

Perspectives

Teaching Legal Research and Writing

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As legal practice continues to evolve into a more settlement-dominated legal culture, it is no longer sufficient for legal writing courses to teach students how to write for the court alone. To be considered practice-competent, it is necessary for students to also be able to write for non-adversarial, collaborative settings such as mediation. This discussion bridges the existing legal writing skills gap and recommends that the first-year legal writing curriculum be revised to include a more realistic overview of legal writing in a settlement-dominated legal culture by introducing the drafting of pre-mediation statements.

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This Essay argues that law students can become more effective advocates if they view legal writing as a practice informed by two particular Buddhist concepts: right diligence and *bodhichitta*. The former teaches students how to work effectively, while the latter facilitates writing imbued with patience, confidence, and compassion. The Essay discusses these concepts and explains how to incorporate them into legal writing pedagogy.

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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 4,000 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 in Spring 2024, as volume 31, issue 1. 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.

Dear readers:

I am pleased to share the work of seven authors in this issue. Their valuable insights contribute to our understanding of a range of topics: sampling ChaptGPT in contract drafting; constructing effective rules for application; reducing stereotype threat for diverse students when receiving critical feedback; providing opportunities for students to make choices in legal writing; creating a well-designed learning management system; writing for non-adversarial, collaborative settings such as mediation; and incorporating Buddhist concepts into legal writing pedagogy.

When making hard decisions about article selection, the editorial board focuses on three criteria. We consider how the article's thesis connects to our discipline. Additionally, we look for the thesis to be supported by the works of other authors, tied together with a theoretical thread. And lastly, we look to see whether the article suggests how to readily implement the author's ideas.

Last summer, at the 2023 Biennial Conference of the Association of Legal Writing Directors, I had the privilege of serving with nine colleagues on a panel entitled, "What Legal Writing Scholarship Have to Do With It?" The panelists and audience members grappled with how to define "legal writing scholarship." We did not come to a consensus on the boundaries of legal writing scholarship—some

saw it as limitless, yet others expressed narrow contours. However, one definition that we all agreed upon was stated in a single sentence by Dr. Kirsten Davis, "Legal writing scholarship is communication-centered and law-focused."

The seven articles in this issue meet that definition. They assist in teaching and practicing legal research and writing and related skills. These articles, together with the greater body of work that they cite, embrace communications and are law-focused.

Hearty praise goes to the diligent work of our editorial board, which I am always proud to acknowledge is comprised of legal writing professors and law librarians: Nicole Downing, Assistant Editor in Chief; Brooke Bowman, Managing Editor; Melissa Abernathy; Jessica Hynes; Taryn Marks; Joe Regalia; Shannon Roddy; and Judith A. Rosenbaum, Immediate Past Editor in Chief. The board appreciates Thomson Reuters for publishing *Perspectives* on the Faculty Resources page and for providing the services of its staff and the Red Line Editorial team.

Happy reading!

Robin Boyle-Laisure, Editor in Chief

“These articles, together with the greater body of work that they cite, embrace communications and are law-focused.”

Cite as: Ben L. Fernandez, *We Need to Understand How ChatGPT Can be Used for a Contract Drafting Class and Change Our Pedagogy to Compensate*, 30 PERSPS. 63 (2023).

We Need to Understand How ChatGPT Can be Used for a Contract Drafting Class and Change Our Pedagogy to Compensate

By Ben L. Fernandez

Ben L. Fernandez is a Master Legal Skills Professor at the University of Florida Levin College of Law.

You might think ChatGPT 3.5 would not work well to assist students in a law school class on Contract Drafting.¹ The model was not created for that purpose, and it has no legal training. But you would be wrong. There are deficiencies but they can easily be compensated for. A student who knows what they are doing can use the model to do the work for a drafting class. As a result, law professors who teach Contract Drafting need to understand how to use ChatGPT, and how effective it can be as a drafting tool. We also need to think about how the existence of AI programs like ChatGPT will affect our pedagogy. If we don't do that, students will be able to cheat on take home assignments and assessments, and they may not learn very much from the courses we teach.

I. ChatGPT Was Not Trained on Contract Drafting

The training ChatGPT 3.5 received was very different from the training students receive in a contract drafting class. The model was trained in September 2021 using a method called unsupervised learning on a large dataset of text from the internet.² It does not have real-time access to current events or the ability to browse the internet for information after that date.³

¹ I used ChatGPT 3.5 at openai.com in May of 2023 to do the drafting in this Article. There are other transformers/large language models that may be more competent for some writing tasks, including ChatGPT 4, Microsoft CoPilot, CaseText, NetDocuments, PatternBuilder MAX, and Zuva, LawGood and Spellbook. But ChatGPT is the most common and it was available to the public at no cost in May of 2023.

² Ask ChatGPT 3 (<https://chat.openai.com/>), "How were you trained?"

³ *Id.*

During that training, ChatGPT learned to predict the next word in a sentence given the context of the previous words.⁴ By repeating this process over billions of sentences, the model gained a broad understanding of grammar, facts, reasoning abilities, and some level of common sense.⁵

In addition, the dataset ChatGPT was trained on consisted primarily of publicly-available websites.⁶ As a result, the model's responses are generated based on a mixture of licensed data, data created by human trainers, and publicly-available data.⁷

In contrast, law students are usually trained to draft contracts by studying a textbook, like Tina Stark's "Drafting Contracts, How and Why Lawyers Do What They Do." The textbook gives the students specific rules and guidelines for the provisions that should be included, the words that should be used to draft them, and the way the provisions should be organized in the contract.

ChatGPT 3.5 does not appear to have access to the specific content of "Drafting Contracts."⁸ As a result, it cannot draft contracts for a law school class on its own. However, it is possible to temporarily "train" the model by giving it one of the sample agreements

⁴ *Id.*

⁵ *Id.*

⁶ Based on the original groundbreaking article "Language Models are Few Shot Learners," we know that ChatGPT's base model, GPT-3, was trained primarily on the Common Crawl dataset (<https://commoncrawl.org>), and also on WebText2 (the text of web pages from all outbound Reddit links from posts with 3+ up votes), Books1 and Books2, and Wikipedia(!). Dennis Layton, *ChatGPT—Show Me the Data Sources*, Medium (Jan. 30, 2023), <https://medium.com/@dlaytonj2/chatgpt-show-me-the-data-sources-11e9433d57e8>. The datasets ChatGPT 3.5 and ChatGPT 4 were trained on were progressively larger. But it is not known exactly what information was or was not included in each dataset.

⁷ *Id.*

⁸ *Id.* (Ask: "Do you have access to the content of this book: 'Drafting Contracts, How and Why Lawyers Do What They Do by Tina Stark?'").

“The training ChaptGPT 3.5 received was very different from the training students received in a contract drafting class.”

in the book to use as a model. In fact, if a student were to ask the model to draft the agreement one section at a time, including with each query the relevant facts, very explicit instructions, and the corresponding section from the sample agreement, the model could perform quite well. The student would only have to make minor corrections to the agreement and modify the formatting (e.g., bolding titles, headings and definitions) to produce a contract that would likely be good enough to get an “A” on a graded exam.

II. On Its Own ChatGPT Does Not Work Well Enough for a Law School Class

To demonstrate how ineffective ChatGPT on its own would be for a drafting class, I asked the model to complete the car purchase agreement assignment at the end of Chapter 5 in the “Drafting Contracts” textbook. The exercise is as follows:

Draft a car purchase agreement using the following facts. Do not include any other provisions. Assume that no statutes apply to the transaction.

1. The parties are Barbara Balram, the seller, and Tom Rogers, the buyer.
2. The car is a red, 20xx Acura.
3. It has been driven 26,000 miles.
4. The purchase price is \$11,000. The buyer will pay the seller with a certified check.
5. The seller owns the car, and it is not subject to any liens.
6. The car has been maintained in accordance with the owner’s manual and is in good operating condition, normal wear and tear accepted.
7. The closing will take place on the last day of the month that follows the month in which the car purchase agreement is signed
8. With respect to the period beginning of the day the agreement is signed and ending on the closing date, the seller promises not to paint the car and not to drive it more than 500 Miles. The seller also promises to garage the car and to continue to maintain it.
9. The buyer only has to close if the seller has performed his obligations and if the seller’s representations and warranties are true on the date they were made and on the closing date as is they were made on that date, except to the extent the agreement contemplates that specific facts may change.
10. The date of the agreement is January ___, 2022.

Here is the draft agreement ChatGPT created:

CAR PURCHASE AGREEMENT

This Car Purchase Agreement (“Agreement”) is entered into on January ___, 2022, by and between:

Seller: Barbara Balram

[Address]

[City], [State], [Zip Code]

Buyer: Tom Rogers

[Address]

[City], [State], [Zip Code]

1. DESCRIPTION OF VEHICLE

The Seller agrees to sell to the Buyer, and the Buyer agrees to purchase from the Seller, the following vehicle:

Make: Acura

Year: 20xx

Color: Red

Mileage: 26,000

“[I]f a student were to ask the model to draft the agreement one section at a time, including with each relevant query the relevant facts, very explicit instructions, and the . . . sample agreement, the model could perform quite well.”

“Car Purchase Agreement”

CAR PURCHASE AGREEMENT

This Car Purchase Agreement (“Agreement”) is entered into on January __, 2022, by and between:

Seller: Barbara Balram

[Address]

[City], [State], [Zip Code]

Buyer: Tom Rogers

[Address]

[City], [State], [Zip Code]

1. DESCRIPTION OF VEHICLE

The Seller agrees to sell to the Buyer, and the Buyer agrees to purchase from the Seller, the following vehicle:

Make: Acura

Year: 20xx

Color: Red

Mileage: 26,000

2. PURCHASE PRICE

The Buyer agrees to pay the Seller a total purchase price of \$11,000 (USD).

The payment shall be made in the form of a certified check.

3. OWNERSHIP AND LIENS

The Seller represents and warrants that they are the legal owner of the vehicle, free and clear of any liens, encumbrances, or claims.

4. CONDITION OF VEHICLE

The Seller represents and warrants that the vehicle has been maintained in accordance with the owner's manual and is in good operating condition, with normal wear and tear accepted.

5. CLOSING DATE

The closing of this transaction shall occur on the last day of the month that follows the month in which this Car Purchase Agreement is signed.

6. SELLER'S PROMISES

From the date of signing this Agreement until the closing date, the Seller agrees to the following:

- a. The Seller shall not paint the car.
- b. The Seller shall not drive the car more than 500 miles.
- c. The Seller shall garage the car.
- d. The Seller shall continue to maintain the car.

7. BUYER'S RIGHT TO CLOSE

The Buyer's obligation to close this transaction is subject to the following conditions:

- a. The Seller has performed all obligations stated in this Agreement.
- b. The Seller's representations and warranties made on the date of this Agreement and on the closing date remain true and accurate, as if made on the closing date, except to the extent this Agreement contemplates that specific facts might change.

IN WITNESS WHEREOF, the parties have executed this Car Purchase Agreement as of the date first above written.

Seller:

Barbara Balram

Buyer:

Tom Rogers⁹

⁹ *Id.*

Although ChatGPT managed to transcribe the information in the exercise and organize it into a contract, the result contains a number of errors based on what is taught in the textbook (i.e., the book teaches students to draft the contract differently than ChatGPT drafted it). Among other things, the format for the name of the agreement is incorrect. It should not be in all capital letters; it should be centered, bolded and in larger font.¹⁰

Likewise, the preamble is not in any customary format. According to the textbook, the phrase “by and between” should be “is between.”¹¹ Defined terms should be created for “Buyer” and “Seller,” and their addresses should be in a notice section or at the end of the agreement.¹²

The title for the “Description of Vehicle” section is inappropriate since that section contains the two covenants comprising the “subject matter performance provision” (the parties’ respective promises to accomplish the contract’s primary objective).¹³ The word “shall” should be used for the covenants in that section,¹⁴ and a defined term should be created for the “Car” based on the details listed.¹⁵ The draft contains no recitals and no definitions section, so the definition would have to be created in context.¹⁶

“Shall” should also be used for the covenants in the “Purchase Price” section.¹⁷ Also, that section should convey when payment is due and who must pay by check.¹⁸

The “Ownership and Liens” and “Condition of Vehicle” sections should be combined to form

a “Representations and Warranties” section.¹⁹ That section should also indicate to whom the representations and warranties are made.²⁰

The “Closing Date” section does not contain a covenant.²¹ It should state the closing “is to occur on” or “is to take place on” some specific date, not the closing “shall” be on that date.²² Also, the defined term for the “Agreement” should be used in place of the reference to the “Car Purchase Agreement.”²³

The “Seller’s Promises” section should be titled “Seller’s Covenants.”²⁴ “Agrees” should not be used and should be replaced with “shall.”²⁵ The actual covenants are properly drafted, but those provisions should use a defined term to refer to the “Car.”²⁶

The “Buyer’s Right to Close” section does not contain a right; it contains a condition to an obligation, so the title to that section should be changed.²⁷ Also, the textbook recommends using the word “must” for conditions.²⁸

Finally, in the last section “In Witness Whereof” is legalese and should be deleted.²⁹ And, again, the defined term “Agreement” should be used in place of “Car Purchase Agreement.”³⁰

Overall, ChatGPT’s performance, when used in this way, is unsurprisingly poor. A student cannot just take an exercise out of a textbook, give it to the model,

“Although ChatGPT managed to transcribe the information in the exercise and organize it into a contract, the result contains a number of errors based on what is taught in the textbook”

¹⁰ Tina Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* § 6.2.1, 67–68 (2d ed. 2014) (“Name of the Agreement”).

¹¹ *Id.* § 6.2, 67–79 (“Preamble”).

¹² *Id.*

¹³ *Id.* § 19.5, 276–77 (“Headings”); § 8.2, 117 (“Subject Matter Performance Provision”).

¹⁴ *Id.* § 8.2, 117 (“Subject Matter Performance Provision”).

¹⁵ *Id.* ch. 7, 95–111 (“Definitions and Defined Terms”).

¹⁶ *Id.*

¹⁷ *Id.* § 8.3, 119–25 (“Payment Provisions”).

¹⁸ *Id.*

¹⁹ *Id.* ch. 9, 137–48 (“Representations and Warranties”).

²⁰ *Id.*

²¹ *Id.* § 8.5.2, 128–30 (“Closings and the Closing Date in Acquisitions and Financings”).

²² *Id.*

²³ *Id.* ch. 7, 95–111 (“Definitions and Defined Terms”).

²⁴ *Id.* ch. 10, 149–59 (“Covenants and Rights”).

²⁵ *Id.*

²⁶ *Id.* ch. 7, 95–111 (“Definitions and Defined Terms”).

²⁷ *Id.* ch. 11, 163–70 (“Conditions to Obligations”).

²⁸ *Id.*

²⁹ *Id.* ch. 18, 255–60 (“Legalese”).

³⁰ *Id.* ch. 7, 95–111 (“Definitions and Defined Terms”).

and expect it to draft the contract the way the textbook requires. Even if you tell the model what the textbook is, if the model doesn't have access to the content, it cannot do the drafting correctly.

III. ChatGPT's Deficiencies Can be Somewhat Compensated for by Providing It with a Sample Agreement

I asked ChatGPT to draft the agreement again in the same session, this time including with the same query the sample House Purchase Agreement provided in the book.³¹ Here is the revised agreement ChatGPT drafted using the precedent in the text:

Car Purchase Agreement

This Car Purchase Agreement (the "Agreement") is entered into on [Date], 2022 (the "Effective Date"), by and between Barbara Balram, the seller ("Seller"), and Tom Rogers, the buyer ("Buyer").

Background:

This Agreement provides for the sale of a red, 20xx Acura (the "Car") by the Seller to the Buyer.

Article 1 - Definitions

1.1 Definitions: The terms defined in the preamble have their assigned meanings, and the following terms have the meaning assigned to them:

- a) "Agreement" means this Car Purchase Agreement, including any schedules and exhibits, as amended from time to time.

Article 2 - Purchase and Sale

- 2.1 Purchase and Sale: The Seller agrees to sell the Car to the Buyer, and the Buyer agrees to purchase the Car from the Seller.
- 2.2 Purchase Price: The purchase price for the Car is \$11,000.

Article 3 - Closing

- 3.1 Closing Date: The closing shall occur on the last day of the month that follows the month in which this Car Purchase Agreement is signed.
- 3.2 Closing Location: The closing shall take place at a mutually agreed location.

Article 4 - Representations and Warranties

4.1 Seller's Representations and Warranties: The Seller represents and warrants to the Buyer that:

- a) The Seller is the legal owner of the Car, and the Car is free from any liens or encumbrances.
- b) The Car has been driven for approximately 26,000 miles.
- c) The Car has been maintained in accordance with the owner's manual and is in good operating condition, normal wear and tear accepted.

Article 5 - Payment

- 5.1 Payment Method: The Buyer shall pay the Seller the purchase price of \$11,000 by a certified check.

Article 6 - Seller's Obligations

- 6.1 Car Restrictions: From the Effective Date until the closing date, the Seller agrees to:
 - a) Not paint the Car.
 - b) Not drive the Car more than 500 miles.
 - c) Garage the Car and continue to maintain it in its current condition.

³¹ *Id.* ch. 32, 505–12 ("Document 1").

“I asked ChatGPT to draft the agreement again . . ., this time including . . . the sample House Purchase Agreement provided in the book.”

Article 7 - Buyer's Obligations

7.1 Closing Conditions: The Buyer's obligation to close is subject to the following conditions:

- a) The Seller has fulfilled all obligations under this Agreement.
- b) The Seller's representations and warranties remain true and accurate as of the date they were made and on the closing date.

Article 8 - Governing Law

8.1 Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the jurisdiction where it is executed.

IN WITNESS WHEREOF, the parties have executed this Car Purchase Agreement as of the Effective Date.

Seller:

Barbara Balram

Buyer:

Tom Rogers

This revised draft is better in many ways but also includes some mistakes not made in the first draft. More importantly, it still fails to consistently follow the conventions taught in the "Drafting Contracts" textbook. For example, the format for the name of the agreement is better but still does not conform exactly to the format used in the sample agreement.³²

None of the bolding conventions followed in the sample agreement is applied in ChatGPT's revised version of the Car Purchase Agreement. However, the ChatGPT draft does somewhat mimic the conventions for numbering and headings in the sample agreement.

The preamble is in a more customary format, definitions have been created for "Buyer" and "Seller," and their addresses have been deleted. However, the phrase "by and between" should still be changed to "is between."³³ Also, since the Agreement is defined in the definitions section, it should not also be defined in the preamble.³⁴

The revised draft is better because it adds more of the sections of the sample agreement, which

the textbook teaches students to include in their agreements. A "Background" section has been added and a defined term for the "Car" has been created. Also, a "Definitions" section has been added in an appropriate form.³⁵

A "Purchase and Sale" provision has also been included in place of the "Description of Vehicle" section, another improvement. But the word "agrees" should still be changed to "shall" since that section contains the subject matter performance covenant.³⁶

Again, the "Closing" section does not contain a covenant, so it should state the closing "is to take place on" some specific date, not the closing "shall" be on that date.³⁷ And the defined term for the "Agreement" should be used in place of the reference to the "Car Purchase Agreement."³⁸

There is no reference to a closing location in the exercise, but there is one in the sample, and ChatGPT also added one to its draft of the

"This revised draft is better in many ways but also includes some mistakes not made in the first draft."

³² *Id.* § 6.2.1, 67–68 ("Name of the Agreement").

³³ *Id.* § 6.2, 67–79 ("Preamble").

³⁴ *Id.* § 7.5.1, 101 ("Guidelines for Drafting Definitions and Defined Terms").

³⁵ *Id.* ch. 7, 95–111 ("Definitions and Defined Terms").

³⁶ *Id.* § 8.2, 117 ("Subject Matter Performance Provision").

³⁷ *Id.* § 8.5.2, 128–30 ("Closings and the Closing Date in Acquisitions and Financings").

³⁸ *Id.* ch. 7, 95–111 ("Definitions and Defined Terms").

“But it is still not good enough to get a good grade on an exam in the class.”

agreement. However, the convention of stating the closing “is to take place at” (instead of “shall take place at”) is not followed.³⁹ Rather than leave a blank for the location, the model also states that the parties agree to agree on a location, which is inappropriate.

The “Representations and Warranties” section is much better than what was in the original draft. And it contains an additional, appropriate representation. The “Payment” section is also much improved. However, the “Payment” section should still more closely track the language in the sample which makes clear that payment is due at the closing (the model’s draft omits this information).⁴⁰

The “Seller’s Obligations” section is also improved. That section refers to the defined term for the Car, which is good. But the title “Seller’s Covenants” would still be better than “Seller’s Obligations.”⁴¹ And, more importantly, “agrees” should not be used and should be replaced with “shall” or “shall not” for each covenant.⁴²

The title of the next section: “Buyer’s Obligations” is better but “Conditions to the Buyer’s Obligations” would be best.⁴³ Also, the word “must” should be used for conditions.⁴⁴ Both conventions are demonstrated in the sample but not picked up in ChatGPT’s draft.

The “Governing Law” section was not included in the exercise, but it was in the sample agreement, and ChatGPT included it in its version of the agreement. However, that provision is not a covenant, so the word “shall” should not be used, as it is not used in the sample.⁴⁵

The legalese “In Witness Whereof” still needs to be deleted.⁴⁶ That language is not used in the sample agreement. And, again, the defined term “Agreement” should be used in place of “Car Purchase Agreement” at the end of the model’s draft.⁴⁷

The second version is much better than the first. It would likely be good enough for a homework assignment in the course. It demonstrates that the model learned some things from the text, and that is what you would expect to see in a student’s homework assignment. But it is still not good enough to get a good grade on an exam in the class.

IV. Breaking the Contract Up, Providing the Relevant Facts and a Sample Provision, and Making the Instructions Very Explicit Makes ChatGPT Effective Enough to use for a Class on Contract Drafting

To rectify these issues, I asked ChatGPT 3.5 to draft the agreement once more, this time asking the model to draft one section at a time and including with each query both the relevant information for the provision and the corresponding language from the House Purchase Agreement. During this process, I noticed the model has a tendency to “run at the mouth” and go way beyond what I asked it to do (e.g., it consistently added multiple provisions that were not requested, many of which were inappropriate and incorrectly drafted). To compensate for this, I was very explicit about what language I wanted included, and that I wanted no other provisions added. If I did all that, the model performed quite well. It drafted the agreement according

³⁹ *Id.* § 8.5.2, 127–30 (“Closings and the Closing Date in Acquisitions and Financings”).

⁴⁰ *Id.* § 8.3, 119–25 (“Payment Provisions”).

⁴¹ *Id.* ch. 10, 149–59 (“Covenants and Rights”).

⁴² *Id.*

⁴³ *Id.* ch. 11, 163–70 (Conditions to Obligations”).

⁴⁴ *Id.*

⁴⁵ *Id.* § 16.4, 226–28 (“Governing Law”).

⁴⁶ *Id.* ch. 18, 255–60 (“Legalese”).

⁴⁷ *Id.* ch. 7, 95–111 (“Definitions and Defined Terms”).

to the conventions in the textbook with relatively few errors. The only thing the model couldn't do was correctly center text, bold language, and indent paragraphs to conform to the formatting of the sample.

Here are some examples:

Query 1:

Draft the title and preamble for a car purchase agreement. The parties are Barbara Balram, the seller, and Tom Rogers, the buyer. The date of the agreement is January __, 2022. Use the following sample title and preamble as a precedent. Draft the provision the same way the following provision was drafted. Do not add any additional language or provisions.

House Purchase Agreement

This House Purchase Agreement, dated August 15th, 2022, is between Sally Seller (the "Seller") and Bob Buyer (the "Buyer").

Response 1:

Car Purchase Agreement

This Car Purchase Agreement, dated January __, 2022, is between Barbara Balram (the "Seller") and Tom Rogers (the "Buyer").

This version of the title and preamble contains no mistakes, except formatting (titles are not centered and bolded, definitions are not bolded).

Query 2:

Draft a definitions section for the car purchase agreement. Use the following sample definitions section as a precedent. Draft the provision the same way the following provision was drafted. Do not add any additional language or provisions.

Article 1 - Definitions

1.1 Definitions. The terms defined in the preamble and recitals have their assigned meanings and each of the following terms has the meaning assigned to it:

"Agreement" means this House Purchase Agreement, its schedules, and exhibits, each as amended from time to time.

"Closing" means the consummation of the transaction that this Agreement contemplates.

"Closing Date" has the meaning assigned to it in section 2.3.

"Premises" means the House, the land described in Exhibit A, and the household items that Schedule 1.1 lists.

Response 2:

Article 1 - Definitions

1.1 Definitions. The terms defined in the preamble and recitals have their assigned meanings and each of the following terms has the meaning assigned to it:

"Agreement" means this Car Purchase Agreement, its schedules, and exhibits, each as amended from time to time.

