-review exercise. In addition to the above benefits, a self-review exercise would benefit the student by providing them with questions to ask themselves when editing their own work, something they will end up doing more and more as law school continues and in practice.<sup>24</sup>

## I. The Results and Reviews

The week following my exercise, I began my one-on-one student conferences to discuss their progress on their final assignment, which gave me an opportunity to see if the peer review exercise yielded any improvements. I also conducted anonymous polling of my classes to see how they felt about the exercise.

During the conferences, I noticed some students had notes within their paper that mirrored my specific peer review questions. Particularly, most of them seemed to benefit from the E paragraph proposition questions, which had been an emphasis throughout the semester. This translated to well-written proposition sentences in the final papers.

Overall, the anonymous reviews of the exercise were positive. Students primarily liked having the opportunity to see examples of how other students examined and analyzed the issue. Regarding the professor-specific questions, one student commented that it “encouraged good feedback” because it focused them in on exactly what to look for. As mentioned above, some students found the peer review “less helpful” because of the time constraints on the written product, which is easily addressed through better messaging or with a different writing assignment.

## J. Conclusion

In the end, this professor-specific tailored peer review exercise will help students see the material through your eyes. Ideally, this perspective will put them in a better position to be successful in your class.

“I chose to make this a peer review and not a self-review . . . .”

<sup>22</sup> The exercise was not conducted anonymously the first time.

<sup>23</sup> See also Sparrow & McCabe, *supra* note 1, at 195; Gustafson, *supra* note 1, at 51–53.

<sup>24</sup> See Durako, *supra* note 2, at 75 (using the same criteria in a peer review that you teach for self-editing will “reinforce[ ] general editing skills”).

## Appendix A

### Schwartz-Specific Peer Review Exercise

#### Discussion Section

#### Overall organization

Does your partner's writing follow the TREAT organizational formula? Does the reader learn about the law first, then then see how the law is applied to the client's facts? Please explain your answer.

#### "E" paragraphs

For an explanatory synthesis "E" paragraph, does the proposition explain to the reader a part of the overall rule? As a reader, do you understand what the court will look at when considering this part of the issue? Please explain your answer.

For a case-by-case "E" paragraph, does it start with a topic sentence that explains to the reader a part of the overall rule that this paragraph is about? Does the paragraph then explain the facts, holding, and reasoning? Please explain your answer.

#### "A" paragraphs

For the "A" paragraph, does it tell the reader what point it will address first? Does it use similar language to the "E" paragraph? Are you confused on how any of the points relate to the "R" and/or "E" paragraphs? Please explain your answers.

Does the reader learn how the law applies to the facts? Are there any additional facts that the writer could have included to support that point? Please explain your answers.

## Appendix B

### Schwartz-Specific Peer Review Exercise

#### Statement of the Facts (SOF)

1. Step 1: Turn on Track Changes.

2. Step 2: (Readability)—Read your partner's SOF. Try to read it from the perspective of a person who is not very familiar with the facts.

Add comments if you think that an uninformed reader may be confused or not able to follow.

3. Step 3: (Organization)—Now that you have read it once, ask yourself whether the SOF is in chronological order.

- a. If so, add a comment telling your partner "Good job organizing the facts in chronological order!"
- b. If some parts are not in chronological order, highlight and add a comment identifying which parts are out of order.

4. Step 4: (Facts v. Law)—Did your partner include any statements of law?

a. If so, highlight those and leave a comment suggesting that the law be removed and placed in the Discussion section.

b. If not, add a comment telling your partner “Way to focus on the facts!”

5. Step 5: (Fact choice)—Did your partner include any facts that were unnecessary to understanding the story as it relates to our two issues? Were there any facts that you felt were possibly irrelevant to determining our two issues?

a. If so, highlight those and leave a comment asking your partner to consider whether the reader needs to know this fact to understand our Discussion section.

b. If not, add a comment telling your partner, “Great work focusing on the relevant facts!”

6. Step 6: (Objectivity)—Did your partner recite the facts in an objective way? Were “bad” facts included in the SOF?

a. If so, leave a comment telling your partner that you liked the objective tone used.

b. If not, highlight sections that were not objective and ask your partner if there is a way they could rephrase this to be more objective. Similarly, if bad facts are not included, leave a comment for your partner identifying which facts are missing.

7. Step 7: (Writing flow/typos)—Read it one more time. This time, focus on whether the sentences appear to flow together in a way that makes it easy to read (for example, transition words are used to connect sentences/paragraphs), or are they choppy? Also, look for any typos or other errors within each sentence.

a. If you find that the sentences flow nicely together, tell your partner that.

b. If you think they could benefit from some transitions or other changes to improve flow, show them where and how.

8. Step 8: (Clear and concise)—Read it again. This time, look for places where your partner could be more concise or use a clearer choice of words. Could your partner say the same thing using less words?

Highlight these parts and provide a comment suggesting a way to improve on clarity or conciseness.

9. Step 9: (Passive Voice)—Read it one last time, looking for passive voice. For example, “The paper was reviewed by Prof. Schwartz.” Ask who or what is doing the action and place that in front of the action (verb). This sentence, in active voice, would read—“Prof. Schwartz reviewed the paper.”

Highlight any passive voice and offer a suggestion on how to change it to active voice.

10. Step 10: You’re done! Please email the SOF back to your partner and cc me.

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## Wishful Thinking: Using Research Wish Lists to Help Students Bridge the Gap Between Research and Writing

By Hadley Van Vactor

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On a sunny fall day in my first-year lawyering class, my students were nodding at me. We were discussing their research progress for their open-universe memo problem—an analysis of two elements of a non-competition statute—and I had just asked whether they had found all the authorities they would need to write their memo. “Did everyone find the statute?” They nodded. “Did you find cases with facts similar to our client’s situation?” The nodding continued. “What about a case explaining the relationship between the elements in the statute?” Some students stopped nodding. “How about a case that explains the standard for the legitimate business interest factor specifically?” The nodding stopped, and students began to look at one another uncertainly. They had found many relevant cases, so why didn’t they have these authorities?

This problem had stymied me many times before: my first-year lawyering students, having purportedly completed the research for their first open-universe assignment, had not, in fact, located all of the authorities they would need to write a complete analysis of the legal issue. On this occasion, as before, when I reviewed their research charts, I found that most of them had found many relevant cases and even seminal cases. Still, most research charts lacked key authorities in some essential categories. For example, as their uncertainty in class had suggested, many students did not include any cases explaining the relationship between the two elements—information critical to a reader’s ability to understand the memo’s prediction. Other students had plenty of cases stating and explaining the rules for one of the factors but not the other.

In other words, these students—who believed their research was complete—had positioned themselves to either write an incomplete memo or to realize at the eleventh hour that they would need to perform additional research.

This predicament gave me an idea: what if I could give students a method to help them think more clearly about what they would need for their written analysis during the research process, rather than after the fact? Thus, the “research wish list” was born. This simple technique has proven highly effective in helping my students more efficiently and accurately generate initial research results, and it can help yours too.

Part I of this Article explains what a research wish list is and what it might contain. Part II provides sample wish lists to demonstrate how they work (and evolve) in practice. In Part III, I explain how research wish lists can help address the research deficiencies many practitioners, professors, and scholars have identified in law students and new lawyers. In Part IV, I offer suggestions for teaching students to build wish lists effectively.

### I. What Is a Research Wish List?

A wish list is, put simply, a list identifying the kinds of authorities that a student would want to have to analyze a particular legal problem. A wish list asks a student to think actively about finding and selecting the authorities needed to complete the task effectively rather than passively focusing on the authorities that a student locates first or most easily.

A wish list is specific, with list items tied to the particular legal issue and task. A complete list will include list items for each legal issue the student will analyze and any kinds of authorities necessary to provide context for the analysis as

“This simple technique has proven highly effective in helping my students more efficiently and accurately generate initial research results, and it can help yours too.”



a whole. Thus, a wish list for a rule with multiple elements or aspects would include as a list item the overarching or “umbrella” rule and any authorities that explain how the elements of the rule work together. Similarly, a wish list for an appellate brief would include an entry for standard of review as well as for any substantive issues the brief will analyze.

For each legal issue a student will analyze, a wish list should include list items identifying authorities that will perform different functions within the analysis. A typical legal analysis requires stating rules, explaining those rules, and then applying those rules through analogical reasoning. Thus, a wish list for a particular legal issue might include authorities that state the relevant rules for that legal issue, cases that are useful for explaining those rules, and cases that are useful for applying those rules. For example, a student creating a wish list for an analysis of the “dwelling” element of burglary might include list items like “case or statute identifying the rule for ‘dwelling,’” “case explaining the rule for ‘dwelling,’” and “case that can be analogized to our case for ‘dwelling’ element.”

A wish list has a purpose distinct from other organizational devices such as case charts or outlines. Case charts can help students decide between similar relevant authorities, and outlines can help them figure out how to organize an analysis using those authorities. A wish list, in contrast, helps students actually identify a set of relevant authorities from which to choose.<sup>1</sup> Also, a student can use a wish list when the student is just beginning to research, unlike a case chart or outline, which requires that a student already have a good sense of the most relevant cases. Thus, a wish list is a supplement to, rather than a replacement for, other techniques for organizing research.

## II. Sample Wish Lists

This section includes two versions of a wish list for each of two different assignments, reflecting

that a student’s wish list can and should evolve as the student’s research progresses.

### Sample Wish List 1—Initial Draft

This wish list is for an office memo analyzing whether a client meets the statutory “legitimate business interest” requirement for enforcing a non-competition agreement in Florida. The statute’s “legitimate business interest” provision identifies five categories of interests that can constitute a legitimate business interest. However, a student would not yet know that at the initial research stage. Thus, this initial wish list draft is an example of one a student might make when first beginning to research this new issue.

#### Research Wish List for Analysis of “Legitimate Business Interest” Requirement for Enforcing Noncompetition Agreement

- Secondary sources that provide useful context for non-competition agreements in Florida
- Florida statute governing non-competition clauses
- Cases defining what the “legitimate business interest” (LBI) requirement means in general
- Cases identifying LBI elements, factors, or categories, if any
- Cases providing rules for when an LBI exists
- Cases in which a party *did* have an LBI
- Cases in which a party did *not* have an LBI

### Sample Wish List 1—Revised Version

After doing some initial research, a student would learn that the LBI provision identifies five categories of interest, only two of which are potentially applicable to the student’s assignment. This initial research would also reveal that these two categories—client relationships and extraordinary training—have different legal standards that require separate analysis. This revised version of the wish list includes separate list items for each LBI category, reflecting the student’s better understanding of the structure of the legal issue.

