



Legal Writing  
Institute

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### LWI Policy Statement on Law Faculty *Adopted March 2015*

The Legal Writing Institute is committed to a policy of full citizenship for all law faculty. No justification exists for subordinating one group of law faculty to another based on the nature of the course, the subject matter, or the teaching method. All full-time law faculty should have the opportunity to achieve full citizenship at their institutions, including academic freedom, security of position, and governance rights. Those rights are necessary to ensure that law students and the legal profession benefit from the myriad perspectives and expertise that all faculty bring to the mission of legal education.

Dear LWI Colleagues,

I have a small white board on my refrigerator with self-caricatures of my husband and me. Above us is a dialogue balloon that I typically fill with reminders, bits of advice, and what I hope are inspirational messages. It fulfills my need to continue to sound the parental voice of reason without provoking the direct wrath of our “adult” children.



As I write this message on a sweltering hot and humid day in mid-July, I can see that board out of the corner of my eye telling me to “Cherish Summer.” By the time you read this, we will have launched into the 2019-2020 academic year and left July far behind. I hope you were able to make personal time for yourselves this summer and that it did not fly by as quickly as mine seemed to do. Oh, for those summer days when my children were young that seemed to stretch deliciously on and on.



LWI had a busy end of the Spring 2019 semester and summer, and I am pleased here to update you on what we have experienced and accomplished together since my last message.

## YET ANOTHER APPLIED LEGAL STORYTELLING CONFERENCE SUCCESS

LWI and CLEA’s Seventh Biennial Applied Legal Storytelling Conference was a great success. Held July 9-11, 2019, at the University of Colorado at Boulder, the conference was co-hosted by the University of Denver Sturm College of Law and University of Wyoming School of Law, and coordinated by the Rocky Mountain Legal Writing Scholarship Group. The scenery, law school, presentations, and gala at the Chautauqua Dining Hall—all inspiring and delightful. We also heard a stimulating keynote address from Susan Schulten, Professor and Department Chair of History at the University of Denver, on the stories that maps tell us about American history.

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Thanks again to committee chairs Nantiya Ruan and Amy Griffin, as well as the planning committee, Deb Cantrell, Ken Chestek, Derek Kiernan-Johnson, Robert McPeake, Jason Palmer, Ruth Anne Robbins, and Beth Schwartz.



## AWARDS

### Phelps Award Recipient: Teri A. McMurtry Chubb

At the storytelling conference gala at Chautauqua Dining Hall, I had the pleasure of awarding the 2018 Teresa Godwin Phelps Award to Teri McMurtry-Chubb for her article, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham's Sycamore Row*, 48 Memphis L. Rev. 889 (2018). As Teri herself told me, there was no better venue for Teri to receive this award for her article on a work of fiction than the storytelling conference. Congratulations again, Teri!



### New Emerging Scholar and Influential Teaching Awards

Last spring, the Board approved two new awards: the Emerging Scholars Award and the Influential Teaching Award. The former award is designed to recognize valuable scholarly contributions to the legal writing discipline by faculty early in their careers, while the latter award underscores LWI's commitment to high-quality teaching in our community. We anticipate the first recipients being recognized at the 2020 Biennial Conference in Washington D.C. Thanks once again to our fabulously creative and devoted Awards Committee members, Brenda Gibson (co-chair), Greg Johnson (co-chair), Andrew Carter, Lindsey Gustafson, Margaret Hannon, Dana Hill, Mary Nagel, and Suzanne Rowe.

## BRANDING EFFORTS

### Visual identity manual

I am excited to announce the first of several projects the Board has been working on to improve the appeal, uniformity, and recognition of the LWI brand. When I took office, I asked Ruth Anne Robbins to chair a new Public Relations & Social Media Committee, which presented the Board with a draft visual identity manual in July that was later approved this fall. The manual will help the Board and Committees communicate both internally and externally in a more professional and uniform manner. This message is styled with the spirit of the new manual in mind.

### Webmaster

In conjunction with developing our new visual identity manual, the Board has decided to appoint a Webmaster to add content of interest to the membership to our website and keep it current. Our Website Maintenance and Updates Committee, Dan Real (co-chair), Neil Sobol (co-chair), Cynthia Adams, Megan Boyd, and Rebecca Scharf, do a terrific job helping members with access to the Teaching Bank, troubleshooting website issues, and posting information to the site, but the tasks associated with gathering and updating content for a site as large as ours is another job altogether.