"Closing" means the consummation of the transaction that this Agreement contemplates.

"Closing Date" has the meaning assigned to it in section 2.3.

"Car" means the red, 20xx Acura being sold under this Agreement.

"Seller" refers to Barbara Balram, the party selling the Car.

"Buyer" refers to Tom Rogers, the party purchasing the Car.

This definitions section contains no mistakes, except formatting. However, the model incorrectly restates the

“This definitions section contains no mistakes, except formatting. However, the model incorrectly restates the definitions for the Car, the Buyer, and the Seller”

definitions for the Car, the Buyer, and the Seller (those terms are already defined in the preamble and background section).⁴⁸

Query 3:

Draft a purchase and sale section for the car purchase agreement. The purchase price is \$11,000. The buyer will pay the seller with a certified check. The closing will take place on the last day of the month that follows the month in which the car purchase agreement is signed. Use the following sample definitions section as a precedent. Draft the provision the same way the following provision was drafted. Do not add any additional language or provisions.

Article 2 - Purchase and Sale

2.1 Purchase and Sale. At the Closing, the Seller shall sell the Premises to the Buyer, and the Buyer shall purchase the Premises from the Seller.

2.2 Purchase Price. The purchase price for the Premises is \$200,000.

2.3 The Closing. The Closing is to occur on September 15, 20 22, or another date as to which the Seller and the Buyer agree (the date the transaction closes, the "Closing Date"). It is to take place at the offices of Abbott and Peabody LLP, 100 Geary Street, San Francisco, California, beginning at 9 a.m. local time.

2.4 Instruments of Transfer; Payment of Purchase Price; Further Assurances.

(a) Sellers Deliveries. At the Closing, the Seller shall execute and deliver to the Buyer

(i) A general warranty deed for the Premises, substantially in the form of Exhibit B; and

(ii) Any other instrument or instruments of transfer that may be necessary or appropriate to vest in the Buyer good title to the Premises.

(b) Buyers Deliveries. At the Closing, the Buyer shall deliver to the Seller by wire transfer \$200,000 in funds immediately available in San Francisco, California.

(c) Further Assurances. Following the Closing, at the request of the Buyer, the Seller shall deliver any further instruments of transfer and take all reasonable action that may be necessary or appropriate to the vest in the Buyer good title to the Premises.

Response 3:

Article 2 - Purchase and Sale

2.1 Purchase and Sale. At the Closing, the Seller shall sell the Car to the Buyer, and the Buyer shall purchase the Car from the Seller.

2.2 Purchase Price. The purchase price for the Car is \$11,000.

2.3 The Closing. The Closing is to occur on [Last day of the month following the month in which the Car Purchase Agreement is signed], or another date as to which the Seller and the Buyer agree (the date the transaction closes, the "Closing Date"). It is to take place at a mutually agreed location, beginning at [time].

2.4 Instruments of Transfer; Payment of Purchase Price; Further Assurances.

(a) Seller's Deliveries. At the Closing, the Seller shall execute and deliver to the Buyer:

(i) The title transfer documents for the Car, including the certificate of title, registration documents, and any other necessary documents to transfer ownership of the Car to the Buyer.

(ii) Any other instrument or instruments of transfer that may be necessary or appropriate to vest in the Buyer good title to the Car.

(b) Buyer's Payment. At the Closing, the Buyer shall pay the Seller the purchase price of \$11,000 by certified check.

(c) Further Assurances. Following the Closing, at the request of the Buyer, the Seller shall deliver any further instruments of transfer and take all reasonable action that may be necessary or appropriate to vest in the Buyer good title to the Car.

The purchase and sale section, like the definitions section, contains no errors except formatting issues. The

⁴⁸ *Id.*

“The purchase and sale section . . . contains no errors except formatting issues.”

only thing a student might have done better is determined that the closing date should be March 31, 2023. Also, the place of closing might better have been left blank.

To test the model further I tried asking it to draft a provision that was not included in the sample agreement (i.e., for which there was no sample). This is an example of one of the types of tasks I would also ask a student to do in a drafting class.

Query 4:

Draft an inspection provision for the car purchase agreement. The buyer has to give the seller 24 hours' notice of the inspection, and pay for the costs of the inspection. The inspection can take place on any weekday between the hours of 9:00 a.m. and 5:00 p.m. If the results are not satisfactory to the buyer, the buyer can cancel the agreement. Only draft the inspection provision so that it reflects these facts. Do not add any additional language or requirements.

Response 4:

Inspection

3.1 Notice of Inspection: The Buyer shall provide the Seller with at least 24 hours' written notice prior to conducting an inspection of the Car.

3.2 Inspection Costs: The Buyer shall bear all costs associated with the inspection.

3.3 Inspection Timeframe: The inspection shall take place on any weekday between the hours of 9:00 a.m. and 5:00 p.m.

3.4 Inspection Results: If the inspection results are not satisfactory to the Buyer, the Buyer may cancel this agreement.

[No additional language or requirements are added as per the request.]

The inspection provision is drafted very well. There is one mistake in section 3.3. There is no covenant in that section so the word "shall" should not be used. Also, the last statement "[No additional language or requirements are added as per the request]" should be deleted. The model apparently added that statement because the query made clear not to "add any additional language or requirements."

To test the model's consistency, I then asked the same question again.

Query 5:

Draft an inspection provision for the car purchase agreement. The buyer has to give the seller 24 hours' notice of the inspection, and pay for the costs of the inspection. The inspection can take place on any weekday between the hours of 9:00 a.m. and 5:00 p.m. If the results are not satisfactory to the buyer, the buyer can cancel the agreement. Only draft the inspection provision so that it reflects these facts. Do not add any additional language or requirements.

Response 5:

Inspection

3.1 Notice of Inspection: The Buyer shall provide the Seller with a written notice at least 24 hours in advance of the scheduled inspection.

3.2 Inspection Costs: The Buyer shall be responsible for all costs associated with the inspection, including any fees or charges.

3.3 Inspection Timeframe: The inspection shall be conducted on any weekday between the hours of 9:00 a.m. and 5:00 p.m.

3.4 Inspection Results: If the results of the inspection are not satisfactory to the Buyer, the Buyer shall have the right to cancel this agreement.

Interestingly response 5 was better than response 4 in one way but not as good in another. There is the same error in section 3.3, but the last statement is not there and thus need not be deleted. However, the model made a new error in section 3.4: "shall have the right to" should be "may."⁴⁹

“To test the model further I tried asking it to draft a provision that was not included in the sample agreement”

⁴⁹ *Id.* § 13.1, 173–78 (“Discretionary Authority”).

“Among other things, the student would have to know what they are doing.”

If a student were to combine each of the sections ChatGPT 3.5 drafted using this method, make some relatively minor corrections (compared to the number of corrections that would be required using the prior two methods demonstrated in this article), and address the omitted formatting conventions (e.g., bolding titles, headings and definitions),⁵⁰ the final result would likely be good enough to get an “A” on a graded exam in a class using Tina Stark’s book. But that conclusion is based on some crucial assumptions and qualifications about the student.

Among other things, the student would have to know what they are doing. They would have to know how to determine what facts in the prompt correspond to each of the sections of the agreement. They would have to work with the model slowly, taking one provision at a time (the shorter the provision the better). For each query, they would need detailed descriptions of the relevant facts and explicit instructions of what is and is not requested, as well as a corresponding sample provision showing how it should be worded and organized. Also, they would need to review each provision carefully and be able to recognize whatever mistakes were made so that they can be corrected. And then they would need to put all the provisions together and finish the contract by adding the applicable formatting conventions (i.e., bolding, numbering, spacing, etc.). By the time they are done, the student would likely find that it would have been more efficient to just draft the contract themselves.

V. Because of Programs Like ChatGPT, Law School Professors Need to Change How They Teach Contract Drafting

Once I realized my students could use ChatGPT to do the work I assign in my Contract Drafting class, I started wondering whether my students have already been using AI to complete assignments and assessments. And I thought about whether I should make any changes to my pedagogy for the class.

⁵⁰ In fact, if a student were to pay for a subscription to ChatGPT 4, they would likely need to make even fewer corrections. And if they were to use the model with a markup language like “Markdown” they would likely also be able to replicate the formatting of the sample contract.

If I could figure out how to make ChatGPT perform reasonably well for the class, my students likely could do the same thing even better. Some have a background in computer science and programming that I do not have. All of them have grown up with technology I could not have imagined when I was their age. And, again, ChatGPT may not be perfect now, but it may only be a matter of time before versions are created for drafting contracts based on the conventions in a particular textbook. When that happens, teaching students to draft from scratch may be like instructing them to “Shepardize” cases with the red, gold, and white paperback books the library used to have.

For now, assuming we will continue to teach drafting conventions using textbooks like Tina Stark’s book, should we allow students to use the model to do the assignments we give for the course? The model needs to be better trained to draft contracts well, but once it is more and more lawyers will use it. If that is the world students will likely be working in, then perhaps Contract Drafting courses should prepare them to work in that world now. I introduce students to document assembly programs like HotDocs and PatternBuilder in my Contract Drafting class. I do that because transactional lawyers use document assembly programs to make their practice more efficient. You could argue that using ChatGPT to draft from scratch is like using a document assembly program to draft with a precedent. The model is one of many tools students should at least be familiar with to practice law after they graduate.

But if we embrace that approach in law school, I am concerned the skill of drafting from scratch may eventually be lost. As an analogous example, consider how Westlaw’s online service has affected the use of the West Digest. When online searching became available, it was embraced by lawyers and law professors. No one claimed it was cheating to research an issue online; and Westlaw made researching online available to students for free. As a result, students have stopped using the books, including the Digest. They do all their research online. And I think many graduate from law school having little or no idea how to use the Digest. We may still cover it in legal research

classes, but if students think learning to research in paper is an outdated and unnecessary skill (like Shepardizing cases in paper), they will not learn very much from the class. The skill of using a Digest to research a legal issue may eventually be lost. And I worry the same thing may happen to the skill of drafting a contract from scratch.

Because of programs like ChatGPT, I feel like I should make some changes to my contract drafting classes. I plan to introduce my students to the model, make sure they are aware of its limitations, and discuss possible strategies for compensating for those deficiencies, as I have done in this article. But I also plan to advise my students not to use ChatGPT to do the assignments and assessments I give for the course. Homework assignments will not be effective as a learning tool if students have a computer do the work for them. Students learn legal skills by practicing them. They need to do the work themselves. And, obviously, assessments will not end up determining a student's abilities if the student's work is done by ChatGPT, not the student.

I also plan to change my pedagogy for the course in three ways. The first thing I am going to do is give them more homework assignments and graded assessments for which there is no corresponding sample in the textbook. The Drafting Contracts textbook has multiple sample purchase agreements, including the House Purchase Agreement I used in this article. But it does not have a sample employment agreement or a sample lease agreement. Giving the students those types of agreements to work on in class should make it much more difficult for them to use ChatGPT to do the work. I have been experimenting with the model for some time, and I have found no way a student could use ChatGPT to get an "A" or any other passing grade, if they do not give the model a good sample to work with.

The second thing I plan to do is give my students graded assessments that are timed and take advantage of the ExamSoft's ability to restrict a student's

access to online sources like ChatGPT during the assessment. I believe that is the method many other law school classes use, and it is a less burdensome option than having the students take an in-class, proctored exam. Because the assessments are timed, I may have to make them shorter (or break them up into sections), but otherwise I think this method is feasible and appropriate under the circumstances.

And the third change I will implement is to look for what I think are good indicators a student may have used ChatGPT when I am reviewing and providing feedback on student work. For example, a contract that reflects the facts in the exercise but is not drafted using any of the conventions in the textbook (like the first draft the model produced in this article), suggests that ChatGPT may have been used to draft it. A contract that reflects most of the conventions in the textbook but is just missing the formatting conventions ChatGPT cannot reproduce (e.g., nothing is bold or centered) is another indicator. And contract provisions that begin correctly but then add a lot of extra language that was not in the prompt, much of which is either inappropriate or incorrectly drafted, also suggest ChatGPT was used to draft the provisions.

ChatGPT makes it more challenging to teach Contract Drafting to law students. But it also presents exciting opportunities for the future of the course. As law professors, we must understand the technology and its limitations, as well as the effect it is likely to have on legal education and law practice. We need to be flexible, and we need to adapt. Having learned more about how ChatGPT works in this context and taken the time to think through the implications for the Drafting Courses I teach, I feel like I'm ready to deal with the challenges and seize on the opportunities this new technology presents.

“ChatGPT makes it more challenging to teach Contract Drafting to law students. But it also presents exciting opportunities for the future of the course.”

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One Tort, Four IRACs, and Five Lessons About Rule Support Cases

By Alissa Bauer*

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Introduction

They go by many names—rule support cases, case illustrations, rule explanations, or rule proof. However, no matter what you call them, rule support cases are often pivotal to the success of a student’s legal analysis, especially for a first-year law student who is just learning to use the IRAC or CRAC structure.¹

To be sure, legal analysis does not always require extensive discussion of the facts and reasoning of the rule support case or cases. For instance, sometimes the rule itself clearly answers a legal question,² and a student can use rule-based reasoning to easily address the relevant legal issue. Also, sometimes the facts of a fact pattern do not matter because an issue is purely a legal question. In this situation, once the student has determined what the proper rule is or has advocated for

what the proper rule should be, then the student can easily apply the rule to the relevant facts.

However, the rule itself frequently does not provide the student with enough information to address the relevant legal issue or issues. Many legal rules, whether created by statute or by case law, are intentionally written to be both broad and vague. The legislature passing or the courts creating and refining these rules want to ensure that the language is broad enough to cover future factual scenarios that may arise. In this situation, which is the focus of this Article, the rule support section is a cornerstone of the entire IRAC. Specifically, the rule support section clarifies how courts have applied the relevant rule in a previous case or cases and sets up the application section by providing concrete examples that the writer can compare to the relevant parts of the fact pattern. In other words, the rule support case or cases provide a bridge between the rule and the application. Without the rule support section, a student has trouble getting from the vague, general rule to the appropriate application.

While that sounds straightforward, the rule support section is complicated, in part because there is no one-size-fits-all solution. Sometimes the descriptions of rule support cases need to provide a lot of factual detail to lay the groundwork for a facts-to-facts comparison, but a student will still need to figure out which facts are legally relevant. Other times, an effective rule support discussion zooms in on only one aspect of the case, and the surrounding dispute is irrelevant. Alternatively, the rule support cases may present useful themes rather than just specific facts to compare to the rule’s elements or factors. Developing a feel for how much and what to include in the rule support section is a key aspect of lawyering.

Professors can create opportunities for a student to grapple with these challenges through carefully-constructed problems. This Article outlines a

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¹ In fact, rule support cases do not even get their own initial in the traditional IRAC or CRAC acronym. The IRAC acronym stands for Issue Rule Application Conclusion, which is the basic legal analysis structure. The CRAC structure is similar but starts with the Conclusion, not the Issue. TRAC is an alternative acronym for the same basic structure, but the T stands for the Thesis. To be fair, the IREAC, CREAC, and TREAC acronyms do refer to the rule explanation as its “E.” However, the term “rule explanation” appears to refer to additional information about the general rule, not the specific details of the rule support case or cases that are often foundational to a student’s legal analysis.

² When I refer to the “rule” or “rules,” I am using the term in the way that it is used in the IRAC – the general legal standard that “tell[s] people what they must or can do, that they must not or should not do, or what they are entitled to do under certain circumstances.” Christine Coughlin et al., *A Lawyer Writes: A Practical Guide to Legal Analysis* 61 (3d ed. 2018); see also Heidi K. Brown, *Mindful Legal Writer: Mastering Predictive and Persuasive Writing* 27 (2016) (describing “rules” as the “substantive legal rules about parties’ entitlements and obligations”).

“[T]he rule support section is a cornerstone of the entire IRAC.”

single negligent infliction of emotional distress fact pattern and the five important rule support lessons that the problem teaches. Negligent infliction of emotional distress under Pennsylvania law is a relatively straightforward, multiple-element test.³ Each of the four elements requires its own IRAC, and each IRAC offers a different level of difficulty for the student and provides one or more unique rule support lessons. The problem not only teaches a student how to use the IRAC structure, but it also helps the student think about the underlying legal analysis, focusing on the role and importance of the rule support cases in that analysis.

I. The Fact Pattern

In this factual scenario,⁴ Jessica Rendle is the client and potential plaintiff. She is a twenty-three-year-old college graduate who moved back in with her father, stepmother, and half-brother during COVID. Her half-brother, Josh Rendle, is fourteen years old. Jessica and Josh are really close, and Jessica always helps take care of Josh. Josh attends a fictional Pennsylvania public middle school.

On September 14, 2021, Jessica walked with Josh to the middle school and ran into a friend just outside the school entrance. Jessica talked to her friend near the front door to the school for about 45 minutes.

In the meantime, Josh went to his first period class and left briefly to use the bathroom. During that fall, there had been a TikTok trend called “deviouslicks” where students would destroy part of or steal from school bathrooms and post the videos of their actions on TikTok.⁵ On alert for this type of activity, Josh’s teacher thought that Josh might have been involved in TikTok bathroom destruction when he left the classroom. After Josh returned from the bathroom, his teacher called security.

A few minutes later, a security guard arrived and asked Josh to exit the classroom. The guard then questioned Josh in the hallway about the teacher’s suspicions. Josh was very offended by the accusation. He threatened to go into the bathroom and do “actual” destruction. Fearing that Josh might destroy school property in his anger, the security guard grabbed Josh and forcibly moved him into a supply closet that was two doors down from Josh’s classroom. The security guard locked Josh in the closet while the guard went to investigate the bathroom to see if Josh had vandalized it earlier.

Locked in the dark closet, Josh called Jessica, who was still standing outside the school, approximately 35 feet from the closet where Josh was trapped. After explaining where he was and how he got there, Josh told Jessica that he was “freaking out” and “really, really claustrophobic” in the dark because he could not see. He explained that he was unsuccessfully feeling around to find a light switch and begged his sister to come get him out of the closet.

Frustrated, Josh kicked and shook a large bookcase in the dark. A smaller metal bookcase that was sitting on top of the larger bookcase fell on Josh. The corner of the smaller bookcase hit Josh in his head. Josh cried out and told Jessica that he was in “excruciating” pain and could feel blood rushing out of his head “everywhere.” After listening to the entire incident and hearing Josh’s description, Jessica pictured the “absolute worst” after the phone disconnected.

At that point, Jessica had gone the short distance to the middle school entrance, but the door was locked. She pressed the intercom and waited to be let in, pacing back and forth. When Jessica was buzzed into the school, she saw Josh leaning on the security guard while blood was dripping down from Josh’s head and covering his clothing.

After the accident, Jessica experienced anxiety, panic attacks, nightmares, and loss of appetite. Her appetite has improved, but she is still plagued by anxiety, panic attacks, and recurring nightmares.

“The problem not only teaches a student how to use the IRAC structure, but it also helps the student think about the underlying legal analysis, focusing on the role and importance of the rule support cases in that analysis.”

³ The Pennsylvania Supreme Court originally mislabeled this test as a factor test. See *Sinn v. Burd*, 404 A.2d 672, 685 (Pa. 1979).

⁴ I created this assignment by modifying a problem written by Peter Widulski at the Elizabeth Haub School of Law at Pace University.

⁵ See James Doubek, *Students Are Damaging School Bathrooms for Attention on TikTok*, NPR (Sept. 17, 2021, 7:09 PM), <https://www.npr.org/2021/09/17/1038378816/students-are-damaging-school-bathrooms-for-attention-on-tiktok>.

II. IRAC Lessons from a Bystander Liability Claim

Each of the four elements of negligent infliction of emotional distress will require its own IRAC discussion because each element's application to Jessica's case is not obvious based simply on a reading of the general terms from the rule. Specifically, under Pennsylvania law, to recover for negligent infliction of emotional distress under a claim for bystander liability,⁶ a plaintiff must show that (1) the plaintiff was "located near the scene of the accident"; (2) the plaintiff's shock resulted from a "sensory and contemporaneous observance" of the accident; (3) the plaintiff and the victim were "closely related";⁷ and (4) the plaintiff suffered a "physical injury."⁸

Looking at the language of the rule, it is unclear if Jessica was "near" the accident when she was outside the school 35 feet from where Josh was, if she had a "sensory and contemporaneous observance" of the accident when she heard Josh's injury over the phone, if she and Josh as half-siblings were "closely related," and if her symptoms following the accident qualify as a "physical injury." Therefore, the student will need to address each element in its own IRAC, and each IRAC will provide one or more rule support lessons.

A. Lesson 1(a)—Sometimes Rule Support Cases Provide Concrete Numbers for Comparison

The first element of the negligent infliction of emotional distress test requires a plaintiff to be "located near the scene of the accident as contrasted

with one who was a distance away from it."⁹ This element is written in very broad terms. What does "near" the scene of the accident actually mean? If a student attempts to apply this rule to the facts of Jessica's case at this point, the student will have no idea what to focus on because the term "near" is too broad and vague to compare the relevant facts to.

However, if a student uses rule support cases as a bridge between the rule and the application for this element, the application section becomes clearer and more straightforward because the rule support cases provide a concrete number for comparison. In fact, the student can find cases that provide exact distances that courts will accept to satisfy this element.¹⁰

For example, in *Anfuso*, a car struck and killed a girl when she was riding her bicycle in the street near her home.¹¹ The court found that the victim's brother, who was approximately 100 feet in front of the point of impact, satisfied the elements of negligent infliction of emotional distress.¹² Although the court in *Anfuso* did not specifically address the distance element, the negligent infliction of emotional distress test includes mandatory elements,¹³ and therefore the distance element must have been met if the victim's brother was able to satisfy the test.

Based on this rule support case, the student now has a concrete distance to compare to the fact pattern. Specifically, Jessica was thirty-five feet away from the closet where Josh was trapped when the accident happened. This distance is closer than the 100 feet between the victim and his sister in

⁶ A plaintiff may have a valid negligent infliction of emotional distress claim under Pennsylvania law in four situations: (1) when there is a contractual or fiduciary duty between the plaintiff and the defendant; (2) when the plaintiff experienced a physical impact from the incident; (3) when the plaintiff was in the "zone of danger" from the accident; or (4) when the plaintiff was a bystander who "observed a tortious injury to a close relative." *Toney v. Chester Cty. Hosp.*, 961 A.2d 192, 197–98 (Pa. Super. Ct. 2008). There is no contractual or fiduciary duty between Jessica and the middle school; Jessica was not physically injured when the bookshelf fell on Josh; and Jessica was not in the closet with Josh when the accident happened. Therefore, the issue is whether Jessica meets the fourth factual scenario because she observed a tortious injury to a close relative.

⁷ *Mazzagatti v. Everingham*, 516 A.2d 672, 677 (Pa. 1986) (citing *Sinn*, 404 A.2d at 685).

⁸ *Armstrong v. Paoli Mem'l Hosp.*, 633 A.2d 605, 609 (Pa. Super. Ct. 1993); *Wall by Lalli v. Fisher*, 565 A.2d 498, 502 (Pa. Super. Ct. 1989).

⁹ *Mazzagatti*, 516 A.2d at 677 (citing *Sinn*, 404 A.2d at 685).

¹⁰ See *Bliss v. Allentown Pub. Libr.*, 497 F. Supp. 487, 488 (E.D. Pa. 1980) (holding that the victim's mother "met indisputably" the near the scene of the accident requirement when she stood about twenty-five feet from the site of her daughter's accident); *Anfuso v. Smith*, 15 Pa. D. & C.3d 389, 391, 393 (Ct. Com. Pl. 1980) (finding that the victim's brother was able to recover under a theory of negligent infliction of emotional distress when he was 100 feet from where his sister was hit by a car).

¹¹ 15 Pa. D. & C.3d at 391.

¹² *Id.* at 391, 394.

¹³ See *Mazzagatti*, 516 A.2d at 677 (citing *Sinn*, 404 A.2d at 685).

“However, If a student uses rule support cases as a bridge between the rule and the application for this element, the application section becomes clearer and more straightforward”

Anfuso, which was sufficient to meet this element.¹⁴ Therefore, the student can reasonably conclude that Jessica's thirty-five-foot distance from the closet likely fulfills the distance part of this element.

B. Lesson 1(b)—Sometimes the Rule Support Cases Show That the Student Cannot Stop After Just One Step in the Analysis

The physical distance between Jessica and Josh is not, however, the only issue raised by the “near the scene of the accident” element. Josh was locked inside a closet inside his school when he was injured, while Jessica stood outside the school. Therefore, the student next needs to figure out if the physical barrier of the school and closet walls between Jessica and Josh will prevent Jessica from satisfying this element. Again, the student must use rule support cases to answer this question.