“A wish list has a purpose distinct from other organizational devices such as case charts or outlines.”

<sup>1</sup> Because the primary objective of a wish list is to help students identify during the research process the kinds of authorities a student will need to write an analysis, a device like a case chart is likely better suited to helping students actually select specific authorities among the relevant authorities the student located while researching.

Research Wish List for Analysis of “Legitimate Business Interest” Requirement for Enforcing Noncompetition Agreement

- Secondary sources that provide useful context for non-competition agreements in Florida
- Florida statute governing non-competition clauses
- Cases defining what the “legitimate business interest” (LBI) requirement means in general
- Cases explaining the relationship, if any, between different LBI categories
- For “client relationships” category:
  - Cases providing rules for when client relationships constitute an LBI
  - Cases in which client relationships *did* constitute an LBI
  - Cases in which client relationships *did not* constitute an LBI
  - Cases that have facts that are comparable to the facts of our case with respect to client relationships
- For “extraordinary training” category:
  - Cases providing rules for when extraordinary training constitutes an LBI
  - Cases in which extraordinary training *did* constitute an LBI
  - Cases in which extraordinary training *did not* constitute an LBI
  - Cases that have facts that are comparable to the facts of our case with respect to extraordinary training

Sample Wish List 2—Initial Draft

This sample is an initial draft of a wish list for an appeal of the denial of a motion to suppress an indictment on the ground that incriminating information was elicited through custodial interrogation in violation of the defendant’s Fourth Amendment rights. Because this task is an appellate brief, this wish list includes an entry for the standard of review. The wish list also reflects some assignment parameters, such as focusing

on cases from certain jurisdictions because of the large universe of cases. As with the initial wish list above, this example is a wish list that a student might write before knowing the structure of the legal issue—*i.e.*, that “custodial interrogation” comprises two discrete elements: custody and interrogation.

Research Wish List for Appellate Argument re: Custodial Interrogation

- Cases identifying the standard of review for an appeal of a motion to suppress
- Secondary sources regarding custodial interrogation/*Miranda* rights in general
- Eighth Circuit or Supreme Court cases explaining custodial interrogation/*Miranda* rights in general, including the relationship between “custody” and “interrogation”
- Eighth Circuit or Supreme Court cases that state rules for custodial interrogation
- Eighth Circuit or Supreme Court cases that explain rules for custodial interrogation
- Eighth Circuit or Supreme Court cases where the defendant was subject to custodial interrogation (to analogize to my case)
- Eighth Circuit or Supreme Court cases where the defendant was not subject to custodial interrogation (to distinguish from my case)

Sample Wish List 2—Revised Version

This revised wish list is a version a student might draft after performing initial research and learning that “custodial interrogation” has two separate elements. Thus, this revision includes separate list items for each element since a complete analysis would require stating, explaining, and applying the rules for each of the two elements.

Research Wish List for Appellate Argument re: Custodial Interrogation

- Cases identifying the standard of review for an appeal of a motion to suppress
- Secondary sources regarding custodial interrogation/*Miranda* rights in general

- Eighth Circuit or Supreme Court cases explaining custodial interrogation/*Miranda* rights in general, including the relationship between “custody” and “interrogation”
- For custody issue:
  - Eighth Circuit or Supreme Court cases stating rules for custody
  - Eighth Circuit or Supreme Court cases offering a helpful explanation of custody rules
  - Eighth Circuit or Supreme Court cases where the defendant was in custody (to analogize to my case)
  - Eighth Circuit or Supreme Court cases where the defendant was not in custody (to distinguish from my case)
- For interrogation issue:
  - Eighth Circuit or Supreme Court cases stating rules for interrogation
  - Eighth Circuit or Supreme Court cases offering a helpful explanation of interrogation rules
  - Eighth Circuit or Supreme Court cases where the defendant was interrogated (to analogize to my case)
  - Eighth Circuit or Supreme Court cases where the defendant was not interrogated (to distinguish from my case)

### III. Using Wish Lists to Address Research Deficiencies

In addition to the practical benefit of helping students more efficiently complete class assignments, research wish lists can be a helpful way to address some of the research deficiencies that many practitioners, professors, and scholars have observed in law students and new law graduates.

Unsurprisingly, surveys of legal employers reveal that employers rank legal research skills as among the essential skills for recent law graduates. For example, a 2021 Bloomberg Law survey showed that 82% of attorneys thought that new lawyers should acquire research skills in law school rather than on the job or during their undergraduate

studies.<sup>2</sup> Other surveys revealed similar results; in a 2017 survey of 24,000 legal employers, 87% of respondents identified “effectively research the law” as a skill “necessary in the short term.”<sup>3</sup> Similarly, in a 2015 LexisNexis survey of hiring partners and senior associates who supervise new lawyers, 86% of respondents believed that legal research skills are “highly important” in young associates.<sup>4</sup> And the importance of research skills makes sense given how much time lawyers spend researching: a recent American Bar Association survey found that the typical lawyer spends roughly one-fifth of their time conducting legal research.<sup>5</sup>

However, recent surveys also confirm that many employers find new graduates’ legal research skills deficient. In the 2015 LexisNexis survey, 95% of respondents said that recent graduates lack sufficient practical skills, including research skills.<sup>6</sup> Other surveys have also revealed similar concerns about new graduates’ research abilities, particularly regarding research efficiency. In a survey of over 600 practitioners, approximately 40% of respondents said recent graduates performed “poorly” or “unacceptably” in performing cost-effective research and knowing when to stop researching.<sup>7</sup>

Of course, neither the fact that legal research is vital in practice nor the concerns about deficiencies in legal research skills is news to legal writing professors. Every professor who teaches

“[M]any employers find new graduates’ legal research skills deficient.”

<sup>2</sup> 2021 Law School Preparedness Survey, BLOOMBERG LAW (2021), <https://aboutblaw.com/111>.

<sup>3</sup> *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. ADVANCEMENT OF AM. LEGAL SYS. (2020), [https://iaals.du.edu/sites/default/files/documents/publications/building\\_a\\_better\\_bar.pdf](https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf).

<sup>4</sup> *Hiring Partners Reveal New Attorney Readiness for Real World Practice*, LEXISNEXIS (2015), [https://www.lexisnexis.com/documents/pdf/20150325064926\\_large.pdf](https://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf) [hereinafter *Hiring Partners Reveal New Attorney Readiness*].

<sup>5</sup> *Legal Technology Chapter Outline*, ABA LEGAL PROFILE, <https://www.abalegalprofile.com/technology.php#anchor2> (last visited Nov. 22, 2022).

<sup>6</sup> *Hiring Partners Reveal New Attorney Readiness*, *supra* note 3.

<sup>7</sup> Susan Nevelow Mart, et. al., *A Study of Attorneys’ Legal Research Practices and Opinions of New Associates’ Research Skills* 77 (June 2013), <https://docslib.org/doc/1919581/a-study-of-attorneys-legal-research-practices-and-opinions-of-new-associates-research-skills>.

“[W]ish lists help students understand research and writing as an intertwined and recursive process rather than two sequential, separate tasks.”

research and writing knows that law students struggle to understand how much research is “enough.” “How do I know when to stop?” and “How many cases should I use?” are among the questions my students most frequently ask when discussing how a new research assignment is going. (Perhaps not surprisingly, “when you are done” or “as many as you need” are not satisfying answers to students, accurate as they may be.)

Research wish lists, though, can help students learn to answer these questions for themselves. First, a wish list helps students determine when their research is complete by asking students to identify concrete research objectives at the outset. Once a student finds authorities that match the objectives identified in the wish list, the student can feel confident that they can transition to writing an analysis based upon that research. In other words, a wish list shows students that effective researchers determine whether they are “done” based upon whether they have what they need to write the analysis, not any other metric. In this way, wish lists help students understand research and writing as an intertwined and recursive process rather than two sequential, separate tasks.

Second, by asking students to identify the kind of authorities they need, a wish list helps students understand that the question of which authorities to use is much more important than the question of *how many*. A wish list helps students focus on finding sufficient authorities to write a complete analysis rather than worrying about finding the correct number of cases. Moreover, a wish list helps students begin to internalize that a given legal analysis could be written in many different ways with many different combinations of authorities, disabusing them of the notion that there is a singular “right” combination of cases for a particular issue.

Undoubtedly, making law students effective and efficient researchers requires a multifaceted approach. Still, introducing the concept of a research “wish list” is one of the most successful strategies I have found to help students see research

and writing as a unified process and to think in terms of the utility rather than the number of authorities—becoming more efficient researchers as a result.

#### IV. Teaching Students to Build Wish Lists

Over the past several years, I have refined my approach to introducing research wish lists to students. As a result, I have several suggestions for implementing them successfully in your classroom.

**Embrace collaboration.** Eventually, my goal is for students to independently generate research wish lists for any research or analysis task. However, working together as a class or in small groups can be a very effective way for students to understand what a wish list should contain and how to build one effectively. When my students are working on wish lists for the first time, I often have them work in small groups to generate a wish list. Then, as a class, we discuss the wish list items each group came up with to build consensus on what wish list items are necessary for the particular assignment. This allows all students to participate in the process of generating a wish list but ensures that students end up with a wish list that is appropriate for the task and legal issue.

**Offer examples.** Unsurprisingly, students who have never thought about identifying the different kinds of authorities they will need for an analysis or how they will use authority in their analysis have a hard time doing so initially. Providing examples at the outset helps students visualize the end product they are attempting to create and familiarizes students with common wish list items. Moreover, examples are particularly useful in demonstrating how a wish list might change depending on the task, the nature and structure of the legal issue, and the types of authorities available. Several sample wish lists are included above in Part II.

**Lean on CREAC.** Students are most likely to understand how and why to use a device like a research wish list when they know how it relates to other lawyering skills they are learning, such as CREAC.<sup>8</sup> In explaining and generating wish

<sup>8</sup> Though I reference CREAC here because that is what I use in my classes, a professor can make the connection between wish list items and the pieces of any organizational paradigm.

lists, I frequently ask students to think of the types of authorities they will need for each section of a CREAC-style analysis of a particular legal issue. For example, for their “R” sections, they will need cases that identify the rule for a specific issue. For their “E” sections, they will need to find cases that provide an explanation or illustration of that rule. And for their “A” sections, they will want cases with facts that will work well for analogies or distinctions.

**Manage expectations.** Students should know at the outset that a wish list is, by definition, aspirational; some types of authorities that they would want to find may simply not exist. Also, students should know that the wish list they generate before they begin researching will likely change as they learn more about the structure of the legal issue from their research. Like research and writing in general, using a wish list is an iterative process. Students should be encouraged to revisit and revise their wish lists as their understanding of the legal issue and the research universe evolves.

