

**“I SEE AND I REMEMBER;
I DO AND UNDERSTAND”¹
TEACHING FUNDAMENTAL
STRUCTURE IN LEGAL WRITING
THROUGH THE USE OF SAMPLES**

*Judith B. Tracy*²

I. INTRODUCTION

Legal educators are charged with the responsibility of engaging students intellectually in thoughtful inquiries about the role of law and lawyers and the pursuit of justice. They also are responsible for preparing each student for life as a professional lawyer who serves others.³ Balancing these two features of legal

¹ The complete saying, attributed to Confucius, is: “I hear and I forget, I see and I remember, I do and I understand.” Available at www.quotationspage.com/quote/25848.html (last visited March 25, 2005). I am grateful to Boston College Law School Legal Information Librarian Joan Shear both for this quote and for her partnership and support over the years.

² Associate Professor of Legal Reasoning, Research & Writing (LRR&W), Boston College Law School (BCLS). This article is adapted from my presentation at the Tenth Biennial Conference of the Legal Writing Institute in 2002, as part of the Basics Track (sessions of particular interest to newer teachers). I deeply appreciate the collaboration of and inspiration provided by my colleagues in the BCLS LRR&W program, Jane Gionfriddo, Dan Barnett, Joan Blum, Mary Ann Chirba-Martin, and Elisabeth Keller, and by my students at BCLS, others on the BCLS faculty who have encouraged and supported me, and my assistant, Alice Lyons. I owe special thanks for the insightful contributions of Research Assistants Peter Rahaghi (BCLS 2006), Meredith Haviland (BCLS 2004) and Amy Reichbach (BCLS 2005). I also gratefully acknowledge the grant support provided by the Law School Fund which made it possible for me to complete this article.

³ Although there is tension between the practicing bar and the legal academy about the role and effectiveness of law schools in meeting these two goals, it is undisputed that lawyers are expected to have intellectual prowess as well as

education is challenging; it requires creative curriculum development and teaching techniques, which incorporate intellectual discourse and the practical training of practitioners. The reputation of a law school and the measure of its success depends on many characteristics, including the degree of competence and confidence with which its graduates are equipped as they begin and pursue their legal careers.⁴

Consequently, an essential component of legal education is the development of a law student's ability to research legal problems, analyze legal authority, and write legal documents.⁵ As such, instruction in these skills generally begins in the first year of law school. Those who teach legal reasoning and writing (LR&W)⁶ explicitly introduce students to the fundamentals of these tasks. Ideally, further development of the skills of legal analysis and written expression of that analysis occurs in other 1L

practical legal skills. See generally Robert MacCrate, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—an Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISS. BAR [hereinafter *MacCrate Report*]. This comprehensive study examined the responsibility and capacity of law schools to create a challenging curriculum that provides both an intellectual and a practical focus.

⁴ See, e.g., Joseph Kimble, *On Legal-Writing Programs*, 2 PERSP. TEACHING LEGAL RES. & WRITING 43 (1994). The author notes that the scope and intensity of the LR&W program at Chicago-Kent Law School was “‘the great equalizer’ in competing with graduates from other schools,” enhancing the school’s reputation and dramatically increasing recruiting at the school, because “[e]mployers have learned that those students can write.” *Id.*

⁵ *MacCrate Report*, *supra* note 3, at 138-39, 151-63, 172-76 (stating that in its examination of the legal profession, the ABA Section of Legal Education and Admissions to the Bar found these skills fundamental to the practice of law).

⁶ Legal Writing Institute, *2003 Survey Results*, available at www.alwd.org (last visited March 25, 2005) (revealing that those who teach LR&W are a diverse group, and include full and part-time, long-term contract, tenured and adjunct professors).

courses, as well as throughout the curriculum,⁷ and then continues as a part of the practitioner's life. LR&W educators have approached their task by conscientiously reflecting on and re-examining what they do and how they do it, in order to design the most effective curricula and utilize the most meaningful teaching methodologies.⁸ They seek to engage students by recognizing that these skills must be learned incrementally and by structuring the course so that students can internalize the fundamentals which will enable them to successfully approach legal problem solving and expression.

An essential component of an LR&W curriculum is teaching students how to prepare legal documents which reflect the conventions of the practicing professional. Teachers want students to be able to apply what they learned from the LR&W course assignments to what they will be called upon to do as upper-level law students, legal interns, summer associates and, ultimately, as practitioners. This article describes how the use of sample documents can be incorporated into the introductory LR&W

⁷ See generally Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997); Pamela Lysaght & Christina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASSOC. LEGAL WRITING DIRECTORS 73 (2004).

⁸ This thoughtful approach by LR&W professionals is revealed in the substantial literature and scholarship they have prepared addressing what they do and how to improve it. In addition to publications devoted to the specific pedagogy of legal reasoning, research, and writing — such as the *Journal of the Legal Writing Institute*, *Scribes*, the *Journal of the Association of Legal Writing Directors*, *The Second Draft*, and *Perspectives* — numerous articles can be found in generic law reviews and journals. See, e.g., Donald J. Dunn, *Legal Research and Writing Resources: Recent Publications*, 13 PERSP. TEACHING LEGAL RES. & WRITING 116 (Winter 2005), and previous seasonal additions.

curriculum to maximize opportunities for students to identify and apply a structure to their legal writing and adapt it for future assignments in and beyond law school.

The material in Part I explores more precisely the introductory LR&W curriculum, beginning with objective legal research, analysis, and writing assignments. It suggests including within that basic curriculum skills which students will apply as practitioners. Part II describes specifically how different kinds of samples can be integrated into the curriculum so that students are exposed to examples of the types of documents they are being asked to prepare and, through examination of these samples, are able to self-identify a useful and logical structure for the written presentation of legal analysis. The use of samples serves a number of purposes: to enable students to identify the need to *completely* explain legal analysis; to demonstrate a *structure* for the presentation of that analysis; and to suggest ways to *convert* a written objective analysis into an advocacy presentation.

II. CURRICULAR GOALS AND CONSIDERATIONS IN THE FIRST-YEAR LEGAL REASONING AND WRITING COURSE AND THEIR RELEVANCE TO THE PRACTICE OF LAW

Teachers of legal reasoning and writing want to equip their students with the skills which will enable them to engage in valid legal analysis and to express that analysis effectively in writing. This is a cooperative effort between teacher and student. It requires thoughtful curriculum design, using appealing

assignments which keep pace with the students' development, accompanied by meaningful feedback.⁹ It also requires the students' trust in the course and commitment to the learning process, which teachers must earn and conscientiously work to maintain. Teachers can begin this process by reassuring students that what they are learning as legal thinkers and writers are *additional* skills. Although teachers should communicate to students that legal analysis and writing require a particular rhetorical and professional approach,¹⁰ they should emphasize that the acquisition of these new skills will not invalidate or compromise other analytical and writing techniques used in other contexts.¹¹ This is accurate because it appropriately acknowledges both the substantial abilities and experiences students currently bring to law school,¹² which will enhance their capacity to be

⁹ See, e.g., Gail Anne Kintzer et al., *Rule Based Legal Writing Problems: A Pedagogical Approach*, 3 J. LEG. WRITING INSTITUTE 143 (1997). The authors state that teachers in legal methods courses (one way to characterize a legal reasoning and writing course) all pedagogically design and select problems for first-year law students which enable them to logically build and reinforce legal analytical skills incrementally. *Id.* at 143-44. This progression from simple to more sophisticated allows students to self-correct before advancing to more complex steps, aided by the professor's highly structured oral and written instruction, and feedback, at each stage. *Id.* at 145.

¹⁰ See *infra* text accompanying note 13.

¹¹ See Jessie C. Grearson, *Teaching the Transitions*, 4 J. LEG. WRITING INST. 57, 61 (1998). "[T]he student's goal should be to learn how to build on previous experience and to develop and draw on a repertoire of writing strategies — in short to become a professional writer who can adapt to each new writing situation by attending to rhetorical considerations such as audience, purpose and context." *Id.*

¹² See *id.* at 72.

Many of our students are professionals with distinguished backgrounds and significant levels of expertise in other discourse communities and other professional communities. . . . We cannot simply mention in passing that

effective legal writers, and the fact that legal analysis and writing is characterized by particular conventions and expectations.¹³

To effectively teach the skills necessary to become successful legal thinkers and writers, the curriculum should advance students' self-confidence. This article suggests two themes which can contribute to this success and will reinforce the credibility of the course. First, teachers can provide a curriculum that reflects how lawyers approach analysis and writing in

students come to legal writing with their own expertise, and then treat this expertise as a stumbling block, an explanation for students' incompetence at and discomfort with legal writing. To do so not only frustrates students but it ignores a real possibility: students as potential agents for review and possible reform of legal writing conventions.

Id. (footnote omitted). See also Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1193 n.1 (2000) (describing how many law students make predictions about their performance based on their past experiences, and how their diverse backgrounds contribute in various ways to initial challenges they may encounter); Mary Dunnewold, *Establishing and Maintaining Good Working Relationships with 1L Writing Students*, 8 PERSP. TEACHING LEGAL RES. & WRITING 4 (1999).

¹³ See, e.g., Parker, *supra* note 7, at 580. "[S]tudents should learn how to read and revise their own writing to create documents that meet professional standards and serve their intended purposes and audiences."; Rowe, *supra* note 12, at 1206-08.

[L]awyers reading legal memoranda generally want to understand the relevant law before they read about your analysis of the client's facts under that law. . . . Lawyers also want to read the most important part of the analysis first. . . . [A] legal memorandum that does not follow accepted organization will seem odd, and will likely indicate that the writer is a novice.

