LegalWriting institute

THE SECOND DRAFT

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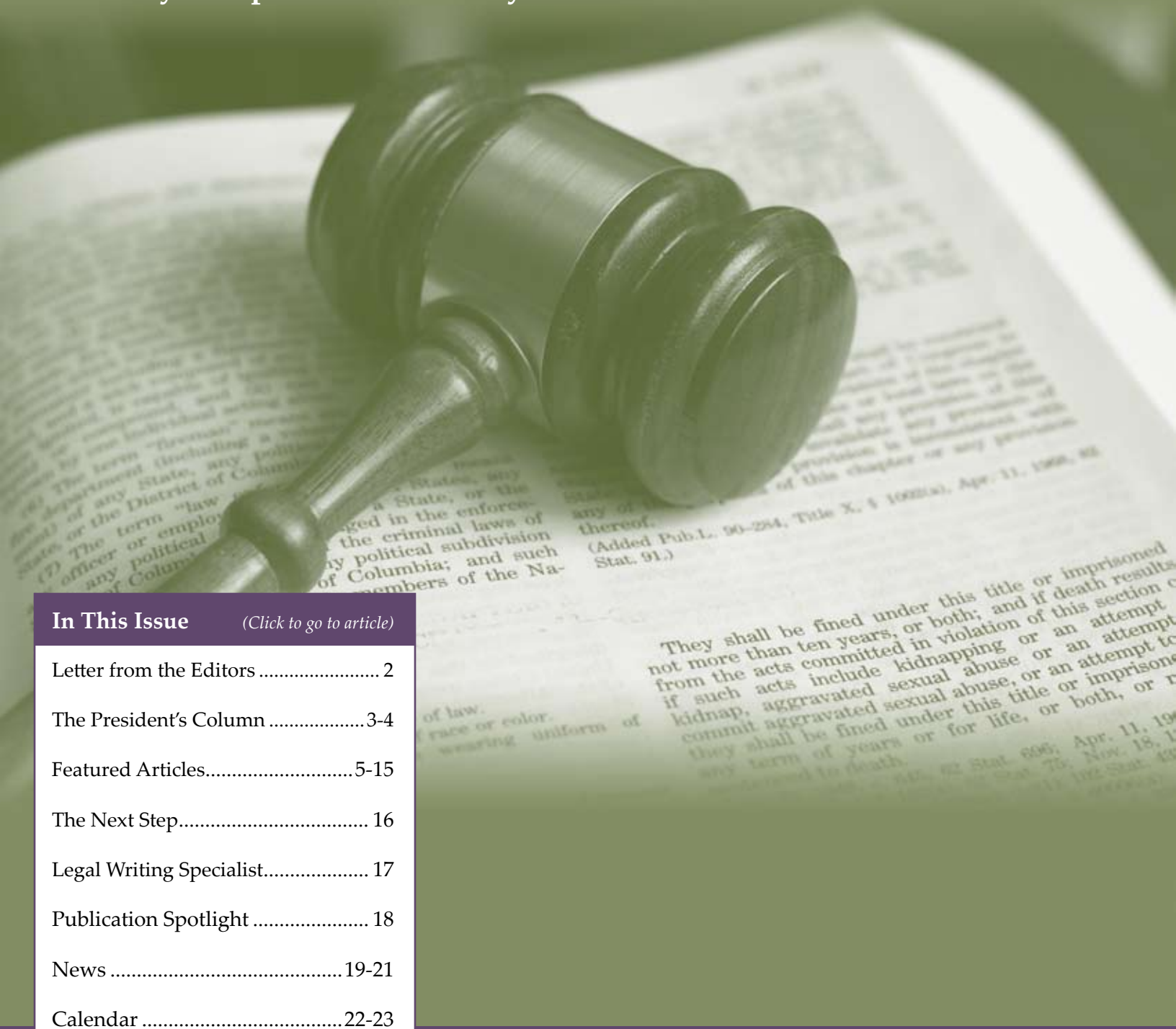
Teaching Statutory Analysis

The articles in this issue discuss techniques to teach statutory interpretation and analysis.



In This Issue *(Click to go to article)*

Call for Submissions

THE SECOND DRAFT

Spring 2009

"Teaching Through Technology"

Submissions are due by Monday, October 6th to seconddraft@suffolk.edu

Please go to **www.lwionline.org** for details

Letter from the Editors

Although it seems that grades were only turned in yesterday, the fall semester is upon us and another exciting year of teaching has begun.

In the spirit of making a new start, we are pleased to introduce the first fully-electronic volume of *The Second Draft*. We are very excited about making the switch to on-line publication, because it allows us to update our format, include more articles, and provide links to a variety of resources through LWI and other sources. Although we are no longer mailing out paper copies, we hope that everyone will continue to read and look to *The Second Draft* on-line for great teaching ideas and information about our profession. We'd love to hear any feedback that you might have regarding the new format and how you like it.

In this volume, we present you with a variety of interesting and useful articles on Teaching Statutory Interpretation. We were happy to receive so many submissions providing specific exercises and concrete examples of techniques that have–and in one case, have not–worked to help teach students to work with and apply statutes in their legal writing and analysis.

In the next volume, we will focus on Teaching Through Technology–we would like to hear about what new (or old) technologies you have been using to enhance your teaching, as well as particular websites or other technological resources that you have found useful yourself or that you have passed along to your students. Please go to **www.lwionline.org** for details regarding submission formats and deadlines.

We wish everyone a successful fall semester!

Kathleen Elliott Vinson

Stephanie Hartung

Samantha Moppett

Julie Baker

SUFFOLK UNIVERSITY LAW SCHOOL

The President's Column

Ruth Anne Robbins,
Rutgers University School of Law—Camden

Dear LWI Members:

This is the forum in which I am supposed to provide you with LWI updates and with some sort of inspirational thoughts about legal writing. As I write this column—two weeks out from the conference and a few days after the letters to the ABA and to AALS—I am still a little numb. So I am not sure I can accomplish either of my appointed tasks without either boring you to death or sounding dreadfully pompous. But here goes a valiant effort.

Let me start by paraphrasing what I said at the opening session of the 2008 conference—"I love legal writing." I truly believe that we have the best jobs in all of law because of the substance of the lawyering skills that we teach, because of the students we are privileged to teach, and because of this wonderful community in which we share our ideas, insights, and stories. I am part of other legal organizations, but they are nothing like what we have in LWI.

Our recent biennial conference demonstrated that simple fact many times during its three days. The 2008 conference, "Racing Towards Excellence," was the largest yet and offered many different choices for people. The last count was 616 attendees, with people coming from 13 different countries. We had 179 presenters speaking in 95 presentations. The facilities were perfect, as was the food and the atmosphere. Thank you again to everyone at Indiana University—Indianapolis and to everyone on the many conference committees for their superhero efforts putting this conference together, and for making sure posters were created, moved, and stayed hung; committee fairs happened; need-based scholarships were funded; ideas were banked; and cold water bottles were plentiful. Thank you for working technology, for beautiful locations, for well-organized uses of space, and for some of the best conference food I have ever eaten. Thank you, Cliff Zimmerman, for guiding me towards the incomparable Mel Weresh and her limitless talents as conference co-chair. And thank you again to the program committee for their balanced choices. As one person wrote in their evaluation, "you know that it was a great conference because during the sessions there was almost no one sitting out in the common areas." I can personally attest to that fact because I looked for it. The hallways were a veritable ghost town.

We introduced several innovations for the 2008 conference: poster presentations, "popcorn" (evening) sessions complete with popcorn, committee posters, and the committee fair. Based on previous conference evaluations we also included longer changeover times between sessions, later starts and earlier ends to most days, and shorter session durations. We also started a tradition of honoring the scholarship grant recipients from the past biennium as part of a short awards ceremony. The most visibly obvious innovation on display at the conference was our new logo, website, and color scheme (doesn't *The Second Draft* look snazzy?). It's not that we don't love teal. It has its place in history. It's just that we are signaling to you and to the world that LWI is serious about racing towards excellence.