## V. Conclusion

Teaching students to research efficiently is a process; no single tool can transform students into effective researchers. However, research wish lists can be an excellent technique for helping students become more efficient and effective researchers and writers. Research wish lists can help your students better understand the relationship between the research and writing process and enable them to find necessary authorities for a complete analysis more quickly and easily. Wish lists have been an excellent tool for my students, and I encourage you to try them with yours.

“[R]esearch wish lists can be an excellent technique for helping students become more efficient and effective researchers and writers.”

Cite as: Mark Cooney, In Praise of Counterintuitive Lessons, 30 Persps. 40 (2023).

## In Praise of Counterintuitive Lessons

By Mark Cooney

*Mark Cooney is a Professor and the Chair of the Research & Writing Department at Western Michigan University Cooley Law School.*

I've seen a lot in 20 years of teaching. But mostly I've seen variations on the same struggles that one expects from new legal writers. As the years have multiplied, I've come up with some counterintuitive lessons to help students through some of the expected sticky spots.

My headlines for these lessons are admittedly contrived to capture students' (and now your) attention. Think of them as pedagogical click-bait. All the better, I say, to pique my students' intellectual curiosity.

I've described some of my counterintuitive lessons below. Each, I hope, can help your students—especially your first-year students—navigate some of the hidden currents that make legal research and writing such tough wading.

### **Lesson 1: When analogizing to cases, don't mention the cases.**

During every grading cycle, we encounter perfectly accurate case comparisons that induce head-scratches. Imagine, for instance, a memo about whether a patch of ice posed an open-and-obvious danger, thus negating the landowner's duty. While reading, we come to this:

Like the plaintiff in *Jones*, Mary Smith has sued a property owner for failing to maintain its premises in a reasonably safe condition.

Well, yes, that's certainly true and accurate. And I suppose that the premises-liability context is what underlies the doctrine's application. Yet this undisputed given doesn't warrant a case comparison. It brings to mind Professor Patrick Barry's "Uselessly

Accurate" article—an article whose title makes us nod in agreement before we've even read it.<sup>1</sup>

What to do?

My advice to students is that whenever and wherever they apply the law to their facts, they should work through two drafts with no references—none at all—to the precedent cases they've discussed.

Zero.

Students are understandably perplexed. "Why did we bother discussing those cases if we're not going to compare them to our own case?"

My answer is that even when embarking on analogical reasoning, in our initial drafts we're better off letting the *ideas*—our substantive analytical points—drive our discussion and organization. Once we've finished a second draft, and our focus and organization are more developed and refined, we can *then* reread our draft and look for the best places to insert case comparisons or distinctions.

By telling our students to be patient, and by stressing that less is sometimes more, we can guide them toward an idea-driven organization with comparisons that pack an analytical punch. This third-draft approach is a potent safeguard against superficial comparisons and distinctions.

This approach also prevents students from being lulled into a false sense that they've offered a meaningful analysis when they haven't. After all, seeing all those italicized case names in a first draft creates a vibe of serious legal analysis. It looks good, but looks can be deceiving.

“As the years have multiplied, I've come up with some counterintuitive lessons to help students through some of the expected sticky spots.”

<sup>1</sup> Patrick Barry, *Uselessly Accurate*, 18 SCRIBES J. LEGAL WRITING 27 (2018–2019).



**Lesson 2: Be repetitive.**

We're bombarded with warnings against undue repetition. But an unbendable anti-repetition ethos robs advocates of prime opportunities for persuasion. In fact, careful, strategic repetition is one of the most practical means of reinforcing favorable law or facts. We always aim to reinforce favorable information by slowing down and giving details. Repetition can help.

So I teach my advocacy students to repeat themselves. But rather than blatant repetition, we strive for repetition that makes an impact without announcing itself. We *disguise* our repetition.

Imagine that you've filed a defamation suit against a loudmouth trial lawyer who dragged your client's reputation through the mud during his closing argument. His remarks were false and strayed far beyond the usual credibility challenges. In response to your suit, the attorney invokes the absolute judicial-proceedings privilege. In your brief opposing summary judgment, you'd want to emphasize that this privilege only protects courtroom statements that are relevant to the case.

You could present the rule without repetition:

This privilege protects statements by attorneys during judicial proceedings if the statements are relevant to an issue in the case. *Oesterle v. Wallace*, 725 N.W.2d 470, 474 (Mich. Ct. App. 2006).

This statement of the relevancy requirement is . . . fine. But if your only hope for surviving summary judgment is the relevancy requirement, some strategic repetition is in order. After inserting the word "only" to nudge the first sentence's vibe in your direction, you could present the same relevancy rule again. Yes, repeat it. But you'd disguise your repetition, perhaps by quoting a case that reinforces the rule or fleshes out its boundaries. Or you might add a sentence restating the rule with synonyms or with language that comes at it from a slightly different angle. You might do all these things, perhaps adding *multiple* repetitive sentences for extra oomph:

The absolute privilege protects statements by attorneys during judicial proceedings only if those statements are relevant to an issue in the

case. *Oesterle v. Wallace*, 725 N.W.2d 470, 474 (Mich. Ct. App. 2006). The privilege "does not extend to slanderous expressions . . . [that] have no relation to or bearing upon the issue or subject matter before the court." *Timmis v. Bennett*, 89 N.W.2d 748, 753 (Mich. 1958). Thus, a lawyer's statement is unprotected when its content strays from what is "relevant, material, or pertinent to the issue being tried." *Oesterle*, 725 N.W.2d at 474.

That was repetitive, but hopefully not obviously repetitive. You were on the lookout for it here, of course. But if you hadn't been—and if you'd read that passage in a larger context—I wonder whether you'd have noticed.

Effective repetition, like so many aspects of written and oral advocacy, is a bit of an art, and nuances matter. These are fruitful and fascinating nuances to explore with our students.

**Lesson 3: When following IRAC, don't follow IRAC.**

I have an uneasy relationship with IRAC and its variants. Within the same five-minute conversation, I might sing IRAC's praises as the bedrock of all well-organized legal prose yet curse it as a crutch that encourages bad habits.

My primary concern with IRAC is that it suggests to our students that there must be one and only one conclusion in a legal discussion. In other words, it leads them to believe that they must refrain from explicitly closing a point or stating a logical consequence until they've reached the magic C at the IRAC finish line. This misconception hampers our students' growth and undermines their work's impact and clarity.

Waiting until the very end to conclude poses a number of problems for both writer and reader. First, a literal tracking of IRAC discounts the crucial need for—and tremendous value of—primary and secondary topic sentences framed in an affirmative style.

Second, holding off until the Final C causes many students to shy away from nailing points home in strategic places along the way as they move through

“My primary concern with IRAC is that it suggests to our students that there must be one and only one conclusion in a legal discussion.”

“Jumping right into a case search may feel efficient, but it’s not.”

their analysis. Those strategic pre-finish conclusions enhance clarity while building persuasive momentum. We want little c’s before the Final C.

For an example of concluding along the way, I’ve selected an excerpt of Judge Diane Wood’s opinion in *Conyers v. City of Chicago*, 10 F.4th 704, 710 (7th Cir. 2021). I’ve excised much of the original text, leaving behind the parts in which Judge Wood drives her points home:

If *Lee* stood alone, it might indeed resolve this part of the plaintiffs’ case. But it does not. . . . Plaintiffs contend that the Supreme Court’s later decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), shows that *Lee* wrongly rejected the idea that the Fourth Amendment applies to a continuing seizure. . . . But for at least two reasons, *Manuel* does not help them. First, *Manuel* dealt with pretrial confinement, not the retention of property. More importantly, even if we were to equate persons and property for these purposes, it would not help our plaintiffs. . . . In other words, were the seizure and detention flawed from the outset? No such question arose in *Lee*, and no such question exists in our case. . . . As *Lee* recognized, that issue falls more naturally under the Due Process Clause of the Fourteenth Amendment, or perhaps the Takings Clause of the Fifth Amendment. The district court thus correctly rejected the plaintiffs’ Fourth Amendment theory.

Notice how many times she concludes within that single paragraph. Yes, it has the Final C at the end for true closure, but there’s a lot of c-c-c along the way. In fact, the best legal writers don’t use IRAC; they use an approach more akin to IRACCACAACACACACC.

#### **Lesson 4: Cheat—and use people.**

New legal researchers shouldn’t research without a net. But that’s just what they’re doing if they jump onto Lexis or Westlaw and immediately start searching for cases. Jumping right into a case search

may feel efficient, but it’s not. Worse, it’s fraught with risk. Students need to learn that there’s a better, safer way for them to begin the research process.

I teach my students to cheat and use people. When facing an unfamiliar legal landscape, there’s no reason for students to go it alone and reinvent the wheel, as the clichés would say. I’d hazard to guess that 99 times out of 100, whatever issue they’re researching has already been researched—and written about, with care—by a seasoned legal professional with expertise in that area of law.

I’m talking, of course, about treatises, and especially state-law treatises. These books are designed to teach lawyers about new areas of law, presenting the governing codified law and the leading cases in a well-organized, reader-friendly style and format. The relevant law is already there on a silver platter, with citations.

So why start from scratch when an expert author has already done the work? Often, in just two or three pages of reading from a treatise (or encyclopedia), students gain invaluable, reassuring context and coverage of an unfamiliar concept.

Students often remark that using a treatise to start the research process is so efficient that it “feels like cheating.” They’ll report that they researched in other sources for hours on end, only to discover that the authorities they’d found in a treatise in the first 30 minutes turned out to be the centerpiece of their brief or memo.

Besides being remarkably efficient, the treatise-first approach is *safe*. Remember, a prominent legal professional has put their reputation on the line in that treatise or treatise chapter. This expert brings practice expertise and a strong motivation to work with care. And often editors with substantive knowledge add a second layer of protection during the publication process. So the odds are remote that the author has omitted a leading case or has missed a controlling statute or regulation. Students are the beneficiaries of that careful work.

### Lesson 5: Develop a healthy disrespect for the rule of law.

Rules, rules, rules. First, the student lays a foundation of controlling rules to begin the substantive discussion or argument. So far, so good. We need that. But then more and more of the same rules, again and again. You see it often, I suspect. When you're hungry for examples of how courts have applied those rules to analogous facts, you see a topic sentence for a discussion of the leading case: "Landowners generally owe no duty to warn invitees of open-and-obvious dangers." (A rule you'd read in the previous paragraph.) Then, the case holding: "The court held that a landowner generally owes no duty to warn invitees of open-and-obvious dangers." (Same rule.) Then the court's reasoning: "The court reasoned that because obvious hazards are apparent to an ordinary person of average intelligence, no duty should exist absent special aspects that make the hazard unreasonably dangerous despite its obviousness." (The same rule with some underlying policy.)