Id. See also Julie M. Spanbauer, *Teaching First-Semester Students That Objective Analysis Persuades*, 5 J. LEGAL WRITING INST. 167 (1999). "The law also imposes certain conventions for different writing projects, e.g., inter-office memoranda versus memoranda in support of motions for summary judgment. Thus, a defined product which answers a legal question or effectively argues in support of a legal position is a very real part of legal writing." *Id.* at 172.

practice.¹⁴ Second, teachers can give their students opportunities to self-identify valid techniques for presenting legal authority to a reader. Incorporating samples into the first-year legal reasoning and writing curriculum can advance these goals.¹⁵

In terms of simulating how lawyers approach legal problems, teachers should explain that lawyers first objectively analyze a client's legal situation before advising that client about an appropriate adversarial position and course of action. Lawyers consider the client's facts in conjunction with a thorough and objective analysis of the relevant law, such as statutes, regulations, cases, and administrative rulings. Only then can the lawyer assess the client's possible and practical options and provide advice. The best choice, ranging from a vigorous adversarial pursuit of the matter to a recognition that immediate resolution would be best, will be determined by the objective analysis as applied to the facts, and this will dictate what advocacy documents the lawyer prepares.

¹⁴ See Rowe, *supra* note 12, at 1204 (observing that teaching students to weave analysis into research and writing prepares them to practice law — the LRW professor is preparing them to practice law, to think and act like a real lawyer); Parker, *supra* note 7, at 568 (explaining that one of the goals of an overall law school curriculum should be to “provide students with the ‘tools of the trade’ by teaching [them] to create effective professional documents”); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 49, 56-61 (1994) (providing a comprehensive analysis of various approaches to legal writing and the programs which teach it and advocating “a revised view . . . that allows for improved classroom practices, a more flexible and comprehensive program design, and a fuller understanding of writing for law practice,” which would include consideration of the particular social contexts and conventions of legal discourse); *MacCrate Report*, *supra* note 3, at 151-63, 242-44, 255-60.

¹⁵ See *infra* note 25 and accompanying text (discussing examples of the observations of other LR&W teachers about the use of samples).

Given the realities of practice, even though students may arrive in law school eager to assume an advocacy role immediately, they first should be taught to undertake objective analysis and writing, so that they develop the skills which are critical to responsible lawyering.¹⁶

This understanding of how a lawyer approaches a client's problem is reflected in the method used to teach legal reasoning and writing. Teachers of legal reasoning and writing typically design their curricula so that students begin with objective analysis and writing, and the course progresses in later stages to introduce advocacy techniques.¹⁷ Often the first assignment in the course

¹⁶ See Spanbauer, *supra* note 13, at 170. "Thus, it is vital that from the very beginning, legal writing students be taught that objective analysis flows both from and to persuasive analysis or advocacy." The author cites literature supporting the course sequence from objective or predictive memoranda to persuasive writing, and notes:

My point is simply that students need to be told that the ability to objectively analyze is a necessary prerequisite to persuasive analysis. The student must be able to see all sides of the legal issue in order to make the best arguments on behalf of a client and to anticipate an opponent's potential arguments. First-semester students are not likely to understand this point unless they are specifically told.

Id. at 168 n.3.

¹⁷ See *id.* at 167. "[T]he standard legal writing curriculum . . . invariably begins with the objective memorandum, taught as a prerequisite to advocacy and to persuasive writing." *Id.* Also, the author remarks that most legal writing texts are structured with objective memoranda first in the table of contents — one example being *Legal Method and Writing* by Charles R. Calleros. *Id.* at 167-168 n.1-3. See also Rowe, *supra* note 12, at 1202-03 (describing this progression in the curriculum of most legal writing programs, noting that throughout the year, the assignments become more complex (citing Jill Ramsfield & Florence Super Davis, *The Legal Writing Institute 1996 Survey Results* (1997)); Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 726 (1997). "Villanova follows a traditional legal writing program model shared by many law schools: students learn objective or predictive writing of legal memoranda during the first

requires students to analyze and synthesize a limited body of authority relevant to a hypothetical problem, such as a common law problem in which the focus is on reading and understanding case law.¹⁸ Within the context of this assignment, students are taught how to identify the legal issues, read and analyze relevant authority and derive an overall understanding of the issues based on a thorough synthesis of that authority.¹⁹ Through this process, students begin to develop fundamental analytical skills. Students learn how to read a case and understand the holding and the explicit reasoning, as well as what was implicit in the case, which taken together fully explains the outcome. Students learn how courts interpret and apply prior cases, how to synthesize a group of cases to articulate what they teach collectively about the legal issue, and how to apply that analysis to the facts of the hypothetical problem.²⁰ Then, students learn how to transform that

semester and persuasive writing of appellate briefs during the second semester . . .” *Id.*; Neil Feigenson, *Essay Review: Legal Writing Texts Today*, 41 J. LEGAL EDUC. 503 (1991) (comparing the organization of several writing texts, noting that discussion of objective memoranda before advocacy is the standard practice). “Their sequence of topics is logical . . . because persuading a judge is in general rhetorically more complex than conveying an objective or predictive doctrinal analysis to another attorney in the office, writing the memorandum should precede writing the brief.” *Id.* at 508-09.

¹⁸ See Kintzer et al., *supra* note 9, at 152 (explaining why common law problems work well as an initial assignment).

¹⁹ See Kimble, *supra* note 4, at 2. “We have to teach, in the writing courses, the structure of analysis: how to analyze cases, how to connect one case to the other, and how to apply them by deduction or analogy to a client’s problem, a client’s story.” *Id.*

²⁰ See Parker, *supra* note 7, at 579. “In first-year legal writing classes, writing exercises that require students to focus on the structure of legal analysis help [them] understand legal authorities, delineate relationships among authorities, and articulate the logic by which they may apply authorities to facts to reach a legal conclusion.” *Id.* See also Rideout & Ramsfield, *supra* note 14, at 55.

analysis into a written document, such as an office memorandum in which they set forth the analysis and apply it to hypothetical facts to suggest a course of action for the client.

This written presentation should also reflect the realities of practice and the expectations of the practicing lawyer. Thus, to arrive at the analysis of the legal issues in the problem, students read the relevant cases one after the other; worked through each one to understand the facts, outcome, and reasoning; and, finally, understood what the cases taught them *as a group* about the issues. But, to be useful, the written presentation should not document this process. The reader does not want to hunt for the analysis in a series of case descriptions. Rather, the lawyer expects a coherent expression of the analysis derived from the synthesis of those cases.²¹ The writer's task is to convert the analytical process into a

"Especially for law students, but no less in law practice, the act of writing is intimately involved with the act of 'constructing' the law — describing and synthesizing the applicable law, applying legal rules, drawing analogies and distinguishing facts, and developing legal arguments." *Id.*

²¹ See Rowe, *supra* note 12, at 1203.

Legal writing has to go beyond repeating what the law is; legal writing must analyze possible solutions for a unique legal situation. In the legal context, writing requires thinking. You cannot simply describe one case and jump to a conclusion. Instead, you have to prove what the law is, based on all the relevant authority you found in researching. Then, you have to explain how that law applies in your client's situation.

The author explains that this process of writing the document requires explanation of "the facts and reasoning of [the] cases" and "how they work together" or have inconsistencies, so that the author can "provide a coherent rule of law." *Id.* The writer then has to apply that to the client's situation, which will include discussing the similarities and differences between the client's facts and those of the cases and an application of general rules derived from those cases to the client's situation. *Id.* See also Parker, *supra* note 7, at 588 (describing a teacher's responses to a common deficiency in students' memoranda — that students "had lapsed into a case-by-case organization that failed to effectively

structure that presents the information in a way which most effectively and efficiently educates the reader, provides a clear explanation of the legal analysis and instills confidence in the reader that the application of the analysis to the client's situation is reliable.²²

One way to equip students with the ability to prepare clear, logical and reliable presentations of legal analysis,²³ consistent with what will be expected of them in practice,²⁴ is to provide them with sample memoranda. Samples can be used to demonstrate, generally, the structure and organizational approach expected in an objective legal document. The use of samples allows students to identify for themselves and then internalize useful and efficient

synthesize the authorities . . . [and presented] discussions of case law [which] tended to focus on tangential material rather than key reasoning”).

²² See Parker, *supra* note 7, at 601.

To communicate effectively, a lawyer must understand the substance that is to be communicated and must present precisely that information to its intended audience, and do so in a form that will accomplish that writer's purpose and will not defeat that purpose by its effect upon any additional audiences the document may reach. In helping students develop effective writing skills, a law school provides students with the tools by which they may practice their profession.

Id. See also *supra* note 14.

²³ See Rowe, *supra* note 12, at 1206 n.59 (discussing that the “different labels all point to the same organizational paradigm: (a) explain the legal point to be discussed, (b) explain the relevant law, and (c) explain how your facts fit under the law.”).