Hopefully you enjoyed those new aspects to the conference. But the stars of any LWI conference are of course the presenters and the knowledge that they share with us. I am sure that as you read this column you will be able to point to at least one teaching or scholarship idea from an LWI member that you have incorporated into your own classes. As a community, we are a model of sharing for other academic groups.

And that brings me to the vision of LWI over the next several years. We are about to begin the 25th anniversary celebrations. Our celebration team, headed by Mark Wojcik, will make sure we see a lot of silver during the next year or so. It seems to be an appropriate time for some long-term reflection and long-term planning for the future of LWI and its role in the legal education and lawyering worlds. The LWI Board of Directors (**www.lwionline.org/board_of_directors.html**) is keenly aware that we at a "tipping point" to use a popular phrase, and we were working the week after the conference to make sure our members were represented in both the ABA security of position discussions and in the AALS decisions regarding the choices of hotels for

The President's Column

the January 2009 conference. If you aren't sure what I am talking about when I use those other acronyms, then I urge you to spend some time checking out our website, our listserv, and the legal writing professor blog (go to **www.lwionline.org**).

My hope is that each of you will be proud of our collective accomplishments. And I hope that you will raise your voices and share with others the accomplishments that we have made as a group. Consider letting a few of your colleagues know, "I am a proud member of LWI—helping teach our future lawyers how to be lawyers."

Thanks to David Austin for these great pictures from the LWI conference!

Colleen Barger and Mark Wojcik

Kristen Gerdy, Kirsten Davis, Terrill Pollman, Judith Stinson, and Mary Garvey Algero

Ruth Anne Robbins and Mel Weresh, conference co-chairs

LWI Board

Kathy Vinson, Stephanie Hartung, and Samantha Moppett

Featured Articles

Charting the Statutory Seas Without a CREAC Lifeboat

Meredith Bowers and Amy Griffin,
Notre Dame Law School

Teaching statutory interpretation and analysis is straightforward, right? We constantly remind the students that they must first "look to the text of the statute," then turn to the cases to see how courts have interpreted that text. Students learn to synthesize a rule by combining the statute and the case law. We are mindful of weight of authority issues and make sure to update our research lest a legislative amendment slip through without our knowledge. Simple formula, or so we thought … .

In the spring of 2008, we found ourselves faced with a new teaching challenge—how to teach statutory interpretation and analysis to first-year students with only a handful of relevant cases, none of them binding. Part of our spring moot court problem was based on a disagreement over the interpretation of the statutory term "electronic storage" in the Stored Communications Act. The lack of case law, and the absence of any significant factual issues, made the traditional CREAC paradigm extremely unhelpful to our struggling first years.

> ***One simple change that helped our students was a broader, more flexible paradigm.***

The text we had used in the fall, *Legal Writing and Analysis* by Linda Edwards, did offer a helpful description of the tools of statutory interpretation, including: (1) the text itself; (2) the intent of the legislature; (3) policies implicated by the various interpretations; and (4) the opinions of other courts and of respected commentators.[1] The text also provided some examples of statutory canons of construction. We supplemented this with a Congressional Research Service report titled *Statutory Interpretation: General Principles and Recent Trends* (last updated March 30, 2006).[2] But we still needed a basic structural format first-year students could follow. How could we reconcile what they had learned about CREAC with the building blocks of statutory interpretation? In short, we had provided the tools, but not the blueprint.

One simple change that helped our students was a broader, more flexible paradigm. Once we acknowledged that traditional CREAC would not lend itself to the assignment, we investigated alternatives. After consulting several legal writing texts, we found guidance in the organizational scheme for issues of first impression provided by Laurel Currie Oates and Anne Enquist in *The Legal Writing Handbook*.[3] We modified their organization, combining it with the standard elements of statutory interpretation for the purposes of our assignment:

- Assertion setting out proposed interpretation
- Arguments relating to why the court should adopt your proposed interpretation, rather than the interpretation proposed by your opponent.
  - Text of the statute
  - Legislative history
  - Historical context
  - Policy
  - Persuasive precedent
  - Respected authorities
- Conclusion

Though this may not seem like much of a paradigm, even this minimalist structure was enough to alleviate the students' anxieties. Right away, students recognized the first and last part of the new paradigm as the equivalent of the first and last "C" conclusions of CREAC. The "R" was equally recognizable; they had already used the text of a statute as the rule in the fall semester. In the "E" explanation section, students used the few cases on point to support their interpretation. However, they also learned to use standard statutory interpretation tools to further "explain" the rule. They attempted to "synthesize" their support for a proposed interpretation using the text of the statute, canons of construction, legislative history, historical context, policy, and the opinions of experts. Though this was not the same "synthesis" that they had learned in the fall, it was based on the same basic principle–putting pieces of a puzzle together to present a unified explanation of the rule (in this case, the statute). Since the issue was one

of law, students only needed to apply their proposed interpretation to the moot court client and then segue to their conclusion. By the end of our class discussion, brows began to un-furrow as students fit what they already knew about the CREAC structure into the new paradigm.

> ***By the end of the semester, many of our students were surprisingly successful at translating CREAC into a more flexible paradigm.***

This difficult moot court problem with its altered paradigm still gave us an opportunity to emphasize the basic skills of persuasive writing. We focused the students on persuasive techniques, including starting with their strongest argument, effectively dismantling counter-arguments, and using language effectively. By the end of the semester, many of our students were surprisingly successful at translating CREAC into a more flexible paradigm. Our temporary departure from CREAC reaffirmed our belief that novice legal writers really do need a basic framework, whatever the acronym and paradigm may be, that responds to the goal of the specific legal problem at issue.

1 Linda H. Edwards, *Legal Writing and Analysis* 51-52 (2d ed. Aspen 2007).

2 We later found the CRS report helpfully posted on a statutory construction blog: http://www.lawprofessors.typepad.com/statutory.

3 Oates and Enquist suggest this structure:

- Introduction establishing that the issue is one of first impression.
- Assertion setting out proposed rule.
- Arguments relating to why the court should adopt your proposed rule rather than the rule being proposed by your opponent.
- Application of your proposed rule to the facts of your case.
- If appropriate, alternative argument asserting that even under the rule being proposed by your opponent you win.

Laurel Currie Oates and Anne Enquist, *The Legal Writing Handbook* 483 (4th ed. 2006).

The Edwards text proposes a similar outline when it is uncertain which rule your jurisdiction will adopt:

A. If the court adopts rule A, what will be the result?
B. If the court adopts rule B, what will be the result?
C. Which rule is the court most likely to adopt?

Edwards, *Legal Writing and Analysis* at 86.

Using a "Mini-Memo" Assignment to Teach Sizeable Concepts

Jamie Rene Abrams,
American University, Washington College of Law

Teaching statutory interpretation and analysis is a skill that students learn best through application. A "mini-memo" assignment is an application tool that has worked well in conjunction with the closed memo at the American University, Washington College of Law. We introduce the closed memo by setting out the client's issue, distributing the relevant statute to students, and teaching basic statutory interpretation and legal analysis. We hold off, however, on circulating the case law or secondary authority that will later complete the closed memo universe. Instead, we begin the writing of the closed memo with a threshold writing assignment called the "mini-memo."

In this assignment, students work through a written analysis of each element of the statute as a stand-alone source and apply it to the client's problem. The process–by design–is somewhat of a challenge for students, but it serves important pedagogical purposes. It is helpful to emphasize at the outset to students that the goal of the assignment is not necessarily to reach their ultimate conclusion–that will come later. Rather, students learn at least three valuable skills from drafting a "mini-memo":

- Students learn that the statute alone is rarely sufficient to answer the client's question without looking to interpretative authority. They have already read in their textbook and learned in class that various canons of construction are relevant to statutory review and that there may be interpretative legal authority to fill in the gaps of the statute. They now see how these principles work first-hand.
- They learn that a thorough grasp of the statute's structure likewise helps inform the structure of their writing. They accordingly begin to see how to structure the macro organization of their writing.
- They learn basic principles of legal analysis before the cases fold in more advanced layers to their writing, such as rule synthesis and hierarchy of authority. They

also apply the written analytical structure (CREAC or similar) to see the delineations in each section of the structure.