There are multiple potential rule support cases with fact patterns in which the victim was separated from the negligent infliction of emotional distress plaintiff, but the plaintiff still satisfied the distance element.¹⁵ For instance, in *Francart v. Smith*, the plaintiff parents were sitting inside the kitchen of their home when a car hit their daughter on the street outside the house.¹⁶ Despite the physical barrier of the house walls separating the parents inside the house from their daughter outside the house, the court held that the near the scene of the accident requirement was “irrefutably present.”¹⁷

Also, in *Rideout v. Hershey Medical Center*, a very similar case to Jessica's fact pattern, the defendant hospital removed the plaintiffs' daughter's ventilator support without the parents' presence or permission.¹⁸ At that moment, the parents were

located in an office within the hospital.¹⁹ At the same time, the hospital's chaplain, who was located in the daughter's room, announced to the parents over the hospital's intercom system that “they turned her off, they turned her off!”²⁰ The parents heard the announcement and immediately rushed to their daughter's room “hysterically crying and screaming that their child had been murdered.”²¹ The court held that the parents established the requisite close proximity element despite being in a separate room of the hospital when the hospital removed their daughter's ventilator.²²

Once a student presents and describes one or more of these rule support cases, it becomes clear that the physical walls between Jessica and Josh should not be an impediment to proving the “near the scene of the accident” element. Again, the rule support section sets up an easy and straightforward application of the rule to the facts of Jessica's potential case once the student sees that this IRAC involves more than one analytical step.

C. Lesson 2—Try to Find Rule Support Cases with Similar Fact Patterns as Well as One Good Contrast Case

The second and most complicated element of a negligent infliction of emotional distress claim requires that the plaintiff's shock “resulted from a direct emotional impact” on the plaintiff from a “sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.”²³ This general rule provides very little guidance regarding how a plaintiff might satisfy this element. Although Jessica heard Josh's accident over the phone, she did not watch the accident happen. Therefore, it is unclear from this broad rule whether she had a “sensory and contemporaneous observance” of the accident.

“Again, the rule support section sets up an easy and straightforward application of the rule to the facts . . . once the student sees that this IRAC involves more than one analytical step.”

¹⁴ See *Anfuso*, 15 Pa. D. & C.3d at 391, 394.

¹⁵ See *Ahner v. Bauder*, 1 Pa. D. & C.4th 596, 597, 599 (Ct. Com. Pl. 1988) (holding that parents who were located in an adjoining room when a car crashed into their apartment and injured their son were near the scene of the accident); *Anfuso*, 15 Pa. D. & C.3d at 391, 393 (finding that a mother “clearly” met the distance element when she heard the impact of a car striking her daughter outside the house while the mother was located inside of the house).

¹⁶ 2 Pa. D. & C.4th 585, 587, 611 (Ct. Com. Pl. 1989).

¹⁷ *Id.* at 611.

¹⁸ 30 Pa. D. & C.4th 57, 63 (Ct. Com. Pl. 1995).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 66.

²³ *Mazzagatti v. Everingham*, 516 A.2d 672, 677 (Pa. 1986) (citing *Sinn v. Burd*, 404 A.2d 672, 685 (Pa. 1979)).

“There are many options for good rule support cases to set up a robust application section for the ‘sensory and contemporaneous observance’ element.”

The courts have fleshed out this rule in more detail, explaining that the “sensory and contemporaneous observance” element is not “limited to visual observance” but “properly includes an aural sensory awareness as well.”²⁴ Specifically, the “practical focus” of this element should be on “whether the observance was direct and immediate as opposed to indirect and removed,” not on the “particular sensory vehicle which gave rise to the awareness of the event.”²⁵ However, “unlike visual observance, aural awareness may rarely, standing alone, give rise to a sufficient awareness of the nature and import of the event to cause severe emotional injury.”²⁶ With this additional guidance, the student is able to see that Jessica may be able to meet the “sensory and contemporaneous observance” element despite only hearing, but not seeing, Josh’s accident.

However, it is still unclear exactly what this rule means for Jessica’s fact scenario. Did Jessica in fact have a “direct and immediate” observance when she heard Josh’s injury over the phone? Also, what additional awareness is required to supplement Jessica’s aural observance of the accident? There are many options for good rule support cases to set up a robust application section for the “sensory and contemporaneous observance” element.²⁷

24 *Neff v. Lasso*, 555 A.2d 1304, 1313–14 (Pa. Super. Ct. 1989); see also *Kratzer v. Unger*, 17 Pa. D. & C.3d 771, 773 (Ct. Com. Pl. 1981) (noting that “[t]here is no rational reason to believe that what an eyewitness sees will be any more or less shocking than what an ‘earwitness’ hears”).

25 *Neff*, 555 A.2d at 1313.

26 *Id.*

27 See *Bliss v. Allentown Pub. Libr.*, 497 F. Supp. 487, 488–89 (E.D. Pa. 1980) (holding that a mother who heard the crash of a statue falling on her daughter and looked up “immediately” to see her bloody daughter “identified herself sufficiently as a ‘percipient witness’ to state a cause of action for negligent infliction of emotional harm”); *Rideout v. Hershey Med. Ctr.*, 30 Pa. D. & C.4th 57, 66 (Ct. Com. Pl. 1995) (finding that parents who heard over the hospital’s intercom system that the hospital staff removed their daughter’s ventilator support without the parents’ presence or permission at “approximately the same time” that the ventilator was removed experienced a “sensory and contemporaneous observance”); *Francart v. Smith*, 2 Pa. D. & C.4th 585, 614 (Ct. Com. Pl. 1989) (concluding that the jury should hear a negligent infliction of emotional distress claim when a mother spoke to her daughter on the phone right before an accident, the mother and father heard screeching tires and the sound of their daughter being hit by a car, and the father saw his daughter’s body immediately after the accident); *Kratzer*, 17 Pa. D. & C.3d at 772–73 (holding that a foster mother who heard a “loud thump” outside her house right after her son left the house and then saw her son unconscious in the street after he was hit by a car satisfied the “sensory and contemporaneous observance” requirement); *Anfuso v. Smith*, 15 Pa. D. & C.3d 389, 391, 393 (Ct. Com. Pl. 1980) (finding that a mother who was watching her daughter from inside of their house, heard tires squeal and the sound of a car hitting her daughter on her bike, and then hurried to find her daughter was a “‘percipient witness’ to the impact”).

Each of these potential rule support cases involves a plaintiff or plaintiffs who heard an accident happen rather than saw the accident happen.

For instance, through her kitchen window, the plaintiff in *Neff* saw her husband’s car driving down the street.²⁸ She also saw the defendant’s car following her husband’s car at an “excessive rate of speed.”²⁹ Although she could not see the two cars when they crashed, the wife heard a collision and raced to the accident, where she found her husband unconscious on the front lawn.³⁰

The court held that, although the wife did not visually observe the actual accident, she satisfied the “sensory and contemporaneous observance” element.³¹ The court explained that the wife’s “aural perception” when she heard the crash combined with her “prior and subsequent visual observance” when she saw the defendant’s car speeding behind her husband’s car and then she saw her husband “lying unconscious immediately after the impact” could have created a “full, direct, and immediate awareness.”³² The court continued, “To deny [the wife’s] claim solely because she did not see the precise moment of the impact would ignore the plain reality that the entire incident produced the emotional injury for which the plaintiff seeks redress.”³³

Because the “sensory and contemporaneous observance element” is the most complicated and nuanced element, it is worth using another rule support case with a similar fact pattern to set up the student’s application and show the courts’ consistent approach to plaintiffs who hear, rather than see, the relevant accident. For example, in *Krysmalski v. Tarasovich*, the plaintiff mother’s three children asked for permission to wait for her in the parking lot just outside of a supermarket while she paid for

28 555 A.2d at 1313.

29 *Id.*

30 *Id.*

31 *Id.* at 1313–14.

32 *Id.*

33 *Id.* at 1314.

the groceries.³⁴ While the children were standing outside, the defendant crashed his car through a concrete barrier at the entrance of the store, striking and injuring the children.³⁵ At that time, the mother was likely still inside the grocery store checking out.³⁶ The mother subsequently ran to the scene of the accident and found her children “horribly injured.”³⁷

The court held that even if the mother “was in the grocery store at the exact second of impact,” she satisfied the “sensory and contemporaneous observance” element.³⁸ Specifically, she “most certainly heard the crash” because it was audible from inside the store, and she “knew that her children were at the scene of those events.”³⁹ The fact patterns in both *Neff* and *Krysmalski* are similar to the fact pattern in Jessica’s potential case, allowing a student to do a one-to-one type of comparison in the student’s application section.⁴⁰

However, a case with a different set of facts from our fact pattern, a different legal conclusion on the relevant element, or both can serve as a very useful contrast case to use in the rule support section to set up a more nuanced application section. For the “sensory and contemporaneous observance” element, *Tiburzio-Kelly v. Montgomery* is an instructive and helpful contrast case.⁴¹ In *Tiburzio-Kelly*, the plaintiff’s wife delivered their child by emergency Caesarean section without anesthesia.⁴² During the delivery, the husband was in a birthing room approximately 40 to 50 feet from the delivery room.⁴³ He heard his wife screaming during the delivery.⁴⁴

About 20 minutes later, he was told that he had “a beautiful girl.”⁴⁵ About 45 minutes after that, the plaintiff saw his wife in a recovery room.⁴⁶ At that time, his wife was cleaned up with combed hair and a little makeup on.⁴⁷ The husband had “no idea” about how his daughter was delivered.⁴⁸

The court held that the plaintiff did not satisfy the “sensory and contemporaneous observance” requirement because his “sensory observation consisted of hearing alone” and he was “not aware of” the cause of his wife’s screams.⁴⁹ The court also noted that the husband did not see his wife until later when she was in the recovery room.⁵⁰

These three rule support cases set up a focused application of the “sensory and contemporaneous observance” rule to the facts of Jessica’s potential case. The rule support cases offer concrete facts and the corresponding legal analysis to which the student can compare the facts of Jessica’s case. Specifically, the cases analyze the plaintiff’s “sensory and contemporaneous” experience of the accident before, during, and after the relevant incident.

Focusing on what happened “before” the accident, each of the rule support plaintiffs who proved this element had some context to the accident before the plaintiff heard the accident happen. For example, the plaintiff in *Neff* saw a car speeding down her street behind her husband’s car before she heard the crash,⁵¹ and the plaintiff in *Krysmalski* knew that her children were waiting just outside the grocery store when she heard the car crash near the entrance to the store.⁵² Therefore, these plaintiffs had the context to understand what was happening before they heard the relevant accident.

“However, a case with a different set of facts from our fact pattern, a different legal conclusion on the relevant element, or both can serve as a very useful contrast case to use in the rule support section to set up a more nuanced application section.”

³⁴ 622 A.2d 298, 301, 303 (Pa. Super. Ct. 1993).

³⁵ *Id.*

³⁶ *Id.* at 303.

³⁷ *Id.* at 301.

³⁸ *Id.* at 303.

³⁹ *Id.*

⁴⁰ See *Neff v. Lasso*, 555 A.2d 1304, 1313 (Pa. Super. Ct. 1989); *Krysmalski v. Tarasovich*, 622 A.2d 298, 301 (Pa. Super. Ct. 1993).

⁴¹ 681 A.2d 757 (Pa. Super. Ct. 1996).

⁴² *Id.* at 762.

⁴³ *Id.* at 772.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 772–73.

⁴⁷ *Id.* at 773.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Neff v. Lasso*, 555 A.2d 1304, 1313 (Pa. Super. Ct. 1989).

⁵² *Krysmalski v. Tarasovich*, 622 A.2d 298, 303 (Pa. Super. Ct. 1993).

“Based on the student’s analysis of two similar rule support cases and one contrast rule support case, the student will be able to support his or her conclusion that Jessica’s observance of Josh’s accident was likely ‘direct and immediate.’”

This comprehension of the circumstances surrounding an incident is a direct contrast to the facts in *Tiburzio-Kelly*, where the husband did not know his wife was delivering their child by emergency Caesarean section without anesthesia.⁵³ Instead, without sufficient context, he experienced her screaming simply as a regular part of delivery and therefore did not have a “sensory and contemporaneous” experience of the incident.⁵⁴

Based on a comparison to the facts of the rule support cases, the student will see that Jessica had sufficient context to understand what was happening to Josh prior to hearing his accident. Specifically, Jessica dropped off Josh at his school before he called her from the supply closet. While locked in the closet, Josh reached out to tell Jessica what was happening. During this phone call, he went into explicit detail about what he was experiencing. He told her that he was locked in a dark supply closet by a security guard. Josh also explained how scared and claustrophobic he felt, pleaded with her to come help him, and described how he was searching for a light switch in the closet. Based on this information, Jessica was able to mentally picture everything that was happening to Josh before he was injured.

Looking at the “during” the accident part of the analysis, the student will again find that the rule support cases are an invaluable source for potential comparisons. Both the plaintiff in *Neff* and the plaintiff in *Krysmalski* heard the crash that injured their loved ones and understood what that meant based on the context of their auditory experience.⁵⁵ Again, this experience is a direct contrast to the situation in *Tiburzio-Kelly* when the husband heard but did not understand the meaning of his wife’s screams during delivery.⁵⁶

Similar to the plaintiffs in *Neff* and *Krysmalski*, while on the phone with Josh and aware of exactly

what was happening to him, Jessica heard the sound of a bookcase crashing into Josh’s head and his cry of pain. If that was not enough, Josh explained to Jessica that he was in “excruciating” pain and that he could feel blood rushing out of his head “everywhere.” Based on this information, Jessica pictured the “absolute worst.” The relevant facts, holdings, and reasoning from the rule support cases provide the foundation and support for the student’s analysis.

Finally, the rule support cases are also a very useful setup to analyze the “end” of Josh’s accident. For instance, the wife in *Neff* found her unconscious husband on the front lawn immediately after the accident,⁵⁷ and the mother in *Krysmalski* found her children “horribly injured” right after the accident.⁵⁸ Again, *Tiburzio-Kelly* may serve as a useful contrast case. In that case, the husband did not see his wife until after she was cleaned up, had combed her hair, and was wearing some makeup.⁵⁹ Like the plaintiffs in *Neff* and *Krysmalski* and unlike the husband in *Tiburzio-Kelly*, Jessica rushed into the school to find Josh with blood dripping down his head and covering his clothes while he was forced to lean for support on the security guard who had locked him in the closet.

Based on the student’s analysis of two similar rule support cases and one contrast rule support case, the student will be able to support his or her conclusion that Jessica’s observance of Josh’s accident was likely “direct and immediate.” Looking at the specific facts from these rule support cases as well as the courts’ reasoning, the student will be able to present a robust analysis of why Jessica probably had a “sensory and contemporaneous observance” of Josh’s accident.

D. Lesson 3—Rule Support Cases Are Particularly Helpful When the Law Is Inconsistent and Still Expanding

The third element mandates that the plaintiff and the victim be “closely related as contrasted with an absence of any relationship or the presence of only a distant relationship.”⁶⁰ Again, the general rule

⁵³ 681 A.2d 757, 773 (Pa. Super. Ct. 1996).

⁵⁴ *Id.*

⁵⁵ *Neff*, 555 A.2d at 1313–14; *Krysmalski*, 622 A.2d at 303.

⁵⁶ 681 A.2d at 773.

⁵⁷ 555 A.2d at 1313.

⁵⁸ 622 A.2d at 301.

⁵⁹ 681 A.2d at 773.

⁶⁰ *Mazzagatti v. Everingham*, 516 A.2d 672, 677 (Pa. 1986) (citing *Sinn v. Burd*, 404 A.2d at 685).

is very vague. Although this element may seem simpler to a student because the student may already have formed his or her own opinions regarding what “closely related” means, the element’s general description fails to answer basic and important questions. For instance, is a familial relationship the only way to meet this element or would a friendship qualify? If a familial relationship is required, how close must that relationship be? Is that closeness measured in terms of genealogy or depth of feeling?

The Pennsylvania courts have fleshed out this rule in some additional detail, providing helpful and still expanding but sometimes inconsistent rules. First, the courts have historically held that the plaintiff must be a “member[] of the injured person’s immediate family,” which includes only a “spouse, parent or child” of the victim.⁶¹ However, some Pennsylvania intermediate appellate courts and trial courts have moved away from such a narrow definition of immediate family.⁶² For instance, the courts have found that a stepson,⁶³ a fiancé,⁶⁴ and a foster parent⁶⁵ met the “closely related” element, but a boyfriend did not.⁶⁶

This expanding and evolving rule requires that the student look to rule support cases for additional guidance. The student needs to determine (1) whether a sibling relationship is sufficient to meet

this element and (2) whether a half-sibling relationship makes a difference to the analysis.

Luckily, the student will be able to find multiple rule support cases where a court held that a sibling relationship satisfied the close relationship element. For instance, in *Turner*, the plaintiff accompanied her sister to the hospital and helped her deliver her fetus without any help from the medical personnel.⁶⁷ The court found that the relationship between the plaintiff and her sister satisfied the “closely related” element because the plaintiff was “both a blood relative and close family member” of her sister.⁶⁸ Similarly, in *Anfuso*, the court held that a brother was closely related to the victim, his sister, because “young siblings are ‘closely related’ biologically and emotionally.”⁶⁹

To determine whether a half-sibling will meet the close relationship element, the student will find a variety of cases that address relationships besides just the sibling relationship or the historically-covered “spouse, parent or child” relationship. For instance, in *Zentz*, a stepson witnessed a motor vehicle accident in which his stepfather was severely injured.⁷⁰ The plaintiff’s biological father and his mother separated 12 years before the accident.⁷¹ The plaintiff was one year old when his biological father left and had “almost no contact” with his biological father after that.⁷² The plaintiff lived with his mother and stepfather for the nine years before the accident, and the plaintiff and his stepfather “developed a relationship akin to that of a father and son.”⁷³

The court adopted the definition of a “parent” as “one that begets or brings forth offspring,” “a lawful parent,” or “a *person standing in loco*

“This expanding and evolving rule requires that the student look to rule support cases for additional guidance.”

61 *Blanyar v. Pagnotti Enters., Inc.*, 679 A.2d 790, 791 (Pa. Super. Ct. 1996), *aff’d*, 710 A.2d 608 (Pa. 1998) (citing *Sinn*, 404 A.2d at 677 n.6) (discussing how the Supreme Court of Pennsylvania in *Sinn* suggested that only members of the victim’s “immediate family,” which was limited to a “spouse, parent, or child,” would satisfy the “closely related” element).

62 *Turner v. Med. Ctr., Beaver, PA, Inc.*, 686 A.2d 830, 833–34 (Pa. Super. Ct. 1996) (holding that “closely related” should not be “limited to a spouse, parent or child”).

63 *Zentz v. Harne*, 2 Pa. D. & C.5th 398, 409 (Ct. Com. Pl. 2007).

64 *Black v. Wehrer*, 23 Pa. D. & C.4th 313, 315 (Ct. Com. Pl. 1995). *But see* *Jimenez v. All Am. Rathskeller, Inc.*, No. 4:04-CV-1897, 2005 WL 8167979, at *10 (M.D. Pa. Apr. 1, 2005) (stating that “Pennsylvania law, as it stands today, does not allow for the recovery of damages by a fiancé for negligent infliction of emotional distress”). Also, in *Blanyar v. Pagnotti Enterprises, Inc.*, the court attempted to explain away the decision in *Black* that a fiancé satisfied the “closely related” element, noting that the relationship was “closely akin” to the “already sanctioned” relationship of “husband and wife.” 679 A.2d 790, 792 (Pa. Super. Ct. 1996).

65 *Kratzer v. Unger*, 17 Pa. D. & C.3d 771, 773 (Ct. Com. Pl. 1981).

66 *Caserta v. GEICO Gen. Ins. Co.*, 507 F. App’x 104, 107 (3d Cir. 2012).

67 686 A.2d at 831–32.

68 *Id.* at 833.

69 *Anfuso v. Smith*, 15 Pa. D. & C.3d 389, 394 (Ct. Com. Pl. 1980).

70 *Zentz v. Harne*, 2 Pa. D. & C.5th 398, 399 (Ct. Com. Pl. 2007).

71 *Id.* at 400.

72 *Id.* at 400, 409.

73 *Id.* at 400.

“Having set up the application with a few of these helpful rule support cases, the student will have a significant amount of material to use.”

*parentis although not a natural parent.*⁷⁴ The court noted that the “definition takes into consideration that there are a growing number of nontraditional families within society today in which children are parented by someone other than a biological or adoptive parent.”⁷⁵ It also explained that “there is more to being a parent than the biological or legal relationship one shares with a child; there is also the care and affection one provides that child.”⁷⁶ Therefore, the court held that a “stepparent/stepchild relationship can serve as the basis for a negligent infliction of emotional distress cause of action when it is established that the stepparent stands in loco parentis to the stepchild,”⁷⁷ and this particular relationship between the plaintiff and his stepfather was “sufficiently close” to satisfy the close relationship element.⁷⁸

In the similar case of *Kratzer*, the defendant’s car struck the plaintiff’s foster son.⁷⁹ The plaintiff had been her son’s foster mother for eight years, and “[d]uring that time, love and affection developed as between a natural child and mother.”⁸⁰

The court held that the specific relationship between the foster mother and her son satisfied the “closely related” requirement.⁸¹ Specifically, the court did “not perceive of a foster parent relationship as being significantly different from that of a natural parent and child for purposes of evaluating the degree of emotional trauma likely to be suffered by the observer of a serious accident.”⁸² The court explained that in “many” instances, the “foster parent and child may quickly develop an enduring love for one another equal to

the deepest familial ties.”⁸³ The court emphasized that the “technical nomenclature ascribed to the relationship is not as important as the closeness of feelings between the participants.”⁸⁴

However, in *Blanyar*, a minor plaintiff watched his cousin, who was around the same age and a “very close friend[],” drown on the defendant’s property.⁸⁵ The court held that because the plaintiff was “not a member of the victim’s immediate family” or, alternatively, because the plaintiff and victim did not live “together as a family unit,” the plaintiff could not satisfy the close relationship element.⁸⁶

Having set up the application with a few of these helpful rule support cases, the student will have a significant amount of material to use. As a basic starting place, the student can easily note that Jessica and Josh are half-siblings, and the sibling relationship satisfied the close relationship element in *Turner* and *Anfuso*.⁸⁷ However, because Jessica and Josh are half-siblings, the student’s analysis cannot stop there, like the student could not stop his or her analysis after only the distance part of the “near the scene of the accident” element.⁸⁸

The student will be able to point out that, unlike the cousins in *Blanyar*, Jessica and Josh live “together as a family unit.”⁸⁹ Also, some courts focus on the “closeness of feelings between the participants” rather than the “technical nomenclature ascribed

⁸³ *Id.*

⁸⁴ *Id.* However, in *Blanyar v. Pagnotti Enterprises, Inc.*, the court attempted to minimize the *Kratzer* decision that the foster parent fulfilled the “closely related” element by stating that the relationship was “closely akin to the type already sanctioned by our appellate courts, that is, natural parent and child.” 679 A.2d 790, 792 (Pa. Super. Ct. 1996).

⁸⁵ *Id.* at 794.

⁸⁶ *Id.*

⁸⁷ See *Turner v. Med. Ctr., Beaver, PA, Inc.*, 686 A.2d 830, 833 (Pa. Super. Ct. 1996) (finding that the relationship between the plaintiff and her sister was “that of a ‘close relative’” because the plaintiff was “both a blood relative and close family member”); *Anfuso v. Smith*, 15 Pa. D. & C.3d 389, 394 (Ct. Com. Pl. 1980) (holding that a brother was closely related to the victim, his sister, because “young siblings are ‘closely related’ biologically and emotionally”).

⁸⁸ See *supra* sec. II(B).

⁸⁹ See 679 A.2d at 794.

⁷⁴ *Id.* at 407 (citation omitted) (emphasis in the original).

⁷⁵ *Id.* at 408.

⁷⁶ *Id.*

⁷⁷ *Id.* at 399.

⁷⁸ *Id.* at 409.

⁷⁹ *Kratzer v. Unger*, 17 Pa. D. & C.3d 771, 772 (Ct. Com. Pl. 1981).

⁸⁰ *Id.*

⁸¹ *Id.* at 774.

⁸² *Id.* at 773.

to the relationship.”⁹⁰ Therefore, like the stepson’s relationship with his stepfather in *Zentz* and the foster mother’s relationship with her son in *Kratzer*, Jessica and Josh have a “really close” half-sibling relationship, and Jessica always helps take care of Josh.⁹¹ Therefore, Jessica’s relationship with Josh likely satisfies the close relationship standard. When explained clearly, these rule support cases set up a fairly easy and straightforward application section despite the inconsistent and evolving nature of the rules governing the close relationship element.