²⁴ See Parker, *supra* note 7, at 582. “Assigning writing problems that require students to create documents they will later prepare in practice provides students with an experiential base upon which they may build in summer clerkships and when they begin to practice.” *Id.* “Assignments designed to acquaint students with the purposes, audiences, and forms of legal documents and with professional standards of quality also afford opportunities to discuss ethical issues that arise in the context of producing documents in practice and foster development of professional integrity.” *Id.* at 599-600.

techniques for presenting legal analysis, rather than being told abstractly how to prepare the material. Further, a well-structured sample memorandum can provide the essential basis for the preparation of an advocacy memorandum.²⁵ Finally, it is

²⁵ The use of samples has been acknowledged as a worthwhile mechanism to help students achieve competence as writers in the pedagogy of traditional English composition, although many authors and teachers use the term "models." See, e.g., Frank J. D'Angelo, *Imitation & Style*, 24 C. COMPOSITION & COMM. 283, 283 (Oct. 1973) (advocating the careful, orchestrated analysis of a model to enable some imitation, but ultimately to help the "student writer become more original as he engages in creative imitation"); James F. McCampbell, *Using Models for Improving Composition*, 5 ENGLISH JOURNAL 772, 773, 776 (1966); Elizabeth A. Stolarek, *Prose Modeling and Metacognition: The Effect of Modeling on Developing a Metacognitive Stance Toward Writing*, 28 RES. TEACHING ENG. 154, 154 (1994). The results of the author's study indicate "that novice writers who are given a model of an unfamiliar prose form to imitate respond in a manner which is more introspective and evaluative and far more similar to the responses of expert writers than do novice writers who are not given a model." *Id.* See also Davida H. Charney & Richard A. Carlson, *Learning to Write in a Genre: What Student Writers Take from Model Texts*, 29 RES. TEACHING ENG. 88, 111, 116 (1995). The study results indicate that models do not have automatic benefits for the writing process, but they do influence content and organization of students' texts.

Model texts are a rich resource that may prove useful to writers in different ways at different stages of their development. For student writers, models may be effective tools for learning the more enduring conventional forms or for understanding those that apply most broadly across the discipline It seems likely that early experience in evaluating and drawing from models will be of lasting value.

Id. at 116.

Certainly other teachers of legal reasoning and writing also have observed the usefulness of samples in teaching legal writing. See, e.g., Laurel Currie Oates, *I Know That I Taught Them How To Do That*, 7 J. LEGAL WRITING INST. 1, 7-9, 15, 16 (2001). The author suggests the use of multiple examples and sample memoranda as an efficient way to expose students to a number of different problems that deal with radically different facts but involve the same underlying principles and organizational issues, so that students do not feel that they:

need to reinvent the wheel each time that they sit down to write a discussion section. The more efficient approach is to search their memories for problems that involved similar

legitimate and reasonable for students to want to see examples of the kinds of documents they are being asked to prepare, especially because the document is probably unlike anything that most first-year law students have previously seen or written.²⁶

Perhaps because of the alien nature of legal writing for the beginning law student, and the teacher's difficulty in explaining how to organize the legal document, many teachers of legal reasoning and writing teach students to apply a formula to express their analysis. This is often referred to with an acronym. The most commonly used acronym is IRAC (Issue, Rule, Application,

analytical structures and then use the organizational schemes that they used for those problems as models for organizing the discussion section for the current problem.

Id. at 16. See also Parker, *supra* note 7, at 572-73, 583-584. Here, the author suggests that the teacher "provide models of expressing analysis more clearly," and that students be offered different kinds of models in response to the particular misunderstanding or challenge they were experiencing, e.g., a model exemplifying the conventions of organizing, or alternatively, one which provided examples of different methods of reasoning. *Id.* See also Kim Cauthorn, *Keep on "TRRACING,"* 10(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Nov. 1995, at 4, 5 (describing how the author uses a sample legal memorandum discussion section to show students how variations of the structural paradigm are applied to the particular analysis in the sample, which serves to emphasize both the utility and the flexibility of that paradigm); Robin S. Wellford, *IRAC Unnecessarily Confuses,* 10(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Nov. 1995, at 19, 20; Myra G. Orlen, *Modeling: Placing Persuasion in Context,* 16(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Dec. 2001, at 7-8 (describing a curriculum which relied on a model objective memorandum as the basis for the preparation of a persuasive memorandum).

²⁶ See Debra Harris & Susan D. Susman, *Toward a More Perfect Union: Using Lawyering Pedagogy to Enhance Legal Writing Courses,* 49 J. LEGAL EDUC. 185, 185, 200 (1999) (describing the authors' "incorporat[ion of] lawyering methodologies into a legal writing and research course" and stating that students "overwhelmingly requested 'good' models of" the document they were preparing; in that case, a client letter); see also *infra* note 36 and accompanying text.

Conclusion), or some variation of that.²⁷ However, the imposition of a formula may create a misimpression among students that all analyses can be expressed and fully explained within it and that there is only one way in which lawyers present information. Admittedly, a formula may be useful because it provides students with a stated way to express their analysis and it offers teachers a way in which to evaluate the students' presentation; i.e., by determining whether the formula was followed. Although the limitations of the IRAC formula or its variations have been acknowledged — for example, as a tool which represents only one approach²⁸ and as one which must be adaptable to different analyses or more sophisticated presentations²⁹ — its broad

²⁷ See, e.g., 10(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Nov. 1995, at 1. This particular issue contains a series of articles discussing a number of variations on the acronym as well as “a wide range of views on the efficacy of this tool”. *Id.* See also Rowe, *supra* note 12, at 1206 n.59 (identifying some legal writing texts and the acronyms they employ, citing CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 72-74 (3d ed. 1998); DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL 89-96 (1998)).

²⁸ See Grearson, *supra* note 11, at 69. “It is easy to forget that the organizational tool IRAC, so pervasive in our legal writing world, is a *human-made* creation that has served us well as a group, that we have decided to endorse and pass along to our new members, but it is not . . . the *only* or the most important way in the world to organize thinking.” (emphasis added); Rowe, *supra* note 12, at 1206 n.59. “These acronyms are very useful tools for beginning legal writers, but other equally valid paradigms exist. . . . Despite their great usefulness for beginning law students, these acronyms and paradigms are only rough tools, and they may not be appropriate in more sophisticated writing.” (internal footnotes omitted).

²⁹ Some who teach IRAC or a variation of that have observed, for example, that any paradigm is subject to adjustment to meet the needs and purposes of the writing project. See Spanbauer, *supra* note 13, at 175-76 (noting that students can be shown that the IRAC, CREAC, or other variation of the paradigm “provides direct empowerment because the student is in charge of its manipulation”); Cauthorn, *supra* note 25, at 5 (noting one instructor’s

application suggests widespread acceptance.³⁰

Rather than teaching students to apply a formula, the use of sample memoranda which present different analyses enables teachers to equip students with the ability to identify and then apply a more general, and yet logical, approach to structure. This approach reinforces two realities: that there is no one structure which fits all presentations; and that lawyers need to approach analysis and its written presentation considering not only their

presentation of her structural paradigm “as an analytical writing tool, rather than as a pair of formalistic writing handcuffs. I do this by assigning them a series of legal problems presenting increasingly complex variations of the paradigm. At the same time, the sophistication of their understanding and manipulation of the paradigm increases.”).

However, the limitations of IRAC may also be revealed by this acknowledgement that its application is constantly subject to adjustment. This may then cause students confusion rather than clarity, undermining the utility of the acronym. See, e.g., Christina Kunz & Deborah Schmedemann, *Our Perspective on IRAC*, 10(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Nov. 1995, at 11-12 (stating that there are a wide range of options subsumed within the broad IRAC template, for example, a discussion may skip or repeat a letter, the rule and application may be merged, each element of a rule may require separate presentation, and sometimes the template will not be followed at all, if, for example, the analysis does not entail application of a rule to the client’s facts, or it would be more persuasive to lead with the client’s facts).

³⁰ See, e.g., CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 73-74 (Aspen Law & Business 4th ed. 2002) (using a traditional IRAC structure); ROMANTZ & VINSON, *supra* note 27, at 89-96 (using CREAC); DIANA V. PRATT, *LEGAL WRITING: A SYSTEMATIC APPROACH* 109 (1989) (using IRAC); TERESA J. REID RAMBO & LEANNE J. PFLAUM, *LEGAL WRITING BY DESIGN, A GUIDE TO GREAT BRIEFS AND MEMOS* 443-46 (2001) (using BaRAC: Bold Assertion, Rule, Application, Conclusion); DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING AND WRITING* 119-23 (1999) (using IRAC); see also Sue Liemer, *Memo Structure for the Left and Right Brain*, 8 PERSP. TEACHING LEGAL RES. & WRITING 95 (2000) (discussing the basic structure of an inter-office memorandum which incorporates an explicit IRAC structure, noting that it is “standardized enough to be one of the basic conventions of legal writing taught in American law schools.”).

audience and purpose,³¹ but also the content, because the nature of the analysis will determine the structure of its written presentation.³² Some teachers who use formulas have acknowledged these limitations, for example, when they recommend that the acronyms be modified for particular assignments. Rather than present and then qualify the utility of the formulas, teachers can provide students with instruction about structure which provides them with confidence about how to select an appropriate structure on their own and recognizes the need for

³¹ This is a "touchstone" of writing instruction. Anne Enquist, *Critiquing Law Student's Writing: What the Students Say Is Effective*, 2 J. LEG. WRITING INST. 145, 191 (1996). The author discusses sources supporting the proposition that "[l]egal writing instructors spend a great deal of time emphasizing to their students the importance of audience and purpose in writing" and discusses sources documenting the emphasis placed on this by rhetoricians generally. *Id.* at 145, 145 n.1-2. See also Parker, *supra* note 7, at 568, 574, 580-84 (stating that "[s]tudents should learn to recognize the rhetorical contexts in which lawyers write these [particular] documents and to consider the purpose and intended audience for every document they create" and further discussing a variety of considerations of which law students should be made aware to prepare them for writing as lawyers, including "the various purposes, audiences, and common formats for legal documents."); Debra R. Cohen, *Competent Legal Writing — A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 520 (1999) (identifying audience as "a critical factor in communicating information. (footnote omitted). A lawyer needs to identify the intended audience and write for that audience. . . . Once the lawyer identifies the audience, the lawyer must reduce the substance to writing in a form that the intended audience is likely to understand.").