Students then bring the assignment to class the following week. It is ungraded, but it is required and it counts toward their "other assignment" grade. Working with the "mini-memo" in class is a critical part of the exercise. Through class discussions, faculty can tease out some of the following points to reinforce the assignment goals:

- In what ways did students struggle with the exercise? What would they do next in response to those struggles?
- How is the statute structured and how did that impact their selection of writing strategies? Which elements are undisputed and which are in dispute?
- What forms of reasoning are students applying in analyzing the statute?
- How would students go about looking for interpretative authority to fill in the gaps of the statute? What authority would be the most persuasive? What search terms would they use?
- What other facts became relevant to the legal analysis after reviewing the statute that perhaps they did not cover with the client?

After working through these questions in a class discussion, students have learned through experience and application many of the core principles of statutory interpretation and analysis. They have learned these principles in a manner that interconnects tightly to effective writing strategies and they have done so without extensive initial drafting. This allows students and faculty both to flag issues with legal analysis or writing structure early on.

After completing the "mini-memo," students receive the case authority and secondary sources that complete the closed memo universe. The next phase in their writing is to layer in these additional authorities and complete a full draft of their office memorandum. Having already worked through many threshold issues of the CREAC structure and statutory analysis, students are able to focus well on the next challenges.

At the American University, Washington College of Law we have had much success with this initial "mini-memo" writing assignment to teach students to apply basic principles of statutory interpretation and analysis.

Using Legislative Intent as Reasoning in Legal Analysis

Stephanie Roberts Hartung,
Suffolk University Law School

Teaching first-year law students to incorporate reasoning into a legal analysis can be a challenge. With some instruction and practice, students can generally grasp the basics of how to use analogical reasoning in their analysis, specifically how to compare critical precedent facts and client facts in order to predict or advocate for a particular outcome. Incorporating the courts' reasoning into this type of analysis, however, proves to be a more elusive skill.[1] Even well into the spring semester, students frequently struggle to apply reasoning effectively. Often the inability to incorporate reasoning into an analysis stems from the students' failure to find an express statement of the court's reasoning in an opinion. Novice legal writers are understandably hesitant to infer the court's reasoning where it is not expressly stated. One way to help students build confidence in this aspect of their analytical skills is to use a fall memo fact pattern involving statutory interpretation in which the courts' reasoning (both express and implied) aligns with the legislative intent behind the statute. This type of assignment helps the students to see legislative intent as a part of the courts' reasoning and, therefore, as a more tangible idea to be applied to their client's facts.

While many fact patterns could achieve this goal, I have had success with a problem I created, in which students are asked to analyze whether pushing an inoperable car while intoxicated amounts to driving under the influence ("DUI") under the California Penal Code. Because the facts are unorthodox and no case law addresses a directly analogous set of facts, the students are forced to think both analytically and creatively. While they must begin their analysis with a direct fact-to-fact comparison with precedent cases, this method will only take their analysis so far. For example, in one part of the analysis, where the courts look at whether the defendant "operated the mechanism and controlled the course of the vehicle"[2] for purposes of driving, the students must begin by comparing the physical way in which the car

was controlled in the client's case and in the precedent cases. A student might point out, for example, that standing outside an open door while pushing a small car with one hand on the steering wheel is similar to a precedent case, where the intoxicated defendant sat in the passenger seat and controlled the steering wheel while another individual controlled the gas and brakes.[3] However, without a discussion of the implied reasoning of the court, the comparison is hollow, as the potential factual similarity is extremely broad.

> ***Often the inability to incorporate reasoning into an analysis stems from the students' failure to find an express statement of the court's reasoning in an opinion. Novice legal writers are understandably hesitant to infer the court's reasoning where it is not expressly stated.***

To develop a complete and effective analysis, the students must take the next step and discuss how the court's reasoning applies here. Some of the relevant case law discusses the legislative intent behind the DUI statute, specifically, that the law was enacted to "reduce the life threatening hazards caused by such drivers."[4] This general public safety purpose behind the DUI laws is stated expressly in some of the opinions, and alluded to more implicitly in others. Incorporating this idea into the analysis becomes more manageable, however, once the students recognize this universal reasoning that seems to motivate the California courts in their interpretation of the DUI statute. Thus, a well-developed analysis will take the next step beyond the fact-to-fact comparison in order to explain why pushing a car with one hand on the steering wheel is fundamentally similar to, or distinct from, sitting in the passenger seat and steering a car while another person controls the gas and brakes. To support a position in favor of either conclusion, the students must discuss whether and to what degree the defendant's conduct was inherently dangerous.

For example, a memo concluding that pushing the car does amount to driving would have to incorporate the court's reasoning to point out that pushing and steering an inoperable car, although traveling at a much slower speed, nonetheless poses a significant threat to public safety because of the potential risk that the defendant could lose control of the car. This point can be supported by the idea that the defendant lacked control of the brakes and therefore would be unable to stop the car in a timely manner if necessary. On the other hand, a memo concluding that pushing a car does not amount to driving would have to use the legislative intent to support just the opposite conclusion. Specifically, this memo would have to develop the idea that pushing an inoperable car with one hand on the steering wheel does not pose nearly the public safety hazard created by an intoxicated person steering a fully operational car at full speed while another person is in the driver's seat operating the remainder of the controls. This memo would conclude that the client's conduct falls outside the spirit of the law, as her actions did not pose a meaningful threat to public safety.

This assignment provides an effective context in which students can develop a more meaningful analysis based on reasoning. By using a fact pattern which is not directly analogous to any of the existing case law, students are put in a position where they must look to the legislative intent as the courts' reasoning in order to support their conclusions.

1 *See generally* David Romantz & Kathleen Elliott Vinson, *Legal Analysis: The Fundamental Skill* (Carolina Academic Press 1998).

2 *People v. Wilson*, 222 Cal. Rptr. 540, 543 (Super. App. Dep't 1985).

3 *In re Queen T.*, 17 Cal. Rptr. 2d 922, 922 (Ct. App. 4th Dist. 1993).

4 *Henslee v. Dep't Motor Vehicles*, 214 Cal. Rptr. 249, 253 (Ct. App. 6th Dist. 1985).

Featured Articles

Using a Class Exercise to Teach the Importance of Statutory Language in Case-Law Driven Problems

Ken Swift,
Hamline University School of Law

One concept of teaching statutory analysis which I struggled with in the past was making sure that students understood the importance of the connection between the statutory language itself and the application of that language to the facts of the case. With my students, I refer to the application of statutory language directly to the facts of a case, without the guidance of additional case law, as being "pure" statutory analysis. The problem, of course, is that most major (graded) legal writing problems are designed to also include case-law interpretation of the statute and its key terms. When this happens, the statutory language, and analysis thereof, oftentimes becomes subsumed within the case-law analysis and the students treat the statutory language as they would rules from case law or other sources.

As I explain to my students, "pure" statutory analysis is important for them to undertake and understand, for a couple of reasons. First, as a practical matter, there are likely to be times in their careers where they will have to apply statutory language directly to the facts of their case in an argument before a court. Beyond statutory schemes that are either new or seldom defined by appellate courts, some common procedural and evidentiary rules are rarely appealed. In addition, it is important for students to realize that, even when a statute is being defined by a case, the precise statutory language, and the legislative history and intent behind that language, plays an important role in a court's application of the statute to the facts of the case.

I have attempted to teach this skill within the context of legal writing problems in a couple of different ways; neither produced fully satisfactory results. On one occasion I selected a "statute" (in that case a component of the Best Evidence Rule from the Minnesota rules of evidence) that had very little applicable case law, so that students were forced to apply the language directly to the fact pattern. There were some committee comments available so that they could interpret the legislative intent behind the rule. I have also tried having a component of an assignment that is statute based and simply precluding students from researching or using case law.