Then, in the analysis of your own case, you get a repeat of the rules with a bare conclusion appended to them.

Rules, rules, rules.

Where are the facts? The facts that control how the rules apply? Why did the court in the leading case think that the facts did or did not meet the legal test? Why would a court think that our facts do or don't meet the legal test?

Facts are the gasoline for our analytical engine. Without them, our progress sputters and halts. Unless a lawyer is urging a new legal rule in a supreme court—an infrequent situation for most lawyers—the controlling rule is a given. It's all about the facts.

It's perfectly understandable that our students struggle to get factual. Why wouldn't they gravitate to rules given how much time and effort they devote to learning rules, outlining rules, and memorizing rules? And in doctrinal courses, they often get the sense that their true aim is to extract shiny, clean rules from all those messy facts in the homework cases.

Plus, explaining how and why certain facts do or do not meet the controlling rule isn't easy. It requires subtle and sometimes abstract characterizations or categorizations of what those facts represent. This is heavy mental lifting—and a new analytical skill for most. Yet it's the skill that is, perhaps more than any other, *lawyering*.

Of course rules matter. But one of our main goals as teachers is to help our students see that, typically, the rule is not the end. It's just the beginning.

### Lesson 6: When identifying people or entities, don't identify them.

When reading student discussions of precedent cases, it's common to see distracting or uninformative references to parties and other relevant people or entities. We may learn, for example, that

the plaintiff-appellant, James G. Smith, a borrower, brought suit against the defendant-appellee, JP Morgan Chase Bank, . . .

That took 16 words to say "a borrower sued a bank."

The parties' proper names or status on appeal (*appellant*, *appellee*) aren't usually relevant or helpful. Rather, the parties' status matters. Whether it's a *landlord* and *tenant*, a *buyer* and *seller*, or a *policyholder* and *insurer*, the status words immediately connect with our busy reader's busy brain. Even references to "the plaintiff" and "the defendant" can be uninformative, with the notable exception of criminal cases. But even in criminal cases, status words can capture a lot with a little: a *police officer*, a *witness*, a *bystander*, an *informant*, etc.

There will be exceptions. But I try to create a status-word default for case illustrations. No names. No "appellants" or "appellees." And "the plaintiff" or "the defendant" only if a status word would feel contrived or distracting.

I'm not alone. Federal Rule of Appellate Procedure 28(d) urges brief-writers to "minimize use of the terms 'appellant' and 'appellee'" and consider other options, including "such descriptive

"Facts are the gasoline for our analytical engine."

“This passage flows seamlessly, and it’s a breeze to follow who’s who and who’s doing what.”

terms as ‘the employee,’ ‘the injured person,’ ‘the taxpayer,’ ‘the ship,’ ‘the stevedore.’” Court rules across the country, such as those in Iowa, Massachusetts, Montana, North Dakota, and more (too numerous to cite here), likewise suggest descriptive terms to enhance clarity.

The National Conference of Bar Examiners takes the same approach to help examinees follow intricate fact patterns more easily. Here’s an excerpt from a past bar question:

A retailer sent a purchase order to a computer manufacturer requesting the shipment of a specified quantity of laptops. . . . The manufacturer received the purchase order and promptly shipped the laptops to the retailer. The manufacturer sent an acknowledgment form to the retailer four days later.

Two days after accepting delivery of the laptops, the retailer received the manufacturer’s acknowledgment form, which excluded consequential damages. The same day, the retailer discovered that the laptops were defective.

This passage flows seamlessly, and it’s a breeze to follow who’s who and who’s doing what. I encourage students to imitate this style when discussing precedent cases. It’s a little technique—one that will likely escape readers’ notice—that pays big readability dividends.

### Conclusion

There you have it: my favorite counterintuitive lessons. You’ve probably found similar opportunities to play the agreeable contrarian. If so, I’d love to hear about it—and I encourage you to share your strategies on the Legal Writing Institute’s online idea bank (<https://www.lwionline.org/resources>).

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# Commas Are the New Periods, Except When They're Not

By Maryam Franzella

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“A comma is not a period.” I have found myself making this comment, or some variation of it, with increasing frequency over the past several years. I have also spent class and conference time explaining that two independent clauses cannot be separated by a comma, a concept that my students find boring and archaic. That many students start law school today unable to recognize where a sentence ends may be startling, but perhaps it should not be. Informal English has become the primary form of expression for this segment of the population.<sup>1</sup> Whether daily “text speech” has exacerbated grammar problems, including the use of the comma splice, remains debatable. Nevertheless, it behooves this generation’s legal writing students to practice recognizing grammar errors that ubiquitously appear in digital conversation, and may be unobjectionable or even welcome there, but still have no place in conventional legal writing. While some students may already be proficient at conforming the syntax of their written composition with its purpose and audience, others can benefit from exercises that ask them to actively distinguish between digital grammar and formal grammar, which legal practice still demands.

## A. “Text Speak” Has Arguably Eliminated the Need for Language Rules

In almost all aspects of their lives other than school, legal writing students are free from the dogmatic norms of language. While they write formal legal documents in class, they send text messages to friends that are unfettered by the need for proper

grammar. “In the 1990s the internet created an ethos of linguistic free love where breaking the rules was encouraged and punctuation was one of the ways this could be done.’ Social media sites have only intensified that sense of liberation.”<sup>2</sup>

Some studies have found that the relaxed punctuation attitudes in text speech may have either no effect, or in some cases, a *positive* effect on literacy performance for those students who are able to “code-switch”; for the student who is an effective communicator, text speech has provided a great deal of practice in altering language tone to correspond to the purpose and audience of various correspondences.<sup>3</sup> Other legal writing students, though, fall into habits like joining consecutive, related points with a soft comma rather than a rigid period, especially when aiming to add language continuity. Whether there is a data link between digital writing style and certain grammatical issues remains arguable, but it would not be farfetched to assume that pervasive texting has exacerbated the problem for some students who have a weaker sense of “metalinguistic awareness” and may not be as adept at “code-switching” as others.<sup>4</sup>

Even on social media, correct grammar matters,<sup>5</sup> but it especially matters in business. *The Wall Street Journal* has reported that managers were “fighting an epidemic of grammar gaffes in the workplace...attribut[ing] slipping skills to the informality of email, texting and Twitter

“That many students start law school today unable to recognize where a sentence ends may be startling, but perhaps it should not be.”

<sup>2</sup> Dan Bilefsky, *Period. Point Stop. Point. Whatever It's Called, It's Going Out of Style*, N.Y. TIMES (June 9, 2016), <https://www.nytimes.com/2016/06/10/world/europe/period-full-stop-point-whatever-its-called-millennials-arent-using-it.html> (quoting University of Wales linguistics professor, David Crystal).

<sup>3</sup> See Gustafson, *supra* note 1, at 171–72, 181.

<sup>4</sup> *Id.* at 171–72.

<sup>5</sup> Livia Albeck-Ripka, *Missing Apostrophe in Facebook Post Lands a Man in Defamation Court*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2021/10/11/world/australia/facebook-post-missing-apostrophe-defamation.html?searchResultPosition=4>.

<sup>1</sup> Even back in 2011, among young adults between the ages of eighteen and twenty-four, 97 percent used text messaging, averaging about 110 messages per day and over 3,200 per month. Lindsey P. Gustafson, *Texting and the Friction of Writing*, 19 LEGAL WRITING 161, 166 (2014).



“[T]eaching academic grammar rules has become as much a lesson in syntax as it has a lesson in considering language tone and audience.”

where slang and shortcuts are common” and that “[s]uch looseness with language can create bad impressions with clients, ruin marketing materials and cause communications errors.”<sup>6</sup>

In official venues such as courtrooms, where legal documents have consequential objectives, formality and precision remain the fundamental norms. Legal arguments must be meticulously crafted, and lawyers must be credible authors.<sup>7</sup> The media of legal writing has, and will continue to, dramatically change, becoming quicker and perhaps more informal, but the required elements of sentence structure remain unadulterated. As the atypical use of punctuation (including the use of a period) has become passé in students’ daily lives, teaching academic grammar rules has become as much a lesson in syntax as it has a lesson in considering language tone and audience.<sup>8</sup>

## B. The Multi-Functional Comma in Digital Conversation Is Not As Adaptable Elsewhere.

Punctuation marks are often superfluous in digital conversation as they are frequently inferable by the reader based on the context of the conversation. Further, the lack of such formal marks is largely excused by readers due to the speed with which written information is communicated. “im so stressed, i did no readings for class, did you” demands no apostrophes or question mark as the purpose behind the symbols is discernible based on a mutual understanding between the parties,

making their use an inefficient waste of time. In a text dialogue, the “send” button itself serves as a punctuation marker, encapsulating each clause in its own chat bubble and separating it from the phrases surrounding it. At best, the ending period seems extraneous. At worst, including an ending period is unnaturally formal, or even rude:

To younger generations, using proper punctuation in a casual context like texting can give an impression of formality that borders on rudeness, as if the texter is not comfortable enough with the texting partner to relax. The message-ending period establishes a certain distance. The punctuation is polite when speaking to someone older than you or above you at work, but off-putting among friends. Simply put, the inclusion of a formality in casual communication is unnerving.<sup>9</sup>

The lack of punctuation itself has come to connote a natural familiarity, so much so that the finality of a full-stop period now indicates harshness – even, sometimes, anger. “‘Thanks’ becomes ‘Thanks,’ read ‘Thanks for nothing.’ ‘No’ becomes ‘No,’ read ‘No. Absolutely not. No. No. No.’ A single pixel can turn the tone course regardless of one’s original intentions.”<sup>10</sup> Rather than dismissively concluding a statement, younger generations, and increasingly older ones, are replacing the period with a comma, ellipses, or no punctuation at all.

It doesn’t help that technology companies are all but eliminating the need to *think* about the period. When composing a text message on an iPhone, for example, one must switch to another set of characters entirely, hit the period, and then return to the original screen to continue a message.<sup>11</sup> Until

6 Sue Shellenbarger, *This Embarrasses You and I\**, WALL ST. J. (June 20, 2012), <https://www.wsj.com/articles/SB10001424052702303410404577466662919275448>.