³² See Jane Kent Gionfriddo, *Dangerous! Our Focus Should Be Analysis, Not Formulas Like IRAC*, 10(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Nov. 1995, at 2, 2-3. "[Students] must use the structure of the analysis to decide the best organization (or organizations) to convey the ideas to a reader in several paragraphs of general legal principles and case illustrations."; Parker, *supra* note 7, at 562. "[T]he development of communicative skills is inseparable from the development of analytical skills [A] consensus has emerged that analysis and communication are interrelated"

flexibility. This approach helps the students effectively provide their readers with worthwhile documents.³³

While students want to prepare a document which responds to the needs of its audience, they, nevertheless and predictably, may react to being taught the necessity of structure in legal writing — and, indeed, to spending time writing objective legal analysis at all — with skepticism or even resistance.³⁴ Teachers may tell a class that an organized presentation is essential to effective communication among lawyers, but students may still express concerns that their use of a structure will be confining, will make them mechanical rather than creative writers, and will deprive them of individuality.³⁵ This reaction tends to be exacerbated

³³ Practitioners also acknowledge that many factors will influence how a writer structures a document. See Mark Gannage, *Structure your Legal Memorandum*, 8 PERSP. TEACHING LEGAL RES & WRITING 30 (1999).

There is no one right way to organi[z]e a memorandum. You can appropriately structure your memorandum in many different ways. The variable structure might depend on such factors as the memorandum's purpose, your instructions, your reader's needs, the nature of the problem, your legal findings, the logic of the subject, the scope of your research, and any standard approach adopted by your law office. These factors might require you to be flexible and to structure your memorandum creatively and idiosyncratically.

Id.

³⁴ See *supra* note 16 and accompanying text.

³⁵ See Mary Barnard Ray, *A Matter of Style*, 16(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Dec. 2001, at 16 (discussing law students' concerns about losing personal style by becoming legal writers, and how teachers can help students recognize and manage that personal style); Grearson, *supra* note 11, at 74, stating:

I expect student learners to feel discomfort as they encounter new ways of doing things. But teachers should not ignore this discomfort, or consider students who are uncomfortable with different conventions as somehow backward. We must

when teachers explain the presentation of legal analysis by relying on an imposed formula that, by its nature, appears rigid. The credibility of the formula is further undermined when the teacher attempts to modify or manipulate it.

The use of different samples can respond to these concerns by demonstrating what the structure should be, while showing that different approaches and analyses can generate very different documents that are far from mechanical. The samples should be presented as examples, as opposed to the way in which a formula is taught, to minimize the risk that students will try to artificially and mindlessly force their analysis into the form they see in the sample, similar to an attempt to force analysis into a formula.³⁶

become learners ourselves and allow ourselves the discomfort of viewing our conventions through new eyes.

Id.

³⁶ See Cohen, *supra* note 31, at 498 (stating that lawyers must approach the preparation of each document by focusing “on the logical sequence of presentation.”). “When lawyers skip this step, rather than consider an alternative ordering of the provisions of a document, they copy the organization of a prior document. Although the organization may have been appropriate in the original document, it is not necessarily appropriate for the current writing.” *Id.* The author, in advocating that the Model Rules of Professional Conduct set forth “guiding principles” of competent legal writing, states:

Like so many legal rules, the principles should provide direction, but retain enough flexibility to deal with the variety of legal writing lawyers are called upon to produce. In addition to stating the guiding principles, the commentary should include illustrations. Samples are particularly helpful when dealing with subjective standards.

Id. at 519-20 (footnote omitted). See also Gionfriddo *supra* note 32, at 2. [Students] try to fit their ideas into the “pigeon holes” or labels of the formula’s structure, without fully understanding why they are doing what they do or how they should come up with the necessary analysis. They fragment their ideas by failing to see, or communicate, the interrelationship of the parts; as well, they do not develop ideas in sufficient depth.

This attempted replication inevitably would lead to an awkward and unsuccessful presentation, because that particular organization would not fit the relevant analysis and would not reflect the student's individual approach to the matter.³⁷ However, careful use of samples as a teaching device will enable students to employ a meaningful structure for an assignment. This will both reinforce the need for a discernable organization and demonstrate that the analysis dictates how the material will be presented.³⁸

III. USING SAMPLES TO ADVANCE THESE CURRICULAR GOALS AND CONSIDERATIONS, AND TO INCORPORATE LAW PRACTICE REALITIES

Samples can be used at various times within the first-year LR&W curriculum to further different pedagogical goals, as

Id. See also Harris and Susman, *supra* note 26, at 200. "Some thought that we were simply hiding the ball by not providing good models, although a few recognized the danger that students would simply copy the models when writing their own letters." *Id.* See Parker, *supra* note 7, at 583-84.

Providing models of effective legal writing to law students does carry some risk, especially if students are given only a single model of a particular kind of document. Students may seek to use it as a template from which to create all documents of that type or, not yet having sufficient experience in the genre to recognize what is good about the model document, may emulate its less desirable attributes.

Id. See also Helene S. Shapo and Mary S. Lawrence, *Surviving Sample Memos*, 6 PERSP. TEACHING LEGAL RES. & WRITING 90 (1998) (endorsing the use of multiple samples but advocating against the use of models which novice legal writers may mimic mechanically); see *supra* note 25.

³⁷ See Grearson, *supra* note 11, at 63-64 (stressing a pedagogy that centers on the "individual student writer" and teaches the process of writing, not merely how to make a product; such a focus allows teachers to "discuss invention, collaboration, writing as learning and so to escape some of the brutality of rigid, hierarchical world of traditional law school teaching.").

described in the examples which follow. When students are provided with a sample memorandum on a subject with which they are unfamiliar, they will react to it as the reader. They will react as the audience whom the author set out to educate. They will know immediately whether the document successfully educated them and, if it did, they will be able to dissect how the author achieved that and apply those techniques as they become the writer. On the other hand, when a student studies a sample memorandum which presents analysis with which he or she is familiar because, for example, it addresses part of the assignment with which the class has been working, then the sample provides a different learning experience. Here, the student will be able to see how the process by which the analysis was developed — through reading and class discussion of the authority — was transformed into a structure which successfully explains that analysis. Further, if students are given a sample memorandum on a matter on which they have already written, the sample will serve to confirm their work and will become part of the critiquing and feedback process.³⁹

³⁸ See *supra* note 36.

³⁹ See Parker, *supra* note 7, at 573.

When commenting on papers, a teacher can show students precisely where their writing is unclear, pose questions designed to illuminate thinking problems underlying the unclear communication, and provide models for expressing the analysis more clearly. To respond to the questions, students must confront their failures to communicate and then examine their thought processes on paper. Answering the questions in the context of their own work provides students with the experiential basis that will permit them to understand why the models are useful and to incorporate into their own thinking those aspects of the models that permit more straightforward expression of legal analysis.

Regardless of the pedagogical goal to which a sample is directed, teachers must actively engage students with each sample, discussing and dissecting the structure identified in the document.⁴⁰ This will facilitate the students' ability and willingness to internalize the purpose of structure so that an appropriate format for the particular assignment can be created. Teachers will have advanced the likelihood that students will continue to meaningfully organize future law school and practice assignments. Further, interaction with the samples will be worthwhile because the students have been directly engaged with the product.

A. Samples to enable students to identify the need to present a complete explanation of the analysis

Students are more receptive to understanding and applying structure in legal writing if they can see for themselves why it is

Id. (footnotes omitted).

⁴⁰ See Parker, *supra* note 7, at 583-84.

To [further] use models of legal writing effectively . . . teachers should devote some time to discussing the reasons why the examples are good and assessing the comparative strengths and weaknesses of the model documents. By developing a list of the desirable attributes for a particular kind of document and asking students to evaluate the models against those criteria, teachers may help students recognize and emulate effective legal writing.

Id. See also Shapo & Lawrence, *supra* note 36, at 90. "Samples can be used for in-class editing. To dispel students' perception that there is but one "right" approach to writing, samples can be used to illustrate the different ways of effectively organizing a memo, as well as the different methods of signaling logical continuity within paragraphs and within sentences." *Id.*

needed.⁴¹ One way to accomplish this is to give students a deficient sample but not identify it as such.

To illustrate, assume students are in their second or third week of law school and are actively involved in classroom analysis of the legal issues in the first assignment of the course. Also, they have not yet produced any written analysis in the legal reasoning and writing course. This is an excellent time to introduce a sample, such as a brief presentation of a purported analysis of an entirely different issue. Providing a deficient sample will enable students to identify and appreciate what the presentation of legal analysis should include.

For example, what follows is a sample that could be presented to the students as the analysis of the contact requirement in the tort of battery.

A person may be liable for the common law intentional tort of battery if he or she acts intending to cause offensive contact with another person and if such contact results. [cites omitted] Direct touching of the plaintiff's body satisfies the contact requirement. [cites omitted] Thus, in Case A, the

⁴¹ This can be introduced even on the first day of class. See, e.g., Charles R. Calleros, *Using Classroom Demonstrations in Familiar Non-Legal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 J. LEGAL WRITING INST. 37, 38 (2001). The author describes how to demonstrate legal analysis and case synthesis through the use of everyday situations and circumstances. *Id.* The BCLS LRR&W curriculum uses such an exercise in the first sequence in the fall. It presents brief narratives describing a teenager's three encounters with his parents regarding his curfew. Students are asked to try to discern and then express the parents' "rule" about when he must be home. This material is accessible and familiar to the beginning law student, and is used to identify some fundamentals about the kind of analysis that lawyers engage in — the use of facts, outcomes, and reasoning — and to suggest ways in which to express that to another person who needs to know about the curfew rule.

contact requirement was satisfied when the defendant slapped the plaintiff's face. [cite omitted] Similarly, in Case B, the court found that the defendant's punching and scratching the plaintiff's arm satisfied the contact requirement. [cite omitted]

In addition, courts have found that there has been contact even though the defendant does not actually touch the plaintiff's body. [cites omitted] For example, in Case C, the court found contact within this tort of battery when the defendant knocked a ruler out of the plaintiff's hand. [cite omitted] Similarly, in Case D, the defendant's grabbing the plaintiff's suit coat was considered contact. [cite omitted]

However, in Case E, the contact requirement was not satisfied when the defendant knocked over a garbage can two feet away from the plaintiff. [cite omitted]. Similarly, in Case F, the defendant's pounding on a table approximately four feet away from where the plaintiff was standing did not constitute contact. [cite omitted]

This sample is deficient because the author's discussion does not include any general analysis based on the *reasoning* in the cases. It is limited to a description of the *facts* and the *outcomes* in several cases.⁴²

Students examining this sample should be asked if they understand the analysis and whether it can be applied to predict a likely outcome in a hypothetical situation the teacher describes. In this situation, the students should discuss whether it is likely that the contact requirement would be satisfied if Person X kicked Person Y's dog, while Person Y had the dog on a six foot leash.