## COMMITTEE UPDATES

### Diversity & Inclusion Committee

As part of its mission to foster and support diversity and inclusion in legal writing education, the Diversity and Inclusion Committee coordinated with ALWD to host a pre-gala reception on Thursday, May 30, at the 2019 ALWD Biennial Conference at Suffolk University Law School. By all accounts, the reception was a big hit. Thanks to LWI Board member and ALWD Conference Program Committee member Sam Moppett for her assistance as well as Diversity & Inclusion Committee members, Sha-Shana Crichton (co-chair), Shailini George (co-chair), Diana Donahoe, Meredith Stange, Bruce Ching, Rachel Smith, Latisha Nixon-Jones, and Maureen Johnson for their innovation and effort.

## Professional Status Committee

The Professional Status Committee is proud to announce progress on two projects. First, a sub-committee started work at the 2018 biennial on an article arguing that all skills-based faculty should be entitled to a security of position equal to ABA Standard 405(c) and that 405(d) be eliminated. That article is now complete and has been accepted for publication by the Oregon Law Review: *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(c) and Eliminating 405(d)*, 98 Or. L. Rev. (forthcoming 2019-20).

Another sub-committee has been compiling the first of several planned toolkits, which will be posted on our website. The first toolkit will be a compilation of materials related to salary equity and should be available this fall. Thanks to the continued efforts of this committee, whose members include Mary Bowman (co-chair), Melissa Weresh (co-chair), David Austin, Heidi Brown, Olympia Duhart, Lyn Entrikin, Lucy Jewel, Suzanne Rowe, Amy Sloan, and Craig Smith.

## Scholarship Development Committee

The Scholarship Development Committee has been working hard to bring attention to timely topics to advance scholarship within the legal writing, research, and analysis community and provide scholarship support in a variety of forms. In July, the Committee gathered information about members' interest in writing groups and related writing support, made us aware of upcoming scholarship deadlines of potential interest, and gathered together a number of useful resources. For more information, visit the Committee's new webpage, at <https://www.lwionline.org/scholarship-development-committee>. Thanks to committee members Kristen Murray (co-chair), Kathleen Elliott Vinson (co-chair), Alyssa Dragnich, Tamara Herrera, Brian N. Larson, Susan McMahon, and Danielle Tully.



## IN MEMORIAM

This has been a particularly difficult period for our community, having lost two dear friends, Lou Sirico and Ralph Brill, within six months of each other. We plan to honor their memory and contributions to the legal writing discipline properly at the 2020 Biennial Conference in D.C. Our hearts are with their loved ones.



## SIRICO SCHOLARS WORKSHOP 2019

The sixteenth Legal Writing Institute Writers' Workshop—recently named the Sirico Scholars' Workshop in honor of our dear Villanova colleague Lou Sirico—was held in July 2019 at a vacation home in the mountains near Boulder, Colorado. The workshop consisted of three days of writing, critiquing, and sharing nine works-in-progress. The Workshop took place immediately after the Seventh Biennial Applied Legal Storytelling Conference at the University of Colorado. Our thanks to facilitators Cynthia Adams, Ken Chestek, and Christine Coughlin,



as well as Governing Board Members Cindy Adams, Ken Chestek, Deborah Gordon, Michael Higdon, Kim Holst, and Kathy Stanchi.

## UPCOMING EVENTS

- **One-Day Workshops (Fall 2019)**
- **Conferences**
  - AALS Annual Meeting, January 2-5, 2020, at the Marriott Wardman Park in Washington, D.C.
  - LWI Biennial Conference, July 15-18, 2020, at Georgetown University Law Center, in Washington, D.C.
- **Legal Writing Institute Journal Board Elections (Spring 2020)**