E. Lesson 4—Sometimes the Rule Support Cases Lead the Student to a Different Conclusion Than the Rule Itself Indicated

The fourth and final element requires that the plaintiff suffer a “physical harm or injury”⁹² from the “shock of apprehending an injury to a loved one.”⁹³ The Pennsylvania courts have adopted the Restatement (Second) Torts, Section 436A.⁹⁴ The Restatement provides that “emotional disturbance alone, without bodily harm or other compensable damage,” does not satisfy this element.⁹⁵ Emotional disturbance includes “temporary fright, nervous shock, nausea, grief, rage, and humiliation.”⁹⁶ However, “long continued nausea or headaches may amount to physical illness.”⁹⁷

Based on a reading of this general rule, a student might reasonably conclude that Jessica is out of luck and cannot prove the physical injury element of negligent infliction of emotional distress. Although

Jessica suffered from anxiety, panic attacks, nightmares, and loss of appetite immediately following Josh’s accident and continues to experience anxiety, panic attacks, nightmares, these symptoms do not appear to be “physical symptoms” or “bodily harm.” Rather, they seem more akin to “emotional disturbances.” However, if the student looks at a few rule support cases, the student will come to a very different conclusion.

For example, in *Love v. Cramer*, the plaintiff alleged “symptoms of severe depression,” including “nightmares, stress and anxiety.”⁹⁸ She also alleged that “her injuries were of a continuing nature and have required her to obtain psychological treatment.”⁹⁹ The court held that the plaintiff had alleged “physical manifestations of emotional suffering” and concluded that the “alleged injuries are of a greater magnitude than the ‘transitory, nonrecurring physical phenomena’ contemplated by the Restatement (Second) of Torts § 436A, and, therefore, sufficient to sustain a cause of action for negligent infliction of emotional distress.”¹⁰⁰

Similarly, the plaintiff in *Brown v. Philadelphia College of Osteopathic Medicine* continued “to suffer from weight gain, sexual difficulties, anxiety, nightmares and loss of self-confidence” over a year after the relevant incident.¹⁰¹ The trial court held that this testimony met or exceeded the physical injury requirement in part because the symptoms were “not merely transitory,” and the appellate court affirmed.¹⁰² Also, in *Armstrong*, the court held that the plaintiff’s “allegation of loss of continence when she learned [that] the accident victim [was not her husband] coupled with her

“However, if the student looks at a few rule support cases, the student will come to a very different conclusion.”

⁹⁰ *Kratzer v. Unger*, 17 Pa. D. & C.3d 771, 773 (Ct. Com. Pl. 1981).

⁹¹ See *Zentz v. Harne*, 2 Pa. D. & C.5th 398, 408 (Ct. Com. Pl. 2007); *Kratzer*, 17 Pa. D. & C.3d at 773–74.

⁹² Wall by Lalli v. Fisher, 565 A.2d 498, 502 (Pa. Super. Ct. 1989) (stating that the “element of physical harm or injury is a necessary element” of the right to recover for negligent infliction of emotional distress); see also *Armstrong v. Paoli Mem’l Hosp.*, 633 A.2d 605, 609 (Pa. Super. Ct. 1993) (explaining that a negligent infliction of emotional distress plaintiff must show that “she suffered a physical injury as a result of the defendant’s negligence”).

⁹³ *Armstrong*, 633 A.2d at 611.

⁹⁴ *Crivellaro v. Pa. Power & Light Co.*, 491 A.2d 207, 209 (Pa. Super. Ct. 1985).

⁹⁵ *Banyas v. Lower Bucks Hosp.*, 437 A.2d 1236, 1239 (Pa. Super. Ct. 1981).

⁹⁶ *Crivellaro*, 491 A.2d at 210.

⁹⁷ *Id.*

⁹⁸ 606 A.2d 1175, 1179 (Pa. Super. Ct. 1992).

⁹⁹ *Id.*

¹⁰⁰ *Id.*; see also *Crivellaro*, 491 A.2d at 210–11 (finding that the plaintiff’s “intense headaches, uncontrollable shaking, involuntary hyperventilation and shortness of breath, frequent nightmares, inability to control bowels, upset stomach, and an intense tightening of the muscles in the neck, back and chest which produced severe pain lasting several days following each incident” were sufficient to satisfy the physical injury element).

¹⁰¹ 674 A.2d 1130, 1137 (Pa. Super. Ct. 1996).

¹⁰² *Id.*

“Professors can create the space and opportunity to explore the complexities of rule support cases through problems that present different rule support lessons in different IRACs.”

claim of depression, nightmares and insomnia” satisfied the “physical injury” element.¹⁰³

After analyzing these rule support cases, the student will see that the symptoms that the plaintiffs experienced in *Love*, *Brown*, and *Armstrong* are almost identical to Jessica’s continuing anxiety, panic attacks, and nightmares.¹⁰⁴ If the student stopped at the general “physical injury” rule and did not delve into these rule support cases, the student would likely reach the wrong conclusion about this element and therefore the entire negligent infliction of emotional distress claim. However, based on these very helpful rule support cases, the student may conclude that Jessica likely satisfies the “physical injury” element and probably has a valid negligent infliction of emotional distress claim against Josh’s middle school.

Conclusion

Rule support cases are often pivotal to the success of a student’s legal analysis. They work as a bridge between the rule and the application, setting up the application section by providing concrete examples that a student can compare the relevant parts of the fact pattern to. Professors can create the space and opportunity to explore the complexities of rule support cases through problems that present different rule support lessons in different IRACs. These lessons develop core lawyering skills that a student will use during law school and throughout the student’s legal career.

¹⁰³ *Armstrong v. Paoli Mem’l Hosp.*, 633 A.2d 605, 609 (Pa. Super. Ct. 1993).

¹⁰⁴ See *Love*, 606 A.2d at 1179; *Brown*, 674 A.2d at 1137; *Armstrong*, 633 A.2d at 609.

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Words Matter: Incorporation of “Wise” Techniques in Critical Feedback in Legal Research and Writing

By Susan O. Winters

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I. The Hard Truth

During my first-year teaching legal research, I met a truly exceptional student, whom I will call Maria, in my class.¹ Maria was a first-generation, student of color, and a rock star! She thoughtfully engaged in the class, moving both her and her cohort’s understanding of legal research forward. Simply put, she is the type of student we all dream of having.

During Maria’s second year, we were having a candid discussion about law school culture and specifically the experiences of historically underrepresented students, like herself. During this talk, Maria recounted a story from her first semester of law school. She was struggling in a doctrinal class, not unlike many first-year students. Maria went to the professor seeking advice and feedback on improving her legal analysis and critical thinking skills. The professor’s response was simply, “if you aren’t getting these simple concepts, you might want to talk to (the) Dean about withdrawing.” After the meeting, Maria describes weeping in a hidden area of the building questioning not only whether the professor was right, but also, whether he would have said the same thing to her if she looked different. Unfortunately, Maria now faced the added mental load of determining the professor’s motivation, in addition to unraveling the substantive academic struggles she was originally facing.

Thankfully, Maria ignored the “advice” and graduated as a leader amongst her peers and with a federal clerkship. While I do not know the professor’s reasons for using those particular words, I learned a valuable lesson from them: my words matter! My words, especially if I am delivering critical feedback on performance, hold significance and can affect students’ personal perceptions, learning outcomes, and trust in the academy. I have since learned, through research and conversations, this is especially true for students from historically underrepresented groups.

This Article explores and promotes a simple, yet effective, method known as “wise feedback.” Wise feedback is targeted feedback that conveys high expectations, a genuine belief that those expectations can be achieved by the student, and concrete information to help the student meet the expectations. Here, “wise” does not necessarily mean smarter or better. Instead, wise feedback refers to psychological interventions which are attuned to how people make sense of themselves, others, and social situations that may affect their learning. This method can be implemented to diminish the potential for a negative learning outcome and weakened motivation when faculty are conveying critical feedback to students from historically underrepresented groups.

This Article explains the concept of wise feedback in the context of higher education and provides support and examples for the application of the method in legal research and writing classes. The beauty of this technique is it allows faculty, on an organic student level, to effect positive and real change, for individual students and, potentially, the institution as a whole. And the method is simple.

“My words, especially if I am delivering critical feedback on performance, hold significance and can affect students’ personal perceptions, learning outcomes, and trust in the academy.”

¹ The name of the student has been changed; however, I have been given permission to share her story.

“When a student receives critical feedback, a student of color, based on previous life experiences, may question whether the feedback is not due to weak work product, but the professor’s internalized view of a stereotype.”

We can all agree that academic institutions that foster an inclusive, growth-minded atmosphere produce a richer learning environment for all students. Even with this truth, systemic change in academia is slow and, at times, difficult.

This technique gives a small, but scientifically backed, method for faculty to create a growth-minded atmosphere inclusive of all students. And maybe, as the African proverb goes, “little by little, a little becomes a lot.”²

II. History of Wise Feedback . . . The Science Behind the Concept.

Giving critical feedback can be a difficult task. As educators, our goal is to provide constructive performance feedback to improve learning outcomes without undermining the student’s self-confidence or intrinsic motivation.³ This is sometimes referred to as the mentor’s dilemma.⁴ The dilemma, and the potential for negative outcomes, are enhanced when providing critical feedback to historically underrepresented students due to the potential for stereotype threat.⁵

A stereotype threat is both psychological and situational. A stereotype threat is defined as a perceived threat to one’s psychological identity when a negative stereotype exists for a group, and an individual member of that group feels devalued by that negative stereotype by merely being a member of the group.⁶ The tricky part of this threat is there need not be actual bias or prejudice present by the person giving the feedback for the negative impact to occur. When a student receives critical feedback, a student of color, based on previous life experiences, may question whether the feedback

is not due to weak work product, but the professor’s internalized view of a stereotype. This disconnect can occur even when there is no existence of bias as the basis for the feedback. Therefore, the threat can merely exist in the air for the student, so to speak.⁷

Stereotype threat is a situational threat meaning it emerges when situational cues indicate to the student that a stereotype explains the subpar performance, as opposed to actual performance.⁸ Stereotype threat is distinguished from other psychological threats in that it is triggered by the simple recognition that a negative stereotype could apply to the student in a situation. This stereotype threat can be activated with critical feedback, in that the student may believe the feedback is not constructive, but that they are being judged in light of the negative stereotype or that they have now conformed to the negative stereotype.⁹ Importantly, there need not be actual or inherent bias as a motivation in the critical feedback for the situational threat to occur for the student.

Claude M. Steele perhaps explains it best when he writes, “[T]he mere fact of being black, in light of the stereotypes about it, creates a quandary over how to interpret critical feedback on academic work. Is the feedback based on the quality of their work or on negative stereotypes about the group’s ability?”¹⁰ Steele’s thoughts demonstrate why critical feedback should be conveyed such that the student trusts the feedback is given for the student to achieve the academic standard and not as a result of the teacher’s bias.¹¹ Unfortunately, even when the “mentor” is giving feedback with this in mind, stereotype threats can derail the student’s trust and motivation.

For students from historically underrepresented groups, the results of the stereotype threat, in conjunction with critical feedback, may be

² Geoffrey L. Cohen et al., *An Identity Threat Perspective on Intervention*, in STEREOTYPE THREAT 280, 292 (Michael Inzlicht & Toni Schmader eds., 2012) (“Because inequalities in education correlate with inequalities in well-being and health, the effects of identity threat-and of intervention to alleviate them-reach beyond the classroom.”).

³ Geoffrey L. Cohen et al., *The Mentor’s Dilemma: Providing Critical Feedback Across the Racial Divide*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1302, 1302 (1999).

⁴ See generally *id.*

⁵ *Id.* at 1302-03.

⁶ Cohen et al., *supra* note 2, at 281.

⁷ Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in PROMISE AND DILEMMA: PERSPECTIVES ON RACIAL DIVERSITY AND HIGHER EDUCATION 92, 92 (Eugene Y. Lowe ed., 1999).

⁸ *Id.* at 101.

⁹ Cohen et al. *supra* note 3, at 1302.

¹⁰ CLAUDE M. STEEL, WHISTLING VIVALDI 162 (2010).

¹¹ David Scott Yeager et al., *Breaking the Cycle of Mistrust: Wise Intervention to Provide Critical Feedback Across the Racial Divide*, 143 J. EXPERIMENTAL PSYCHOL. 804, 806 (2014).

decreased effort, motivation, etc. since the student does not want to risk a repeated experience of that negative stereotype again.¹² Furthermore, the student may completely devalue the feedback under the premise that it was only given in conformity with the negative stereotype and not as true constructive criticism.¹³ Again, the result is a decreased learning outcome for the student. Effective social psychological interventions, like wise techniques, can be highly effective in ensuring academic rigor and growth while minimizing the potential effect of stereotype threat.¹⁴

In contemporary social psychology, wise interventions are techniques aimed at fostering a sense of trust in individuals.¹⁵ Wise strategies for giving critical feedback attempt to assure the student they are not being evaluated based on negative stereotypes, but rather on their inherent qualities and characteristics with the goal of intellectual growth.¹⁶ Simply put, wise feedback resolves the “quandary” historically underrepresented students face when given critical feedback and allows the student to focus on the academic.¹⁷

The application of wise techniques also encourages a growth-minded view of critical feedback which is dramatically different than a fixed mindset.

[I]f a student has a growth-mindset, perceiving intelligence as something that is malleable, i.e., can be developed and increased, the student attributes poor performance to a correctable cause—an intellectual ability that needs to be further developed; because the student believes this ability can be developed by further effort,

the student responds by working harder to develop the necessary skills.¹⁸

In a well-known academic study, Geoffrey L. Cohen, Claude M. Steele, and Lee D. Ross examined the use of wise techniques in critical feedback for Black and White students at Stanford University.¹⁹ The Stanford studies were conducted in the late-1990s looking at whether Black and White students perceived bias by reviewers and if wise techniques would decrease that perceived bias. The first study found that perceived bias by Black students was totally eliminated when they received feedback prefaced with a statement meant to “explicitly invoke high standards while assuring the particular student that he or she could meet such standard.”²⁰ The second study found that Black students given wise feedback also had higher motivation.²¹ Cohen et al.’s work demonstrates to fully combat stereotype threat and perceived bias, the feedback must contain a high academic standard coupled with the concrete assurance that the student can meet the high standards.²² Furthermore, to be fully effective, the feedback should be accompanied by concrete resources to encourage a growth-minded learning opportunity for the student.²³

III. Application in Legal Education—Why Does It Matter So Much in Our Halls?

Dean Paula Manning appears to be the first author to discuss the stereotype threat and the mitigation principle of wise feedback in regard to legal education.²⁴ In her article, Manning suggests that the methodology of law school pedagogy presents an environment ripe for attributional ambiguity and thereby stereotype threat. Attributional ambiguity refers to the difficulty in determining the cause of one’s successes or failures, particularly when one’s

“Effective social psychological interventions, like wise techniques, can be highly effective in ensuring academic rigor and growth while minimizing the potential effect of stereotype threat.”

¹² *Id.* at 1303.

¹³ *Id.*

¹⁴ Cohen et al., *supra* note 2, at 283.

¹⁵ Paula J. Manning, *Word to the Wise: Feedback Intervention to Moderate the Effects of Stereotype Threat and Attributional Ambiguity on Law Students*, 18 U. MD. L.J. RACE RELIG. GENDER & CLASS 99, 120 (2018).

¹⁶ *Id.*

¹⁷ STEELE, *supra* note 10, at 163.

¹⁸ Manning, *supra* note 15, at 114.

¹⁹ Cohen et al., *supra* note 3, at 1303.

²⁰ *Id.* at 1310.

²¹ *Id.* at 1313.

²² Manning, *supra* note 15, at 127.

²³ *Id.* at 136.

²⁴ See generally *id.*

“All of these factors demonstrate the need for legal educators and administrators to engage in macro and micro initiatives to alleviate potential stressors for historically underrepresented students.”

membership in a historically underrepresented group may be a factor.²⁵ For example, if a student from a historically underrepresented group performs poorly on an exam, it may be difficult for the student to determine if the poor performance was due to their own abilities or to prejudice and discrimination they perceived in the testing environment. Alternatively, if the same individual performs well, it may be unclear to the student if the success was due to their own abilities or to efforts to provide equal opportunities and accommodations. This ambiguity can lead to feelings of uncertainty and can contribute to increased academic stress.²⁶

In addition, law school is hard. For most students, the academic standards faced in law school are more rigorous than any other previous academic experience. The academic rigor, coupled with the intense nature of the institution due to the competitive grading and ranking system, create an uncharted landscape for most students. As such, even with increased effort, the results can be lower than what a student is accustomed to. Simply put, everyone that attends law school was an elite academic performer in their undergraduate program; however, law school is where elite students are now competing against other superstars and inevitably, no matter how hard you train, someone is going to move down in the rankings.

The high-pressure, competitive atmosphere of legal education can be especially challenging for historically underrepresented students. In many law schools, minority students often lack a community of fellow students who share their ethnicity or background which can lead to a sense of insecurity and a lack of support. And insecurity ignites and fuels anxiety.²⁷ The entering law school class from 2022 is the most diverse ever, which is encouraging; however, only 36.6% of enrolling students identify as a person of color.²⁸ The numbers are even lower

when looking at Black and Latino enrolling students, at 7.8% and 9.4%.²⁹ The reality for many diverse students is, they may not see other students who share their backgrounds or characteristics when they look around them in this weird new world of law school. All of these factors demonstrate the need for legal educators and administrators to engage in macro and micro initiatives to alleviate potential stressors for historically underrepresented students.

In 1985, Michelle LaVaughn Robinson (Obama) wrote about the experience of Black students in a predominately white educational institution, Princeton.³⁰ She wrote, “(M)y experiences at Princeton have made me far more aware of my ‘Blackness’ than ever before. I have found that at Princeton no matter how liberal and open-minded some of my White professors and classmates try to be towards me, I sometimes feel like a visitor on campus as if I really don’t belong. Regardless of the circumstances under which I interact with Whites at Princeton, it often seems as if, to them, I will always be Black first and a student second.”³¹ Ms. Obama was not discussing the law school experience, and this was written almost forty years ago; however, it is not unlikely that minority students, like Maria, share the same thoughts as Ms. Obama within the current legal education cohorts.³² So how can we, as individuals, help a systematic academic, and maybe societal, problem? Again, I think we start with how we deliver critical feedback to first-year students.

IV. Why us?

Legal research and writing is usually the first place where first-year students receive feedback in law

²⁵ *Id.* at 110–11.

²⁶ *Id.* at 112–13.

²⁷ Sha-Shana Crichton, *Teaching in the Time of Disruption: A Case for Empathy and Honoring Diversity*, 25 *LEGAL WRITING* 4, 7 (2021).

²⁸ Julia Brunette Johnson, *Diversity Improves Make Law School History*, NAT’L JURIST’S PRELAW (Jan. 24, 2023, 12:35 PM), <https://nationaljurist.com/national-jurist/news/diversity-improvements-make-law-school-history/>.

²⁹ *Id.*

³⁰ Ms. Obama went on to attend and graduate from Harvard Law School. While at Harvard she wrote an essay advocating for increased hiring of women and people of color in law schools which appears to demonstrate her continued feelings regarding diversity and inclusion in higher education. See Michelle Robinson, *Minority and Women Law Professors: A Comparison of Teaching Styles* (1988) <https://www.scribd.com/doc/102879345/Michelle-Obama-Law-School-BLSA-Essay#> (also on file with Author).

³¹ Michelle LaVaughn Robinson, Princeton-Educated Blacks and the Black Community (1985) (unpublished B.A. thesis) (on file with Princeton University, Mudd Manuscript Library and with Author).

³² STEELE, *supra* note 10, at 152 (discussing the feeling of out of place as a Black student at a predominantly White institution).

school. This is partly due to the use of formative assessment, as opposed to summative assessment, in the legal research and writing curriculum.³³ Furthermore, it is not uncommon for legal research and writing to be taught in smaller-sized classes which lends itself to more individualized feedback.³⁴ These two factors provide an optimal setting for the implementation of wise techniques in critical feedback. As discussed above, this is a small change in methodology; however, science shows it can have a large impact for historically underrepresented students. It stands to reason that if legal research and writing faculty can build trust with diverse students during their first year, it can carry over to their upper-level years. So, while it's a small thing, building trust and creating a positive learning environment for diverse students as a whole, or even on the individual level, benefits both the student, or students, and the institution.³⁵

V. Let's practice . . .

The delightful attribute of this technique is its simplicity. Below are the steps to providing wise feedback:³⁶

Step One: Communicate the high academic standard.

Step Two: Explain why the student can meet the high standard.

Step Three: Provide concrete actionable feedback and resources that assist students in meeting the academic standard while demonstrating support and building trust.

This process works since it reduces the possibility of attributional ambiguity and stereotype threat for critical feedback while maintaining high learning expectations and providing concrete actionable

steps for improvement.³⁷ It must be stressed, wise feedback does not turn faculty into cheerleaders or lower academic standards.³⁸ In fact, either of these can be counter-productive for the students.³⁹ The technique is meant to consider the student's own lived experiences in receiving critical feedback, which can be heightened in the parameters within the methodologies in legal education.⁴⁰ While this Article focuses on the use of wise feedback in delivering critical feedback to students from historically underrepresented groups, the technique could be used with other students who enter law school subject to potential negative stereotype threats. This would include first generation students, neurodivergent students, or students with latent or hidden disabilities.

So, let's look at a real-life example of the application of the technique in legal research and writing. Below is a hypothetical involving a first-year student who failed to master an exercise on hierarchy of authority. The example gives feedback with traditional feedback methods and then wise feedback.

Hypo: A first-year student is unsuccessful in an exercise on hierarchy of authority. Previously the student has been engaged in the learning process and successfully completed exercises on the court system and binding/persuasive authority.

Non-Wise Feedback: You must understand hierarchy of authority to conduct effective legal research. This skill is a foundation for beginning any legal research question. Please revisit the assigned reading.

Wise Feedback: Hierarchy of authority analysis is a difficult skill, but it is foundational for legal research. You have been successful in understanding the court systems and binding

³³ Judith Welch Wegner, *Contemplating Competence: Three Meditations*, 50 VAL. U. L. REV. 607, 709 (2016).

³⁴ Susan L. Brooks et al., *Experience the Future: Papers from the Second National Symposium on Experiential Education in Law: Alliance for Experiential Learning in Law*, 7 ELON L. REV. 1, 63 (2015).

³⁵ Cohen et al., *supra* note 2, at 281, 292.

³⁶ Yeager et al., *supra* note 11, at 806.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Cohen et al., *supra* note 3, at 1303 (listing numerous studies with findings that students must not be over-praised or under-challenged for the method to maintain a positive outcome).

⁴⁰ Manning, *supra* note 15, at 127.

“The delightful attribute of this technique is its simplicity.”

“To create a positive and inclusive learning environment, it is essential to ensure that students feel respected, supported, and valued.”

versus persuasive authority; therefore, you have the building blocks for this skill. Please review my comments, the readings, and attempt to rework the exercise. There is also a good Quimbee video on the topic. If you still are struggling, let's meet during office hours to discuss this concept further.

Let's now look at an example of giving feedback on first-year writing.

Hypo: A first-year student submits the discussion portion of a closed legal memorandum which does not maintain the IREAC formula and lacks thoughtful legal analysis.

Non-Wise Feedback: Your submission needs a considerable amount of revisions before submission of the final closed memorandum. I have provided editorial comments on the memo itself, but you will need to correct the following substantive revisions as well. First, you need to review the IREAC formula and edit the formatting of the submission. Second, the analysis and application of the law to our facts is weak and requires revision.

Wise Feedback: The expectations in this course, and law school generally, are very high, and I know you can meet those high standards. My comments are critical but are given with the intent of providing straightforward feedback to improve your writing skills and meet the high standard of this course.

First, the formatting of the IREAC is wrong. You might find it helpful to label each part of the writing to ensure you are following the formula. You will want to remove the labels prior to submission. In addition, revisit the use of transitional language discussed in class and included in my PowerPoint slides.

Second, the analysis and application of the law to our facts is weak. You should try briefing the cases to ensure you fully understand the rule(s) of law and rationale. The thesis sentences and prediction/conclusion statement should be

revised for context and clarity. Tell the reader what they will read and what your conclusion is.

These scenarios demonstrate that wise techniques are not difficult to use, and over time can become a routine method in the grading process.

VI. Parting Words

It is crucial to understand that as educators, our words can have a significant impact on all students, but especially students from historically underrepresented groups due to stereotype threat and attributional ambiguity. This negative impact can occur even when there is no negative intent or bias on our part. Our words have the power to shape perceptions, influence trust, and determine learning outcomes. As educators, we must choose our words carefully and be mindful of how they can impact students.