⁴² See *supra* note 21 and accompanying text.

The discussion will invariably demonstrate that no prediction can be made. The class should then explore the reasons for this. The students can articulate that without some general analysis, which incorporates the reasoning derived from the several cases, the reader cannot apply the cases to make a reliable prediction. A reader may understand that the court ruled a certain way based on a particular set of facts, but the author has not told the reader *why*. Therefore, a reader cannot state confidently or reliably what the next court would likely do when confronted with a new set of facts. This cannot be done because the sample contains no reasoning; there is no “*because . . .*”

Now the teacher can distribute a second sample which includes the general analysis and the reasoning. In the first paragraph, the author would explain that contact is unwelcome touching, which is considered an offensive violation of personal integrity, and that direct touching of the plaintiff’s body satisfies the contact requirement because this is an unambiguous, physical connection with the person. Then, the descriptions of the facts and outcomes in Cases A and B would meaningfully illustrate this. In the next paragraph, the author would explain that courts have found sufficient contact when the defendant touches something physically connected to the plaintiff, even though the defendant has not actually touched the plaintiff’s body. This is because the physical connection between the plaintiff and the object implicitly makes that object an extension of the plaintiff’s body. Therefore, such unwelcome touching may be as offensive to the plaintiff’s

personal integrity as direct touching would be. Again, the facts and outcomes in Cases C and D would illustrate this, and be effective examples if the author incorporated that reasoning to explain the outcomes.

Finally, the author would introduce the third paragraph with the explanation that, at some point, the physical relationship between the plaintiff's body and the object touched becomes too attenuated for the court to rule that there has been contact. In such circumstances, the object has an insufficient physical connection with the plaintiff and, therefore, is not an extension of the plaintiff. Cases E and F would be used to illustrate that. The entire discussion would leave the reader with the understanding that there must be a sufficient physical connection between the touched object and the plaintiff's body to meet the contact requirement.

Class discussion will reveal how *this* presentation enables the readers to understand the issue so that they can apply the analysis to the hypothetical facts. Students will be able to identify where the author provided the reasoning, presumably by synthesizing the cases, and offered the case descriptions to *illustrate* that analysis. Then, they will be able to make a reasonable prediction of how a court would rule on the hypothetical case the teacher describes.

This lesson is a powerful one. Students are able to apply it to the completion of their first assignment. In addition, both students and teachers can refer back to this exercise as a reminder that the explanation of legal analysis must include the courts'

reasoning to explain the outcomes in the precedent cases in order to make and support a valid prediction when that analysis is applied to a new situation.

B. Samples to demonstrate the structure for a complete written presentation determined by the nature of the analysis

Once the class has concluded the analysis of the issues for the first assignment, the teacher can distribute complete sample memoranda to enable students to understand how to prepare such a document.⁴³ This timing supports the proposition that analysis must precede writing and that analysis dictates structure; teachers should not introduce structure until students have completed the legal analysis of an issue. This will encourage students to organize the presentation according to that analysis.

Generally, distribution of more than one sample is useful. As a result, students can see varieties in presentation based on

⁴³ There also is an opportunity just prior to this point for teachers to confirm that students may already sense from the analysis how to present it in writing. A useful exercise can be to ask students simply to write out their understanding of the analysis, in a manner which they think will best educate and inform the reader. They should be told not to worry about any particular form, but rather, simply to write the explanation as a narrative, so that the reader will understand it. They can be told to include case names at places in which they seem to be relying on a case for some statement in the text. The teacher can collect and review these, and invariably, a good number will reflect the kind of structure which is about to be discussed; some of the students will have stated the issue, explained it generally, and then used the facts, outcomes, and reasoning in the cases to illustrate it. Pointing out to students that they incorporated some basics of logical and useful written explanation of legal analysis as they are embarking on learning some fundamentals for the formal presentation can be extremely reassuring and empowering.

different analyses.⁴⁴ Also, it is particularly instructive if the memoranda concern subjects which the class has not discussed, so that the students, as readers, can be educated by the author. However, the samples also should present analyses which first-year students at this point in their education can comprehend. Teachers can develop these samples from prior assignments in the course, perhaps based on a composite of effective student memoranda or a template the teacher had drafted to evaluate the student memoranda. Useful samples can also be prepared based on documents the teacher prepared in practice.⁴⁵ Regardless of the source, samples must be clear and accessible to the students as readers and they should incorporate a logical, discernible organization based on the analysis. Further, the samples need not be flawless. It is extremely worthwhile for students to be able to suggest ways in which the sample could be improved.⁴⁶

⁴⁴ See Parker, *supra* note 7, at 583. "To use models of legal writing effectively, teachers should try to provide more than one example of 'good writing' in a particular format."

⁴⁵ I have distributed two samples at this time in the course. One discusses laches in an administrative proceeding, derived from a memorandum prepared in practice, and the other is based on an assignment several years ago in the LRR&W course. Both are fictionalized in terms of jurisdiction and citation, so that they can be used without concerns for currency, accuracy, or appropriation.

⁴⁶ See *supra* note 41 and accompanying text; see also Shapo & Lawrence, *supra* note 36, at 90. The authors differentiate "samples" from "models:" "models tempt students to substitute mimicry for thoughtful analysis. They divert students' attention from analytical processes and can impede students from developing self-editing skills." *Id.*

Now it is time to engage the students in the document, by asking them to read one of the sample memoranda in class.⁴⁷ There should be an open discussion of what the memorandum is about, what the analysis is, and what the prediction is and why. Overall, the class will be able to understand the memorandum sufficiently so that students can answer these questions. The goal of the discussion is to demonstrate that a well-constructed memorandum educates and informs the reader, regardless of, or especially in the absence of, prior familiarity with the subject matter. Most likely, this is a point that the teacher has made previously, but which the students have not yet experienced.

Next, the class should dissect each part of the memorandum, beginning with the facts section and the thesis paragraph.⁴⁸ The class should read these carefully together, discussing the contribution of each sentence and how the author constructed each one to achieve that result.⁴⁹ Students, as readers, will be able to identify what contributes to successful written communication, and even identify ways in which the material could have been presented more effectively. The discussion will be open and vigorous, permitting students to thoroughly explore

⁴⁷ Preliminarily, it is helpful to use the samples to review the parts of the memorandum; for example, the heading, facts section, discussion, and conclusion.

⁴⁸ I refer to "thesis paragraph" as the introductory, overview, or summary paragraph, which outlines the issues discussed in the body of the memorandum.

⁴⁹ Analysis of the preparation of a facts section and thesis paragraph was beyond the scope of the presentation at the LWI Conference and are not explored here. However, *see infra* where the use of samples is recommended to help students convert the objective Facts section to an advocacy Statement of the Case.

and challenge reactions to the document.

Now students are ready to dissect the presentation of the analysis of the first issue in the sample memorandum. Assume that the class is using a sample concerning intentional infliction of emotional distress, a portion of which is included here as Appendix I. The students are then asked to examine the discussion of what constitutes conduct that is considered outrageous in the extreme and will, therefore, form the basis for recovery under this tort. The students are told to closely read each sentence, to identify what the words accomplish and how they do so. This careful reading of the sample enables students to identify that, first, the author states the issue or requirement derived from the cited cases:

Recovery based on a claim of intentional infliction of emotional distress will only be provided if the plaintiff can establish that the actor's conduct was outrageous in the extreme, such that it was beyond the bounds of what is socially tolerable. See Hall v. Hathaway, 75 N.4th 162, 164 (Grimes 1982); Brewen v. Otter, 75 N.4th 42, 45 (Grimes 1982); Patton v. Loomis 80 N.3d 22, 23 (Grimes 1967).

Students then will be able to recognize that the next sentence provides a general explanation of that principle, which was derived from a synthesis of material from the cases.

Remarks which consist merely of obscenities, demands, threats or insults do not generally result in liability unless accompanied by physical force which places plaintiff in fear for her safety.

See Walker v. Houseman, 85 N.4th 8, 9 (Grimes 1991); Patton 80 N.3d at 26.⁵⁰

Following that, students will see that the author explains this broad analysis further, including, in this instance, policy considerations.

Such statements alone, although unpleasant and disturbing, are considered part of the friction of everyday life and the kind of annoyances which are to be tolerated. See id. Recovery is not provided every time someone's feelings are hurt because there must be a safety valve through which irascible tempers may blow off relatively harmless steam. See id.

Students will note that, next, the author provided a case description.

In Walker, the court held that there could be no liability for insults made to employees being fired, because although the conduct was harsh and insulting, it was merely rude, boorish, churlish and mean, but did not exceed the bounds of social toleration. See 85 N.4th at 9. The employer referred to the employees as "deadbeats" and "selfish scum," and the court ruled that although such comments were regrettable and unwarranted, they were not sufficiently offensive to notions of social decency that they could be considered outrageous in the extreme. See id. Likewise, in Patton, ...