*Kuster K. Jiscione*



# Small Teaching Transactional Skills in the Legal Writing Classroom



Adam Eckart  
Suffolk University Law School

As law schools are increasingly charged with creating “practice ready” graduates, calls to integrate transactional skills into a historically litigation-focused curriculum continue to amplify.<sup>1</sup> Law schools have made great strides in addressing this need in the 2L and 3L years by offering advanced courses, clinics, and concentrations, but more can be done in the formative first year of law school. In my Legal Practice Skills (“LPS”) course, I utilize the principles of “small teaching”<sup>2</sup> to introduce transactional skills, foster learning, and increase student engagement.<sup>3</sup>

Based on the learning sciences principles of retrieval and scaffolding,<sup>4</sup> small teaching focuses on making small strategic changes to a syllabus in order to introduce small-scale low-stakes exercises and examples that ask students to 1) retrieve learned concepts from their memory and 2) scaffold new skills upon existing skills. By retrieving learned concepts from memory, students solidify and practice those skills. By scaffolding new skills upon existing skills, students enhance their understanding of the existing skill while also providing a baseline for learning the new skill.

Like many legal writing courses, my LPS course focuses on objective or predictive writing in the Fall semester and persuasive writing in the Spring semester. While some legal writing programs have added a new semester or intersession for contract drafting or transactional skills, I use small-teaching principles to integrate transactional skills and perspectives into my existing syllabus in order to emphasize how these skills are related to traditional legal writing skills and how these skills complement rather than detract from each other. Based on my experience, students have responded well to the method, learned transactional skills and perspectives, and deepened their understanding of traditional legal writing skills.

## INTRODUCING TRANSACTIONAL SKILLS AND PERSPECTIVES

The transactional skills<sup>5</sup> I focus on in my LPS course are primarily two types: Transferable Skills and Drafting Skills.

### Transferable Skills

Transferable Skills include the traditional legal writing skills that are required for all types of practice but are typically taught in legal writing courses solely through adversarial problems. Examples of Transferable Skills include research, writing, statutory interpretation, rule synthesis, legal reasoning, and oral communication. By introducing a transactional perspective to these skills, I seek to inform students that these skills are not solely litigation skills but also apply to a transactional

context. Professors can incorporate transactional perspectives into classes discussing the following Transferable Skills, among others, in a variety of ways, including:

- Legal research: Ask students to practice research skills in a transactional context by researching recent changes to a statute governing a transactional situation, such as an intellectual property registration process;<sup>6</sup>
- Statutory interpretation and rule synthesis: Ask students to practice statutory interpretation and rule synthesis in a transactional exercise by interpreting a statute and published agency regulations, such as an antitrust compliance question;<sup>7</sup>
- Legal reasoning: Ask students to practice analogical reasoning skills for a transactional problem, such as comparing recent precedent for merger cases and determining what outcomes may result for a similarly situated theoretical client;<sup>8</sup> and
- Oral communication: Ask students to give an oral presentation to a transactional “supervising attorney” regarding how a client should amend company policies in order to remedy a legal issue presented in an objective or persuasive memorandum assignment.<sup>9</sup>

The examples listed below are small-teaching exercises I have used and are designed to provide transactional perspective and reinforce retrieval of traditional legal writing skills.<sup>10</sup>

**Example 1:** Reinforce statutory interpretation and rule synthesis skills by interpreting an antitrust statute. After completing a statutory interpretation lesson, students are introduced to a short exercise involving an antitrust statute. In this assignment, students interpret statutory language (specifically, \$10,000,000) in the Hart Scott Rodino Antitrust Improvements Act of 1976.<sup>11</sup> Using supplied and simplified Federal Trade Commission Regulations<sup>12</sup> and Informal Interpretations<sup>13</sup> instead of researched case law, students practice statutory interpretation, are exposed to different types of legal research and precedent, and are engaged with the results—evaluating whether a party meets the statutory \$10,000,000 asset threshold is determined not

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*[S]mall teaching focuses on making small strategic changes to a syllabus in order to introduce small-scale low-stakes exercises and examples that ask students to 1) retrieve learned concepts from their memory and 2) scaffold new skills upon existing skills.*

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solely by counting dollars but by interpreting the rules in the statute, regulation, and interpretation to determine which dollars to count.