Every individual may interpret words differently, and something that may seem harmless to one person could be hurtful or discouraging to another due to their background and life experiences. To create a positive and inclusive learning environment, it is essential to ensure that students feel respected, supported, and valued. By being mindful of our language while considering the potential impact of our words, we can foster an atmosphere that encourages growth-minded learning. While not the only way we can foster this environment, the wise feedback technique is a simple, and scientifically backed method, to work towards this goal. We can be the little that hopefully leads to a lot.

Cite as: Frances C. DeLaurentis, *Oh, the Choices You'll Make: Embracing Choice in Legal Writing Classes*, 30 Persps. 92 (2023).

Oh, the Choices You'll Make:¹ Embracing Choice in Legal Writing Classes

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Before sitting down to put pen to paper, or finger to keyboard, I began the process of writing this Article by making a series of choices. What should I write about? How should I begin the article? In what voice should I write? As I continued to write this Article, I made a series of choices ranging from the words to use and how to package those words to the thesis to develop and the arguments to craft in support of that thesis. Intuitively, we recognize that each author makes choices as she creates her story, develops her character, or composes her argument. Yet, we often fail to appreciate the significant role of choice in legal writing, contributing to the narrative that legal writers are not creative.

Such a narrative fuels law students' complaints that they lose their voice when writing for their legal writing class. Students often feel as though they are simply plugging words into a formula like a mathematical equation rather than creating an original work product. Despite faculty statements that legal writing is a creative process, we often teach the class in a way that minimizes such creativity. We do so to help socialize first-year law students into the legal discourse community³ by concretely defining reader expectations and introducing legal writing conventions. Yet, our class design and instruction also restrict or eliminate opportunities for our students to make choices. By restricting such choices,

we limit our students' sense of autonomy⁴ and fail to empower our students, hindering their ability to develop decision-making strategies that will enhance their legal writing. Even though such limitations may be necessary in a first-year legal writing course where faculty must prioritize other pedagogical values⁵ and teach fundamental skills that will allow students to make informed choices later, we should recognize the consequences of our design selections, and we should seek other ways to embrace choice as part of our students' writing development.

Scholars Sheila Rodriguez and Carol Wallinger have specifically addressed the need to support students' autonomy as a way of motivating students and deepening their learning in the first-year legal writing course.⁶ They encouraged the use of various feedback techniques as a means of doing so.⁷ Wallinger also noted that educators can provide autonomy support by offering students implementation choices, such as a choice about how

“Intuitively, we recognize that each author makes choices as she creates her story, develops her character, or composes her argument.”

4 For a fuller discussion of the role of self-autonomy in the motivation and performance of law students, see Carol Wallinger, *Autonomy Support 101: How Using Proven Autonomy Support Techniques Can Increase Law Students Autonomy, Engender Hope, and Improve Outcomes*, 48 DUQ. L. REV. 385 (2010) [hereinafter, Wallinger, *Autonomy Support*]; Sheila Rodriguez, *Using Feedback Theory to Help Novice Legal Writers Develop Expertise*, 86 U. DET. MERCY L. REV. 207, 211 (2009); Carol L. Wallinger, *Moving from First to Final Draft: Offering Autonomy-Supportive Choices to Motivate Students to Internalize the Writing Process*, 54 LOY. L. REV. 820, 835–36 (2008) [hereinafter Wallinger, *Moving from First*].

5 For a discussion of the required structure and curriculum of legal research and writing programs and courses, see ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *ALWD/LWI LEGAL WRITING SURVEY, 2021–2022, REPORT OF THE INSTITUTIONAL SURVEY* 198 (June 2023), <https://www.lwionline.org/sites/default/files/2021-22%20Institutional%20Survey%20Report.FINAL%20June%202023.pdf> (Questions 4.2, 5.2, and 6).

6 Rodriguez, *supra* note 4, at 212, 217; Wallinger, *Moving from First*, *supra* note 4, at 833.

7 Rodriguez, *supra* note 4, at 220 (discussing the Blaustone Six Step feedback model); Wallinger, *Moving from First*, *supra* note 4 at 833–44 (discussing the tools to promote student autonomy as well as suggestions for how a legal writing course can provide students with choices as to how they learn course objectives).

1 An adaption of Dr. Seuss's book *Oh, the Places You'll Go*.

2 Thank you to my Georgetown Law colleague Jessica Wherry for her thoughtful feedback, to my Research Assistant Alec Moore for his able assistance, and to Georgetown Law Dean William Treanor for his generous support of my scholarship.

3 See Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING 1, 9–30 (1995) for an explanation of socialization and how one is socialized into a discourse community.

“I suggest balancing the limitations of the first-year legal writing course by more fully embracing choice in advanced writing classes.”

to learn the course material.⁸ Like those articles, this Article supports the goal of student autonomy; it does so by focusing more narrowly on choice and tackling the problem somewhat differently. I suggest balancing the limitations of the first-year legal writing course by more fully embracing choice in advanced writing classes. Although embracing choice in advanced writing courses will not address the lack of motivation in first-year writing courses that may flow from restrictions of students' sense of autonomy, it will provide students with an opportunity to develop decision-making strategies that will enhance their legal writing and professional development. Additionally, it may help to reverse the declining motivation often present in upper-class law students.⁹ To that end, I designed an advanced legal writing class with choice as one of its defining principles and I seek ways to incorporate some of this design into my first-year legal writing course in the future.

This Article first discusses how faculty shy away from explicit teaching of choice in first-year legal writing classes,¹⁰ and engages with some of the consequences of such decision, including the reticence of many students to make choices. It then explores ways to incorporate choice more explicitly in our teaching of advanced legal writing courses. Specifically, the Article discusses my advanced legal writing class, describing the course design, reflecting on its success, and noting the benefits and challenges of designing around choice. Finally, the Article encourages faculty to provide students with the opportunity and tools to develop decision-making strategies, particularly in upper-level writing classes. It argues that such tools are needed presently to help students gain legal writing expertise and to allow students to experiment with decision-making. Even more important, though, a reason to incorporate choice

into Legal Writing pedagogy is that students will need to be capable decision makers in their future practice—in which they will have to contend with evolving technology such as generative AI. Generative AI poses new challenges and choices for young lawyers who must be able to make decisions as to whether, when, and how to use it effectively and efficiently. Providing students with opportunities to make decisions while in law school aids in their professional formation and ensures that they will be prepared to tackle new challenges in the future.

I. The Limits on Choice in First-Year Legal Writing Courses

Many first-year law students arrive at law school with developed writing skills, which they expect to transfer easily to legal writing. Unlike torts, which most of them never studied previously, students have been writing for years and believe that they need only learn the legal resources and conventions to be utilized in their writing. Thus, students often anticipate that legal writing will be less challenging than their other courses and become frustrated when that expectation is not realized. There are a multitude of reasons for why their expectation is not realized,¹¹ not the least of which is that they are writing for a new audience, most having never written previously for the legal discourse community.

Thus, it is not surprising that first-year law students struggle at this time of transition, moving from college to law school, and writing for a new discourse community.¹² Part of helping students become effective legal writers requires helping them socialize into the discourse community so they can understand the expectations of the community and can make choices in their writing that will satisfy

⁸ Wallinger, *Autonomy Support*, *supra* note 4, at 396.

⁹ See Wallinger, *Moving from First*, *supra* note 4, at 830 (discussing the statement in the Carnegie Report on the Law School Survey of Student Engagement, which showed a significant reduction in the amount of time and effort 3L students spent on their academic work).

¹⁰ Admittedly, some faculty may prioritize other lessons with the lack of student choice being an unintended result rather than an intended consequence.

¹¹ Some younger students may be struggling with concepts and abstractions because they are operating at a lower cognitive level where true concept formation is a new skill. Some students may arrive at law school having written personal style reflections or summaries of a subject but having never written any structured and supported argument. Students may have successfully navigated their undergraduate program performing minimal research, copying the style of the teacher's examples, and making mechanical corrections for the rewrite. They may have written writer-based documents, but they are now expected to write a reader-based document. See Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 LEGAL WRITING 81, 88 (1997).

¹² See Williams, *Autonomy Support*, *supra* note 3, at 1–9 (discussing the natural struggle of writers at points of transition).

the needs of readers in that discourse community. Yet, while guiding them and easing their transition to law school, we often remove the decision-making from students. We do so by providing detailed formula or templates for them to follow, limiting the resources upon which they may rely, and dictating the rhetorical elements of their documents. Although helpful by limiting cognitive overload, we insulate our students from having to make choices and from developing decision-making strategies for writing.

In terms of formulas or templates, most students have been exposed to the “hamburger” paragraph¹³ or the five-paragraph essay¹⁴ before arriving at law school. At law school, they are often exposed to IRAC or some other formula or template for communicating legal analysis.¹⁵ If presented as templates, these tools can be helpful guides for writers who are struggling to transition to legal writing. But, if presented or perceived by students as formulas, students often become dependent on them and are unable to move beyond those formulas. Too often students see the formula as mere arrangement instead of invention¹⁶ and fail to embrace critical decisions about the content of their document or think broadly about potential arguments. For example, some first-year law students are so wed to the IRAC formula that they struggle to write a legal analysis on a case of first impression because they don’t know how to organize an analysis where there is no established rule to insert into the “R” of IRAC. Relatedly, faculty who rely heavily on rigid rubrics may stunt student growth when they are graded purely on the sum of the rubric components. At times, a student’s paper may holistically read better

than the sum of its parts as reflected in a grading rubric; in this situation, the overall quality of the paper is often not valued or rewarded with students being penalized for “coloring outside the lines.”

We similarly restrict student choice when we ask them to draft a legal analysis based on a closed packet of material. Often, legal writing classes begin with the closed memo assignment, an assignment that asks students to draft an objective legal memorandum based on the sources provided in the memo packet. Students must produce a legal analysis based on the cases, statutes, and other materials provided and are unable to conduct additional research. The closed memo assignment is used because faculty want students to be able to focus on their writing without the burden of conducting research or because the assignment comes so early in the semester that students have not yet been trained in the necessary research skills. Notwithstanding the laudable reasons for using a closed memo assignment, a consequence of such assignment is that we dictate to some extent the student’s analysis and curtail a student’s ability to choose the arguments to make and legal sources upon which to rely.

Likewise, we limit the student’s choices when we dictate the rhetorical elements of purpose, audience, stance, and scope. For most first-year legal writing assignments, faculty state as possible purposes of the document such goals as predicting the likely outcome based on legal analysis, informing a supervising partner of the answer to a legal question, or persuading a judge to rule in the client’s favor. In doing so, faculty indicate the intended audience of the document and define the stance. Faculty also set the scope by assigning a page or word limit, thus limiting students’ choices about the design of their document. Arguably, students can draft a document that is less than the word limit, but many students blindly rely on the word limit as a guide instead of thinking about the length needed to support their analysis or argument.

Collectively, these limitations hinder the growth and development of the professional identity of law students. In practice, lawyers make choices many times a day. Lawyers are presented with client

“Relatedly, faculty who rely heavily on rigid rubrics may stunt student growth when they are graded purely on the sum of the rubric components.”

¹³ For an example of the hamburger paragraph, see Classroom Strategies Paragraph Hamburger, <https://www.readingrockets.org/classroom/classroom-strategies/paragraph-hamburger#:~:text=The%20%22paragraph%20hamburger%22%20is%20a,%22piece%22%20of%20the%20hamburger.>

¹⁴ There are many websites and texts discussing the five-paragraph essay, for example, *The Five-Paragraph Essay*, https://guidetogrammar.org/grammar/five_par.htm, and Matt Ellis, *How to Write a Five-Paragraph Essay, with Outlines and an Example*, <https://www.grammarly.com/blog/five-paragraph-essay/>.

¹⁵ For a brief discussion of IRAC and other formulas used in legal analysis, see DIANA R. DONAHOE, *THE ROAD TO LEGAL PRACTICE*, available at <https://teachinglaw.com/legalAnalysis/ConstructingLegalAnalysis>.

¹⁶ KRISTEN K. TISCIONE, *LEGAL WRITING FROM ADVICE TO ADVOCACY: A CONTEMPORARY APPROACH* 266–74 (2021).

“I hoped to demonstrate the role of choice in writing by first having students choose which case file they would work on and then reflect on their choice.”

problems in which the lawyer must determine if there is a claim and the nature of the claim; lawyers must determine the governing law, identify the relevant jurisdiction, and propose a course of action. There are no formulas and no closed packets in practice, and even when court rules dictate some rhetorical elements (*i.e.*, word or page limits), lawyers are responsible for finding and adhering to those rules as well as choosing other rhetorical elements. Thus, faculty need to ensure that their students have not only had the opportunity to gain confidence in their legal skills, but also that they are (or are on their way to becoming) competent lawyers. Providing students with the opportunity to make decisions about their writing and asking them to defend their choices helps students develop both confidence and competence.

Admittedly, there are pedagogical reasons for limitations on choice, particularly in the first-year legal writing course. And, even with such limitations, there are still opportunities for writers to make choices such as which cases to use to synthesize rules, how to state a synthesized rule, which cases to analogize to, what arguments to make in a brief and in what order, what theme or theory of case to develop, etc. Nonetheless, the design of many first-year legal writing courses enables students to become overly dependent. We often see students who are wed to samples and unwilling to make even the simplest of choices, such as the number of cases to cite for each proposition or in support of each argument. Such unwillingness to make choices often signals that the writer lacks confidence. To balance the need to impose some limits in the first-year course with the need to provide students with greater opportunities to gain confidence and competence, we need to ensure that we embrace choice more explicitly in advanced writing courses and explore ways to add choice in all writing courses.

II. Advanced Legal Writing Course: A Focus on Choice

When given the opportunity to teach an advanced legal writing seminar for upper-class law students, I decided to design a course in which choice would be one of its defining principles. The Advanced

Legal Writing in Practice course was a three-credit seminar for sixteen students¹⁷ and satisfied the school's upper-level writing requirement.¹⁸ From the very outset, I wanted to provide opportunities for students to make choices. I hoped to demonstrate the role of choice in writing by first having students choose which case file they would work on and then reflect on their choice. Given that this seminar satisfied the writing requirement, students had to draft documents that required in-depth research and substantial legal analysis. Students submitted both drafts and rewrites of two major assignments; the rewrite of each assignment was graded. A third major assignment required students to collaborate in drafting a document and to provide a statement of collaboration detailing their process. Each pair of students received the same grade for the collaboration project. Students were provided minimal parameters with some rhetorical elements left undefined; there were no word limits on some assignments and other assignments were limited by court rules only.

A. Course Design

I created two complete case files for different types of cases. I intentionally created case files that would provide students with different research

¹⁷ The seminar was designed to reinforce and build upon the legal writing skills introduced in the first-year Legal Practice class as well as to ensure mastery and develop efficiencies in terms of the legal writing process and product. The seminar focused on efficient and effective prewriting techniques; gave students ample opportunity to hone their writing skills; allowed students to learn effective rewriting and revising techniques and to critically assess their own and others' legal writing by participating in the commenting process; and helped students develop collaborative working skills. The course was run like a law firm, with students performing assignments for a supervising attorney. The students wrote at least three significant documents, with smaller interim writing assignments. Students had opportunities to work in teams, to strategize and write both individually and collaboratively, and to write as they will be expected to write in practice, including using email correspondence, preparing drafts for colleagues, and ultimately finalizing their work product for a client and the court. This course was designed as a workshop, with in-class and out-of-class writing and rewriting, in-class presentations, peer critique, individualized feedback from the teacher, self-critique and reflection, and collaborative work.

¹⁸ According to Georgetown's Academic Policy, the upper-class writing project in a Writing Requirement (WR) seminar should show the student's mastery of the in-depth research undertaken and demonstrate how the student has organized, clarified, or advanced this body of knowledge in resolving the issues raised by the paper. 2022–23 GEORGETOWN LAW STUDENT HANDBOOK OF ACADEMIC POLICIES 3–4 (2022) (on file with Author). In an advanced legal writing class, the WR can be met if the students are required to draft legal documents that require in-depth research and legal analysis. Collectively, the documents must meet the 6,000-word minimum of WR papers.

and writing challenges. Case File A concerned age and gender discrimination issues. It involved a private school that had eliminated some positions and laid off faculty. The school feared potential age and gender discrimination claims from a former teacher under the Age Discrimination in Employment Act, Title VII, and a state human rights statute. There was an abundance of case law addressing legal issues implicated in Case File A; students were challenged with having to wade through the law to find the most helpful cases and apply the law to their specific facts. Students also faced organizational challenges in writing, such as whether to organize around law or facts.

Case File B involved the intersection of national security and First Amendment issues. That case involved the United States government, a journalist, and the media company for which the journalist worked, all of whom were concerned with the implications of the potential publication of a story based on classified government documents that a government employee had leaked to the journalist. The government employee did not have permission to share such documents and the journalist lacked the security clearance to possess such documents. Case File B raised potential reporter shield law questions, First Amendment protections, and criminal liability under the Espionage Act. Case File B presented questions of first impression, had very little governing case law, and involved policy and constitutional arguments. Students faced fewer organizational challenges, but greater substantive legal challenges, than were posed by Case File A.

After they reviewed the case files, each student chose the file to work on throughout the semester with some students working on Case File A and others on Case File B. Students were asked to reflect on their choice and explain why they made it. The reflections demonstrated student awareness of their strengths and weaknesses in terms of writing, research, and legal analysis; they also expressed a variety of reasons for their choices. Students who chose Case File A explained their choices as reflecting an interest in employment matters, the need to

become more efficient with their research and writing, or a desire to grapple with how to choose the best cases when confronting a ton of relevant law. Students who chose Case File B explained their choices as reflecting an interest in First Amendment or constitutional law, an opportunity to engage more meaningfully with policy reasoning, or a desire to advocate for new law.

The first time I taught the course, I also provided students with the opportunity to choose the specific documents they wanted to create for each assignment. Students working in each case file could choose to create a document from a list of documents. My goal in providing this choice was to allow students who were contemplating a legislative, regulatory, or transactional practice to draft relevant, non-litigation-based documents. The document choices included a white paper, proposed legislation, a contract, a settlement agreement, a client advice letter, a demand letter, a memorandum in support of a dispositive motion, and an excerpt of an appellate brief argument. I organized the class around skills as opposed to documents, with each skill unit culminating in a major writing assignment. Unit I addressed Informing, Unit II discussed Persuading, and Unit III focused on Collaborating. Teaching a graded course where students were simultaneously working on different documents for different clients proved to be quite challenging and grading that course was even more problematic.

Consequently, after that year, I revised the course by eliminating the ability of students to choose their documents, justifying my decision as the need for more transparent fairness in grading. Instead, I acknowledged the litigation focus of the course and assigned the documents for each unit as set out in the table that follows:

“Students were asked to reflect on their choice and explain why they made it.”

“To draft this client letter, students had to choose the stance to adopt and the level of detail to provide; students also had to make choices based on incomplete factual records.”

	Case File A Employment Discrimination Documents to be Produced	Case File B Espionage Act/ First Amendment Documents to be Produced
Unit I: Informing	Client Letter	Client Letter
Unit II: Persuading	Memorandum in Support of Defendant's Motion for Summary Judgment	Memorandum in Support of Defendant's Motion to Dismiss Criminal Indictment
Unit III: Collaborating	Excerpt of Appellate Brief Argument for Reversal of Grant of Summary Judgment	Excerpt of Appellate Brief Argument for Reversal of Dismissal

In doing so, I discussed how the skills associated with each document transferred to other practice areas that students might pursue. Regardless of practice area, students would draft documents whose purpose was to inform their clients (the focus of Unit I), and other documents whose purpose was to persuade a reader, be it a judge, opposing counsel, regulatory agency, or corporate board (the focus of Unit II). Additionally, students would encounter situations in any practice area where they had to collaborate with others to create and produce documents (the focus of Unit III).

1. Unit I

As part of the Unit I focus on informing, students were provided information about their respective client and asked to draft a client letter responding to their client's concerns as shown in the table that follows.

Unit I: Informing	Case File A Employment Discrimination	Case File B Espionage Act/First Amendment
Document to be Produced	Client Letter	Client Letter
Facts provided to students via written notes of partner phone call with client.	Private school, whose principal had spearheaded marketing efforts seeking to rebrand school, increase enrollment and implement budget-cutting fiscal policies and teacher lay-offs.	Online and print US media company intended to publish likely classified information about a joint U.S.-U.K. covert operation that reporter had received from a confidential source.
Writing Assignment	Draft a client letter that addresses concerns that lay-offs might expose school to age and gender discrimination claims, helps the client understand potential legal issues, and notes steps that the school could take to limit exposure to potential liability.	Draft a client letter addressing whether the reporter can be forced to reveal her source, explaining whether the reporter or newspaper can be prosecuted under federal law for publication of likely classified information, and discussing whether the publication of this information would violate any laws of the United Kingdom and, if so, whether there are any steps that they can take to limit exposure abroad.

Students were told the primary audience for whom they were writing, *i.e.*, their client, and the type of document to be written. They were not, however, told the stance to assume nor were they given any word limit. Instead, they were told that the client had a limited budget for this stage of the project and did not wish the firm to engage in a comprehensive, in-depth review. To draft this client letter, students had to choose the stance to adopt and the level of detail to provide; students also had to make choices based on incomplete factual records. After the draft of this client letter, students received feedback from a classmate as part of a peer review and written comments from me. Students then rewrote the client letter for a grade.

2. Unit II

For Unit II on persuasion, students were given additional facts and asked to draft a memorandum in support of a dispositive motion as described in the table that follows.

Unit II	Case File A	Case File B
Persuading	Employment Discrimination	Espionage Act/First Amendment
Document to be Produced	Memorandum in Support of Defendant's Motion for Summary Judgment	Memorandum in Support of Defendant's Motion to Dismiss the Indictment
Additional Facts provided to students via verbal class instruction about case status and through primary source documents.	Former teacher who had received a notice of right to sue from the EEOC sent a demand letter to the school, attaching a draft complaint alleging age and gender discrimination in violation of Title VII and ADEA.	Grand jury indicted the reporter, charging her with (1) aiding and abetting the government employee in the communication and transmission of classified documents and (2) unlawful possession and willful communication of a national security document. ¹⁹
Writing Assignment	Client sought an assessment of the likelihood of resolving this case at the summary judgment stage. After reviewing draft complaint and draft affidavit in support of the school's motion for summary judgment, students drafted the memorandum of law in support of the motion for summary judgment.	At media company's request and after resolution of all conflicts, students reviewed the criminal indictment and drafted a memorandum of law in support of a motion to dismiss the indictment on constitutional or statutory grounds.

The nature of the assignment informed students of both the audience for whom they were writing and the persuasive stance of the document. As for scope, students were informed that they had to draft a memorandum that complied with federal and local court rules. Students had to choose the theory of the case, the arguments to make, and the sources to support their arguments. Students received written feedback from a classmate and me. Students also conferenced with me to discuss their drafts and the choices they made in drafting the memorandum. Students then rewrote the memorandum of law in support of the dispositive motion for a grade.

3. Unit III

The final major assignment occurred within the Unit III discussion of collaboration and required students to produce two documents. Students were told to assume that the Case File A motion for summary judgment and Case File B motion to dismiss had been filed and were granted. They switched sides (representing the terminated teacher for Case File A and the United States for Case File B) and were assigned a partner with whom they would collaborate. After class discussions of collaboration

in the workplace and effective collaboration techniques, each pair was asked to decide on one argument that they would jointly draft as part of the argument section of an appellate brief. The only limitation was that the chosen argument had to be a legal issue addressed by at least one member of the pair at the motion stage. Additionally, each pair had to draft a Statement of Collaboration identifying the argument to be addressed on appeal, explaining the process used to reach consensus on that argument, setting out the tasks to be completed and the dates for completion, and designating which student had responsibility for each task. As with the Unit II memorandum, the nature of the assignment dictated rhetorical elements, but students still had to choose their theory of the case, the most compelling argument, and the sources to support that argument. They then had to collaborate to draft the argument.

B. Results of and Reactions to Course

Students embraced the opportunity to choose their case file, but they did not initially embrace the myriad of choices required throughout the course. Lower performing students who still struggled with the basics of legal writing were initially overwhelmed with all the choices, sometimes leading to frustration and disengagement.

“Students had to choose the theory of the case, the arguments to make, and the sources to support their arguments.”

¹⁹ In violation of 18 U.S.C. § 2, 793(d) and 18 U.S.C. § 793(e), respectively.

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Nonetheless, most students grew to appreciate the opportunity to make choices, and they became more confident over the course of the semester.