While the exercises had their basic desired effect– students were required to apply statutory language directly to the facts of the case–students were uncomfortable with the analysis structure, as they were left to provide the intellectual application without the comfort of case law analysis to guide and assure them. While this, in and of itself, is not a reason to forego such assignments, the reality is that these assignments did not meet one of the primary teaching goals: for students to understand the importance of statutory language even in situations where significant case-law analysis of a statute is available.

Because of the importance of understanding this concept, I now regularly set aside one to two hours for an elaborate statute based moot court in-class exercise. I divide the students out into teams of two or three and assign each a role as an attorney for the plaintiff, attorney for the defendant, or judge. The problem consists of a statutory scheme, usually several sections, and a fairly lengthy fact pattern. The teams are each given significant time, perhaps twenty to thirty minutes, to identify the key statutory scheme terms and prepare an argument as to how those terms should apply to the facts of the case. We then break off into multiple moot court arguments.

Once we reconvene as a class we discuss the key terms and hear from the different judges as to how those key terms were applied by the attorneys arguing the case. I then bring up a case interpreting a component of the statute so that the students can understand how, even with a case (or multiple cases) interpreting the statute, the direct application of the statutory facts, along with the legislative reasoning underlying the statute, plays a very important role in a court's application of case law interpreting the statute.

I have found that this exercise has translated into a greater awareness of the importance of statutory language and legislative intent in my students' analysis, even when the problem is heavily case-law based.

Featured Articles

Using the ADA to Teach the Interaction of Statutes

Stephen E. Smith,
Santa Clara University School of Law

For most students, reading a statute is easier than reading a case. Unlike a case, a statute is all rule, with no factual component or dicta to distract. It may need interpreting, but it still constitutes, in itself, some sort of "answer." Students are frequently puzzled, however, by cross-references and other interactions between statutes. It takes time for them to become comfortable with deriving rules from multiple interacting laws. Familiarizing students with the ways in which a set of statutes must be read–incorporating or excluding one another–is an important part of understanding the law.

When I teach statutory interaction, I find the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq*.) helpful. It has elements that reach to other statutes for definition and explanation, and it shows how parts of an act may be independent of other parts. In particular, the Act's retaliation provision, § 12203, provides many opportunities to demonstrate statutory interaction.

Section 12203(c) incorporates the procedural requirements of other sections of the Act. It contains only a few words about procedure–"[t]he remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available." The sections it refers to, in turn, incorporate the procedures established under another law entirely–42 U.S.C. § 2000e. These brief references lead to a world of descriptive detail about the pertinent procedures. This teaches students that a statute operates not only in its immediate context–the sections before and after, or a definitions section–but may include materials well beyond the volumes in their hands.

The retaliation section also illustrates how a statute may have to be read independently of nearby sections. Subsection 12203(a) provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter." Students understand that particular words within statutes are often defined and, when working with the Act, they inevitably discover § 12111(8), defining a "qualified individual with a disability." This portion of the Act is a key provision in many ADA cases; whether a plaintiff is entitled to many of the Act's benefits often turns on status as a "qualified individual with a disability."

Once students have found this section, they frequently import it into the Act's retaliation provision. Section 12203 uses the word "individual," and the Act defines "qualified individual with a disability," so the "individual" alleging retaliation must, in the first instance, be a "qualified individual with a disability," right? The answer, of course, is no. The retaliation analysis follows an entirely different track.

> ***Familiarizing students with the ways in which a set of statutes must be read–incorporating or excluding one another–is an important part of understanding the law.***

This discovery demonstrates three things. First, it illustrates to students the importance of paying close attention to statutory language. On their faces, the word "individual" and the phrase "qualified individual with a disability" are different things. They share a word, but legal analysis requires closer attention to possible differences. Second, it shows that an act's definition section may have very specific applications. Third, and perhaps separately, it demonstrates the importance of case law to the reading of statutes, which cannot be read in a vacuum. There is a significant body of law holding that an "individual" under section 12203 need not be the "qualified individual" described in § 12111(8).

Walking students through § 12203 is a useful way to illustrate how statutes interact with others, both on nearby pages, and in faraway volumes. It gives the students a chance to dig into a complex act, and consider a variety of interpretive components. Ultimately, however, what is important is not what statute is used, but that these sorts of positive and negative statutory interactions are explored, and that students learn that statutory analysis may involve careful choice of related material, or exclusion of unrelated.

Keeping It Real: Teaching Statutory Construction

Sue Liemer,
Southern Illinois University School of Law

Cognitive learning theory,[1] composition theory,[2] and years of teaching experience all suggest that legal writing students learn best when they can relate to the subject matter of the law underlying their assignments, when it seems real to them. Introducing statutory construction in class, it is easy to find statutes to examine that will entertain the students long enough to hold their attention. But if you want them to integrate statutory construction skills more quickly and solidly into their quiver of nascent legal skills, try choosing instead statutes directly relevant to their lives.

To find examples relevant to your students' lives, consider the typical lifestyle for students in your law school. For example, if your school is in a college town known for its undergraduate party life, even if only a fraction of your students have lived that party life, all of them have to put up with its impact on your town. Your state's public drunkenness law could be a great statute to use as an example for class discussion, because many students will be able to recall relevant behavior they have witnessed firsthand. (As an added benefit, you will be able to introduce first-year students to the fact that in three short years your dean will be signing a character and fitness letter for the state bar examiners.)

> ***My students "own" the material and integrate the statutory construction skills quickly, because the context is so very familiar to them.***

Another topic of state statutes highly relevant to many law students' lives is rental housing. Whether your school is in an urban or rural setting, most of your students will have had the experience of renting a place to live. Many of them will have recently signed a lease with a local landlord or university housing department. And chances are none of them researched your state law on security deposits first. Ask your students what "normal wear and tear" means in this context, and they will see they already have many of the tools of statutory construction at the ready. Your job then becomes making them aware of the tools they are using—pointing out where they are construing narrowly or broadly, for example—so they can do the same in a less familiar context in the future.

Finally, when looking for relevant examples of statutes for your class discussion of statutory construction, consider municipal ordinances. These laws tend to deal with the more mundane aspects of everyday life, with which almost all students are personally directly familiar. As an added bonus, the municipal legislative body may be even less adept at drafting than the state legislative body, providing a wealth of teachable moments. In my class a perennial favorite is our town's anti-loitering law.[3] This ordinance is rife with doubly dependent clauses and filled with lists and phrases joined by "ands" and "ors." When challenged to imagine behavior that violates the ordinance, it gradually dawns on my students that most of them have quite innocuously behaved in ways that technically violate this law. (Even the high school band selling trees in a parking lot has technically violated this law.) My students "own" the material and integrate the statutory construction skills quickly, because the context is so very familiar to them.

Statutory construction can become a dry and unnecessarily difficult topic if you use examples outside most first-year students' personal experience. As with most of what we teach in legal writing class, with statutory construction too, try to use your choice of underlying subject matter to keep it real and keep it relevant.

1 *See* Susan E. Thrower, *Teaching Legal Writing through Subject-Matter Specialties: A Reconception of Writing across the Curriculum*, 13 J. Legal Writing 3, 18-21 (2007) (concisely reviewing learning theories relevant to teaching Legal Research and Writing).

2 *Id.* at 23-24 (concisely reviewing composition theories relevant to teaching Legal Research and Writing).

3 Carbondale, IL, City Code § 17-1-4.

Featured Articles

Using Ethics Codes to Reinforce Lessons of Statutory Interpretation

Ted Becker,
University of Michigan Law School

To increase my students' exposure to statutory interpretation, I assign them early in the second semester to argue a motion to disqualify counsel based on imputed disqualification under Michigan's ethics rules.[1] Interpreting ethics rules involves many of the same "pure" statutory interpretation techniques I introduced the previous semester, and the students appear to easily make any needed translations. This exercise also helps prepare students to interpret other quasi-legislative authorities like court or evidentiary rules, administrative codes, and municipal ordinances.[2]

The assignment hinges on whether a firm timely screened a new associate to ensure that she did not reveal confidential client information obtained during a summer clerkship at a different employer in a matter in which her new firm represents an adverse party. Michigan explicitly allows screens of attorneys moving from firm to firm if certain conditions are met.[3]

We begin by walking through the language of the rule phrase by phrase to determine whether the firm is presumptively disqualified. Students must think about what it means to "become associated" with a firm and about the definition of a "substantially related matter." The language forces them to follow a cascade of cross-references to other provisions to devise some tentative solutions.