⁵⁰ The nature of this particular analysis resulted in the phrasing of this explanation in the negative. The class could discuss this and acknowledge that perhaps logically, in other analyses, it is helpful to first state the analysis

Students should discuss why the case description was included, and should notice that, at that point in the memorandum, although the reader understands something about the issue, the author wants to enhance and confirm the reader's comprehension by demonstrating how the analysis played out in the cases. The author wants to show that the court reached a particular outcome based on its application of the reasoning that the author had just described in general terms.⁵¹ The case description, then, illustrates both how the analysis was applied in, as well as how it was derived

affirmatively (what satisfies the requirement) before describing it negatively (what does not satisfy the requirement).

⁵¹ For some students, the convention of stating the issue first, followed by the analysis, or the conclusion first, followed by the explanation, will seem foreign. They may have been familiar with conventions in other disciplines which present support and analysis first, and conclusion last. Again, the teacher can help the students accept this different presentation by reminding them that this simply is a different way of writing, adding to the students' pre-existing skills, which is better suited to the legal reader. *See* Cauthorn, *supra* note 25, at 5.

[B]usy decision-makers . . . want the bottom line first and the support for that bottom line second. This makes sense to beginning law students. Even if they learned (or got away with) habits in college, like writing towards a conclusion or stream of consciousness writing, in "real life" most of them understand that you normally communicate your resolution of a problem by first giving your answer to that problem. Any time we, as teachers of legal process, can provide context for what we're trying to convey to our students, we're halfway home. If we show our students how legal process mirrors "real life" behaviors, then they won't be as intimidated and they'll gain confidence as legal problem solvers sooner.

Id. The author also notes that using a sample legal memorandum discussion section with her students enables them to "appreciate that if their written legal analyses follows a structure in which they first identify the relevant law before applying it to the facts of their legal problem, then their legal writing is more reader friendly and less likely to be superficial or incomplete." *Id.* *See also* Rowe, *supra* note 12, at 1206-07. The author notes that students may have difficulty accepting conventions of legal writing and explains that "lawyers reading legal memoranda generally want to understand the relevant law before they read about [the] analysis of the client's facts under that law." *Id.*

from, that case. Class discussion of the rest of the memorandum would continue along these lines, with a careful examination of the author's presentation of the prediction, based on the application of this analysis, and the use of case analogies to support that prediction.⁵²

Students now should have identified for themselves, through the careful reading and consideration of the sample, how the use of a logical structure to explain a legal issue educates and informs the reader, because they were the readers. Students can outline this structure in terms of what the author set out to do:

- State the issue/requirement
- Explain it, based on a synthesis of authority
- Use cases to illustrate that analysis

And then,

- Apply that analysis to the facts to make a prediction, supported with case analogies

This self-realization of the structure of the presentation provides students with the ability and willingness to apply it to a

⁵² A discussion of how to apply the analysis to make a prediction concerning the client's facts was omitted from the LWI presentation and is not included here because there is considerable variation among curricula and legal practice settings about how this best is done. *See, e.g.,* CALLEROS, *supra* note 30, at 70-73, 130-35 (describing the use of deductive reasoning and IRAC in order to communicate the applicable analysis for the situation, and then using "inductive" reasoning, through analogy or the creation of a general proposition from particular cases, to apply the analysis to the specific facts of the problem). Certainly the elements of a logical and clear presentation which students identify in the discussion section of an objective memorandum should be transferred to the prediction section as well.

current memorandum assignment.⁵³ With this foundation, students are well-equipped to complete the objective memorandum by applying and adapting the structure identified in the sample.⁵⁴

⁵³ Some of the debate about the utility of IRAC has considered this question of whether imposing a formula is pedagogically sound. See, e.g., Toni M. Fine, *Comments on IRAC*, 10(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Nov. 1995, at 7-8.

[D]oes it really make sense to offer students an approach that substitutes for student-driven judgment? . . . Giving students a convention within which to operate frustrates our efforts to develop in students an understanding of the process of legal analysis by deconstructing the various steps, and then structuring an analytic framework appropriate to a given task . . . [T]he very act of providing a formula reduces dramatically the likelihood that the students will ask themselves (and [writing professors]) the hard questions about why things are done in a certain way; why a particular approach works best under a given set of facts and circumstances; what the theory is that underlies any systematic approach to legal analysis; etc.

Id. See, e.g., Feigenson, *supra* note 17, at 515-17 (comparing three writing texts, and criticizing one particular text's use of IRAC, noting its simplicity and inflexibility, while praising the other two treatises for their sophisticated discussions of flexible legal analysis that allow students to see a wide range of options and not simply a model to be imitated).

⁵⁴ Class discussion should also include recognition that the writing was concise and direct, with every word precise and worthwhile. Teachers should spend time explaining that successful exposition in other disciplines may value elaboration or exploration of every detail, but that this form of legal writing values the clear, straightforward presentation of material. The dangers of rambling and storytelling should not be underestimated; in practice, verbosity can meet with extremely harsh results. See Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1 (1997). "The purpose of the court system is not, after all, to provide a forum for storytelling or political griping, but to resolve legal disputes." *Id.* at 10 (quoting *McHenry v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996)). Again, the legal writing teacher can work to inculcate these different values and goals while affirming law students' valid conviction that they bring to law school appreciable writing skills. What will help teachers and students in this endeavor of learning new ways to present information is a process which enables students to compose appropriate legal documents with a structure which makes sense to them, because they identify it as meaningful for the audience for whom they are writing and the purpose of the document.

C. Samples to reinforce both the effectiveness of a structure in educating the reader and the students' successful application of that principle

Once students have completed the first assignment, there is another opportunity for meaningful use of a sample — to discuss both the analysis of the issues in that assignment and the structure used to explain and apply it. The teacher can distribute a sample memorandum, either one written by the teacher or a compilation based on the students' memoranda.⁵⁵ An in-depth class discussion of the sample is extremely beneficial at this point. Students can identify, explore, and question the way in which the author: stated the issue, explained it, used the cases to derive and to illustrate the analysis, and made a prediction based on the application of the analysis to the hypothetical. Students can compare these techniques to their own choices, both to reinforce what they did and to enhance the teacher's feedback. Also, students can examine how another writer addressed a particular section. Students can compare the structure and content of their memoranda to those in the sample, confirming the effectiveness of parts of their writing, identifying ways in which they could be more successful, and recognizing that there are acceptable variations in the structure.

⁵⁵ See Durako, *supra* note 17, at 729. The authors discuss the use of a professor-generated model answer to the first assignment which “not only provides students with a sample of good legal writing, but demonstrates the concrete application of the writing process,” serving as a “‘bridge’ between the product and process techniques.” *Id.* at 729-30. The annotated memoranda “[a]re . . . more than examples that students may follow blindly; rather, they

Even at this early stage of the legal education process, this is a significant opportunity to confirm the breadth of what students have learned so far.

D. Samples to demonstrate the conversion of objective writing to a persuasive presentation

When students are introduced to persuasive writing, many are ready and eager to learn how to prepare advocacy memoranda. However, students may also be intimidated or uncertain about making the transition from the objective to the persuasive format, even though they have had valuable experience objectively analyzing legal issues and are likely ready to try presenting that analysis persuasively. Here again, samples can be used to demystify that process and underscore the logic of an effective structure. Samples can help confirm students' accomplishments, demonstrating that their work so far in the course provides the building blocks for meaningful advocacy.⁵⁶ Samples can also be used to show students that the structure for persuasive writing is parallel to that used in an objective presentation.

Once students have been introduced to the principles which guide their role as advocates, to the new audience for and purpose

require students to reflect deeply about their applicability to different legal writing contexts." *Id.* at 727.

⁵⁶ See Sophie Sparrow, *Using a Civil Procedure Exam Question to Teach Persuasion*, 16(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Dec. 2001, at 12. "Turning a predictive discussion into a persuasive argument also demonstrates that making an argument requires the same rigorous thinking as predicting a result."

of a persuasive document, and to the need to create and maintain a theory and a theme within that document, they are ready to see a sample advocacy memorandum. The timing of introducing samples here is different from that suggested for the objective memorandum assignment. For that assignment, samples were introduced only after some analysis of the legal issues had occurred. In this advocacy context, students have experienced legal analysis and communicating ideas in a structured document, so they are less likely to view the sample advocacy documents as forms to be followed rigidly. Rather, the students will be able to identify the techniques that the author used to write persuasively as opposed to objectively.

Again, as with the use of samples to illustrate the presentation of objective analysis, it may be particularly beneficial to provide students with sample advocacy memoranda on subject matters with which they are unfamiliar, so they can experience the persuasive effect of the writing in the absence of any pre-existing understanding of the issues. It is also helpful to discuss an advocacy memorandum as the sample objective memorandum was discussed. For example, students should read the entire memorandum and then answer questions about what the author is saying, what structural and language techniques were used to accomplish the persuasive effect, and why. Then students are ready to break the memorandum down.