Students struggled initially with the Unit I client letter assignment because of the many unknowns. They wanted more facts and more direction, which I refused to provide. Given that these were upper-class students, I wanted them to have to make choices based on incomplete facts and general concerns, as is often the case in practice. Devoting class time to a discussion of their struggles and providing opportunities for students to brainstorm in small groups eased some of their discomfort. Additionally, students responded quite well to my feedback as well as that provided by fellow students. I saw tremendous improvement between the draft client letter and the final, revised client letter. Students were more comfortable with being uncomfortable.

Most students seemed more comfortable with the concept of drafting the Unit II memorandum in support of a dispositive motion, but some struggled with organizational or analytical choices. Some students working with Case File A struggled with whether to organize around the legal claims (*i.e.*, age discrimination, gender discrimination, etc.) or to organize around the adverse actions (*i.e.*, termination, revised evaluation scheme, etc.). Similarly, they struggled with whether to discuss federal and state law claims separately or jointly. Some students working with Case File B struggled to understand the nuanced constitutional and statutory concepts needed to craft persuasive legal arguments. Struggling students working with the respective case files wanted “clearer” direction as to the best way to organize or the strongest arguments to make.

Yet, other students seemed to embrace the choices available to them. Providing students with class time to brainstorm, to delve deeply into the law, and to debate arguments with each other helped them gain confidence with the choices they needed to make. Again, I was quite pleased with the growth in their analytical skills, their writing, and their use of persuasive techniques. Although many of their

drafts were poor, their early struggles appeared to lead to higher quality final documents in the end.²⁰

By the time students had to collaborate and draft the Unit III appellate brief argument excerpt, their struggles revolved around collaborating, not necessarily thinking or writing. Independent learners were uncomfortable having to reach consensus and jointly craft one argument. Other students had little experience in law school collaborating with another student and found the collaborative process challenging. Likewise, they had to decide how to design a Statement of Collaboration, a document with which most were unfamiliar. Even though they may not have liked the experience, all students ultimately recognized the value of the assignment.

Overall, the course was a success. Based on class discussions, student comments, and student evaluations,²¹ students’ views of the course evolved over time with most students coming to appreciate the fast-paced, realistic nature of the course. Students recognized the improvement in their writing and most noted that they were more confident writers by the end of the class. They believed the course to be worthwhile.²² Like the students, I too viewed the course as a success for several reasons. First, the course was successful because it forced students to make choices and to reflect on the choices. Second, the course forced the students to become critical readers of their own writing. Finally, the course was successful because the students’ writing improved and they gained confidence in their abilities.

C. Benefits and Challenges of Course Design

The benefits of this course design are many. Allowing students to choose their case file allowed for greater student involvement and engagement from the outset; it also forced students to reflect on

²⁰ See Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355, 360–63 (2016) (discussing generative learning and how learning that is effortful rather than passive triggers the deep processing of information necessary for the consolidation phase of long-term memory development).

²¹ On a 5-Point Likert scale for course evaluations, the course received an overall mean of 4.8 and a 4.9 for the course covered meaningful and worthwhile subject matter. (Course evaluations are on file with Author).

²² *Id.*

their objectives and goals for the course. Providing broad parameters but fewer directives challenged students to make choices and take ownership of their choices. Although some students were frustrated initially by the perceived lack of direction and sought specifics (what answer did the client really want, how many pages should the document be, which arguments should we make), they eventually became more comfortable making their own choices. Given that the drafts were not graded, the course provided students with an opportunity to make choices and reflect on their choices with minimal consequences. Additionally, the workshop nature of the class where students brainstormed ideas, shared their writing processes, and provided feedback to each other allowed students to see the spectrum of choices available and gain an understanding of why classmates made certain choices. Forcing students to reflect on the choices they made, raised their awareness of when they did something by choice as opposed to habit and provided them with some control over their process. Requiring students to make decisions throughout their writing process helped students develop the judgment they will need as practicing attorneys.

At the same time, there are challenges to this course design. Teaching two different case files is burdensome: it takes more effort to create different case files with comparable workloads and to familiarize oneself with law and potential arguments in two distinct areas of law rather than one. It forces faculty to approach the course a bit like a clinic where students are working on different client matters. As noted earlier, allowing students to choose which documents to draft was a less successful option. Although faculty could provide document options that required teaching the same skill set (*i.e.*, precision in statutory or contract drafting), convincing students that the lessons were applicable to varied documents was a challenging task. More problematic was the potential grading inconsistency where the chosen documents were not comparable; this problem might not exist if the class was graded pass/fail.²³ Another challenge

involved reaching all students. As stated previously, lower performing students who struggled with the basics of legal writing sometimes became frustrated by and overwhelmed with all the choices. Given that an advanced writing class could be particularly helpful to these students, faculty would have to work hard to alleviate frustration and maintain engagement. Indeed, experienced legal writing faculty understand that “[t]he best way to work with writers of varying ability is treat them all as if they are high ability writers.”²⁴ Even though doing so imposes a greater burden on teachers to ensure that students with weaker writing skills can be successful in this type of course, it often leads to meaningful improvement for those students.

III. Creating More Opportunities for Student Choice

Notwithstanding the challenges, providing students with opportunities to make choices as they write is worthwhile. Thus, I continue to design my advanced writing course with choice in mind, and I seek more ways to embrace choice in the first-year legal writing course without overwhelming students. Ensuring that students are conscious of the choices they make when writing and helping them develop strategies for decision-making should be a component of their legal education.

Creating more open-ended assignments in writing classes may be one technique. Providing students with the opportunity to conduct their own research, choosing the sources and materials they deem relevant, and then designing an appropriate document provides students with opportunities to make critical choices throughout the research and writing process. Another example is to create an assignment involving an unsettled legal question and several different scenarios. Students would

“Although some students were frustrated initially by the perceived lack of direction and sought specifics . . . , they eventually became more comfortable making their own choices.”

pass/fail class, there are other challenges posed where classes are graded pass/fail. As one whose first year required legal research and writing classes as well as her advanced writing course are graded classes, the author fully embraces graded courses and the ability to embrace choice in such classes. Nonetheless, it is appropriate to recognize that the graded nature of a course may affect curricular choices.

²⁴ See Rodriguez, *supra* note 4, at 244 (quoting DONALD A. McANDREW & THOMAS J. REIGSTAD, TUTORING WRITING: A PRACTICAL GUIDE FOR CONFERENCES 91 (2001)).

²³ Even though the challenges of grading consistency might not exist in a

“Students entering the legal workforce likely will have to decide if, when, and how to use generative AI tools.”

choose a scenario, determine how to achieve the goal presented within that scenario and the methods to be used, and then reflect on their choices. A simplified version of this exercise might be to identify a potential client and the client's need, leaving it to each student to create the vehicle through which to respond to the client. Will the student draft a memo, write an email, create a handout, or design a brochure? To avoid the grading challenges of such an exercise, this exercise could be assigned in a pass/fail class, or the exercise could be an ungraded exercise within a graded course.

Alternatively, faculty may provide students with several options for documents to be drafted and have the class vote on the type of document to be drafted. By offering several documents from which the students may choose, the teacher ensures that any chosen document will meet her pedagogical goal for the class. For the students, even though each student may not get to work on their specific document of choice, the students will be working on a document chosen by the class rather than the teacher and collectively will have some agency in the endeavor.

Providing opportunities for students to have to make choices in a classroom setting²⁵ becomes even more important as the nature of legal practice evolves. For example, the advent of generative AI will require students to make even more choices about their writing. Students entering the legal workforce likely will have to decide if, when, and how to use generative AI tools. They will need to be familiar with the benefits of the tools and be able to assess the risks of such use. A ban on using generative AI may be appropriate in an academic setting, particularly in some introductory classes; yet, upper-level classes that bar all use of generative AI tools prevent students from gaining confidence and competence in choosing if, when, how, and why to use these tools.

In an advanced legal writing course, faculty could help students navigate generative AI through a

series of exercises or assignments. For example, one could help students become more confident at prompt engineering by requiring them both to use ChatGPT to complete an assignment and to use several different prompts. This exercise involves a comparison of different prompt engineering patterns²⁶ with students comparing the results and determining whether certain prompt patterns were more effective. Another exercise could require students to compare documents created by human drafting, generative AI drafting, and hybrid (gen AI-human) drafting. Student would reflect on the process and determine which was most effective and efficient for them. Providing students with the opportunity to choose different tools to use and then reflect on their choices will help them gain both confidence and competence in using the tools and in making decisions.

It is important that students become comfortable making choices about their writing while in law school where they can receive feedback and begin to develop strategies for decision-making. Similarly, it is important that they begin to experiment with new tools such as generative AI in a guided environment while at law school so that they can reflect on the benefits and challenges of relying on the tool, develop familiarity with the tool, and determine how they may best utilize the tool in their future practice. Providing students with choice in the classroom encourages student self-autonomy, motivates students, and allows students the opportunity to develop decision-making strategies. Forcing students to make choices helps them develop their professional identity and will serve them well in their future practice.

²⁵ Although this Article focuses on legal writing classes, students would benefit from engaging with choice in other classroom settings as well. As noted earlier, providing students with implementation choice is one way of enhancing student autonomy and motivating students. The nature of the class affects how a teacher incorporates choice, but a teacher should consider ways to do so when designing the course. For example, in classes with student simulations, students could be allowed to choose different roles to play. In largely lecture classes, students could be given the choice of when to sign up to be on call.

²⁶ For a helpful discussion of prompt engineering and prompt patterns, see Jules White et al., *A Prompt Pattern Catalog to Enhance Prompt Engineering with ChatGPT*, available at <https://arxiv.org/abs/2302.11382>.

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A Blank Canvas: Leveraging Learning Management Systems for a Student-Centered Experience

By Rachel Stabler

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Introduction

The use of online learning management systems,¹ or LMS, in legal writing courses has grown dramatically over the last two decades, such that it has been an essential feature for years now. As the pandemic came and more instruction moved online, students and faculty both began relying even more heavily on them.² The online LMS is now an integrated, essential part of the learning experience for students.

Yet, the details of an LMS are all too easily overlooked. As legal writing professors, we are used to dedicating our time to crafting our syllabi, assignments, and slide decks. With ever more content appearing online, it is time to give the same level of attention to the course LMS.

I. Background

I started teaching legal writing in 2010, and at that time adopted TWEN as my LMS. It was easy to use and I saw no need to consider platforms like Blackboard or Canvas; they seemed complicated and intimidating. But when the pandemic hit in 2020, it provided professors everywhere with an

opportunity to rethink everything about how course content could be delivered to students.

Inspired by a video that one of my colleagues shared,³ I turned my attention to Canvas that summer. I launched my first Canvas page in the fall of 2020 and not a semester has gone by since then that I have not received a compliment about the course Canvas page on the student evaluations.⁴ Students sincerely appreciate a well-designed LMS that is easy to use. So, inspired by my own experience, this article aims to persuade other legal writing professors to create an LMS that centers around the students' needs and experience.

A. Tips for Function

1. Minimize Navigation Options

One of the best things about LMS is also one of the worst: its wide range of functionality and integrated applications.⁵ While it's nice to have such functionality, students can be overwhelmed when the LMS has too many navigation options—these are the options that always appear in the same location of the page no matter where the student goes within the LMS. The professor

“As legal writing professors, we are used to dedicating our time to crafting our syllabi, assignments, and slide decks. With ever more content appearing online, it is time to give the same level of attention to the course LMS.”

³ UNC Charlotte Center for Teaching & Learning, *Design Beautiful Course Navigation Buttons for Canvas* (3/16/2017), YouTube (May 1, 2017), <https://youtu.be/Vyw0RDgsXzE> [hereinafter *Design Beautiful Course*].

⁴ Some specific comments include the following: “Her Canvas page . . . was outstanding and really reduced stress because I knew where to find everything”; “The canvas was beautifully designed and very easy to navigate”; “Extremely awesome Canvas organization. By far the most accessible of all my classes”; “I really like . . . the canvas layout. It is really helpful to be able to . . . know where to look as soon as you log on to canvas”; “The UI for the canvas page is so great that I can find information quickly and precisely”; “The Canvas set-up in this course should be used as a demo for other professors in the [law school] because Prof. Stabler has it figured out.”

⁵ The specifics vary by institution. Mine has a dizzying 49 options for course navigation, including everything from basic functions like quizzes to third-party integrations like RedShelf and Slack.

¹ Also referred to as Course Management Systems (CMS), these are online educational platforms that administer content for educational courses, including Canvas, Blackboard, Google Classroom, and Moodle. Specific to law schools, Thomson Reuters offers TWEN and LexisNexis offers Lexis Classroom, which is powered by Canvas.

² E.g., ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI LEGAL WRITING SURVEY, 2020–2021, at 55–64, <https://www.lwionline.org/sites/default/files/2020-2021-ALWD-and-LWI-Individual-Survey-report-FINAL.pdf> (collecting comments about how the pandemic affected details of the course, with many respondents describing how it required more robust use of LMS) [hereinafter 2020–2021 SURVEY].

“In deciding what content to put on the home page, it is also helpful to put yourself in the student’s shoes.”

organizing the LMS should carefully choose which specific navigation options appear to students.⁶

To minimize the chance of a student feeling overwhelmed and not knowing where to look, choose only a few—no more than five, maybe six—of these options to be visible to students. The most helpful ones for a legal writing course would likely be Home, Announcements, Modules, and Assignments; the Discussions option could be helpful if students are expected to post on discussion boards and interact with each other’s content.

2. Organize the Primary Content into Modules

Most of the content for the LMS should appear in modules, and the best way to organize them (for a live or synchronous legal writing class) is chronologically by class.⁷

For each module, include all of the content that the students may need for that class session. This could include content ranging from instructions for assignments that are due, PDFs of (or links to) the assigned reading, class handouts and presentation slides, and links to external material. The idea is to provide a central location for all of the content for that particular class.

This central location benefits students both during and outside of class time. The students can view it in advance and know what to expect before class starts. Then during class, students can simply navigate to that module and have all the resources in one place, ready to download and use as needed during the class time. It is also helpful to have a central location for students who are absent to go to and find all that they missed. Later in the semester, students will be able to easily find each class’s material if they need to review it further.

3. Link the Remaining Content on the Homepage

Of course, not all content fits neatly into a class module. For content that isn’t tied to a single class

session but is more broadly applicable throughout the semester, put that content on the homepage.

This can include a variety of content types, such as files and documents, external links, and internal links (such as to pages, modules, and assignments within the Canvas course). For example, my students can find the following buttons on the homepage:⁸

- A link to the syllabus, which students can view online or download.
- A link to the course schedule, which is maintained—and updated regularly—as an internal page on Canvas, separate from the syllabus.
- Links to email both me and the TA; these links automatically create a new message in the user’s email program with the email address already filled in.
- A link to an internal “Office Hours” page on Canvas that shows up-to-date information about office hours.
- A link to an internal “Land Acknowledgement” page on Canvas.⁹
- A link to the class playlist on Spotify.¹⁰
- A link to the site where students can access class recordings.

In deciding what content to put on the home page, it is also helpful to put yourself in the student’s shoes. Try to figure out the types of content that they might be looking for when they logon and use that as a starting point. For example, if the students will be working on a single case file for an ongoing assignment all semester, it could be helpful to create a separate Canvas page with all of the materials—fact documents, assignment instructions, rubrics,

⁸ See *infra* section B(2) for a screenshot of my homepage.

⁹ My institution, like many others, has developed and posted this on its website. See, e.g., *Indigenous Land Acknowledgement*, ARIZ. ST. UNIV. SANDRA DAY O’CONNOR COLL. OF L. (last visited Sept. 24, 2023), <https://law.asu.edu/indigenous-land-acknowledgement>.

¹⁰ The students’ introduction email assignment asks (among other things) for their two or three favorite songs. I use those songs to create a playlist for each section, and I play it before class and during the class break. Students with a Spotify account can also play it on their own using this link.

⁶ On Canvas, these appear on the left-hand side of the page; the professor can choose which ones appear to students on the navigation pane of the course settings.


⁷ My class meets once a week, so I have a module for each week/class.

assignment dropboxes, and so on—and then link to that on the homepage. If a student needs information about that ongoing assignment anytime during the semester, they can find a quick link to it on the homepage.

4. Use Cross-References Liberally

Another technique to increase usability is to add cross-references throughout the various elements of the LMS. For example, if my students have an assigned reading for class that is not in their textbook, I upload a copy to Canvas. I then put a link to that reading in two places: the module for that class and the Course Schedule page. That way, if one student first thinks to look in the class module for the reading, they will find it there. If another first thinks to look in the Course Schedule, they will also find it there.

Week 4 Class Module:

▼ Week 4	
	Sample Brief for Government.pdf
	Sample Brief for Defendant.pdf

Course Schedule for Week 4:

<p>Week 4 February 1</p>	<ul style="list-style-type: none"> • Developing Persuasive Arguments (analysis/application) • Review Sample Trial Briefs 	<ul style="list-style-type: none"> • Review AAP: Part III of Chapter 5 (Apply Your Persuasive Explanation of the Law to the Facts) • Read Sample Brief for Defendant ↓ and Sample Brief for Government ↓
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In addition to readings, the Course Schedule page also links to every weekly class module and every assignment. In turn, every assignment also appears on the corresponding weekly class module. The Office Hours page includes a link to my Zoom room for any office hours held there, as well as a link to email me to set up an appointment.¹¹ These links are already on the home page, but including them on the Office Hours page saves the student the step of clicking back to the homepage to find it.

In short, any one piece of course content could logically fit in any number of places—not just one. Linking that content in more than one place ensures that students do not need to read the professor’s mind to find that content. Instead, using multiple links makes it easy for students to find that content regardless of where they start looking for it.

5. Maximize Its Accessibility

Finally, consider the accessibility features of the course content. This means reviewing the content to ensure that it is presented in a way that does not create unnecessary difficulties for students with disabilities. Modern software often has accessibility checkers built in, which can identify any number of issues that make it hard for screen readers or other similar devices to review the material. This can include, for example, text without headings, images without alternative text, or content with insufficient contrast.

“Another technique to increase usability is to add cross-references throughout the various elements of the LMS.”

¹¹ Professors who use Calendly or similar calendaring software could include a link to that website for scheduling meetings.

“For a seamless appearance throughout the elements of the LMS, choose one or two fonts and use them consistently.”

Ally, an accessibility checker from Blackboard, is integrated into Blackboard, Canvas, and Moodle.¹² This accessibility checker appears as a small odometer next to a file or image. For content that has no or few accessibility issues, the odometer is green and the needle points to the right. With more accessibility issues, it turns orange and then red, with the needle pointing to the middle or the left.



Green: high accessibility



Orange: medium accessibility



Red: low accessibility

Not only does Ally give a score for accessibility, but it also tells the user what the issues are and how to fix them. For example, one common accessibility issue is that an image does not contain an alternative text description. When that happens, a screen reader can only identify that an image is there—it does not know the content of that image. Ally alerts the instructor when an image is missing alternative text, explaining how adding alternative text describing the image improves accessibility by contextualizing the image and allowing users with visual impairments to perceive the image. Finally, Ally can even walk the instructor through the steps to add the alternative text to the image.

B. Appearance

1. Prioritize Consistency and Continuity

For a seamless appearance throughout the elements of the LMS, choose one or two fonts and use them consistently. Similarly, choose one or two colors and use them consistently; recording the HTML hex color code¹³ can help ensure the exact same color appears throughout. Finally, choose one or two design elements to incorporate consistently.

One helpful shortcut here is using a pre-designed slide deck template. I chose one from Slides Carnival.¹⁴ I then modeled all of my buttons and banners using the same design elements: Quicksand as the font and “Dark Orange” (HTML Color Code #ff8c00_) as the main color. I also used the waves design element as the banner on my homepage.

2. Make Your Own Banners and Buttons

To accomplish this, one must venture outside of the LMS. This is perhaps the part that will take the most time, but provides the best, most visually appealing results. A full tutorial of how to do this is beyond the scope of this article; however, YouTube is a great resource here.¹⁵ In short, a separate graphic design software, such as Canva, Publisher, or even PowerPoint, is used to create buttons and banners of the correct size with consistent design elements. Those buttons and banners can be downloaded or saved as image files, then uploaded to the LMS to create the homepage.

One important tip to remember when creating these buttons and banners: do not put any dates or other time cues in your images—for example, “Fall 2021.” This will allow those images to be reused from semester to semester, and year to year, without needing to edit the actual images themselves.

A screenshot of my Canvas home page, as it appears to students, is below. There, you can see the use of a consistent font (Quicksand) and color scheme (“Dark Orange”), as well as buttons that follow a consistent layout (200x200 pixels with an orange border and a round icon above text).

¹² See BLACKBOARD ALLY, <https://ally.ac> (last visited Oct. 9, 2023).

¹³ This is a six-character, alphanumeric code that is used to define a specific color; over 16 million color options are available. See *Guide to Understanding HTML Color Codes in Your Designs*, ADOBE EXPRESS (Feb. 3, 2023), <https://www.adobe.com/express/learn/blog/understanding-html-color-codes>.

¹⁴ The Slides Carnival website, www.slidescarnival.com, provides modern templates that can be used with PowerPoint, Google Slides, or Canva. I chose one called “Red Dynamic Waves,” <https://www.slidescarnival.com/silvia-free-presentation-template/4051>. I also use this template for all of my slide decks in class, providing additional consistency for the students and myself.

¹⁵ See, e.g., *Design Beautiful Course*, *supra* note 3.

2022 Fall C

Home
Chat
Modules
Assignments
Announcements

LAW 519: Legal Method and Writing (2022 Fall)

Legal Method and Writing

Prof. Stabler

View Course Stream
View Course Calendar
View Course Notifications

To Do
Nothing for now

Quick Links

Course Syllabus	Course Schedule	Office Hours	Email the Professor	Email the TA
Class Recordings	Helpful Links & Documents	Class Playlist	Land Acknowledgement	Online Research Lessons

Conclusion

Many of you may be reading this Article between prepping for your next class and tackling that stack of 40+ papers.¹⁶ Your to-do list only seems to grow longer,¹⁷ and you may not be getting paid as much as the casebook professor down the hall despite spending just as much time—or more—at your job.¹⁸

So, why add this to your to-do list? Because “[s]tudents are the center of the educational enterprise, and their cognitive and affective learning experiences should guide all decisions as to what is done and how.”¹⁹ If we are dedicated to a student-centered curriculum that seeks to

meet students’ needs, that should permeate all aspects of the course—including the course LMS experience. Creating and maintaining a student-centered LMS can reduce students’ frustration and increase their engagement with the materials. Moreover, students appreciate it.

Additionally, the time investment in the LMS is front loaded. Once the initial time has been invested to create the LMS, it can often be maintained with significantly less effort. Entire courses on Canvas can be copied and re-used from semester to semester. Indeed, my current Canvas page for my 1Ls looks almost identical to the one I initially created for my Fall 2020 semester. Some details will need to be updated, such as due dates and office hours, but the bulk of the content can be carried forward easily.

With the LMS becoming an ever-more prominent piece of the educational experience, it is all the more important to provide an experience that is centered around the students’ needs. Taking a few hours to create an easy-to-use, well-designed course LMS will reap significant benefits in the long run, for professor and students alike.

¹⁶ On that note, designing a new LMS is a great option when you need to procrastinate on grading those papers while still being productive.

¹⁷ See 2020–2021 SURVEY, *supra* note 2, at 92 (listing activities legal writing professors engage in, including ten activities besides teaching and preparing courses).

¹⁸ See AM. BAR ASS’N, SEC. OF LEGAL EDUC. & ADMISSION TO B., LEGAL WRITING SOURCEBOOK 252–53 (J. Lyn Entrikin ed., 3d ed. 2020) (describing criticism that LRW faculty bear a disproportionate teaching and service burden).

¹⁹ Gloria Brown Wright, *Student-Centered Learning in Higher Education*, 23 INT’L J. OF TEACHING & LEARNING IN HIGHER EDUC. 92, 93 (2011).

“With the LMS becoming an ever-more prominent piece of the educational experience, it is all the more important to provide an experience that is centered around the students’ needs.”

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Bridging the Legal Writing Skills Gap: Pre-Mediation Statements

By Elayne E. Greenberg*

Elayne Greenberg is a Professor of Legal Practice and the Faculty Director of the Carey Center for Dispute Resolution at St. John's University School of Law.

Introduction

In our settlement-dominated legal culture, it is no longer sufficient for legal writing courses to teach students how to write for the court alone.¹ Instead, to be considered practice-competent it is necessary for students to also be able to write for non-adversarial, collaborative settings such as mediation. Mediation has become the primary dispute resolution process to settle legal cases, and it has become common practice for judges to strongly encourage litigating parties to try to settle their case in mediation.² While the current legal writing curriculum teaches students how to draft legal memoranda, motions, and appellate briefs for court, students must also have proficiency and comfort drafting pre-mediation statements that align with mediation's goals.³ This discussion bridges the existing legal writing skills gap and recommends how pre-mediation statements could be included in the first-year legal writing curriculum.