Students must then formulate arguments about the timing question. To help them along, I raise a common interpretative issue: Did the drafters intend a bright-line rule that parties can easily follow, or a more open-ended but less predictable approach? I also emphasize that even a supposedly clear bright-line test might not be all that "bright" when applied to a particular set of facts.

Next, we identify whether either side can viably argue that such a bright-line test exists:

- Michigan does not explicitly provide that a screen must be imposed within a set time (such as one day or one week) after a new attorney joins a firm or any other specific triggering event. Michigan does not even include a vague reference that screens must be "timely." Is there a "plain meaning" of the absence of any specific timing requirement?
- The rules also provide that after a screen is implemented, the firm must "promptly" notify an appropriate tribunal. This suggests that the drafters knew how to impose a timing requirement when the mood struck them, so doesn't the lack of any similar requirement for the screen itself further suggest that no such requirement exists?
- Or does the interpretative argument run the other way? The preface to the screening requirement is phrased in the present tense (the firm "is disqualified . . . unless"); so does this suggest that the screen must be imposed immediately upon the firm's discovery that the new associate is "infected" by her awareness of her ex-employer's client's confidential information?

This exercise also helps prepare students to interpret other quasi-legislative authorities like court or evidentiary rules, administrative codes, and municipal ordinances.

Any ethics-based problem will give rise to some general interpretative issues. Most state ethics codes are based on the ABA's Model Rules in a way analogous to statutory schemes based on uniform acts. When a state modifies or declines to adopt some provisions of a model code, how does that affect the interpretation of the law as actually enacted? For example, the Model Rules include an explanatory comment about whether imputed disqualification applies when the bearer of confidential information acquired that information while a law student. Michigan's rules say nothing about this. The Model Rules specifically define "screened." Michigan does not. What interpretations, if any, flow from these differences?

Featured Articles

From there, we turn to other interpretative questions: If the fact-finder has discretion to assess timing issues case by case, what factors should be considered? Do the rules themselves identify any such considerations, either on their face or by reasonable inference? Should students look to other timing requirements in the ethics rules to make arguments by analogy? What about cases, ethics opinions, or secondary sources? And, finally, how do these factors apply to the specific facts of the assignment?

As another general issue, the explanatory comments raise interesting questions of "legislative history," because they are designed to "explain[] and illustrate[] the meaning and purpose" of the rules. Yet the comments are only guides to meaning, and the text of the rules themselves is authoritative. How can students use these comments to help support their interpretation of a given rule?

One such way is for the students to shore up their policy arguments. Should a court err on the side of disqualification if there's any doubt whether secrets could have been disclosed before a screen was imposed? On the one hand, ensuring confidentiality of client secrets is a bedrock principle of the attorney/client relationship. On the other hand, interpreting the disqualification rules too strictly could hinder the ability of lawyers to move from firm to firm, and could be used as a litigation tactic to unfairly force opposing parties to be stripped of their chosen counsel.

In sum, basing a brief writing assignment on ethics codes allows me to reinforce statutory interpretation techniques introduced the previous semester, plus drive home some ethical lessons about maintaining client confidentiality and how law firms try to avoid conflicts of interest.

1 The problem was originally created by my Michigan colleague Phil Frost.

2 For an article on a similar theme, *see* Amy Montemarano, *Using Federal Rule of Civil Procedure 11 to Teach Statutory Construction*, 20 The Second Draft 9 (Dec. 2005).

3 Mich. R. Prof. Conduct 1.10(b). By contrast, the ABA's Model Rules of Professional Conduct do not formally authorize screens for lawyers moving laterally from firm to firm, and only allow screens in limited situations such as when government lawyers move to the private sector or when a prospective client reveals confidential information to an attorney during an initial interview. *See* Model R. Prof. Conduct 1.11(b) & 1.18(d).

When Neighboring States Disagree: Teaching Statutory Interpretation Through Client Letter Writing

Lisa T. McElroy,
Drexel University College of Law

Students should understand that lawyers routinely research, consult, and interpret statutes when counseling clients, and that they often communicate this statutory analysis in letters to the client. Furthermore, students should be aware of and attendant to the fact that their competent and diligent work interpreting statutes will directly impact clients. Finally, students must learn that different states may interpret identical statutory terms using different approaches to construction and reaching different conclusions as to meaning.

With these goals in mind, I devised a client letter problem involving a bar applicant charged with driving under the influence. The client knows that she had started the engine of her car but had not yet put the car in gear when she was arrested; however, the client is not sure in which state her car was located, as the parking lot of the bar where she had consumed five beers straddles the border of Connecticut and Rhode Island. Therefore, students must analyze the issue of what constitutes "operating" a vehicle in two neighboring jurisdictions and counsel the client as to possible conviction and penalties in both states.

The problem makes for a good beginning exercise in statutory interpretation and construction because: (1) each state has very few cases interpreting its statute, making the research and synthesis tasks fairly straightforward; (2) students must perform legal research in two different jurisdictions, sharpening their legal research skills; (3) while the statutory language in both states' statutes is similar, the two states interpret the language in opposite ways; (4) courts in the two states use different approaches to interpreting the statute—Rhode Island uses legislative history, Connecticut uses

plain language as well as comparison of the statute to those of other jurisdictions and public policy; and (5) as the students are asked to communicate their analysis to a client, they begin to understand the importance to real people of careful and considered statutory analysis.

In the end, the students correctly deduce that the client would almost certainly be not guilty of DUI in Rhode Island, as the court notes that "the trial justice, in denying the defendant's motion for judgment of acquittal, concluded that the term 'operates,' as it appears in the amended version of § 31-27-2(a), includes being in actual physical control. Such a conclusion, however, is not in accord with the history of § 31-27-2(a). The actual physical control language was specifically deleted from the section by the Legislature. It was erroneous for the trial justice to conclude that, following the amendment of § 31-27-2(a), the term 'operates' includes being in actual physical control. By amending § 31-27-2(a) and taking out the actual physical control language, the Legislature apparently did not intend to prohibit [sitting on a motorcycle with its engine running]." *State v. Capuano*, 591 A.2d 35, 37 (R.I. 1991).

On the other hand, if the client was in Connecticut when she was arrested, she may well be guilty. The Connecticut court looks first to plain language: "We begin our analysis by looking to the statutory provision in question. General Statutes § 14-227a(a) provides in relevant part: 'No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both . . . .' Section 14-227a(a) prohibits *operating* a motor vehicle while under the influence rather than merely *driving* a motor vehicle while under the influence. It is well settled that 'operating' encompasses a broader range of conduct than does 'driving.' (citations omitted). . . . Nothing in our definition of 'operation' requires the vehicle to be in motion . . .". *State v. Haight*, 903 A.2d 217, 220 (R.I. 2006). The court then surveys the law of several other states, most of which support its interpretation, and discusses Connecticut's "unambiguous policy ... [of] ensuring that our highways are safe from the carnage associated with drunken drivers." *Id*. at 222.

While this client letter problem would certainly work as a memo, it is particularly poignant in its letter form, in part because the letter-writing exercise permits discussion of how to deliver difficult news to a client and how to explain that laws differ from state to state. The fact that the client is a recent law school graduate who is applying to the bar makes the problem particularly relevant for students, who may not have realized that such conduct must be revealed in a bar application.

A Recipe for Understanding Statutes[1]

Cristina Knolton, University of LaVerne College of Law

How is a criminal assault statute like a recipe for blueberry pie? And no, I'm not talking about the consequences of eating someone's bad cooking!