Spending a considerable amount of time on the Statement of the Case section of the memorandum is beneficial, so that

students understand its significance as the first section in the advocacy memorandum. In this section, the author has the opportunity to engage the reader and present the theme.⁵⁷ The class should explore the construction techniques used to maximize the effectiveness of this section, such as chronology, perspective, tempo, phrasing, and highlighting positive facts while minimizing the impact of negative facts.⁵⁸

Students should also discuss how the Statement of the Case differs from the Facts section of an objective memorandum. This can be facilitated by an exercise which enables student self-

⁵⁷ See Stephen V. Armstrong & Timothy P. Terrell, *Organizing Facts to Tell Stories*, 9 PERSP. TEACHING LEGAL RES. & WRITING 90 (2001) (emphasizing that the Statement of the Case should be seen as an opportunity to tell a good story — instead of a bland chronological list of facts — that creates inferences in the client's favor); Randy Lee, *Writing the Statement of the Case: The "Bear" Necessities*, 10 WHITTIER L. REV. 619, 621-22 (1989) (using the story of Goldilocks and the Three Bears to illustrate the persuasive power of a well-crafted theme and Statement of the Case, to sway the reader to your side even before a legal argument is made); see also Parker, *supra* note 7, at 590-92. Parker discusses the relationship between the client's facts and the legal doctrine, and the fact that the construction of statements of fact for memoranda and briefs involves an interpretative act which reflects both communication skills and professional values. *Id.* Parker also explores in-depth the relationship between the client's story and the various relevant legal doctrines the lawyer may consider, as well as how to teach students to construct that story to advance the client's goals within a number of different assignments, such as an office memorandum, an advice letter, a demand letter, and then advocacy documents. *Id.* at 592-97.

⁵⁸ See James W. McElhaney, *Briefs That Sing: A Winning Argument is More Than a Stack of Legal Issues*, 83 A.B.A. J. 80 (1997). The author maintains that effective theme selection can make a merely competent brief an outstanding one. "But to really sing, a winning brief has to have a theme — a theory—a guiding idea that ties everything together into a simple package that satisfies both the head and the heart." *Id.* See also Lee, *supra* note 57, at 621-23. The author's use of the Goldilocks story also provides a vivid illustration of these techniques. Once an appropriate theme and perspective have been chosen, Lee's discussion is notable for his emphasis on organization, at every level of the section. He

realization. The teacher should provide the students with only the Facts section of the sample objective memorandum used earlier in the course.⁵⁹ Then, the class should be divided into groups to explore collaboratively how they might convert that Facts section into a Statement of the Case, applying the techniques discussed in the sample advocacy memorandum. Then, the teacher should reconvene the class so each group can share the version it developed. Class discussion should focus on how to compose the most effective presentation from among the suggestions and on why those choices were made.

This exercise encourages students to write in a collaborative and creative way. It demonstrates to them that, as writers, they can convert something objective into something with a theme and tone directed at engaging the reader and can do so with a particular and deliberate perspective. This also is an opportunity, in a cooperative and collective setting, to reinforce successful drafting techniques. In addition, it aids in identifying unique tendencies in the preparation of a Statement of the Case which should be modified or abandoned immediately, such as over-embellishment, fabrication, factual omissions or undue obfuscations.⁶⁰

details the most effective ways of arranging paragraphs, sentences, and even words, in order to maximize the persuasive impact of each fact. *Id.*

⁵⁹ See *infra* Appendix I.

⁶⁰ See Sharon Pocock, *Writing Facts Persuasively: An Active-Learning Exercise*, 16(1) THE SECOND DRAFT (Bulletin of the Legal Writing Institute), Dec. 2001, at 10. Pocock describes a similar exercise in which students convert objective facts to persuasive ones, something students “seem to understand and retain . . . because they are actively engaged in the writing”, they are familiar

At this point, students are given the sample Statement of the Case to show what another writer did with the same assignment.⁶¹ Students will examine the techniques used to describe the parties, the events and the consequences; to tell the story; to create the theme; and to suggest the theory. For example, in the first paragraph of the sample in Appendix II, the author attempts to sympathetically engage the reader by stating her client's age and emphasizing his dedication to his property. She uses repetition for emphasis, and dramatic transitional and descriptive words (italicized below).

Harry Matthews, *who is seventy years old*, moved to his home in Oak Ridge twenty-two years ago. He has *devoted himself to meticulously* caring for his house and yard, *to maintain his beautifully* landscaped grounds. *Unfortunately, he was deprived of the enjoyment of his property* four years ago when Violet Frank and her husband moved into the house next door. The Franks *immediately began*

with the facts from an earlier objective writing assignment, and they derive benefit from the experience of evaluating their classmates' efforts. *Id.* at 10-11. Parker describes how in an advocacy document the lawyer:

must persuade the decision maker that applicable law permits . . . if not requires, the result the client seeks. Based on facts, doctrine, and policy values, the lawyer will identify a theory of the case. That theory will influence narrative choices, such as level of detail, organization and word choice. Writing teachers can foster awareness of the lawyer's role as interpreter by explicitly raising questions of purpose and audience for each document and exploring the ways in which the purpose and audience will affect the writer's choices.

Parker, *supra* note 7, at 594. "A particularly effective peer-review exercise asks students to read other students' statements of fact to compare the theories of the case they convey and the rhetorical techniques employed to promote that theory." *Id.* at 596.

⁶¹ See *infra* Appendix II.

*to destroy the tranquility and beauty of the neighborhood.*⁶²

Detailed discussion of word choices and techniques of construction, such as placement of phrases, should continue so that students begin to understand how to engage the reader in a calculated retelling of the story in this section. Then the class is ready to move to the Argument section of the advocacy memorandum and to explore how it can be constructed from the Discussion section of an objective memorandum.

Students should be asked to recall the general structure of the presentation of the objective analysis in the previous memorandum; i.e., the statement of the issue, the explanation/analysis, and the case illustrations. Then, the students should read the first paragraph of the sample advocacy memorandum⁶³ and discuss what the first sentence says and does. The students should see that this sentence states the argument; that is, it tells the reader what the writer wants, by integrating the law with this situation.

The court should dismiss plaintiff's complaint because Mr. Matthews' remarks, even if unpleasant or disturbing, were not outrageous in the extreme and therefore were not beyond the bounds of what is socially tolerable. See Hall v. Hathaway, 75 N.4th 162, 164 (Grimes 1982);

⁶² It is worthwhile to have students continue to work through the entire Facts section in Appendix I and compare it to the conversion to the Statement of the Case in Appendix II, noticing these and other drafting and construction techniques.

⁶³ See *infra* Appendix II and accompanying text.

Brewen v. Otter, 75 N.4th 42, 45 (Grimes 1982);
Patton v. Loomis, 80 N.3d 22, 23 (Grimes 1967).

Then, the students should examine the next two sentences and discover that these explain the basis for the party's argument — *why* the party is entitled to the relief requested in the first sentence. In other words, the author presents the analysis which supports the conclusion stated in the first sentence and, again, this is personalized to this controversy.

Such statements do not result in liability, especially as here, in the absence of the use of physical force which placed plaintiff in fear for her safety. See Walker v. Houseman, 85 N.4th, 8, 9 (Grimes 1991); Patton, 80 N.3d at 26. Comments such as those made by Mr. Matthews simply are part of the friction of everyday life which are to be tolerated. See id.

Finally, the class should discuss the last sentence of the paragraph and explore what it does and why. Students will see that the author continues the argument with the explanation which supports the result sought in this case, and that she does so in terms of the broader perspective of the policy limiting the scope of this tort.

Plaintiff is not entitled to relief merely for hurt feelings, because Mr. Matthews was only exercising his right to blow off relatively harmless steam. See id.

Students should continue to analyze the advocacy sample in the same manner as they analyzed the objective sample, moving to the next paragraph and identifying what it is and its purpose.

Mr. Matthews' few, isolated comments are similar to those made by the employer in Walker, who, in firing several employees, referred to them as "deadbeats" and "selfish scum." See 85 N.4th at 9. The court ruled that although such comments were regrettable and unwarranted, they were not sufficiently offensive to notions of social decency that they could be considered outrageous in the extreme. See id. Likewise, although Mr. Matthews, in his frustration, referred to the Franks and their yard in unflattering terms, and criticized Mr. Frank's statues, such remarks, as in Walker, are at worst regrettable, but not sufficiently offensive to result in liability. See id. Thus, the court should grant defendant's motion to dismiss here because, as in Walker, there can be no liability merely for insults which at worst are rude, but do not exceed the bounds of social toleration. See id.

This situation also is similar to that in Patton ...

Students should see that this case analogy is offered as additional support for the argument. They should dissect it to identify how the author precisely compares the *facts* of this situation to those in the analogous case; states the *outcome* in the analogous case and explains it using the *reasoning* described in the previous paragraph; and then *applies* that reasoning to argue for a similar outcome in this situation. The students should then compare this presentation of the analogy to the explanation of this

case in the objective memorandum and note the conversion to a persuasive argument. Now, the argument and facts of this situation are integrated with the case description, so that the case is presented as a persuasive tool rather than as an illustration.⁶⁴

Based on the careful reading of the advocacy memorandum sample, and working with the objective memorandum sample, students are now able to describe the general structure used to present the argument in the advocacy memorandum, similar to the analysis of the legal issue in the objective memorandum. The students should notice that in the advocacy memorandum the author set out to:

- State the conclusion/argument
- Explain that, with general analysis and then with more refined explanation - i.e., answer the question, “Why are you entitled to that relief?”
- Argue further, by using the facts of this situation and drawing complete analogies to the cases

Students will recognize the parallel nature of these structures:

Objective Presentation

- State the issue/requirement
- Explain it based on a synthesis of authority
- Use cases to illustrate that analysis

Advocacy Presentation

- Make the conclusion/argument

⁶⁴ See *infra* Appendix I and compare to that case description.

- Explain it, with general and then detailed analysis
- Argue further by using your facts to draw complete analogies

By working with samples, students will have identified *themselves* how these parallel structures result in effective objective explanation on the one hand, and persuasive advocacy presentation on the other, and experience *themselves* how to convert the objective presentation to an advocacy presentation. They now are equipped to prepare their own advocacy memorandum.⁶⁵ The students have objectively analyzed the law and have seen how the law may be argued and integrated with the facts of the client's case. The structure seems logical because it is derived from the objective analysis. Also, it belongs to the students. The students' individuality as writers can be merged with these principles to produce structured and, yet, personal memoranda which are clear, effective and reliable.