7 Kristen Konrad Tiscione, *A Writing Revolution: Using Legal Writing’s “Hobble” to Solve Legal Education’s Problem*, 42 CAP. U. L. REV. 143, 156 (2014) (“Students may need to be reminded that they are not free to ignore mistakes in grammar, spelling, and punctuation. . . . The immediacy of texting, tweeting, and email, as well as the ease of electronic legal research, may contribute to students’ frustration levels when it comes to the painstaking process associated with good legal analysis and writing. [T]he challenges associated with teaching legal research and writing skills will likely change, if not become more difficult, as the digital divide between faculty and students continues to grow.”).

8 See Gustafson, *supra* note 1, at 187 (“Mental grippers are the abstract concepts...learners can identify in a specific discourse (like texting) and then identify in another domain (like legal writing). . . . For example, once students recognize that texting has its own discourse community whose members have certain rhetorical expectations, they are more likely to appreciate that legal writing similarly has its own discourse community whose expectations students will also need to learn.”).

9 Max Harrison Caldwell, *No More Periods When Texting. Period.*, N.Y. TIMES (June 29, 2021), <https://www.nytimes.com/2021/06/29/crosswords/texting-punctuation-period.html> (“People gain and express interpersonal comfort through unpolished self-presentation, and acting (or writing) too formally comes off as cold, distant, or passive-aggressive.”).

10 Caleb Melby, *The Generation Gap in Online Punctuation: An Open Letter (And Revised Style Guide) to Digital English*, FORBES (May 8, 2013), <https://www.forbes.com/sites/calebmelby/2013/05/08/the-generation-gap-in-online-punctuation-an-open-letter-and-revised-style-guide-to-digital-english/?sh=5710416f1876>.

11 Gene Weingarten, *The New Rules of Punctuation Are Unbelievable. Period.*, WASH. POST (July 11, 2019), [https://www.washingtonpost.com/lifestyle/magazine/gene-weingarten-the-new-rules-of-punctuation-are-unbelievable-period/2019/07/08/8417cd02-8eca-11e9-b08e-cfd89bd36d4e\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/gene-weingarten-the-new-rules-of-punctuation-are-unbelievable-period/2019/07/08/8417cd02-8eca-11e9-b08e-cfd89bd36d4e_story.html).



a few years ago, Twitter imposed a 140-character limit on tweets, rendering proper punctuation not only superfluous, but a hinderance. It is no wonder that taking the time and extra step to include a period is associated with a negative emotion.

### C. Two Exercises to Raise Awareness of Language Differences in Digital Forums Versus Legal Documents.

To avoid tirelessly lecturing about the independent clause, incorporating exercises that contrast extemporaneous digital communications with meticulous formal legal writing can help students become aware that a mindful adjustment is necessary, even when it comes to punctuation. The first exercise asks students to identify colloquial grammar in digital dialogue, while the second challenges them to edit such language *out* of a formal legal document to reflect a style of writing characterized by more technical grammatical structures.

#### 1. Exercise #1: The Text Message Conversation

The professor can create a customary text conversation between two law students. This is intended to demonstrate to them grammatical, punctuation, and stylistic “infractions within material the students already know and understand” to “avoid the extraneous cognitive load that students encounter when actively engaging with substantive analysis while also looking for more superficial problems.”<sup>12</sup>

It is generally a good idea to make the conversation slightly humorous or exciting to engage the students for the purpose of teaching a dry subject. The text conversation should be timely, perhaps about an upcoming exam, a lost laptop just before an assignment is due, or a particular school trope. For example: “do you think the torts final is going to cover negligence, if so I’m in trouble, and if the contracts exam covers offer or acceptance I’m done for.”

The graphics should reflect an actual text conversation. Replace numerous periods in the conversation with commas, as many texters would,

and keep track of the number of comma splices. It is a good idea to focus the students on a particular issue, e.g. replacing closing punctuation with a comma, rather than asking them to detect other problems that commonly arise in conversational writing (although, in reviewing the exercise, the professor may take the opportunity to engage the class in a united analysis of other grammatical concerns). The sample should contain a combination of accurate punctuation marks as well as punctuation blunders to allow students to practice discerning the errors.<sup>13</sup> At the conclusion of the exercise, poll the students as to how many comma splices exist in the exercise, collectively identifying and correcting each one.

By finding the run-on sentences in the conversation, the students are not only exercising editing skills and recognizing why commas shouldn’t replace periods between independent clauses, but importantly, they are also becoming aware that they relax grammar rules when they engage in dialogue on digital forums. As a result, with hope, they will be cognizant of the grammatical adjustments needed when transitioning from writing a text message to a friend to writing a brief for a judge.<sup>14</sup>

#### 2. Exercise #2: The Formal Letter

A possible second exercise aims to illustrate to students the incongruity of using care-free grammar in a formal legal document. While the first exercise provided practice in recognizing punctuation errors, this one demonstrates the importance of correcting them in legal practice where they not only detract from the substantive goal of the document, but also discredit the writer, thereby impairing his ability to convince his reader to accept his conclusions or arguments. For this exercise, the instructor provides the students with a formal document such as a letter to a court, a business email to an adversary, or

“[I]ncorporating exercises that contrast extemporaneous digital communications with meticulous formal legal writing can help students become aware that a mindful adjustment is necessary . . . .”

<sup>12</sup> Gina Neger, *Two Wrongs Can Make a Right: Introducing Flawed Samples for Effective Counter-Modeling*, 28 PERSPS. 19, 23 (2020).

<sup>13</sup> For instance, in the example in the preceding paragraph, a comma is misused in the place of a question mark after the word “negligence,” but the remaining comma and period are not problematic.

<sup>14</sup> See Appendix A for a sample excerpt of a text message exchange that contains comma splices, as well as other typical grammatical errors.

“Students should become equipped to switch hats to adapt to the context and audience of their writing . . . .”

an excerpt of a memorandum or appellate brief; parts of the language will have been edited by the instructor to reflect grammar used in an online conversation. The language will contain typographical errors, internet shorthand (e.g. “IMHO,” read: “in my humble opinion”), extraneous punctuation (e.g. exclamation points) and yes, relaxed punctuation like commas and ellipses. Ask the students to re-write the document, reflecting upon the audience and verbiage. At the conclusion of the exercise, the professor may share the original, unedited document for comparison.<sup>15</sup>

#### D. Conclusion

Requiring students, and ourselves for that matter, to use correct punctuation in all aspects of daily life may well be unrealistic. Certain grammatical concerns, like the comma splice, however, have become part of students’ dialogue numerous times a day. Students should become equipped to switch hats to adapt to the context and audience of their writing, and practice doing so. Perhaps one day, for a future generation of lawyers and judges who have texted, tweeted, and posted for a lifetime, the comma will become strong enough to hold two independent clauses together. Until then, professors can find creative ways to help an increasingly online student population recognize grammatical problems like the comma splice in legal writing.

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<sup>15</sup> Appendix B provides an excerpt from a sample legal document, in the original, and as edited to incorporate language representative of a typical digital conversation.

## APPENDIX SAMPLE EXERCISES

### Exercise #1

*The following is a fictitious text message conversation between two law students that includes numerous spelling and grammatical errors reflective of a digital conversation. Students are tasked with identifying all such errors.*

Hey! I know you're a 2L, you've been through it before. Do you have any advice for me, I'm not ready for 1L finals in 2 weeks, like where do I even start? Any advice appreciated, but I know your busy too!

Thanks man, I feel like my outline is never done, been trying to pay attention to what my prof likes all semester, not sure how its all gonna come together. Also think I need to leave my study group, lots of procrastination going on there. Appreciate the words of wisdom bud, thanks!

No worries, here's my advice, take your outline, and condense it into a smaller version with the most important points. Also on the exams, don't ramble on about general legal topic, just stick to answering the question on the hypo, or you'll waste time

**Exercise #2**

The following is a letter to a court clerk that has been edited to include numerous grammatical errors reflective of a digital conversation, such as comma splices leading to run-on-sentences, acronyms, exclamation points, and ellipses. What follows after is the correct version. Students are asked to revise the letter.

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May 27, 2022

Giuliana Tezino, Esq.

Clerk of the Court

Supreme Court, State of New York

Appellate Division, First Department

27 Madison Avenue

New York, New York 10010

Re: Sandler Properties, Inc. v. Gould & Go.Docket No.: 2021-24524

Dear Ms. Tezino:

Sandler Properties, Inc. is our client, I write to respectfully withdraw Appellant's pending motion for a stay pending the disposition of the appeal . . . After filing the notice of appeal, Appellant came into some information that obviated the need to for a stay, BTW we have been in touch with the Appellee to discuss settlement terms, which is great, it would not be prudent to proceed with the motion...we hope to fix everything up soon

We don't want to waste anybody's time

TY so much!

Respectfully submitted,

*Cindy Milton*

**CORRECT VERSION**

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235 MAIN STREET  
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May 27, 2022

Giuliana Tezino, Esq.  
Clerk of the Court  
Supreme Court, State of New York  
Appellate Division, First Department  
27 Madison Avenue  
New York, New York 10010

Re: Sandler Properties, Inc. v. Gould & Go.  
Docket No.: 2021-24524

Dear Ms. Tezino:

This firm represents Sandler Properties, Inc., Appellant, in the above-referenced matter. I write to respectfully withdraw Appellant's motion for a stay pending the disposition of the appeal. After Appellant filed the notice of appeal, Appellant came into some information that obviated the need for a stay. Moreover, we have been in touch with the Appellee to discuss a potential settlement, and we are hopeful that such discussions will prove fruitful. Thus, it would not be prudent to proceed with the pending application.

As always, we appreciate the Court's attention and patience.

Respectfully submitted,  
*Cindy Milton*



Cite as: Martha Pagliari & Jody Marcucci, *Zoom Oral Arguments: Should They Stay or Should They Go?*, 30 *PERSPS.* 52 (2023).

# Zoom Oral Arguments: Should They Stay or Should They Go?<sup>1</sup>

by Martha Pagliari and Jody Marcucci

*Martha Pagliari is the Assistant Dean of Experiential Education, at DePaul University College of Law. Jody Marcucci is the Co-Director of Legal Analysis, Research, and Communication, at DePaul University College of Law.*

## I. Introduction

In March of 2020, DePaul University, like almost every other university in the nation, shifted almost exclusively to remote learning due to the COVID-19 pandemic. At that time, our first-year legal writing students were only weeks away from their final class assignment: an oral argument in support of (or in opposition to) a motion to a trial court. Adapting to the “make it work” attitude of those times, we found readings to educate our students how to present oral arguments remotely,<sup>2</sup> set up our Zoom links, and did our best to provide our students with an effective learning opportunity. As our required writing classes remained remote for the 2020–2021 academic year, we continued to develop our teaching materials to focus on the presentation of remote oral arguments. Since fall 2021, we are back in person and hope to remain so for the foreseeable future. This “return to normal” is welcome, but raises several questions relevant to our oral advocacy curriculum, including (1) do we have an obligation to continue to teach effective remote oral argument skills, and, if so, (2) where in our curriculum can we find the appropriate space to do so?