**Example 2:** Solidify legal research and reasoning skills by analyzing market definition precedent. After completion of a memorandum assignment, students are introduced to a short exercise using transactional precedent to evaluate market definitions in an antitrust case. In this assignment, students apply legal research and reasoning skills to analyze market definitions for mergers reviewed by the Federal Trade Commission and persuade a fictional counterparty regarding an appropriate antitrust market definition. Using supplied precedent and a short problem set, students practice legal reasoning skills, understand the use of precedent in a transactional context, and are exposed to a transactional assignment that is relatable to students through its use of precedent in grocery store<sup>14</sup> and fantasy sport<sup>15</sup> proposed mergers.

## Drafting Skills

Drafting Skills include preventive writing and are often displaced from legal writing courses in favor of objective and persuasive writing.<sup>16</sup> Examples of Drafting Skills include revising or drafting contracts, leases, purchase and sale agreements, wills, partnership agreements, or other types of legal contracts or agreements. By introducing these skills, I seek to teach students about preventive writing styles and the types of legal documents and law careers that involve preventive writing. Professors can incorporate Drafting Skills into classes discussing research and writing in order to build upon traditional legal writing skills in a variety of ways, including:

- Build upon legal research: Ask students to apply case law research completed for a memorandum assignment and revise or draft portions of a preventive writing sample (such as a sample employee handbook, contract, lease, or non-compete agreement) to reflect the current law;<sup>17</sup> and
- Build upon objective and persuasive writing: Ask students to transform a memorandum on a legal issue into a preventive writing sample (such as those identified directly above) or an outline thereof after the underlying legal issue in the memorandum has been fictionally decided or settled.<sup>18</sup>

The examples listed below are small teaching exercises that I have used and are designed to provide transactional perspective, retrieve existing skills, and scaffold new skills.

**Example 3:** Apply legal research to introduce Drafting Skills and inform future actions of a client. After submission of a memorandum assignment involving the liability of a company,<sup>19</sup> students are introduced to a short brainstorming activity aimed at applying case law research to forward-looking preventive writing. In this assignment, students apply case law research and brainstorm how a company should act in the future in order to avoid potential liability. Using the underlying legal issue of a memorandum assignment, students think critically about how research and precedent impact company policies or future contracts and begin the process of identifying skills required for preventive writing.<sup>20</sup>

**Example 4:** Scaffold Drafting Skills on a memorandum assignment to revise the fine print on a baseball ticket. After submitting a first draft memorandum regarding the liability of a baseball team for a spectator's injury,<sup>21</sup> students are introduced to a short drafting exercise aimed at developing preventive writing skills. In this assignment, students apply their understanding of researched case law regarding liability of a baseball team to review and revise a simplified policy regarding a spectator's assumption of risk to comply with current law. Using a completed memorandum as a baseline, students apply the research conducted for the memorandum assignment,

validate their understanding of case law, and interact with a forward-looking and relatable document, such as the fine print on the back of a ticket to a baseball game.

## SMALL TEACHING'S BENEFITS AND BIG IMPACT

By bringing transactional skills to the first-year legal writing classroom through small teaching, I seek to incorporate transactional skills earlier in the law school curriculum while also increasing student engagement and learning. Through this approach, students learn transactional skills and perspectives while also mastering traditional legal writing skills. By allowing students to see law school problems through interdisciplinary lenses related to all types of legal practice, students are better situated to develop both transactional skills and traditional legal writing skills and are therefore more likely to be prepared for practice as graduates.