One of the hardest tasks for students during their first year of law school is learning how to analyze and outline a statute. After all, statutes are full of strange new language and are organized in a manner that law students are not familiar with. What students do not realize, however, is that understanding statutes is not as unfamiliar as they think. Every time law students bake brownies for friends or cook beef stew for the family, they are practicing the same skill used in breaking down a statute or identifying the elements of a cause of action.

In order to demonstrate this in class, I assign students a statute and ask them to outline it in a manner that makes clear what the elements are. Consider the following simple statute for assault, drawn from the Texas Penal Code § 22.01(a)(1): "A person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another. . . ."

Every time law students bake brownies for friends or cook beef stew for the family, they are practicing the same skill used in breaking down a statute or identifying the elements of a cause of action.

What are the elements of criminal assault under the foregoing statute? Student responses to this question have varied wildly, from listing every word

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as a separate element, to clumping several elements together. Often, "offense" itself is listed as one of the elements! "Intentionally," "knowingly," and "recklessly" are usually listed as separate elements. If a student recognizes that "intentionally, knowingly, or recklessly" is one element, causation is usually listed as part of that element. "Bodily" and "injury" are almost always listed separately, rather than as one element. Because students have no context for breaking down a statute, very few can properly identify the elements on the first try.

Thus, I shift the context. After letting students attempt to outline the statute, I give them a recipe I have created that is similar to the statute they have just tried to outline. With assault, for example, I give them the following recipe: "A person makes blueberry pie if the person mixes one cup butter, margarine, or similar substitute, in a pie crust with two cups fresh blueberries and one cup sugar." I ask them to tell me what they are making and list the ingredients. Students have no trouble listing butter, margarine, or similar substitute as one ingredient (rather than three). They also list fresh blueberries as one element instead of two. The students never list "blueberry pie" as one of the ingredients. Rather, they easily identify "blueberry pie" as the result rather than an ingredient. In fact, the students typically end up with the same number of ingredients they should have found as elements for the assault statute.

After students are successful in listing the ingredients to the recipe, I point out the similarities between the statute and the recipe. I show them how "butter, margarine, or similar substitute" is the same as "intentionally, knowingly, or recklessly": you need only one to create your result. Similarly, I explain that causation is a separate element, just as the pie crust was a separate ingredient in the recipe. Furthermore, "bodily injury" is one element, just as "fresh blueberries" is one ingredient. "Fresh" is a type of blueberries, not a separate ingredient, as "bodily" is a type of injury, not a separate element. Finally, just as sugar is a separate ingredient in the pie because it is added separately, the phrase "to another" is a separate element in assault because it can be analyzed separately.

I then ask the students to try outlining the original statute again. It comes much easier to them, and it is much easier for them to see why different words are categorized together. This exercise can be done with almost any statute and works even better when the statute is more complex than a simple assault. It's as easy as pie!

1 The concept of using a recipe to assist students in outlining a rule of law originated with Nancy Soonpaa, Director of Legal Writing at Texas Tech University School of Law.

Please send us your feedback about our new electronic format of The Second Draft

Contact us at: seconddraft@suffolk.edu

Raising a Spectre: Using the Ghost of Law Practice Future to Sell Statutory Analysis Today

Mark Edwin Burge,
Texas Wesleyan University School of Law

Have you scared your students today? No, I do not mean spreading Kingsfieldian terror in the classroom. Rather, I refer to provoking a healthy, motivating portrayal of the consequences of not having a working knowledge of statutory interpretation and analytical skills. Students prone to being bored by canons of construction and close dissection of statutory text gain new appreciation for these nuances upon seeing their centrality to future law practice. Rather like Ebenezer Scrooge, the students need a visit from the ghost of law practice future. Fortunately, we have the tools at our disposal to raise such a spectre in the legal writing classroom.

New law students arrive on our doorsteps with no shortage of opinions about law. Teachers of legal analysis spend much of the first year—quite appropriately—on disabusing students of the notion that their unsupported opinions have great value. Our chief weapon supporting this cause is typically *stare decisis*—that cornerstone of the common law admonishing courts to let prior decisions stand. Students learn early and (we hope) often that prior-case precedent narrows the field of future results. Pedagogically, *stare decisis* serves a valuable anchoring function for developing case-based legal analytical reasoning in place of opinion.

Regrettably, once students have a handle on arguing from cases, they are loath to abandon the method. They tend to view every problem through the lens of litigation to be resolved by a trial court restricted by *stare decisis*. Even nominally "statutory" legal writing problems frequently become exercises in working with cases, albeit cases interpreting statutes. On occasions when I have taught Uniform Commercial Code courses, I am disturbed to hear my former legal writing students voice this complaint: "I don't really like statutes. I prefer common law analysis."

Even the best techniques for teaching statutory analysis will fall short if students cannot see the value in the skillset. How do we break through this perception in the legal writing classroom where we have arguably "sold" our students a little too well on case-law analysis? We can raise the spectre of a very different future in law practice with a startling thought: Imagine there's no *stare decisis*. It's easy if you try.

In a world without *stare decisis*, the ability to interpret and argue statutory text takes on heightened importance. Why? Absent *stare decisis*, every question becomes a question of first impression. Bare statutory text is the only certainty upon which a lawyer can rely. Places where case law is on the periphery of practice are already here and we should show them to our students. Two of the most important areas are arbitration and administrative law.

Most of us are well aware of the wide and spreading nature of contractual arbitration. Less appreciated is the extent to which arbitrators are not bound by legal precedent. The Chief Justice of the New Jersey Supreme Court described the situation most colorfully when his court rejected a challenge to alleged interpretive errors in an arbitration award: "For all we know, the arbitrators concluded that the sun rises in the west, the earth is flat, and damages have nothing to do with the intentions of the parties or the foreseeability of the consequences of a breach."[1] This language cannot be dismissed as an outlying comment by a lone judge, either. Two years later, the entire New Jersey Supreme Court adopted this concurrence as its controlling rule.[2]

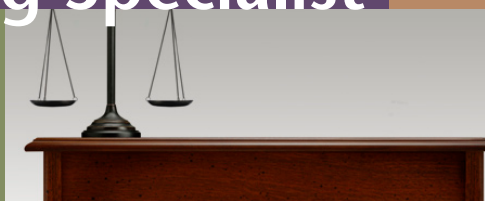
Administrative law is similarly not bound, particularly for statutory interpretation. It has long been settled law that administrative agencies play a role in statutory interpretation and that courts should defer to agencies' interpretations.[3] But in 2005, the Supreme Court went further and held that an agency charged with administering a federal statute can *overturn* a prior judicial interpretation of the statute, so long as the statute is ambiguous.[4] So much for past cases predicting future results. Even the ability to overrule cases is no longer confined to courts.

With these sort of examples in hand, we can and should ask our students: Are you ready to practice law where you do not have the certainty of "controlling" case precedent? Can you be an advocate where every issue is a precedent-less question of first impression? I can think of no better place to expand students' non-judicial lawyering skills than with the tools of statutory interpretation. Once your students have seen the ghost of a world without *stare decisis*, they might take that lecture on the canons of construction a bit more seriously.

1 *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364, 392 (N.J. 1992) (Wilentz, C.J.) (concurring in the affirmation of a $14.5 million arbitration award).
2 *Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 640 A.2d 788, 789 (N.J. 1994).
3 *See, e.g., Chevron U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 842-43 (1984).
4 *Natl. Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

From the Desk of the Legal Writing Specialist

The Metaphor of Grammar: Relating Grammar Study to Content Study



Dr. Natalie Tarenko,
Texas Tech University School of Law

Grammar is important. Good grammar increases reader comprehension, makes a good impression, and prevents misunderstandings that might result in lawsuits. However, at least two more reasons exist supporting the claim that grammar is important. (By "grammar," I also mean here punctuation, spelling, and usage.)

First, grammar study can model how students learn a content area, including law. Historically, grammar study was the first step in classical education or the Trivium; the other two steps were studying logic (dialectic) and rhetoric.[1] Latin was taught because teachers believed all learning begins with understanding how parts are organized, language-like, into a whole. The Trivium, far from trivial, prepared students to learn how to learn. Before they attempted content study, they already knew how to: first, learn the grammar of the content area; second, apply logic to follow the arguments of others and to develop one's own arguments; third, recognize the rhetoric of others and use rhetoric to persuade others. Every content area has a grammar, logic, and rhetoric.