To answer these questions, we first considered the current trends in oral arguments, both at the trial and reviewing court levels. We questioned whether courts are planning to return to traditional in-person arguments or whether remote arguments are here to stay. Next, we considered our obligations as educators to teach law students how to communicate effectively in remote and in-person oral formats. Finally, we considered what benefits remote oral arguments offer to the legal profession as a whole. As we conclude, teaching students the skills necessary for presenting effective oral arguments in a remote setting is an important part of a practice-ready curriculum that should be here to stay.<sup>3</sup> This Article ends with the model we propose to use at DePaul University College of Law.

## II. Current Trends

Courts, both at the trial and reviewing levels, are continuing to rely on remote oral arguments and appearances.

### A. Trial Courts

The trial courts, like the law schools, reacted quickly to the pandemic and shifted from live hearings to remote hearings. Many viewed this shift as “not the disruption courts wanted, but . . . the disruption that courts needed: to reimagine and embrace new ways of operating and to transform courts

<sup>1</sup> This Article is based on our presentation with the same name given at the Central States Region Legal Writing Conference (hosted by the University of Missouri Kansas City School of Law) on October 23, 2021.

<sup>2</sup> See, e.g., Adam Lamparello, *Tips for Giving an Effective and Persuasive Online Oral Argument*, APPELLATE ADVOCACY BLOG (Apr. 12, 2020), [https://lawprofessors.typepad.com/appellate\\_advocacy/2020/04/tips-for-giving-an-effective-and-persuasive-online-oral-argument.html](https://lawprofessors.typepad.com/appellate_advocacy/2020/04/tips-for-giving-an-effective-and-persuasive-online-oral-argument.html).

<sup>3</sup> This Article was drafted in fall 2021, before the discovery of the Omicron variant of the COVID-19 virus. Many courts moved to a remote format in response to that variant, thus demonstrating the likely need for future advocates to be trained in effectively presenting a remote oral argument. Many of those courts are noted below.

“[D]o we have an obligation to continue to teach effective remote oral argument skills . . . ?”

[to be] more accessible, transparent, efficient, and user friendly . . . .”<sup>4</sup> Courts that studied the use of remote proceedings, Arizona, California, Michigan, New York, and Ohio,<sup>5</sup> recommended that remote proceedings continue post-pandemic. The Ohio Supreme Court Committee’s overall recommendation was simply that “[c]ourts should continue the use of remote technology to conduct court proceedings.”<sup>6</sup>

The trial courts in the various states differ in the role technology may play in courtrooms post-pandemic. However, typically, the trial courts recommend that remote hearings continue past the pandemic for non-evidentiary hearings, including status and scheduling conferences, pretrials, and motions.<sup>7</sup> In addition, courts routinely recommend remote hearings continue for a wide variety of types of hearings, including traffic violations, civil infractions, summary

proceedings, guardianships and conservatorships, criminal pleas and sentencing, and short domestic relations evidentiary hearings.<sup>8</sup> Courts are also finding success using remote proceedings for alternative dispute resolutions (ADR), now known as online dispute resolution (ODR).<sup>9</sup>

Because of the increase in access to the courts for litigants, the trial courts will likely continue using remote proceedings post-pandemic.<sup>10</sup> All the courts noted that remote access to court proceedings profoundly impacted fairness and equal access to justice for its citizenry in a positive way.<sup>11</sup> Allowing parties to appear through virtual platforms significantly increased appearance rates.<sup>12</sup> However, courts acknowledge that the digital divide, or the gap between those who have access to technology and those who do not, must be addressed.<sup>13</sup>

“[C]ourts routinely recommend remote hearings continue for a wide variety of types of hearings . . . .”

4 1 *The Supreme Court of Ohio Task Force on Improving Court Operations Using Remote Technology: Report & Recommendations*, SUP. CT. OHIO, at ltr. from chair (2021), <https://www.supremecourt.ohio.gov/docs/Boards/iCourt/ReportVolume1.pdf> [hereinafter *Ohio iCourt Report*]; see also Nat’l Ctr. for St. Cts. (NCSC), *Coronavirus and the Courts*, NCSC, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Dec. 12, 2022) (quoting Michigan Chief Justice Bridget Mary McCormack, the pandemic “is not the disruption courts wanted, but it is the disruption courts needed”) [hereinafter *NCSC State Court Report*]; *Illinois Courts 2020 Annual Report*, ILL. CTS., 5–7 (2020), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/ce15804b-b4a7-4503-8ba9-4c609b160616/2020%20Annual%20Report%20Administrative%20Summary.pdf> (Chief Justice Burke stated, “This pandemic was not the crisis we asked for, but it may be the crisis we need to bring about improvement in technology, access to justice and other areas.”).

5 *NCSC State Court Report*, *supra* note 4. The Arizona, California, Michigan, New York, and Ohio reports on post-pandemic use of technology are available at the NCSC website, under State Court Reports on Remote Access.

6 *Ohio iCourt Report*, *supra* note 4, at 5; see also Workgroup on Post-Pandemic Initiatives, *Interim Report: Remote Access to Courts*, CAL. CTS., 2 (Aug. 16, 2021) <https://www.courts.ca.gov/documents/P3-Workgroup-Remote-Access-Interim-Report-8162021.pdf> (“[C]ourts should expand and maximize remote access on a permanent basis for most proceedings . . . .”) [hereinafter *California Report on Remote Access*].

7 *Ohio iCourt Report*, *supra* note 4, at 23; see also *Ariz. Sup. Ct. COVID-19 Continuity of Ct. Operations During a Pub. Health Emergency Workgroup, Post-Pandemic Recommendations*, AZCOURTS.GOV, 15–19 (June 2, 2021), <https://www.azcourts.gov/Portals/216/Pandemic/2021/Post-PandemicRecommendations.pdf?ver=2021-06-08-192520-583> [hereinafter *Arizona Post-Pandemic Recommendations*]; St. Ct. Admin. Off. *Lessons Learned Comm., Michigan Trial Courts: Lessons Learned from the Pandemic of 2020–2021: Findings, Best Practices, and Recommendations*, MICH. CTS., 24 (June 29, 2021) <https://www.courts.michigan.gov/4a4803/siteassets/COVID/COVID-19/lessonslearned.pdf> [hereinafter *Michigan: Lessons Learned from Pandemic*]; Online Cts. Working Group of the Comm’n to Reimagine the Future of N.Y.’s Cts., *Initial Report on the Goals and Recommendations for New York’s Online Court System*, NYCOURTS.GOV, 11–12 (Nov. 9, 2020) <https://www.nycourts.gov/whatsnew/pdf/ocwg-report.pdf> [hereinafter *NY Online Courts Report*].

8 *Michigan: Lessons Learned from Pandemic*, *supra* note 7, at 24.

9 *NY Online Courts Report*, *supra* note 7, at 20–29 (describing the history, benefits, and risks of ODR and New York’s pilot program); see also *Arizona Post-Pandemic Recommendations*, *supra* note 7, at 22; *Ohio iCourt Report*, *supra* note 4, at 8, 44.

10 For example, the Illinois Supreme Court, noted that “[r]emote hearings have brought greater party participation, fewer defaults and failures to appear, and enhanced case management and scheduling.” *Remote Proceedings*, ILL. CTS. (last visited Dec. 12, 2022), <https://www.illinoiscourts.gov/courts/additional-resources/remote-proceedings/>. The Illinois Supreme Court adopted rules to allow participation in civil or criminal proceedings by telephone or video conference. ILL. SUP. CT. R. 46; see also ILL. SUP. CT. R. 241. Other states have adopted a similar approach, see, e.g., *Arizona* (<https://justicecourts.maricopa.gov/i-want-to-attend-a-hearing>); *California*, CAL. R. 3.672; *Maryland* (<https://mdcourts.gov/remot hearings>); and *MD. CODE ANN. §§ 2-800, 4-23*; and *Michigan*, MRC 2.407, 2.408, and 6.006.

11 See *NCSC State Court Reports*, *supra* note 4; *Arizona Post-Pandemic Recommendations*, *supra* note 7, at 9.

12 See, e.g., *Arizona Post-Pandemic Recommendations*, *supra* note 7, at 9 (stating that before the pandemic in more than one-third of eviction actions, the defendant failed to appear but after implementing the remote option, failure to appear rates decreased significantly to as low as 13%); see also Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> (noting use of remote proceedings allowed legal aid organizations to reach previously underserved persons in remote areas and decreased costs for self-represented and low-income litigants).

13 See *NCSC State Court Reports*, *supra* note 4; *Arizona Post-Pandemic Recommendations*, *supra* note 7, at 7–8; *California Report on Remote Access*, *supra* note 6, at 9; *NY Online Courts Report*, *supra* note 7, at 13; *Ohio iCourt Report*, *supra* note 4, at 19.

“Use of remote proceedings increased efficiency by decreasing court backlogs.”

Likewise, some caution that technology may pose challenges for fair proceedings in some cases.<sup>14</sup>

In addition, the trial courts noted other benefits. Use of remote proceedings increased efficiency by decreasing court backlogs.<sup>15</sup> Lawyers, litigants, and witnesses incurred cost savings due to decreased travel times.<sup>16</sup> Recorded proceedings increased transparency.<sup>17</sup> Courts also noted some disadvantages, including difficulty in accurately transcribing hearings, technology glitches, and difficulties with translation services.<sup>18</sup> Not inconsequentially, Constitutional issues, such as the potential infringement of the Sixth Amendment right of cross-examination and right to confront accusers, must be addressed.<sup>19</sup> However, because the advantages of access to the courts and reduced costs outweigh the disadvantages for some types of proceedings, the trial courts will likely proceed with the use of remote proceedings in some capacity.