### NOTES

1. See, e.g., Tina L. Stark, *Transactional Skills Education: Mandated by the ABA Standards*, 20 *TRANSACTIONS: TENN. J. BUS. L.* 693, 694 (2018) (advocating mandating transactional skills in the law school curriculum); David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 *U. TOL. L. REV.* 689, 689 (2003) (stating that half or more than half of law students will become transactional lawyers or will engage in a transactional practice).
2. Small teaching uses principles from the learning sciences to create incremental but powerful changes in student learning through the use of small-scale low-stakes exercises and examples that can be incorporated into an otherwise full syllabus. See JAMES M. LANG, *SMALL TEACHING: EVERY-DAY LESSONS FROM THE SCIENCE OF LEARNING* 5 (2016).
3. In my course, I have found that students are more engaged when I employ small teaching principles because small-scale low-stakes exercises and examples foster students' curiosity in finding the "correct" answer and generate buy-in and investment in the learning process.
4. "Scaffolding" is an instructional technique that uses teacher- and peer-assisted guidance and support to enhance student learning and aid in the development of skills. See Margaret Butler, *Resource-Based Learning and Course Design: A Brief Theoretical Overview and Practical Suggestions*, 104 *LAW LIBR. J.* 219, 226 (2012).
5. "Transactional Skills" for the purposes of this article are defined more broadly than other scholarship on the subject. See Snyder, *supra* note 1, at 689 (defining transactional skills as "planning, negotiating, documenting, and closing the deal"); Tina L. Stark, *Association of American Law Schools, Petition for Provisional Status: Proposed Section on Transactional Law and Skills* (Dec. 23, 2010), available at <http://www.theconglomerate.org/2010/12/aals-section-on-transactional-law-and-skills.html> (click on "here" in second paragraph) (defining "Transactional Skills" as skills ("negotiating, drafting, risk analysis, contract analysis, and collaboration") and tasks ("due diligence, third party opinion letters, resolutions, and transaction management") required to complete a transaction).

6. As one example, see *Prioritizing Resources and Organization for Intellectual Property Act of 2008*, H.R. 4279, 110th Cong. (2008) (detailing penalties for supplying inaccurate information in a registration process).
7. See *infra* Part A Example 1.
8. See *infra* Part A Example 2.
9. In my closed objective memorandum assignment, students must evaluate whether the manner in which a department store held a suspected shoplifter was appropriate under the Georgia Shopkeeper's Privilege Statute (Ga. Code Ann. § 51-7-60) (2019). In the oral communication portion of this assignment, students are asked to orally report on what behaviors make the manner of detention impermissible and how the prohibition of those actions should be reflected in a fictional employee handbook.
10. Because of my prior experience as an antitrust mergers and acquisitions attorney, some of my examples are rooted in mergers or antitrust law. However, professors can apply the concepts described herein to different types of practice or the underlying legal issue of a persuasive or objective memorandum to achieve the same results.
11. 15 U.S.C. § 18a (2012).
12. 16 C.F.R. § 801.90 (2019).
13. FTC Premerger Notification Office, Informal Interpretation 0903009 (2009).
14. *FTC v. Whole Foods Market, Inc.*, Case Summary available at <https://www.ftc.gov/enforcement/cases-proceedings/0710114/whole-foods-market-inc-wild-oats-markets-inc> (Jan. 23, 2009) (using a relevant market definition of premium natural and organic supermarkets).
15. *In re Draft Kings, Inc. v. FanDuel Ltd.*, Case Summary available at <https://www.ftc.gov/enforcement/cases-proceedings/161-0174/draft-kings-inc-fanduel-limited> (July 14, 2017) (using a relevant market definition of paid daily fantasy sports contests).
16. Preventive writing is forward-looking proactive writing that focuses on drafting designed to avoid or prevent a future legal issue, as opposed to objective or persuasive writing, which is reactive and focuses on addressing a current legal issue. See LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 3-4 (4th ed. 2015).
17. See *infra* Part B Example 3.
18. See *infra* Part B Example 4.
19. As with many of these exercises, this exercise could be revised to build upon the underlying legal issue in an objective or persuasive legal memorandum. In addition to focusing on the liability of a corporation, this problem could likewise focus on the liability of any institutional actor, such as a school or police department.
20. See *supra* note 9. In this portion of the assignment, students use researched case law regarding appropriate store owner conduct under the Georgia Shopkeeper's Privilege Statute to brainstorm how the store should document lawful store policies and train employees in order to avoid future liability in a similar case.
21. A recent real-life case regarding liability of the New York Yankees for a spectator's injury serves as a good basis for such a problem. See *Zlotnick v. N.Y. Yankees P'ship*, 62 N.Y.S.3d 348 (App. Div. 2017); see also Joe Nocera, *Danger at the Ballpark, and in a Baseball Ticket's Fine Print*, *New York Times* available at <https://www.nytimes.com/2015/11/21/sports/baseball/danger-at-the-ballpark-and-in-a-baseball-tickets-fine-print.html> (last visited April 17, 2019).