Second, grammar itself can be a model of the structure of a content area, including law. According to the *Oxford English Dictionary*, one of the meanings of *grammar* is "the fundamental principles or rules of an art or science." In order to use grammar as a metaphor, teachers and students first should identify a lexicon: a list of objects, concepts, or actions in the field of study. The field of study should have syntax: a need for actions to occur or be performed in a certain order. The order should be controlled by rules for combining the elements in the lexicon. With DNA, the lexicon is the nucleic acids, and the syntax is that only certain nucleic acids can pair up to form the double helix. The grammar of chess comprises the lexicon of chess pieces as well as moves and syntax allowed by the rules. Other examples for an in-class exercise include grammars of other games, sports, ballet, art, poetry, clothing, and chemistry.

Legal research has a grammar, wherein the lexicon is primary and secondary sources, indexes, and databases. Most importantly, students have to look things up in a particular order (syntax). So, too, law has a grammar, whose lexicon is *Black's Law Dictionary*. If "a language is like a great city," so are content areas, including law, "'a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this [is] surrounded by a multitude of new boroughs with straight regular streets and uniform houses' . . . Grammar . . . allows us to make our way around."[2] Grammar maps content areas.

The phrase "grammar of law" occurs steadily, if not frequently:

> Wherever a reasonably complete and coherent system of law exists, it necessarily establishes and acts through a structure of formal jural relations, such as rights, duties, liabilities, privileges, and the like, between legally recognized entities. These formal relations . . . constitute what may be called the grammar of law, and due study and analysis of them are essential to a correct understanding and application of legal rules. Such formal relations follow from the existence of legal rules as inevitably as grammar follows from language.[3]

A grammar-organized approach to law is what a foreign-trained law student would look for upon entering an American law school program.[4]

Legal writing faculty could incorporate some of this history and information into their preliminary discussions about grammar, punctuation, and usage. Rather than a dry but grudgingly necessary clean-up task, studying grammar can be a mind-expanding exercise that prepares students to learn other areas, including a grammar of legal research and a grammar of law.

1 See the 1947 Oxford lecture by Dorothy Sayers, "The Lost Tools of Learning," reprinted in *The Poetry of Search and the Poetry of Statement and Other Posthumous Essays on Literature, Religion, and Language* (1963).

2 Ludwig Wittgenstein, quoted in and commented upon by Charles R. Elder, *The Grammar of the Unconscious: The Conceptual Foundations of Psychoanalysis* 210, 213 (1994).

3 John Dickinson, *My Philosophy of Law: Credos of Sixteen American Scholars* 104-105 (1987).

4 Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. Pa. L. Rev. 104-105 (1967-1968). For a grammar-organized approach, see George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International* (2007).

Publication Spotlight

The LWI Monograph Series

In January 2008, the LWI Board approved the Monograph Committee's proposal for a monograph series that will reprint foundational LRW scholarship in subject-oriented volumes electronically on the LWI website. The Board approved the series because this project will:

- support new teachers;
- rejuvenate experienced teachers;
- serve as a basic reference tool; and
- enhance the scholarly reputation of the LRW field.

The Board also appointed Jane Kent Gionfriddo (Boston College Law School) as the first editor-in-chief. She will work with the following Steering Committee members to create and post the first monograph volume on the LWI website in late Fall 2008 and to develop an official editorial structure, policies and procedures to submit to the Board for approval in Spring 2009: Susan DeJarnatt (Temple University Beasley School of Law); Steve Johansen (Lewis and Clark Law School); Alison Julien (Marquette University School of Law); and Kathleen Elliott Vinson (Suffolk University School of Law).

Volume One will gather the existing literature on feedback on student written work. It will include such articles as:

- Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 University of Toledo Law Review 651 (2007);
- Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 Legal Writing: Journal of the Legal Writing Institute 651 (2007); and
- Anne Enquist, *Critiquing and Evaluating Law Students' Writing: Advice from Thirty-Five Experts*, 22 Seattle University Law Review 1119 (1999).

Once the first volume is complete on the website and the LWI Board has approved official editorial policies and procedures, the community at large will be notified about the process for applying for editorial positions.

The Publication Spotlight highlights the increase in publication of law review and other articles and texts by members of the legal writing community.

If you know of any books or articles that we should include here, please let us know.

Publications, Presentations and Program News

Publications and Presentations

Helen Anderson (Washington) published the following articles: *Penalizing Poverty: Making Indigent Criminal Defendants Pay for their Court-Appointed Counsel through Recoupment and Contribution*, University of Michigan Journal of Law Reform (forthcoming), *Using Clickers in Legal Writing Class*, AALS Section Newsletter, Section on Teaching Methods (Winter 2008), *Insights from Clinical Teaching: Learning About Teaching Legal Writing from Working on Real Cases*, 16 Perspectives 106 (2008).

Helen Anderson, **Tom Cobb**, and **Theo Myhre** (Washington) presented "Incorporating Live Cases into the Teaching of Legal Research and Writing" at the Legal Writing Institute Regional Conference in Spokane, WA, on August 17, 2007.

Bill Chin (Lewis & Clark) published an article, *School Violence and Race: The Problem of Peer Racial Harassment Against Asian Pacific American Students in Schools*, in The Scholar: St. Mary's Law Review on Minority Issues. Also, Chin was a panelist at the conference "*Brown* Undone? The Future of Integration in Seattle after *PICS v. Seattle School District No. 1*" held at Seattle University School of Law.

Tom Cobb (Washington) presented "Chaim Perelman's Presence in Legal Education," *The Promise of Reason: The New Rhetoric after 50 Years*, at the University of Oregon in May 2008. He also published, with Eric Dunn et al., *Advocacy Strategies to Fight Eviction in Cases Involving Compulsive Hoarding and Cluttering*, 41 Clearinghouse Rev. 427-41 (2007), and *Public Interest Research, Collaboration, and the Promise of Wikis*, 16 Perspectives 1-11 (2007).

Christine Nero Coughlin (Wake Forest), **Joan Malmud** (Oregon), and **Sandy Patrick** (Lewis & Clark), have just published a first-year legal analysis and writing text, *A Lawyer Writes* (Carolina Academic Press). The book approaches legal analysis in a comprehensive and straightforward style with a graphic layout geared toward today's media-savvy student.

Tamara Herrera (Arizona State) wrote a book, *Arizona Legal Research*, which was just published by Carolina Academic Press.

Mary A. Hotchkiss (Washington) published "Federal Tax Research," in *Specialized Legal Research* (Penny A. Hazelton ed., Aspen, 2008), and published, with Mary Whisner, "Chapter 3: Communicating Research Results Through Writing," in *Fundamentals of Legal Research*, 9th ed. (Roy M. Mersky & Donald J. Dunn, eds., Foundation Press, forthcoming 2008).

Sarah Kaltsounis (Washington) published *Causes of Action for Violation of Individuals with Disability Education Act*, in Causes of Action 2d (West-Thomson 2008). She and Tom Cobb also published *Collaborative Opinion Writing* and the Appellate Process, in the Journal of the Association of Legal Writing Directors (JALWD) (forthcoming).

Ariana Levinson (Louisville) presented "Legal Ethics in the Employment Law Context: Who Is the Client?" at the 25th annual Carl A. Warns, Jr. Labor & Employment Institute. Materials are available at **http://www.law.louisville.edu/node/1869**. Her podcast "Editing in the Legal Workplace" appears in Suffolk University Law Schools' "Transitioning From One-L to Summer Legal Writing Work Podcast Series."

Theo Myhre (Washington) presented "New Voices in Human Rights: Using Equitable Doctrines to Advance Civil Rights for Same-Sex Couples" at the AALS Conference, New York, NY, January 2008.