Mediation is an assisted negotiation in which a third-party neutral, the mediator, helps the disputants

settle their case. Mediation is distinguished from adjudication by its collaborative nature. While litigation is traditionally understood to be a zero-sum game, in which one side's win is the other side's loss, "winning" in mediation is distinctly different and prioritizes coming to an agreement that satisfies each disputant's prioritized interests. In mediation, the disputants, with the guidance of their lawyers and mediators, decide collaboratively if they wish to resolve the case. When deciding whether to resolve the case in mediation, disputants may be influenced by psychological, economic, and business factors, not just the law.

Once disputants agree to mediate, mediators commonly request that lawyers begin by submitting a pre-mediation statement. The pre-mediation statement is a settlement-focused memorandum that educates the mediator about the case from both parties' points of view and suggests how the mediator might help the parties collaboratively resolve the matter.

This Article recommends that the first-year legal writing curriculum be revised to include a more realistic overview of legal writing in a settlement-dominated culture by introducing the drafting of pre-mediation statements. As part of that revision, first-year legal writing courses should also teach three distinct skillsets to help students draft effective pre-mediation statements: (1) writing with a collaborative mindset instead of a with a zero-sum mindset; (2) understanding the purpose of pre-mediation statements, including the difference between statements that are shared with opposing counsel and those that are just for the mediator; and (3) incorporating problem-solving language instead of adversarial language.

* My thanks to Kathryn-Rose Russotto '24 for her assistance in formatting this Article. The Author can be reached at greenbee@stjohns.edu.

¹ Some first-year legal writing curriculums go beyond litigation and include the drafting of transactional skills such as contract drafting, client letters, and emails. Often, these transactional skills are taught with the court context, an adversarial setting, as the default.

² See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). And several courts encourage mediation, such as Texas, <https://statutes.capitol.texas.gov/Docs/CP/htm/CP.154.htm>; Virginia, <https://www.vacourts.gov/courtadmin/aoc/djs/programs/drs/mediation/home.html>; Northern District of California, <https://cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/adr-local-rules/#med>; and Court of Appeals of New York, <https://www.nycourts.gov/whatsnew/pdf/SOJ-2021-transcript.pdf>.

³ The core of first-year legal writing curriculum is persuasive writing in an adversarial context.

“This Article recommends that the first-year legal writing curriculum be revised to include a more realistic overview of legal writing in a settlement-dominated culture by introducing the drafting of pre-mediation statements.”

A. Mindset: Educating Students How to Write with a Collaborative Mindset

In order to draft effective pre-mediation statements, students must first learn to write with a problem-solving mindset.⁴ Traditional legal writing courses train students to write like litigators who zealously advocate for their client's position using adversarial language. As litigators, lawyers see their role as warrior-like and write from the perspective that victory for their client's position inherently requires prevailing over their opponent's position. A different philosophical mindset and writing style is required to write an effective pre-mediation statement.

Drafting an effective pre-mediation statement requires lawyers to see themselves as problem-solvers, and to convey those problem-solving values in their pre-mediation statements. Problem-solving lawyers respect their clients as human beings with their own sense of personal justice. In this expanded way of thinking, effective writers reflect several values absent from adversarial briefing. Lawyers who adopt a problem-solving mindset are able to draft statements that incorporate this different thought process.

- [my client] may not view their conflicts solely about the law . . . my client may value non-monetary remedies such as an apology. In some cases, [my client] may even value non-monetary remedies more than monetary remedies.⁵
- I see the individuality of each client and respect the humanity in every client.⁶
- I appreciate that sharing information in a party-directed process expands opportunities for creating value.⁷

⁴ See, e.g., Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 182 (2001); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO S. L. J. 29, 43 (1982); Elayne E. Greenberg, *Settlement Fever: Lawyers, Have You Updated Your Philosophical Map?* 14 NYSBA N.Y. DISP. RESOL. LAW. 6, 6 (2021).

⁵ Greenberg, *supra* note 4, at 7.

⁶ *Id.*

⁷ *Id.*

- I understand that taking a collaborative and problem-solving approach expands the possible options for resolution.⁸
- Winning is not a zero-sum game. I appreciate that winning a case does not exclude the possibility that the other side could win, too.⁹
- I recognize that "justice" has a different meaning for each client.¹⁰

Writing that reflects this expanded philosophical mindset allows problem-solving lawyers to understand conflict as an opportunity for clarification and change. This shift to a problem-solving mindset prepares the lawyers and disputants to participate in mediation as collaborators trying to solve a problem.

B. Purpose: Aligning Purpose with Effective Pre-Mediation Statements

Pre-mediation statements, also referred to as mediation briefs, serve to educate the mediator about disputant's point of view of the conflict. Each disputant submits a pre-mediation statement through counsel.

By identifying the drivers of the dispute from the disputant's perspective, pre-mediation statements help the mediator understand the nature and cause any impasse and what a realistic settlement may look like. Although pre-mediation statements may be mediator-specific, they customarily include: (1) a short description of the operative facts; (2) identification of the legal claims at issue; (3) a summary of progress in discovery; (4) a summary of settlement discussions and counteroffers; (5) a description of the economic and non-economic relief sought; (6) an identification of any impasses; and (7) possible options for resolution, including how the mediator might help.¹¹ Thus, the purpose of pre-mediation statements is akin to a settlement brochure that

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., Brian Farkas & Donna Erez Navot, *First Impressions: Drafting Effective Mediation Statements*, 22 LEWIS & CLARK L. REV. 157, 181 (2018).

“Drafting an effective pre-mediation statement requires lawyers to see themselves as problem-solvers, and to convey those problem-solving values in their pre-mediation statements.”

“The hallmarks of problem-solving language include writing that effectively asks questions for clarification, acknowledges the other disputant’s perspective, and recognizes the other disputant’s efforts.”

demonstrates how, given the identified impasses, the disputants can collaboratively resolve the matter with the mediator’s assistance.

While the mediator is almost always the intended audience of a pre-mediation statement, some mediators ask that disputants consider sharing their statements with the other disputant. If the disputants are reluctant to share their entire mediation statements, the mediator may suggest that the disputants annex a separate confidential mediation statement that is for the mediator’s eyes only. Whether a pre-mediation statement is shared affects how it should be drafted. When drafted solely for the mediator, the pre-mediation statement provides an opportunity to positively influence the mediator’s relationship with the disputant and counsel by engaging in advocacy that is more nuanced than in litigation but that still reflects a problem-solving mindset. When shared, the purpose of the pre-mediation statement is also to engender transparency, trust, and commitment to try to resolve the matter. The different audiences affect the tone and content of the pre-mediation statement and provide a valuable opportunity to explain how effective lawyers craft their writing to address distinct audiences.

C. Language: Incorporating Problem-Solving Language

Writing that incorporates problem-solving language is distinct from adversarial briefing. The language used in effective pre-mediation statements humanizes disputants and helps identify key areas of both agreement and disagreement for the mediator. The hallmarks of problem-solving language include writing that effectively asks questions for clarification, acknowledges the other disputant’s perspective, and recognizes the other disputant’s efforts.¹²

The problem-solving language in effective pre-mediation statements often reflects the language that effective lawyers use during mediation.

*Our clients see this both so differently. Your client believes that . . . On the other hand, my client believes that . . . How are we going to resolve this, given our clients’ very different viewpoints?*¹³

If one or both disputants and their lawyers agree to share pre-mediation statements, an effective pre-mediation statement can facilitate settlement by conveying an accurate appraisal of the issues causing impasse, a respectful acknowledgment of each disputant’s perspective, and thoughtful ideas about how to resolve the dispute.

D. Implementation Is Easier Than You Think

While some legal writing professors agree that it is important for students to understand how to draft an effective pre-mediation statement, they still worry about how to fit the concept into an already jammed semester. First-year legal writing courses have a finite amount of time to cover an ever-expanding curriculum. As a first step, legal writing professors need to reconceptualize the allocation of class hours so that it more accurately reflects legal practice and the increasingly important role of settlement. Now that the NextGen Bar is on the horizon, law schools are already considering how to reallocate their curriculum foci to better prepare their students for the dispute resolution skills that will be tested. Legal writing professors may find these discussions helpful as they reconceptualize the allocation of class hours for their first-year legal writing classes consistent with their school’s approach.

Once legal writing professors have re-allocated their allocation of instructional hours, a good starting point to teach about pre-mediation statements is to use an active case being litigated in court. The complaint, answer, and legal memoranda on the docket all provide realistic examples of advocacy in an adversarial context. Real cases also provide an opportunity for students to think through how an actively litigated case might look in a settlement posture. Using real cases as a starting point, students can learn to reframe the case in a problem-solving mindset, translating the adversarial language into collaborative,

¹² See, e.g., BARBARA MITCHELL & CORNELIA GAMLEM, *THE CONFLICT RESOLUTION PHRASE BOOK* (2017).

¹³ *Id.*

problem-solving language. If course time is limited, professors can assess students' learning by assigning students to draft, for example, just the fact section of a pre-mediation statement. If time permits, professors can then assign students to draft an entire pre-mediation settlement.

It is a pedagogical reality that first-year legal writing courses are introductory in nature. Legal writing professors appreciate that it is impossible to educate about legal writing with the depth each topic requires. The education about basic legal writing concepts introduced in the first-year legal writing curriculum can then continue in clinics and upper-level skills courses. This can happen when you pique first-year students interest by introducing them to the range of legal writing drafting for litigation and settlement.

Conclusion

Practice-competent lawyers are proficient in writing for both litigation and settlement. Effective pre-mediation statements require students to develop a different philosophical approach to conflict, an understanding of the purpose of pre-mediation statements, and a proficiency in writing that promotes collaboration and problem-solving. This discussion invites legal writing professors to consider including pre-mediation statements as part of their first-year legal writing courses to help re-align legal writing education with the realities of how cases settle in practice.

“This discussion invites legal writing professors to consider including pre-mediation statements as part of their first-year legal writing courses to help re-align legal writing education with the realities of how cases settle in practice.”

Cite as: Conley Wouters, *Cultivating a Practice: Buddhism & Legal Writing*, 30 PERSPS. 111 (2023).

Cultivating a Practice: Buddhism & Legal Writing

By Conley Wouters*

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Introduction

Ten years after becoming a Buddhist, I'm still a beginner. I know the basics. I've read a handful of accessible guides, and some books by the late Thích Nhất Hạnh.¹ But my engagement has always been fitful. I haven't made my way through the suttas,² and while I maintain a meditation practice, its regularity comes in waves. When I do meditate, the experience is inconsistent. Sometimes while sitting, I feel relaxed. Other times, I'm certain that I'm failing spectacularly. Most of the time, nothing happens. I sit, get distracted, ruminate, come back to the breath, and repeat. Yet I feel comfortable with this erratic practice. I still commit to it. I don't feel pressure to improve, whatever that would look like. Even when I go a week or two without meditating, I'm no less dedicated to living out a Buddhist ethic of compassion. I try not to get down on myself when I become distracted or tired. Instead, each day I look for small ways to implement what I have learned, even if that just means reflecting on it. My practice usually looks different than it did the day before, but these constant shifts somehow strengthen my determination. In short, I'm motivated by unsteadiness.

* I'm grateful to my UIC colleague Professor Kim Ricardo for reading drafts of this Essay and offering perceptive feedback.

¹ Nhất Hạnh's work includes some of the best writing I've ever encountered. Discussing the concept of presence, for example, he writes: "A tangerine has sections. If you can eat just one section, you can probably eat the entire tangerine. But if you can't eat a single section, you cannot eat the tangerine." THÍCH NHẤT HẠNH, *THE MIRACLE OF MINDFULNESS: AN INTRODUCTION TO THE PRACTICE OF MEDITATION* 6 (Mobi Ho trans., 1975). I share this excerpt with my class when we discuss the connection between mindfulness and writing. I also use it as an example of effective prose, highlighting its simple language and active verbs. And then later, I come back to the passage again, to show students that it's fine to start a sentence with a conjunction.

² *Suttas* are transcriptions of the Buddha's teachings. See GLEN WALLIS, *BASIC TEACHINGS OF THE BUDDHA*, at xx–xxi (2007).

At first, this seemed like a contradiction. But the Buddhist concepts of right diligence and *bodhichitta* have helped me resolve this paradox and better understand my meditation practice. Regardless of my tangible progress, meditating feels productive because it requires me to cultivate right diligence: a work ethic defined by tenacity, dedication, self-compassion, and contentment.³ And viewing meditation through the lens of *bodhichitta*, which holds that the purpose of a practice is to extend compassion toward others,⁴ has helped me avoid fixating on arbitrary indicators of success. Eventually, I became curious about how these principles could benefit my teaching. I wondered whether students could see their relationship to writing in the same way I experience my meditation practice: not as a linear sequence of goals, but as something to simply be present with each day. In addition, I sensed that students would benefit from seeing legal writing as more than just a collection of technical skills and discursive conventions.

This Essay argues that students will be better prepared to practice law if they understand legal writing as a practice informed by right diligence and *bodhichitta*. There are at least two reasons why. First, seeing writing as an ongoing practice without a discrete end goal will spur students to cultivate right diligence, *i.e.*, a balance of self-compassion and commitment. Right diligence can show students that hard work need not undermine happiness; and that in fact, these endeavors should complement one another. Second, *bodhichitta*, or the ability to pursue one's practice compassionately and in the service of others, is an essential lawyering skill. Exploring the idea of a writing practice will help students understand and develop *bodhichitta*,

³ See THÍCH NHẤT HẠNH, *THE HEART OF THE BUDDHA'S TEACHING* 99 (2015).

⁴ JOSEPH GOLDSTEIN, *MINDFULNESS: A PRACTICAL GUIDE TO AWAKENING* 76 (2013).

“Regardless of my tangible progress, meditating feels productive because it requires me to cultivate right diligence: a work ethic defined by tenacity, dedication, self-compassion, and contentment.”

which will make them more compassionate, successful lawyers. This Essay explores each of these benefits in turn. Ultimately, embracing writing as a practice founded on right diligence and *bodhichitta* can guide students toward a more patient, generous view of themselves, and of their eventual readers—whether clients, judges, or opposing counsel. That kind of equanimity may make it easier for them to acquire complicated legal writing skills.

In Part II, I briefly explain why Buddhism’s questioning nature makes it a useful and appropriate pedagogical lens. Part III begins with a simple definition of “writing practice.” Then, drawing on Buddhist thought and mindful lawyering scholarship,⁵ I demonstrate the pedagogical value of right diligence and *bodhichitta*. I also provide examples of how I subtly incorporate the concepts of writing as a practice, right diligence, and *bodhichitta* into my teaching. To that end, I sometimes refer to a one-page handout that I use with students. The handout is included in an Appendix. The Conclusion offers a provisional sketch of a writing practice as a tool for law students’ professional and personal development.

I. Buddhist Concepts as Secular Teaching Tools

Buddhism offers valuable and appropriate teaching tools for legal writing instructors. To begin with, Buddhism is a “teacher-centric institution.”⁶ It derives its meaning as much from students’ engagement as teachers’ expertise. It embraces divergent views of Buddhist concepts and encourages a critical approach.⁷ When the Buddha shared the dhamma⁸ with his followers, for example, he encouraged them to bring their own experiences to bear on his

lessons.⁹ The point is to take the teachings and adapt them to the messy, shifting circumstances of one’s life: according to the Buddha, we learn through our own “verifiable experience.”¹⁰ In this view, students must test what we teach them. They “should not be convinced because [they] think, [t]his person is our teacher.”¹¹ Our job is to point students in the right direction.¹² But they arrive at their destination by critically evaluating what we teach, and then applying it to their own particular circumstances, whether in school or in practice. And like the diaspora of Buddhist practitioners who shaped the “straight canal” of the teachings into the “meandering brook” of varied traditions,¹³ our students will go on to apply those lessons idiosyncratically, in service of their values and their clients. Like legal writing pedagogy, then, Buddhism prioritizes active, critical involvement with its subject matter. And like legal writing in general, Buddhism reminds us that there is no “right” way to apply what we learn. Rules are meant to be broken, or even (though I wouldn’t announce this to my class) rejected at the outset.

Buddhism is also an appropriate pedagogical framework. Prominent scholars and practitioners present it as a secular tradition.¹⁴ Its emphasis on discerning inquiry helps explain why Buddhism has been described as “a process, an awareness, an openness”¹⁵ Where a religion usually comprises “a system of faith and worship,”¹⁶ Buddhism “is

“Buddhism offers valuable and appropriate teaching tools for legal writing instructors.”

⁵ See, e.g., Susan L. Brooks, *Mindful Engagement and Relational Lawyering*, 48 Sw. L. Rev. 267, 273 n. 22 (2019); Kate Maus Stephens, *Experimentations with Mindfulness and Gratitude Practices in My Legal Writing Classroom*, 3 PROCEEDINGS 11 (2022); KATHLEEN ELLIOT VINSON ET AL., MINDFUL LAWYERING: THE KEY TO CREATIVE PROBLEM SOLVING (2018).

⁶ WALLIS, *supra* note 2, at xxii.

⁷ See *id.* at xxiii.

⁸ Dhamma (or dharma) teaches “the way things are . . . the truth about the world.” RUPERT GETHIN, *THE FOUNDATIONS OF BUDDHISM* 36 (1998). Living consistently with the dhamma helps us avoid harming “ourselves and others” *Id.*

⁹ See WALLIS, *supra* note 2, at xxi–xxiii.

¹⁰ *Id.* at 93.

¹¹ *Kesamutti Sutta*; *Aṅguttaranikāya* 3.65, in WALLIS, *supra* note 2, at 23 (emphasis in original). Taking this pedagogical tack does not require relinquishing our authority. Instead, it means reminding students of their responsibility to thoughtfully engage with their work.

¹² See NHẬT HẠNH, *supra* note 3, at 17 (“The Buddha said many times, ‘my teaching is like a finger pointing to the moon. Do not mistake the finger for the moon.’”); NHẬT HẠNH, *supra* note 1, at 56; STEVE HAGEN, *BUDDHISM PLAIN AND SIMPLE* 11 (2013).

¹³ WALLIS, *supra* note 2, at xxii.

¹⁴ See, e.g., NHẬT HẠNH, *supra* note 3, at 3; WALPOLE RAHULA, *WHAT THE BUDDHA TAUGHT* 1, 5 (1959).

¹⁵ HAGEN, *supra* note 12, at 10.

¹⁶ BLACK’S LAW DICTIONARY (11th ed. 2019) (definition of “religion”).

“When it drives our writing, right diligence yields the practice-sustaining paradox: joyful, relaxed hard work.”

not a belief system, or . . . a religion.”¹⁷ Rather, “it’s about *seeing*.”¹⁸ The suttas, for example, “are not meant to . . . tell us what to believe,” but to offer “contemplations ‘on the way things are.’”¹⁹ Buddhism rejects a “fundamentalist attitude” and invites anyone, “Buddhist [or] non-Buddhist,” to regard its tenets “with an open and critical mind.”²⁰ But even if we do understand Buddhism as a religion, we can, in good faith, present its values as secular. Mindfulness, for example, is deeply entwined with Buddhist traditions, but legal writing professors have used it in class with great results.²¹ In the same way, we can use the concepts that underlie right diligence and *bodhichitta* in the classroom without even referencing Buddhism. As the Appendix demonstrates, I use these concepts as implicit, guiding principles in my teaching. My hope is that students grasp the overlapping motivations behind right diligence and *bodhichitta*—self-compassion and other-directed compassion, respectively—and that eventually, they use these values to fuel a practice that will improve their writing and expand their capacity for empathy.

II. The Foundations of a Practice

In line with my understanding of meditation practice, I think of a “writing practice” as a commitment to write every day with intention, presence, and—the kicker—joy. If a writing process is what we do each time we sit down to write (the intentions and goals we set; the steps we follow to get there), then a practice is a bit like a process that unfolds across a longer timeline. It requires the same intention and commitment, stretched over an entire career (or lifetime). Below, I offer a blueprint for a legal writing practice and some simple methods for sharing this concept with students. I suggest that this perspective of writing might ultimately

help students acquire the skills and work ethic that legal careers demand. A writing practice can even help students determine who they want to be—as a lawyer, and as a person.²² The two pillars of the practice are right diligence and *bodhichitta*.

A. Right Diligence

Right diligence (*sammā vāyāma*, or “right effort,” in Pali) connotes an ethos of persistence, energetic focus, balance, and self-compassion.²³ In Buddhist traditions, “right” (*sammā*) does not mean technically precise or morally correct.²⁴ It means “beneficial.”²⁵ Rather than impose external standards on us, a practice helps us learn what “works for us”—what is beneficial for us—through our own direct experience.²⁶ *Vāyāma* is variously translated as “diligence,” “effort,” or “exertion.”²⁷ Cultivating right diligence thus requires attentiveness and self-compassion, because it means discovering *how to work* in a way “that is true for us.”²⁸

When it drives our writing, right diligence yields the practice-sustaining paradox: joyful, relaxed hard work.²⁹ Probably best to get the more intimidating ingredient out of the way: “hard work.” Quantity matters. Writing more is the only way to improve. As obvious as this idea might sound, it runs counter to popular adages like “work smarter, not harder,” or “quality, not quantity.” Writing requires both: “quantity becomes quality.”³⁰ This means writing as often as we can; ideally, every day. It sounds like a lot, and it is. But it’s not as demanding as it seems, for

²² See BRYAN GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* 2 (2d ed. 2013) (improving legal writing means confronting the question, “What kind of person are you?”).

²³ See NHẬT HẠNH, *supra* note 3, at 99 (Practicing in ways that cause us to “suffer . . . is not Right Diligence It is not because we practice hard that we can say that we are practicing Right Diligence.”). Right diligence is one of eight practices on the Noble Eightfold Path, which is meant to free us “from doing the things that cause us to suffer.” *Id.* at 11.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See, e.g., GETHIN, *supra* note 8, at 81; NHẬT HẠNH, *supra* note 3, at 99.

²⁸ NHẬT HẠNH, *supra* note 3, at 102.

²⁹ See *id.* at 99–104.

³⁰ RAY BRADBURY, *ZEN IN THE ART OF WRITING* 144 (1994).

¹⁷ HAGEN, *supra* note 12, at 10–11.

¹⁸ *Id.* at 9 (emphasis in original); see *Tevijja Sutta*; *Dīghanikāya* 13, in WALLIS, *supra* note 2, at 18 (Buddhist teachings suggest ignoring metaphysical questions and working toward becoming a “conscientious and kind person” in this life.).

¹⁹ Venerable Sumedho Thera, *Foreword*, in MAURICE WALSHE, *THE LONG DISCOURSES OF THE BUDDHA: A TRANSLATION OF THE DĪGHA NIKĀYA* 11 (1995).

²⁰ *Id.* at 19.

²¹ See, e.g., Brooks, *supra* note 5, at 273 n. 22; Stephens, *supra* note 5; VINSON ET AL., *supra* note 5.

two reasons. First, we can define “writing” broadly. Writing, revising, and editing all count as writing. In my admittedly permissive book, even reading—a convincing brief; a compelling judicial opinion; or an enthralling string citation³¹—counts as the work of writing.³² Second, framing the practice as a *commitment* to write every day, rather than a mandate to write every day, builds in flexibility and wards off the specter of burnout. As important as quantity is, it is not the only feature of a practice. Setting an intention, rather than struggling to hit a certain word count, is just as essential.

So, when we hear a prescription (admonishment?) like “the most important thing is to practice every day,”³³ we might sigh at the words “every day.” Instead, we should stay with the word “practice.” Once we recognize the freedom of a practice, maintaining it becomes manageable: mainly, we need to be there. In writing, like in meditating, like in most jobs, showing up is much of the work. When I meditate, it is often hard to focus on my breath for very long at all. It’s hard to sit still, and it’s impossible to stop the trains of thought that speed through the silence. Basically, I can’t do the things that I understand to mean “meditate.” But I still show up and sit down. No one session is “better” than another. How I feel about it is beside the point, especially if how I feel is frustrated with myself. I just do it. And the more I do it, the easier it is to do it again the next day.

Writing is the same. So much of it boils down to attention, consistency, and nonjudgmental presence. If undertaken deliberately, without self-judgment—if undertaken with something like right diligence—a practice facilitates equanimity. One way to do this is to avoid becoming fixated on external goals. Doing so makes it easy to slide in self-doubt, by delivering an exaggerated picture of the shortcomings we need to

overcome to meet those goals.³⁴ Instead, we should “connec[t] with the intelligence we already have.”³⁵ To help students do this, I use the attached handout during an in-class mindful writing session,³⁶ which we hold at the end of the semester while students are revising their memos. Much of the handout’s advice is based on right diligence. First, it prioritizes commitment over results, reminding students that “[t]here is no such thing as a bad writing session.” Relatedly, students are advised to set reasonable goals, but avoid obsessing over those goals and losing sight of their present experience. And while the handout encourages them to be “diligent” and work with resolve, it explains that to do so, they’ll need to be patient with themselves when they get stuck. Rather than get lost in frustration, they’re encouraged to simply come back to the present.