# Reverse Outlines: Fueling Revision & Preparing for Writing Conferences



L. Danielle Tully  
*Assistant Professor of Legal Writing  
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Writing is an iterative process. From draft to draft, a text can (and often should) undergo substantial transformation as the writer figures out what to communicate to the reader and how to do so effectively. But revising can be daunting. Revision requires that writers embrace the possibility—and really the strong likelihood—that parts of their writing should be reworked.

Beyond “feelings” about revising, writers also have to face cognitive process obstacles. For example, because writers think about their “complete message” as they write, when they return to their written work to revise, their short-term memories fill in many of the gaps, making it hard for the writer to see what is actually on the page (and what is not).<sup>1</sup> Additionally, as part of the revision process, writers are often asked to interpret and respond to feedback from external readers. Facing, comprehending, and implementing external feedback can pose additional challenges.<sup>2</sup>

For example, feedback is often provided in code. Revision “code” can come in the form of symbols, text, and even verbal comments. Regardless of form, the person providing feedback employs shortcuts to cue the writer. Expert legal writers quickly understand the cues and can begin to revise. Novice legal writers often stutter-step here.<sup>3</sup> There is a gap between intended meaning and how the novice reader receives the cue. Some students may misunderstand the cue<sup>4</sup> because they have entered law school with under-developed critical reading, reasoning, and writing skills.<sup>5</sup> Others may misunderstand the cue because their attention is split between numerous tasks.<sup>6</sup> These missed “cues” can overwhelm novice legal writers who are not yet comfortable with legal writing genres.

What is a novice legal writer (or any writer) to do? “Fresh eyes” help. But, bringing “fresh eyes” to a targeted revision task is even better. Targeted revision tasks reflect a process-based approach to writing that promotes metacognitive development. In a targeted revision task, students focus on a narrow goal. For example, one targeted revision task might include assessing and solidifying macro-organization.

Another might be identifying holes and developing substantive transitions to lead the audience through the piece. Such targeted revision tasks enable students to deepen their knowledge of the end-goal, assess what they need to succeed, and develop their own abilities to perform the tasks that will get them there. By engaging in these types of active learning strategies law students become self-regulated learners.<sup>7</sup>

The Reverse Outline<sup>8</sup> is one possible targeted revision task that supports self-regulated learning. While there are various structures and applications for this tool,<sup>9</sup> the Reverse Outline exercise I developed is completed post-draft and has four purposes:

- to strengthen students' "critical eye"—the ability to observe elements in their writing, to diagnose deficiencies, and to suggest remedies to themselves;
- to help students receive and understand the external feedback provided in their memos;
- to validate students' growth and competency in the writing process; and
- to provide writer-focused and writing-focused context to the writing conference.

## HOW IT WORKS

One to two weeks after submitting a writing assignment and before receiving external feedback, students complete a Reverse Outline in class. Working with a hard copy of their submission and the Reverse Outline worksheet (sample below) students focus on macro-organization. Specifically, the worksheet instructs students to focus on what their draft actually says, to figure out whether the content and organizational structure support the piece's purpose, and to propose improvements. Students work silently for the class period while they complete the worksheet. After completing it and handing it in to me, they may pick up their submission with my feedback.

The Reverse Outline exercise can be used with any legal writing assignment. In my first-year Legal Practice Skills course, students complete this exercise in the fall semester as part of their open-research predictive memo and then again in the spring semester as part of their open-research trial brief.

After completing the Reverse Outline and prior to attending their writing conference, students also complete a written reflection. Generally, these reflection questions focus on process and growth. For example: (1) What did you learn about the writing process that you will incorporate into future assignments? (2) What did you struggle with when drafting this time? (3) Were any of my comments from previous feedback similar to comments on this assignment? If so, what were those comments and how will you address the comments in your revision? If not, why do you think that a particular comment did not appear on this submission? (4) What are two of your top priorities to improve your memo prior to the final submission? (5) How can I support you to reach your writing goals?

This reflection serves as a "cognitive wrapper."<sup>10</sup> A cognitive wrapper is a metacognitive exercise that wraps around another learning task or assessment to deepen understanding and foster self-regulated learning. The Reverse Outline and reflection exercises not only support student learning, but they also support the professor's understanding of the students' writing process. By providing a window into how my students think about their legal problem solving and communication efforts, these exercises have been invaluable to my preparation for writing conferences.