## B. Reviewing Courts

The United States Supreme Court returned to in-person arguments for the October 2021 Term. As

of fall 2021, the appellate courts, both at the federal and state levels, were taking a more mixed approach. For example, arguments in the First, Fourth, Ninth, Tenth, and the District of Columbia circuits remained remote during the fall 2021.<sup>20</sup> By the fall of 2022, federal appellate courts returned to in-person arguments. However, some courts continue to allow remote arguments by permitting counsel to request that the argument be held remotely.<sup>21</sup>

Appellate courts at the state level are also taking a mixed approach. For this article, we examined a sampling of state courts, including California (where the supreme court and two appellate courts give counsel the option of appearing in-person or remotely via video<sup>22</sup>), Florida (where counsel can request to participate remotely in oral argument<sup>23</sup>), Illinois (where arguments remain remote<sup>24</sup>), Kansas (where guidelines

14 See, e.g., Bannon & Adelstein, *supra* note 12 (noting that when hearing was remote; higher bond amounts set for criminal defendants, immigration individuals more likely to be deported, credibility of witnesses and parties decreased, and attorney-client communication was more difficult); *California Report on Remote Access*, *supra* note 6, at 8–9; *NY Online Courts Report*, *supra* note 6, at 22–23; Future Trials Working Group of the Comm’n to Reimagine the Future of N.Y.’s Cts., *Report and Recommendations of the Future Trials Working Group*, NYCOURTS.ORG, 22–24 (Apr. 5, 2021), <https://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf> [hereinafter NY Future Trials].

15 *California Report on Remote Access*, *supra* note 6, at 3 (after moving exclusively to remote proceedings, juvenile cases’ clearance rate exceeded 100%); *NY Online Courts Report*, *supra* note 7, at 17.

16 See *Ohio iCourt Report*, *supra* note 4, at 21–22.

17 See *California Report on Remote Access*, *supra* note 6, at 2.

18 See *Michigan: Lessons Learned from Pandemic*, *supra* note 7, at 19–20.

19 *California Report on Remote Access*, *supra* note 6, at 28–32; *NY Future Trials*, *supra* note 14, at 28–31; *Michigan: Lessons Learned from Pandemic*, *supra* note 7, at 25–27; *Ohio iCourt Report*, *supra* note 4, at 58–71; see also Pandemic Resource from NCSC, *Constitutional Concerns Related to Jury Trials During the COVID-19 Pandemic*, NCSC (version 3, Mar. 29, 2021), <https://perma.cc/8H47-JE8R> (examines right to a speedy trial, right to a public trial, right to an impartial jury, confrontation clause, right to civil jury trial issues evolving from the pandemic); A Resource from the Pandemic Rapid Response Team, *Trial Court Record Considerations When There Is a Confrontation Objection About Remote Participation*, NCSC (Oct. 2021), [https://www.ncsc.org/data/assets/pdf\\_file/0015/70107/Confrontation-clause-remote-participation.pdf](https://www.ncsc.org/data/assets/pdf_file/0015/70107/Confrontation-clause-remote-participation.pdf).

20 The Fourth Circuit set its oral arguments on December 7 through December 10, 2021, for in-person delivery. *Oral Argument Calendar*, U.S. CT. OF APPEALS FOURTH CIR. (last visited Dec. 12, 2022), <https://www.ca4.uscourts.gov/oral-argument/oral-argument-calendar/earlier-court-terms>. However, its January and March 2022 arguments were scheduled for a remote format. *Id.*

21 See, e.g., *United States Court of Appeals for the Third Circuit Notice Regarding Operations to Address the COVID-19 Pandemic*, U.S. CT. OF APPEALS THIRD CIR. (Feb. 1, 2022), <https://www.ca3.uscourts.gov/sites/ca3/files/COVID%20Notice%202022.pdf> (may request to appear remotely); 3d Cir. R. 34.1(e) (may request oral argument by video-conference); 6th Cir. R. 34(g)(3) (may conduct oral argument by teleconference); *Order United States Court of Appeals for the Seventh Circuit Order Regarding COVID-19*, U.S. CT. OF APPEALS SEVENTH CIR. (Sept. 30, 2022), [https://www.ca7.uscourts.gov/general-orders/General\\_Order\\_22-005.pdf](https://www.ca7.uscourts.gov/general-orders/General_Order_22-005.pdf) (may request to present oral argument remotely); *United States Court of Appeals for the Ninth Circuit Argument Protocols*, U.S. CT. OF APPEALS NINTH CIR. (Sept. 1, 2022), <https://cdn.ca9.uscourts.gov/datastore/general/2022/08/18/In-person-protocols-Sept-1-2022.pdf> (may indicate preference for remote video argument).

22 The California Supreme Court resumed in-person oral arguments in November 2022 and have given counsel the option to appear in-person or remotely via video. Sup. Ct. of Cal. Admin Order 2022-10-05 (Oct. 5, 2022), [https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/2022-10/administrative\\_order\\_2022-10-05\\_2.pdf](https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/2022-10/administrative_order_2022-10-05_2.pdf). This rule is followed by California appellate courts sitting in the First District Court of Appeal (<https://www.courts.ca.gov/1dca.htm>); Fifth District Court of Appeal (<https://www.courts.ca.gov/documents/5dca-Administrative-Order-2022-3-14.pdf>), and the Sixth District Court of Appeal (<https://www.courts.ca.gov/documents/6dca-misc-order-22-001.pdf>).

24 In re. Illinois Courts Response to COVID-19 Emergency, M.R. 30370 (Mar. 17, 2020), <https://www.illinoiscourts.gov/Resources/ceb8bb3a-b3b7-4b10-8539-84098d42f3de/031720-3.pdf> (“If feasible and subject to constitutional limitations, essential matters and proceedings shall be heard remotely via telephone or video or other electronic means.”). In the appellate courts, although a few arguments are scheduled to be held in-person, the majority of arguments remain remote for the 2022 November and December calendars, and the 2023 January calendar. *Appellate Court Oral Argument Calendars*, ILL. CTS., <https://www.illinoiscourts.gov/courts/appellate-court/oral-arguments-calendar/> (last visited Dec. 16, 2022).

have been relaxed<sup>25</sup>), New York (where Appellate Division courts resumed in-person arguments after a fully remote format<sup>26</sup>), and Ohio (where counsel can request remote arguments in some appellate districts but not in others<sup>27</sup>).

Remote appellate-level arguments seem to be alive and well in many parts of the federal and state systems, especially as new COVID-19 variants come and go. Assuming this “mixed bag” approach continues as infection rates rise and fall, we can expect that remote arguments will continue into the foreseeable future. Likewise, given the cost savings to the litigants, at least some reviewing courts, like in Ohio, will continue to use remote hearings where the circumstances warrant it post-pandemic.<sup>28</sup>

### III. Pedagogical Obligations

As courts continue to hear proceedings and arguments remotely, our obligations as educators support that we continue to teach students how to present these types of arguments effectively. The need for legal education to shift toward developing practice-ready, professional, and skilled attorneys has been well-documented.<sup>29</sup> ABA Standard 301 requires law schools to “maintain a rigorous program of legal education that prepares its students, . . . for effective, ethical, and responsible participation as members of the legal profession.”<sup>30</sup> Standard 302

requires law schools to establish learning outcomes that include competency in “oral communication in the legal context,”<sup>31</sup> and the “[e]xercise of proper professional and ethical responsibilities to clients and the legal system” as well as “[o]ther professional skills needed for competent and ethical participation . . . .”<sup>32</sup> These Standards, by shifting the focus of legal education to preparing students for their careers as attorneys, ensure “that students have a defined set of skills and knowledge upon graduation.”<sup>33</sup> If remote court appearances are here to stay, with or without the COVID-19 pandemic, Standards 301 and 302 support that schools continue to teach oral communication skills that lawyers need to be competent and ethical members of the legal profession.

At DePaul, part of the legal writing department’s year-end review looks at our inventory of professional skills taught to determine what skills are needed to meet Standard 302(d). Given our belief that remote proceedings at the trial courts and reviewing courts will continue post-pandemic, effective oral communication skills will require advocates to present their arguments both in person and remotely. Further, given the access to the courts that the remote option gives clients, particularly underserved populations, we believe that the ability to communicate in a remote setting will be an essential skill. The cost savings to clients also increases access to the courts. Thus, the ethical representation of clients will require effective communication in a remote setting due to the cost savings and increased access to justice remote arguments present. We concluded that, to be an “effective, ethical, and responsible” member of the bar, our students should be prepared to communicate effectively in a remote proceeding.

### IV. Benefits to the Legal Profession

While remote oral arguments may be “an imperfect substitute for an in-person appearance,”<sup>34</sup> the

“[T]o be an ‘effective, ethical, and responsible’ member of the bar, our students should be prepared to communicate effectively in a remote proceeding.”

<sup>25</sup> See Sarah Motter, *Kansas Supreme Court Latest to Relax COVID-19 Restrictions*, 13WIBM (Mar. 3, 2022 at 5:19 p.m. ET), <https://www.wibw.com/2022/03/03/kansas-supreme-court-latest-relax-covid-19-guidelines/>.

<sup>26</sup> See, e.g., *Appellate Division of the Supreme Court First Judicial Department AD1 2.0 First Department Operations During the 2022 Winter Terms*, NYCOURTS.ORG, (Jan. 24, 2022), <https://www.nycourts.gov/courts/ad1/PDFs/AD1-2.0January2022Updatefinal.pdf>. The Fourth Department implemented a “hybrid” oral argument pilot program allowing litigants to decide whether to present their appeals in-person or virtually. Press Release from Appellate Division, Fourth Department, *Appellate Division, Fourth Department to Implement “Hybrid” Oral Argument Pilot Program*, NYCOURTS.ORG (Nov. 14, 2022), <https://ad4.nycourts.gov/press/notices/637d2205e7fec026088c7a9e>.

<sup>27</sup> See *Ohio iCourt Report*, *supra* note 4, at 11, 19.

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g., Megan Bess, Grit, *Growth Mindset, and the Path to Successful Lawyering*, 89 UMKC L. Rev. 493, 494–98 (2021) (discussing critiques on legal education and the need to incorporate practical and professional skills into the law curriculum including *The MacCrate Report*, *The Carnegie Report*, *Statement of Best Practices for Legal Education*, and *Building on Best Practices*).

<sup>30</sup> 2022–2023 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS standard 301(a) [hereinafter ABA Standards].

<sup>31</sup> *Id.* at standard 302(b).

<sup>32</sup> *Id.* at standard 302(c), (d).

<sup>33</sup> Bess, *supra* note 29, at 498.

<sup>34</sup> Eric M. Fraser & Krissa Lanham, *Remote Appellate Oral Arguments*, 57 ARIZ. ATT’Y, Mar. 1, 2021, at 12, 12.