Teaching students the importance of presence—of showing up—can demystify legal writing. Anyone can do it. That’s not to say that writing is easy. (I’m always very up front with my class that it is much, much harder than it looks. It’s like pro skateboarding in that way.) But it is to suggest that maintaining a writing practice is uncomplicated. Most of it is being there each day—regardless of what you feel like doing³⁷—and leaning into the momentum you build.³⁸ “You don’t have to like it; you just have to do it . . . For now, just keep practicing.”³⁹ Or, as Ray Bradbury put it:

[Y]ou are in the midst of a moving process. Nothing fails then. All goes on. Work is done. If good, you learn from it. If bad, you

“The more I do it, the easier it is to do it again the next day. Writing is the same.”

31 “They do exist,” I tell students. See Alexa Z. Chew, *Stylish Legal Citation*, 71 ARK. L. REV. 823, 850 (2018) (“Stylish citations should be a goal, just like effective topic sentences and energetic paragraphs.”)

32 There are limits to my permissiveness. Poring over contentious Twitter exchanges isn’t going to help anyone. That’s obvious, of course, but it’s probably worth reminding my students (and myself) that we might choose other ways to spend that time.

33 JOHN KABAT-ZINN, *FULL CATASTROPHE LIVING* 141 (1990).

34 PEMA CHÖDRÖN, *START WHERE YOU ARE: A GUIDE TO COMPASSIONATE LIVING* 98 (1994).

35 *Id.*

36 I am grateful to my former colleague Shailini George for introducing me to the concept of mindful writing sessions. For me, these sessions usually consist of a 30–45-minute block in one of the final classes of the semester.

37 I usually poll students (anonymously) about their relationship to writing. Most recently, in response to the prompt, “When I’m writing, there’s always something else I’d rather be doing,” 68% of the class answered “True.”

38 See, e.g., GEORGE SAUNDERS, *A SWIM IN A POND IN THE RAIN* 164 (2021) (“To be a writer, I only need to read a specific sentence of mine, in its particular context, on a given day . . . changing the sentence as it occurs to me to do so. Then do that over and over again, until I’m pleased.”).

39 KABAT-ZINN, *supra* note 33, at 141.

“Students should understand the concept of right diligence as soon as possible, so they can think critically about what a joy-based writing practice would look like.”

learn even more There is no failure unless one stops. Not to work is to cease, tighten up, become nervous and therefore destructive of the creative process.⁴⁰

Like Pema Chödrön,⁴¹ Bradbury suggests that ambition and achievement can be great, but they are not the purpose of a practice. Like meditating, writing inheres in the present moment. Attachment to some future outcome takes us out of it.⁴² When we're writing, letting our focus drift to external markers of success is like hitting the button on an ejection seat. Suddenly you're hurtling through space, with no idea how you got there. (Plus then you're no longer flying the plane, which makes it hard to get where you're going.) Practice and presence are tied together, and the more we practice, the more we can fortify nonjudgmental presence and an attitude of self-compassion. This results in the scenario Bradbury describes, where anxiety creeps in when we do not write regularly.

Beyond this committed presence, right diligence calls for calm, optimistic energy.⁴³ Working “in ways that cause our body and mind to suffer” undermines the benefits of a practice.⁴⁴ Instead, we should strive for lightness. To sustain a writing practice over the long-term, it helps to trade mechanical persistence for relaxed contentment and humble curiosity.⁴⁵ Working joyfully like this is challenging. It can “take years of practicing the outer form before [we] taste the true joy of practice.”⁴⁶ But without this joy, a practice threatens to devolve into a pursuit of technical mastery, which makes it exasperating and often counterproductive. For example, when a monk's dogmatic commitment to his practice began to intrude on his personal life and well-

being, the Buddha told him, “Maintain your health. Be joyful. Do not force yourself to do things you cannot do.”⁴⁷ Balance and happiness should define the practice, not arise in spite of it. When they do, “work” begins to feel a lot less laborious: “[T]he more we ... work, the closer we come to [r]elaxation.”⁴⁸

Students should understand the concept of right diligence as soon as possible, so they can think critically about what a joy-based writing practice would look like. They might, however, be understandably skeptical. Legal writing is an alien, complicated, consequential discipline. It's anxiety-inducing. Asking new students to find happiness in the hard work of legal writing might come off like a cruel joke. “Spend more time on this and pay more attention to it. Trust me, it will make you happy.” Rather than hit them with blanket directives like this, I try to offer small ways of making writing enjoyable in the midst of a heavy workload.

Here are a few ideas⁴⁹ for guiding students toward right diligence:

1. **Mindful writing sessions.**⁵⁰ Mindful writing sessions are a good way to practice right diligence in a group setting. My students receive the handout in the Appendix as a guide to the session. Students seem to like these opportunities, and to benefit from the underlying message of right diligence. When I asked for written feedback on a session, one student wrote: “I did approach this session differently. I kept in mind the expectations portion and tried not to be too hard on myself. I have hig[h] expectations and goals for myself ... I stress myself out if I feel like I did not meet my own [g]oals in each writing session. I feel better coming out of this session because ... since I did not

40 BRADBURY, *supra* note 30, at 146.

41 See CHÖDRÖN, *supra* note 34, at 98.

42 See EUGEN HERRIGEL, ZEN IN THE ART OF ARCHERY 32 (R.F.C. Hull trans., Vigeo Press reprint ed. 2018) (1953) (“The way to the goal is not to be measured! Of what importance are weeks, months, years?”).

43 See NHẤT HẠNH, *supra* note 3, at 99.

44 *Id.*

45 See *id.* at 100 (“If your practice does not bring you joy, you are not practicing correctly.”).

46 *Id.* at 102.

47 *Id.* at 101.

48 BRADBURY, *supra* note 30, at 147.

49 Most of these ideas were inspired by scholarship on law student wellbeing and mindfulness in legal education. See, e.g., SHAILINI JANDIAL GEORGE, THE LAW STUDENT'S GUIDE TO DOING WELL AND BEING WELL (2021); KATHRYNE M. YOUNG, HOW TO BE SORT OF HAPPY IN LAW SCHOOL (2018). Others come from books on Buddhism written for a general audience. See generally, e.g., HAGEN, *supra* note 12.

50 See *supra*, note 36.

have a rigid ... goal set out, I was able to ... accomplish a lot without feeling guilty that I did not finish x, y, and z. This view has also been helpful in being kinder to myself.”

- 2. Eclectic examples, and a list.** We look at a few writing practices⁵¹ that reflect qualities of right diligence. For example, the fiction writer George Saunders (a Buddhist, as it happens) maintains a blog called [Story Club](#) that provides [thoughtful reflections on writing](#). In addition, on my course page, I post a short bibliography of relevant books or articles. The idea is to be wide-ranging, but I search especially for resources that skew more conversational than technical. (Sometimes, of course, technical is unavoidable, which is not a bad thing for lawyers-in-training. Or so I try to convince my students.) There are plenty of resources for writing, citation, and style that are engaging and even funny, like Diana Simon’s recent book, *The (Not Too Serious) Grammar, Punctuation, and Style Guide to Legal Writing* (2022). And in the event that students demand to see just how contentious the legal style wars can get (one can dream, right?), I can always direct them to Bryan Garner’s . . . let’s say “passionate,” rather than “quixotic,” crusade against in-line citations.⁵²
- 3. Sangha-inspired writing groups.** I tell my students to join or form a writing group. Like “practice,” “group” takes an expansive definition. It can mean writing with just one other person; committing to a session of 20 or 30 or 60 minutes where you are both present with one another and your work. Writing groups serve a similar purpose as *sanghas*. A *sangha* is a Buddhist community where one studies the dharma alongside “brothers and

sisters who are creating a field of mindful energy that can make your practice easy.”⁵³

- 4. Journals.** Journaling is like meditating and writing at the same time. If nothing else, it’s a tool for consistency. I encourage my class to keep a journal and write in it every day, about whatever they feel like. I also sometimes use the Journal feature on Blackboard, asking students to take a few minutes in class to reflect on something we’ve done that day. These entries have the added benefit of helping me track any common challenges that I need to address.

While writing will always be challenging, right diligence can make it nourishing. Maybe it’s like the difference between being forced to eat vegetables as a kid and liking vegetables as an adult. Technically good for you either way, but you get more out of something when you enjoy it. Along with intention and commitment, enjoyment forms the heart of right diligence.

B. Bodhichitta

Where right diligence revolves around the *self*-compassion that is necessary to build and sustain a practice, *bodhichitta* (or “awakening mind”⁵⁴) helps us see that the *purpose* of a practice is to extend compassion toward others. *Bodhichitta* is “the deep wish to cultivate understanding in ourselves in order to bring happiness to many beings.”⁵⁵ The concept is closely associated with Mahāyāna Buddhism, a tradition that emphasizes the interconnection of all beings.⁵⁶ *Bodhichitta* therefore teaches that the pursuit of knowledge must be driven by the intention to help others. It helps us cultivate “a practice [that is] not for ourselves alone, but for the welfare and benefit of all.”⁵⁷

“*Bodhichitta* therefore teaches that the pursuit of knowledge must be driven by the intention to help others.”

⁵³ NHẬT HẠNH, *supra* note 3, at 104.

⁵⁴ What Is Bodhichitta?, Tricycle (last visited Sept. 23, 2023), <https://tricycle.org/beginners/buddhism/bodhicitta/>.

⁵⁵ Nhật Hạnh, *supra* note 3, at 24; see also GOLDSTEIN, *supra* note 4, at 219 (defining *bodhichitta* as “the wish to awaken in order to help beings develop a truer happiness”).

⁵⁶ See What Is Bodhichitta, *supra* note 54.

⁵⁷ GOLDSTEIN, *supra* note 4, at 76.

⁵¹ Anne Lamott’s *Bird by Bird* (1994) and Stephen King’s *On Writing* (2000) include helpful walkthroughs of writers’ processes. Students have also responded positively to excerpts from Ray Bradbury’s *Zen in the Art of Writing*, *supra* note 30.

⁵² See BRYAN A. GARNER, *THE WINNING BRIEF* 176–99 (3d ed. 2014).

“Students seem to intuitively understand that their approach to their work can have far-reaching consequences.”

Similarly, in effective legal writing, compassion and skill converge.⁵⁸ On the first day of class, I share the words of Karl Llewellyn: “Compassion without technique is a mess; technique without compassion is a menace.”⁵⁹ In the context of lawyering, I understand “compassion” to be empathetic altruism, or a commitment to relieve suffering.⁶⁰ Synthesizing these ideas yields something like *bodhichitta*.⁶¹ To state the obvious, lawyers have power. They get to choose how to use that power, and whether to steer their practice toward *bodhichitta*. To have this choice is to be in a rare, privileged position.⁶² In the fall, we discuss this topic near the beginning of the semester, around the time we cover basic professional obligations. Students seem to intuitively understand that their approach to their work can have far-reaching consequences.

The common instruction to “make the reader’s job easier”⁶³ provides a good opportunity to practice *bodhichitta*. Sometimes, it can be difficult to distinguish writing meant for the reader from writing designed to benefit the advocate. A great brief, after all, makes it more likely that the judge will accept the writer’s argument. But what would it look like to write with *only* the reader’s interests in mind? For one, it would mean crafting an honest argument anchored in the writer’s genuine beliefs, not one designed around what the writer believes a judge is most likely to accept.⁶⁴ Advocacy requires writing with an agenda, but

obsequiousness undercuts that agenda; obviously, so does dishonesty. A writer must first recognize their reader as a person, not an abstraction, and then find a way to advance even difficult legal positions via compassion and respect for that reader.⁶⁵

To demonstrate this idea in action, I show students a sample counterargument (one I draft myself) that acknowledges unfavorable law in passing, then redirects the reader back to the affirmative contentions. But we also look at counterarguments that deal with the bad law more directly. In these passages, the writer zealously distinguishes the law out in the open, to whatever extent she can honestly do so.⁶⁶ Students see that the version I’ve drafted is a rhetorical sleight of hand; a quick detour through a delicate concession. It’s a gambit to get the reader to look away. Building a counterargument in the service of the reader may well require the writer to do more research or be more creative. But it will also inspire self-reflection about what the writer owes her audience, not what she thinks a judge wants to hear. Good counterarguments level with the reader.

This is the broader sense of *bodhichitta* in lawyering: centering one’s whole practice on an intention to benefit others. There is a subtle difference, then, between drafting a motion for the “welfare and benefit”⁶⁷ of the client *and* the judge and drafting it simply to win. Only the former embodies *bodhichitta*. And admittedly, the former is more difficult. It requires trust, and it can put a writer in a vulnerable position. The writer must have some faith that her reader will reward openness and sincerity. Believing in the reader this way demands a degree of *metta*, or the willingness “to focus on the good in people,

58 See Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Law Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1, 15 (2008) (“[C]aring makes analysis stronger.”).

59 *Id.* (citations omitted).

60 See generally DALAI LAMA & HOWARD C. CUTLER, *THE ART OF HAPPINESS: A HANDBOOK FOR LIVING*, 10TH ANNIVERSARY EDITION (2009).

61 See GOLDSTEIN, *supra* note 4, at 76.

62 Any lawyer has this choice, not only those working in public interest positions or social justice-oriented roles. For example, a transactional attorney at a large firm could help a client achieve a life-changing professional goal. I thank Dean Mark Alexander for this insight.

63 See, e.g., GARNER, *supra* note 22, at 109–42 (developing a reader-centric approach to transactional drafting).

64 This latter tactic can backfire, anyway. Judges become hesitant to let their guard down. See ANTHONY G. AMSTERDAM & JEROME BRUNNER, *MINDING THE LAW* 174 (2000) (“[A] pleader’s assertions are always suspect of . . . revealing [only] what the pleader thinks the arbiter will regard as persuasive.”).

65 See Saunders, *supra* note 39, at 163–64 (The difference between writing that “feel[s] evasive . . . agenda-laced, selfish” and writing that “feel[s] intense . . . generous, truthful” is “*presence*. Are we there or not? Is the person across the table there (to us) or not?” Saunders also sees “revision as a way of . . . improv[ing] the relationship between ourselves and the reader.” (Emphasis in original.)); see also GARNER, *supra* note 22, at 109 (Transactional lawyers should “[d]raft for an ordinary reader, not for a mythical judge who might someday review the document.”).

66 One example comes from Martha Stewart’s defense team. See ROSS GUBERMAN, *POINT MADE* 139 (2d ed. 2014). I like this one because it goes a step further than distinguishing. Stewart’s lawyers explain how one of the government’s key cases actually supports Stewart, not the government. *Id.* I also like it because it’s a single paragraph.

67 GOLDSTEIN, *supra* note 4, at 76.

rather than their faults.”⁶⁸ But the risk is worth it, at least from a Buddhist perspective, which teaches that one’s intention makes a practical difference, out there in the world. Different motivations result in different outcomes. Some of these outcomes are preferable to a traditional victory.⁶⁹

There are endless examples of the link between compassion and technique in written advocacy. To illustrate *bodhichitta* in legal writing, I have used Justice Brennan’s dissent in *Walker v. City of Birmingham*;⁷⁰ a dissent in a case that rejected a *habeas* petition brought on behalf of Happy, a captive elephant,⁷¹ and scholarship promoting the use of the singular “they.”⁷² I also encourage students to use *bodhichitta* as a grounding device. When they’re feeling stuck, it can help them to pause and ask whether their own writing strikes them as compassionate. I want to encourage students “to start [cultivating *bodhichitta*] in a very humble way, simply planting the seed of this aspiration within [them]selves ... without grandiose expectations.”⁷³ One simple way to do so during a writing session is to provide the class with an example of a motivation grounded in *bodhichitta*. For instance, the one in the attached handout reads, “I feel good about my memo, but I need to do one full, careful proofread where I try to see it from the eyes of a reader who is not familiar with the law.” A simple awareness of the power of *bodhichitta* goes a long way. If law students can acquire that awareness, they’ll have caught up with the Dalai Lama, who said, “I cannot pretend that I am really able to practice *bodhichitta*, but it

does give me tremendous inspiration . . . I realize how valuable and beneficial it is, that is all.”⁷⁴

III. Conclusion: Toward a Practice of Self-Discovery

To become better writers and lawyers, students should understand writing in the first instance as a *practice*—in particular, a practice informed by right diligence and *bodhichitta*. In future research, I hope to expand on the claims made in this Essay by exploring how a practice-based model can help students grapple with issues of professional identity. Just like a meditation practice, a writing practice can be a tool for self-discovery. Our practice is an extension of ourselves. It’s a dynamic pursuit, and it should adapt to the writer’s needs, strengths, ambitions, and values. Cultivating a practice means beginning any project with *why* questions—Why am I doing this? Why does it matter to me? (Does it matter to me? And if not, well, why am I doing this?)—before moving on to the familiar *hows*: How can I win this motion? How am I supposed to get a good grade in this class? Students who build a writing practice around their ‘why’ can critically reflect on the relationship between their work and their values. Good writing (legal or otherwise) alters readers’ perspectives. It makes them feel something, or take some action, or look skeptically at some of their previously unquestioned beliefs. Inspiring authentic self-reflection in the reader requires something similar from the writer: an authentic authorial voice, one that honors the reader’s needs as much as the writer’s goals. Discovering that voice is a difficult, probably endless project. To embark on it, students first need to have a sense of who they are.⁷⁵ A writing practice can help them develop it.

“Just like a meditation practice, a writing practice can be a tool for self-discovery. Our practice is an extension of ourselves.”

⁶⁸ *Id.* at 138.

⁶⁹ See JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES 22 (2d ed. 2022) (cautioning against the “illusory victories” that result from unethical lawyering. “Winning is not always about winning the case.”).

⁷⁰ 308 U.S. 307, 338 (1967) (Brennan, J., dissenting); see Shaun B. Spencer, *Dr. King, Bull Connor, and Persuasive Narratives*, 2 J. ALWD 209 (2004); Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 LEGAL WRITING 167, 178–85 (1999).

⁷¹ *Nonhuman Rights Project v. Breheny*, 197 N.E.3d 921, 932–66 (N.Y. 2022) (Wilson, J., dissenting).

⁷² Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMM’N & RHETORIC 1 (2020).

⁷³ GOLDSTEIN, *supra* note 4, at 76.

⁷⁴ *Id.* (citations omitted).

⁷⁵ See GARNER, *supra* note 22, at 2.

IV. Appendix: Mindful Legal Writing Handout

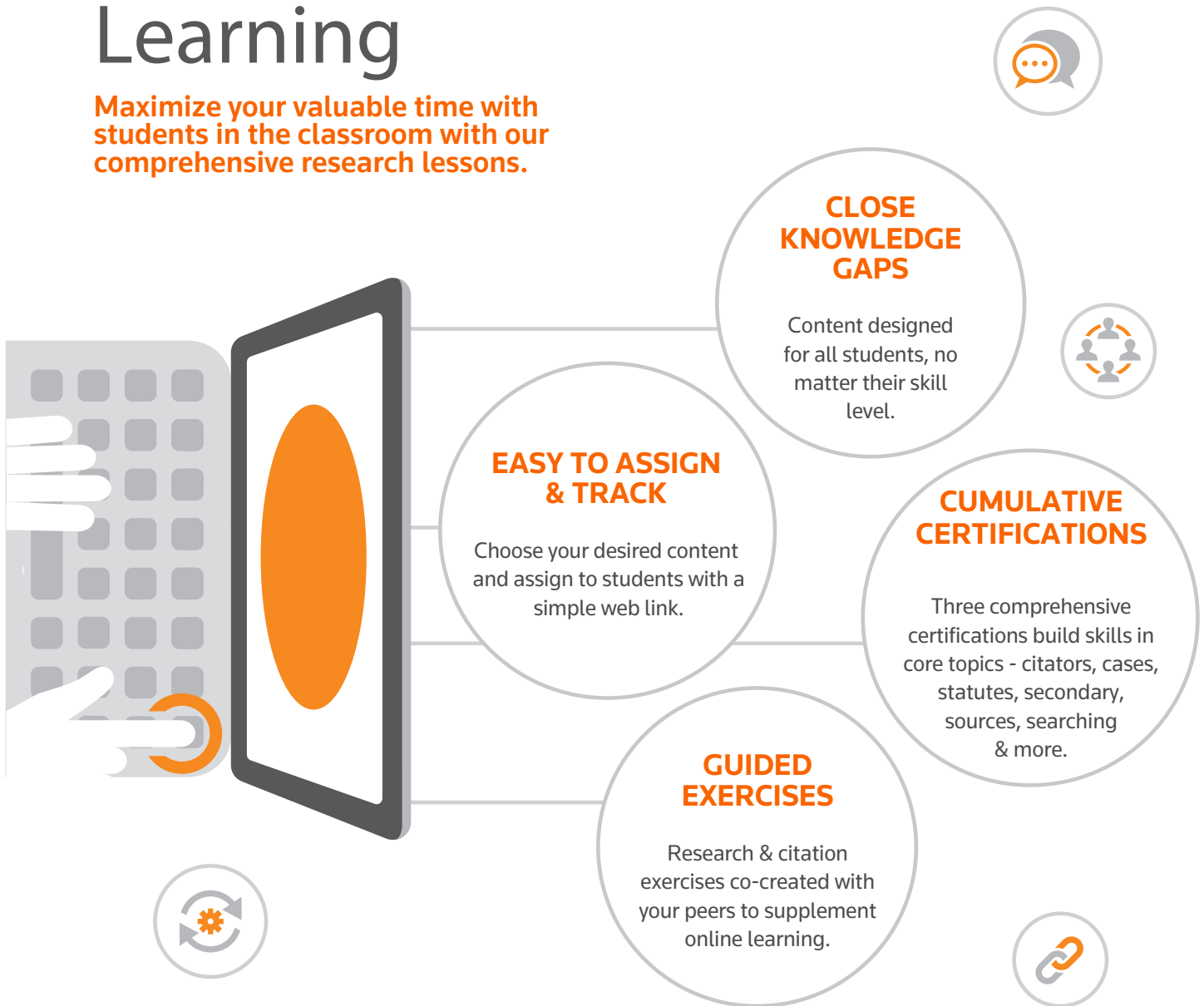
MINDFUL LEGAL WRITING

The following checklist is meant to help you stay mindful and present while you write. Please review it carefully before we begin our writing session, and feel free to return to it throughout the session.

MOTIVATION	<p>What is your purpose for the writing or rewriting you are about to do? Be honest; don't judge your reasons for writing. Be aware and accepting of your motivation.</p> <p>Examples:</p> <ul style="list-style-type: none"> • My roadmap is in pretty good shape, but I know it's not as clear as it could be. • Right now, I would rather be [fill in the blank with some more fun activity], but I've put a lot of work into this memo, and I don't want to lose that momentum. • I feel good about my memo, but I need to do one full, careful proofread where I try to see it from the eyes of a reader who is not familiar with the law.
GOALS	<p>Decide what you hope to accomplish in this session. Make your goal(s) reasonable and simple. They should be easy to articulate.</p> <p>Examples:</p> <p>I'm going to set an intention to . . .</p> <ul style="list-style-type: none"> • Outline the first subsection of my Argument. • Slowly and carefully cite check my memo. • Turn my phone off and use the next 40 minutes to strengthen the counterargument that I've been struggling with. <p>While it's important to set goals, it's equally important not to become too attached to them. Let your goals guide your session. Don't worry about whether you'll meet them all.</p>
EXPECTATIONS AND ATTITUDE	<p>Be kind to yourself. Try to approach the session without any expectations. When you begin, see if you can find enjoyment in the work, no matter what happens. There is no such thing as a bad writing session. Ease into it. See if you can remain relaxed throughout the session.</p>
DILIGENCE	<p>Resolve to work diligently during the time you've set aside to write. Plan to continue working when you become distracted or frustrated. The key here is to be patient with yourself. When you become distracted, stop and take note of the distraction; don't judge yourself for it. Then, turn your attention back to your task.</p>
DISTRACTIONS	<p>Make a quick mental list of thoughts, emotions, or circumstances that might come up to distract you. Acknowledge these possible distractions and resolve to set them aside if they arise. When you do become distracted, don't think in terms of succeeding or failing to refocus. Come back to the intentions you sent earlier.</p>
POSTURE	<p>Aim to embody resolve and attentiveness without carrying physical tension or stress. Relax. If doing so does not cause discomfort, sit upright, and maintain a strong yet relaxed posture.</p>

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