Kate O'Neill (Washington) published an article, *Rhetoric Counts: What We Should Teach When We Teach Posner*, in Seton Hall Law Review (forthcoming). She also published an article, *But Who Will Teach Legal Reasoning and Synthesis?* in the Journal of the Association of Legal Writing Directors (JALWD) (forthcoming).

Susan Provenzano and **Lesley Kagan** (Northwestern) have published their article, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, in Volume 39 of the Loyola University Chicago Law Journal. Drawing on composition and learning theories, the article advocates embracing students' analytical errors as an integral part of their learning process and proposes teaching methods that use students' errors to promote their growth and independence as legal writers.

Publications, Presentations and Program News

Lou Sirico (Villanova) has published an article, *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, in 26 Quinnipiac Law Review 147 (2007).

Nancy Wanderer (Maine) was elected to the Executive Committee of the Section on Sexual Orientation and Gender Identity Issues of the American Association of Law Schools (AALS). Mark Wojcik is Chair of the Committee. This spring, the Committee has been planning a full-day program for the Annual Meeting to be held in San Diego this January—Sexual Orientation and Gender Identity Issues Across the Curriculum: The Challenge of Keeping Law Schools Current with Recent Developments in LGBT Issues. Professor Wanderer will be leading a breakout section—Legal Research, Legal Writing, and Moot Court: Pink Ink and Beyond—in which participants will discuss guidelines for using sexual orientation and gender identity issues in legal writing problems and examine specific topics (such as criminal and civil actions for hate crimes) that have made for particularly effective legal writing assignments. In December, Nancy participated in a panel discussion, *Program Models in LRW: Benefits, Burdens, Limitations*, at the New England Consortium of Legal Writing Teachers Regional Conference, Vermont Law School. Nancy is the primary faculty member for a web-based course, "Opinion Writing in Controversial Cases," produced by the National Center for State Courts (NCSC) which included a webinar presented to Missouri state judges on December 13, 2007. Other components of the course are available for participants on the NCSC website. Nancy also wrote Chapter 5: "Writing Effective Law Court Briefs," in Maine Appellate Practice (Third Edition), by Donald G. Alexander, Associate Justice, Maine Supreme Judicial Court (Tower Publishing 2008).

Program News

Boston University has hired Jennifer Taylor as Associate Director, replacing Elisabeth Smith. Jennifer is a 2005 *magna cum laude* graduate of Boston University Law School. As a law student, she served as Articles Editor of the *Boston University Law Review* and as a Teaching Assistant for the First Year Writing Program. Before joining the program, she was an associate at Ropes and Gray in Boston. She received her B.A. from Harvard.

The Sandra Day O'Connor College of Law at Arizona State University granted tenure to **Tamara Herrera** and **Zig Popko**.

Hillary Burgess is joining **Hofstra Law School** and Astrid Gloade as an Assistant Professor of Academic Support.

Lesley Kagan (Northwestern) has been appointed as the full-time Director of Northwestern Law School's program for Academic and Professional Excellence (APEX).

The Legal Writing Department of **Lewis & Clark Law School** held a legal writing seminar on April 4, 2008. The guest speaker was Mark Herrmann, author of *The Curmudgeon's Guide to Practicing Law*. Mark Herrmann, local senior partners, and the legal writing faculty talked with law firm associates about clear writing.

Susan Provenzano (Northwestern) will serve as Interim Associate Dean and Dean of Students during the 2008-09 academic year.

David T. Ritchie (Mercer) earned tenure this year.

At **St. John's University School of Law**, in Queens, NY, the faculty voted recently to include a practical component to the Advanced Writing Requirement, along with the long-standing scholarly component. Beginning with the Class of 2010, upper-level students must take any one of 15 courses that satisfy the Advanced Practice-Writing Requirement (APWR), which focus on writing for transactional or litigation practice (or both). Students must satisfy the Advanced Scholarly-Writing Requirement by writing a 30-page paper prepared for a seminar, a journal, or directed research. The APWR raises the number of writing course credits needed for graduation to six.

Publications, Presentations and Program News

Suffolk University Law School's Legal Practice Skills faculty continues to add new podcasts to Suffolk's iTunes U site, including a research refresher podcast. In addition, new podcasts are available on the weekly writing tip podcast series. Also, nineteen legal writing professors from around the country contributed podcasts to the "Transitioning from One-L to Summer Legal Work" podcast series. You and your students can listen to them at **http://www.law.suffolk.edu/itunes/**.

Leigh Watts Mello has joined the Legal Practice Skills faculty at **Suffolk University Law School**.

The **University of Washington School of Law** appointed Joan Foley and Theodore Myhre as continuing Lecturers. Joan received her J.D. from NYU School of Law and was most recently a partner at the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson, and Daheim, where she litigated class action and other complex cases. Joan was named a "Rising Star of Washington Law 2007" in *Law & Politics Magazine*. Theo was most recently a Visiting Professor of Legal Writing at Seattle University School of Law. He has a distinguished background in private practice and clerked for Justice Charles Johnson of the Washington State Supreme Court. We are very fortunate to have both of them on our faculty. Tom Cobb, who joined the UW School of Law faculty as a Lecturer in 2004, was promoted to Senior Lecturer with a five-year renewable contract.

Cliff Zimmerman (Northwestern) will be on a research leave during the 2008-09 academic year. He has been appointed to an endowed chair until the end of his leave—the Harry B. Reece Teaching Professorship.

New job?
New title?
New status?
New article?

Don't be shy!

Please send us your publications, presentations and program news.

Calendar

On December 1, 2008, Suffolk University's Legal Practice Skills Program is hosting a "Teaching Through Technology" conference for the **New England Consortium for Legal Writing Teachers**. This conference will allow participants to see demonstrations and receive training on podcasts, clickers, and wikis. **http://www.lwionline.org/other_conferences.html.**

St. John's University School of Law will host a Legal Research and Writing Conference on Friday, December 5, 2008 in New York City. Titled "Practice Meets Pedagogy," the conference will explore how legal research and writing as taught in law school can best prepare new lawyers for practice in today's workplace. Topics will include developments in the workplace affecting the skills expected of beginning lawyers; how legal employers assess applicants' legal writing skills; changes in the nature of writing tasks assigned to beginning lawyers; and the advanced training in legal writing now made available by many legal employers. Speakers and panelists will be primarily from the world of practice, and will include judges, lawyers in private firms and public interest organizations, law librarians, and others. In the afternoon, a panel of legal writing professors will address the interface between the academy and the world of practice, innovations in the legal writing curriculum, and related topics.

The conference will be held at the Manhattan campus of St. John's University, located at 101 Murray Street, between West and Greenwich Streets in lower Manhattan. Registration will begin at 8:00 a.m., and the conference will conclude in the mid-afternoon. There will be ample time to enjoy New York City at the best time of the holiday season. Registration is free. For information, please go to **http://www.lwionline.org/other_conferences.html.**

The Rocky Mountain Legal Writing Conference will be held on March 13-14, 2009 at the Sandra Day O'Connor College of Law, Arizona State University in Tempe, Arizona.

Calendar

2009 ALWD Conference - July 16-18, 2009, Kansas City, Missouri
Site host: University of Missouri-Kansas City School of Law
Event hosts: Washburn University and University of Kansas

June 2010: 14th Biennial LWI Conference

The LWI Board of Directors has selected the Marco Island Marriott Beach Resort for the site of the 2010 Biennial Conference and appointed the Conference Site Committee to begin planning the conference. The Resort is located on three miles of pristine Southwest Florida beaches. With over 225,000 square feet of indoor and outdoor function space, a full-service event planning staff, several renowned restaurants, championship golf, a world-class spa, and a wide range of activities and amenities, the Resort seemed like an ideal setting for the first LWI Conference to be held at a non-campus site. The impressive meeting space, beach location, and affordable accommodations should entice members to not only attend the 2010 Conference but also to combine it with a family vacation, especially since the LWI special rates have been extended to before and after the conference dates. For more information about the Resort, please visit the resort's website: **www.marcoislandmarriott.com.**

If you have any news or calendar items for the Spring 2009 issue of The Second Draft, please send them in!

Contact us at: seconddraft@suffolk.edu