“The shift to remote classes was for DePaul, like the trial courts, the disruption that we did not know we needed.”

legal profession as a whole has benefited from the shift to remote arguments. As noted above, remote oral arguments offer tremendous cost-savings to litigants and the justice system,<sup>35</sup> and the public has greater access to viewing and experiencing remote oral arguments. All these benefits have resulted in greater access to justice.<sup>36</sup>

Additionally, the legal profession benefits from lawyers who are trained to communicate in multiple mediums. Numerous courts have lamented that the lawyers who appear remotely suffer from a lack of decorum. Judges have noted that some lawyers fail to appreciate the formality of the proceedings and appear online with inappropriate clothing, inappropriate backgrounds, inappropriate nicknames, inappropriate filters, and too much background noise.<sup>37</sup> In addition, problems with use of the mute button continue to plague online proceedings.<sup>38</sup> These problems run from the embarrassing to sanctionable conduct.<sup>39</sup>

In response, a typical court expects that “all attorneys dress in professionally appropriate attire . . . [and] are further encouraged to have an appropriate background . . .”<sup>40</sup> Preparing students for the virtual hearing will help avoid these mistakes that hurt a lawyer’s credibility with the court.

## V. DePaul’s Approach

The shift to remote classes was for DePaul, like the trial courts, the disruption that we did not know we needed. Because of the shift, classes were online

for over a year, which gave us the opportunity to examine our approach to oral communication. To our surprise, some of the online arguments were helpful to the students. Although they are digital natives, we found that many of the students were unfamiliar with how Zoom worked. In preparation for the online arguments, in addition to the traditional oral skills, we spent time teaching how to use the tools appropriately: how to use the waiting room, how to change your name, how and when to use the mute button, how to change your background, and how to best use light.

Given that remote proceedings are here to stay, we reviewed our curriculum to determine how to prepare students for both remote and in-person arguments. DePaul has a three-semester required writing program. The two logical opportunities for online presentations were the trial-level argument in the second semester and the appellate-level argument in the third semester.

We recognize that trial-level courts are more likely to continue to use remote proceedings regularly. However, we decided to make the students’ trial-level motion argument at the end of the first year an in-person argument. We believed that the pedagogical benefits favored the in-person argument for several reasons. First, the end of the first year is a benchmark for students, and second, the end-of-year oral argument has been a community building event for our students. However, we wanted to incorporate some of the benefits of remote hearings. To do this, we require that the students record and submit their introduction to their trial court argument, which is no longer than two minutes, to their Teaching Assistant for review and feedback before their arguments. This serves multiple purposes: focuses students on the importance of the oral argument; gives students the opportunity to practice with feedback; and helps students who are nervous to speak publicly to learn how to cope.

In addition, we incorporate technology in the first-year arguments in different ways to help acclimate students to remote arguments, while assessing their “in person” performance. For example, we record all of the trial court arguments and send them to the students with the feedback. Using the

35 *Id.* at 19 (“Flying one attorney to San Francisco [from Phoenix, Arizona] to present a 20-minute oral argument costs thousands of dollars in billable time and expenses. . . . It’s worth thinking about whether every case warrants that treatment, or whether some cases would be better served by presenting argument remotely.”).

36 Margaret D. McGaughey, *Remote Oral Arguments in the Age of Coronavirus: A Blip on the Screen or a Permanent Fixture?*, 21 J. APP. PRAC. & PROCESS 163, 180–81 (2021).

37 See, e.g., Denise Langford-Morris, *Courtroom Decorum, Ethics and Professionalism During the Age of Zoom: A View from the Bench*, 24 ABA JUD. DIV. REC. (July 2021), [https://www.americanbar.org/groups/judicial/publications/judicial\\_division\\_record\\_home/2021/vol24-4/technology/](https://www.americanbar.org/groups/judicial/publications/judicial_division_record_home/2021/vol24-4/technology/).

38 *Id.*

39 *Id.*

40 4th District Court of Appeal, CAL. CTS. (Aug. 25, 2020), <https://www.courts.ca.gov/4dca.htm>.

recorded arguments, we assess each student's performance on a rubric that was previously given to the students. Because we do not "live" grade the student's argument, we have time to personalize our comments on their argument. The rubric with the score and comments is emailed to the student with the recording of their argument. The students have the benefit of the graded rubric and can view their argument to "see" what the comments refer to. Our hope is that this gives the students more personalized feedback than simply our notes and quick comments after their in-person argument.

For the appellate-level argument, we, like many of the courts, are taking a mixed approach. For fall 2021, we continued to offer some advanced writing courses in an online: hybrid format. These classes hold their oral arguments online to match the delivery modality of the course. Because these students have some familiarity with the online format from the first year, we stress the importance of the use of the Zoom tools for the oral argument. Students are trained on the use of Zoom and because their arguments will be judged by alumni, they have a heightened sense of decorum.

However, the majority of our classes meet in person, and these classes will hold their oral arguments in person. This will benefit the current students who experienced a remote oral argument in spring 2021, during their first year.

Going forward, however, we plan to move the appellate-level arguments online for all classes. One practical benefit is that the appellate arguments are judged by a panel of three attorneys, usually alumni. The online format allows us to schedule a wide variety of attorneys for the oral argument because they can judge from wherever they are most comfortable, including from their offices. The legal writing instructors will grade the arguments as we do in the first year. They will view the recordings of the arguments, score them on the rubric, and send the completed rubric with the recording to the student.

## VI. Conclusion

Remote oral arguments appear here to stay, at least in one form or another. Thus, it is imperative for the legal education community to find space in the curriculum to prepare students to effectively and persuasively present them. The remote argument has the additional benefits of educating students about decorum in remote proceedings, of providing students with additional opportunities for personalized feedback, and of giving students the ability to critically review their own argument. As with the courts, this might not have been the change legal educators were looking for, but it may have been the change we needed. And we welcome this change into our curriculum.

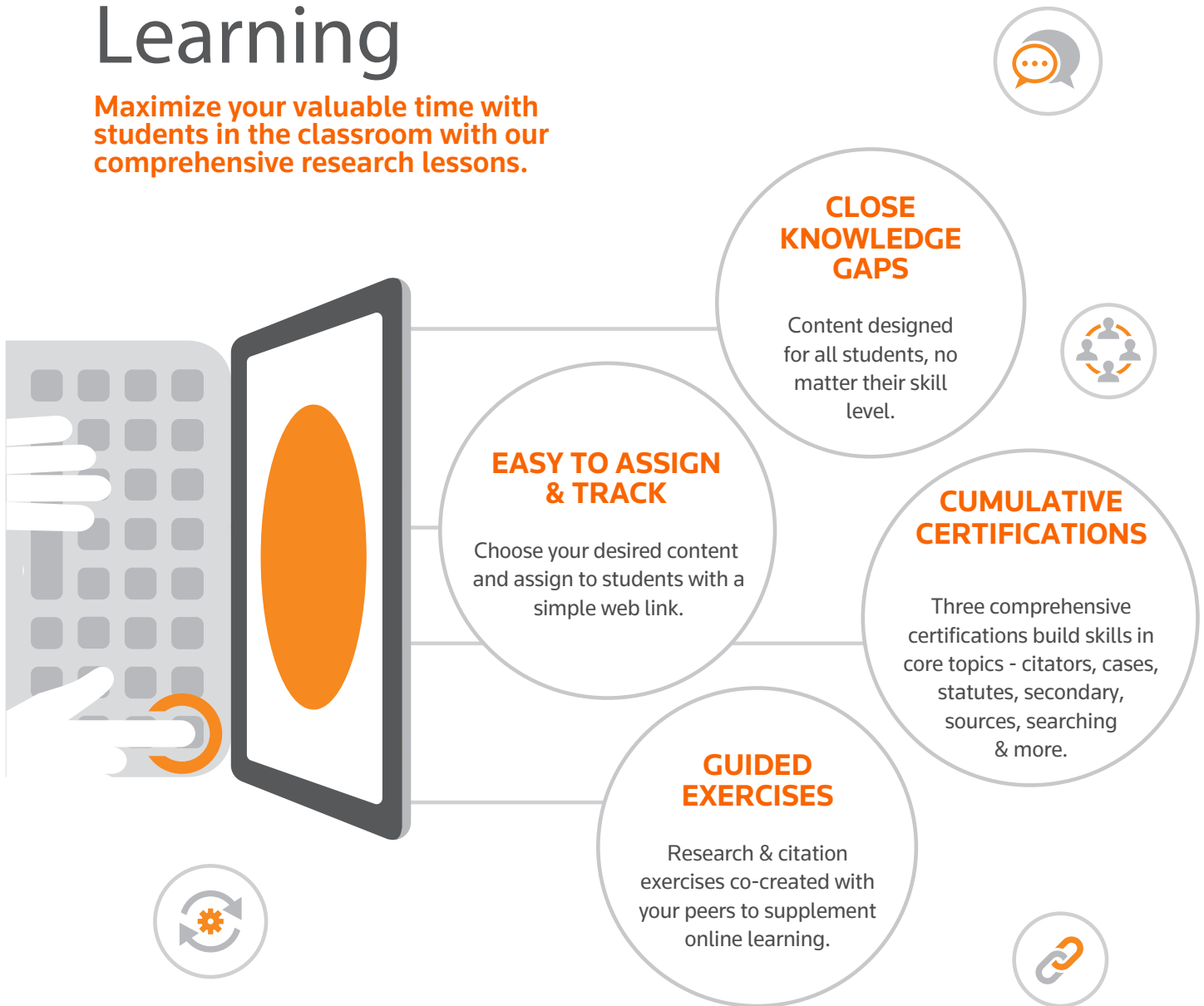
“[I]t is imperative for the legal education community to find space in the curriculum to prepare students to effectively and persuasively present [oral arguments].”



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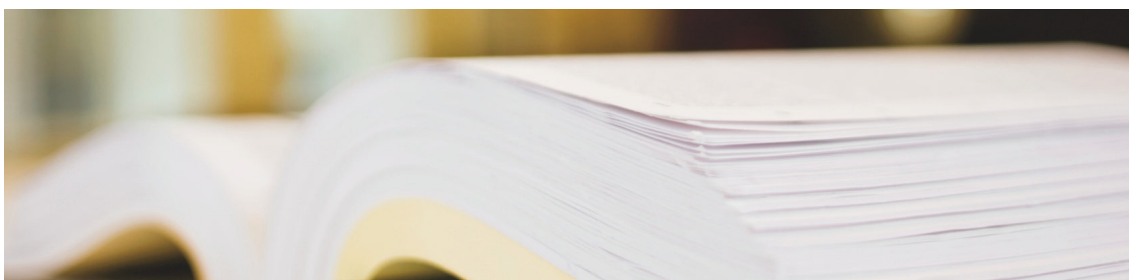
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