⁶⁵ The description of this process is based on my experience of using these samples during January of the year-long LRR&W course, when students are introduced to advocacy following a semester of objective analysis and writing. The assignment during that month requires students to convert a portion of the analysis from their last objective memorandum to a memorandum in support of or in opposition to a motion to dismiss, based on new hypothetical facts. Thereafter, in February, students are given a new advocacy problem in a new jurisdiction, and they write a memorandum in support of or in opposition to a motion for summary judgment. Students can apply to this major advocacy assignment what they have learned from their experience in January.

IV. CONCLUSION

Teaching first-year law students consistently challenges and enriches me. These students have taught me that to be a successful learner, a student should be actively engaged in the learning process. A student is able to comprehend the content of a legal document when it is structured effectively. Further, when a student reads and dissects sample documents, that student is able to identify and remember the techniques that made those documents successful. As a result, the student can apply those lessons to his or her own writing, because now the student understands.

APPENDIX I

Sample Objective Memorandum

[heading omitted]

Memorandum

Facts

Our client, Harry Matthews, is the defendant in a lawsuit filed on October 24, 2001, by his neighbor, Violet Frank. She claims damages for intentional infliction of emotional distress arising out of a series of encounters with Mr. Matthews in which he strongly and bluntly insisted that Ms. Frank clean up her front yard. Mr.

Matthews has been served with the summons and complaint. As part of our evaluation of the nature of the responsive pleading we should file, we need to determine whether Ms. Frank has satisfied the pleading requirements for one element of the common law tort of intentional infliction of emotional distress in *Grimes*, conduct which is outrageous in the extreme.

Mr. Matthews has lived in his home in Oak Ridge for twenty-two years, and he has meticulously cared for his house and landscaped yard. Ms. Frank and her husband moved next door to Mr. Matthews four years ago and immediately converted their property from one which was well-maintained to one strewn with eyesores, creating a neighborhood embarrassment and threatening property values.

Mr. Frank collects tin cans and uses them to make statues, and at any time, he keeps fifteen or twenty such structures on his small front lawn. He also reconstructs outboard motors for local boat owners, and these line the driveway which borders the Matthews' home. Finally, the Franks have planted an unruly flower and vegetable garden in front of their house, and this attracts numerous pests. Twelve-foot sunflowers obscure the Matthews' view of the mountains.

For the last three years, Mr. Matthews and other neighbors have urged the Franks to clean up their property and keep their hobbies in their back yard. The Franks have refused these requests. Mr. Frank underwent heart and lung surgery in mid-June, 2001, and he has been in a rehabilitation hospital since then.

The condition of the Franks' property has deteriorated even further since Mr. Frank has been hospitalized.

During the latter part of June and in July, Mr. Matthews encountered Ms. Frank on her property six times, and in each of these meetings, he demanded that she take some action. He referred to her property as a "junkyard," the statues as "useless pieces of garbage" and "hideous rusted trash," the garden as "a repulsive eyesore" and a "disgrace," and the Franks as "nuisances" and "jerks." During the third encounter, Ms. Frank yelled at Mr. Matthews to leave her alone, and she started to cry. In the fifth meeting on July 27 and during the sixth encounter, on July 28, Ms. Frank also cried, and both times, she ran back into her home. (Complaint ¶¶6-12)

There have been no further meetings between Ms. Frank and Mr. Matthews. Ms. Frank alleges that Mr. Matthews' behavior was "outrageous in the extreme, transgressing the bounds of what is socially tolerable, in that he directed remarks towards her which were gross, callous, cruel and hostile." (Complaint ¶5)

Discussion

[thesis paragraph omitted]

Recovery based on a claim of intentional infliction of emotional distress will only be provided if the plaintiff can establish that the actor's conduct was outrageous in the extreme, such that it was beyond the bounds of what is socially tolerable. See Hall v. Hathaway, 75 N.4th 162, 164 (Grimes 1982); Brewen

v. Otter, 75 N.4th 42, 45 (Grimes 1982); Patton v. Loomis 80 N.3d 22, 23 (Grimes 1967). Remarks which consist merely of obscenities, demands, threats or insults do not generally result in liability unless accompanied by physical force which places plaintiff in fear for her safety. See Walker v. Houseman, 85 N.4th 8, 9 (Grimes 1991); Patton 80 N.3d at 26. Such statements alone, although unpleasant and disturbing, are considered part of the friction of everyday life and the kind of annoyances which are to be tolerated. See id. Recovery is not provided every time someone's feelings are hurt because there must be a safety valve through which irascible tempers may blow off relatively harmless steam. See id.

In Walker, the court held that there could be no liability for insults made to employees being fired, because although the conduct was harsh and insulting, it was merely rude, boorish, churlish and mean, but did not exceed the bounds of social toleration. See 85 N.4th at 9. The employer referred to the employees as "deadbeats" and "selfish scum," and the court ruled that although such comments were regrettable and unwarranted, they were not sufficiently offensive to notions of social decency that they could be considered outrageous in the extreme. See id. Likewise, in Patton,

[rest of analysis with case illustrations, as well as prediction and conclusion, omitted]

APPENDIX II**Sample Advocacy Memorandum**

[caption omitted]

Defendant's Memorandum in Support of Motion to Dismiss**Statement of the Case**

Harry Matthews, who is seventy-six years old, moved to his home in Oak Ridge twenty-two years ago. He has devoted himself to meticulously caring for his house and yard, to maintain his beautifully landscaped grounds. Unfortunately, he was deprived of the enjoyment of his property four years ago when Violet Frank and her husband moved into the house next door. The Franks immediately began to destroy the tranquility and beauty of the neighborhood. They have turned the grounds of their home into a junkyard, lining the driveway between their house and Mr. Matthews' home with rusted, broken outboard motors; strewing their front lawn with upwards of twenty unsightly structures made from abandoned tin cans; keeping an unruly and decaying garden in front of the house which attracts bugs and pests; and growing twelve-foot tall sunflowers which have obliterated Mr. Matthews' view of the mountains. The Franks

have converted their property from one which was well-kept to a neighborhood embarrassment which threatens property values.

As soon as Mr. Matthews and other neighbors recognized that the Franks were creating an eyesore, they asked them to start maintaining their property in conformity with the surrounding homes and grounds. The Franks resolutely refused to do anything, and the property has become increasingly repulsive. In mid-June, 2001, Mr. Frank was hospitalized and then moved to a rehabilitation facility, and since then, the property has deteriorated even further, becoming more overgrown, littered and unsightly.

Over the summer, Mr. Matthews again tried to encourage Mrs. Frank to take some reasonable steps to clean up her property, so that his enjoyment of his home could be restored. He happened to see her on her property six times over the course of about eight weeks, in the months of June and July, and briefly engaged her in conversation to again urge her to begin meaningful maintenance of her grounds. In his frustration at her steadfast refusal to do anything, his remarks in these various conversations included some unfortunate references, scattered throughout this time. He referred to her property as a "junkyard," the structures as "useless pieces of garbage" and "hideous rusted trash," the garden as "a repulsive eyesore" and a "disgrace," and the Franks as "nuisances" and "jerks." In their third brief conversation, Mrs. Frank yelled loudly at Mr. Matthews, demanding that he leave her alone, and she began to cry. In their last two short conversations, at the end of July, Mrs. Frank also began to cry and went back into her house.

Mr. Matthews decided not to try to reason with Mrs. Frank after that last brief conversation and he has had no contact with her since that time. Mrs. Frank took no action whatsoever to clean up the hideous conditions in her yard, and instead initiated this action against Mr. Matthews, claiming intentional infliction of emotional distress. Mr. Matthews has filed a motion to dismiss this action and now files this memorandum in support thereof.

Argument

[point heading omitted]

[thesis paragraph omitted]

The court should dismiss plaintiff's complaint because Mr. Matthews' remarks, even if unpleasant or disturbing, were not outrageous in the extreme and therefore were not beyond the bounds of what is socially tolerable. See Hall v. Hathaway, 75 N.4th 162, 164 (Grimes 1982); Brewen v. Otter, 75 N.4th 42, 45 (Grimes 1982); Patton v. Loomis, 80 N.3d 22, 23 (Grimes 1967). Such statements do not result in liability, especially as here, in the absence of the use of physical force which placed plaintiff in fear for her safety. See Walker v. Houseman, 85 N.4th, 8, 9 (Grimes 1991); Patton, 80 N.3d at 26. Comments such as those made by Mr. Matthews simply are part of the friction of everyday life which are to be tolerated. See id. Plaintiff is not entitled to relief merely for hurt feelings, because Mr. Matthews was only exercising his right to blow off relatively harmless steam. See id.

Mr. Matthews' few, isolated comments are similar to those made by the employer in Walker, who, in firing several employees, referred to them as "deadbeats" and "selfish scum." See 85 N.4th at 9. The court ruled that although such comments were regrettable and unwarranted, they were not sufficiently offensive to notions of social decency that they could be considered outrageous in the extreme. See id. Likewise, although Mr. Matthews, in his frustration, referred to the Franks and their yard in unflattering terms, and criticized Mr. Frank's statues, such remarks, as in Walker, are at worst regrettable, but not sufficiently offensive to result in liability. See id. Thus, the court should grant defendant's motion to dismiss here because, as in Walker, there can be no liability merely for insults which at worst are rude, but do not exceed the bounds of social toleration. See id.

This situation also is similar to that in Patton

[additional case analogies, conclusion and signature block omitted]