## THE REVERSE OUTLINE EXERCISE

The Reverse Outline worksheet contains instructions, sample responses for one paragraph, and a blank table for students to fill in while working through their own submissions.

### Instructions

Today you will work on producing a reverse outline of your submission (a.k.a. Post-Draft Outline). The structure of your legal writing can (and often should) evolve as you figure out (1) what you really said in your draft; and, (2) what you want to say. Reverse outlining can help you diagnose and fix organizational problems by revealing where your document has holes. The goal of a reverse outline is to tackle substantive revisions. We will get to the polish later.

Here's the task: Look at each paragraph in your draft on its own and answer the following questions:

1. What is the point of the paragraph? (Be brief, summarize topic.)
2. Is this point clearly stated in the first sentence? If no, consider possible "fixes" and jot those down in the column to the right.
3. Does every sentence in the paragraph advance your point? If yes, briefly and specifically explain the purpose of the sentences. If no (or "sort of"), consider possible "fixes" and jot those down in the column to the right.

### Sample Response

|            |   |   |
|------------|---|---|
| <b>¶ 1</b> | <p><b>Paragraph Point:</b><br/>Roadmap paragraph: I provided overall assertion/conclusion and the general rule that applies. This narrows scope of memo to threatening and tumultuous behavior.</p>   | <p><b>¶ Fixes:</b></p> <ul style="list-style-type: none"> <li>• Doesn't include the sub-rules for disorderly: need to include these + citation.</li> <li>• Doesn't mention "hazardous condition": need to include.</li> <li>• Doesn't say why I am focusing on threatening and tumultuous only: need to explain that there are no facts to suggest that client was disorderly for fighting/violent/hazardous.</li> <li>• Wording of statute/disorderly definition is confusing: need to say, MA courts use/apply the MPC to define.</li> </ul> <p><b>Additional:</b></p> <ul style="list-style-type: none"> <li>• Typos in the first conclusion</li> <li>• Missing first full cite</li> </ul> |
|            | <p><b>Does the first sentence make the point clearly?</b><br/><b>Y/N</b><br/><i>(If Y, explain below; If N, suggest fix on the right)</i></p> <p>Conclusion/assertion that client was likely disorderly stated clearly in first sentence.</p> |   |
|            | <p><b>Does every sentence support that point?</b><br/><b>Y/N</b><br/><i>(If Y, explain below; if N, suggest fixes to the right)</i></p>   |   |

## LESSONS LEARNED & EXERCISE REVISIONS

Revision is good practice for professors too. The first version of this exercise did not include sample responses. While some students used the table with relative ease, others were concerned that they were not completing it "correctly" and felt constrained in their responses as a result. For example, if students circled "yes" they tended not to explain why their first sentence made the intended point or how the sentence supported the main assertion. Additionally, because the exercise directed students to focus on macro-organization, many students noticed micro-level errors but thought that they could not include them in their table. After discussion with students, I revised the exercise to include sample responses that related directly to the legal hypothetical they were addressing in their memos and added some micro-level fixes they might find. After including this text in the exercise, student responses became more specific, inclusive, and revision-directed.

### WHY IT WORKS

**Reverse outlining builds students' "critical eye"—the ability to observe elements in their writing, to diagnose deficiencies, and to suggest remedies to themselves.** Reverse outlining helps students make substantial progress in the writing process. Students approach their writing with "fresh eyes." Taking time away from a draft weakens the memory's tie to the narrative.<sup>11</sup> With this break, holes and needless repetition (in addition to typos) jump off the page. By seeing and assessing what they actually wrote rather than what they think they wrote, students are able to evaluate whether their points make sense and are ordered logically. This type of self-assessment supports learning because it asks students to retrieve concepts they have learned in class about various legal genres and conventions. Further, they are asked to pay attention to the work they have produced, make evaluative judgments about that work, and then use these evaluations to improve it. This type of sustained attention allows students to encode revision skills into their legal communication knowledge.<sup>12</sup>

**Reverse outlining prepares students to receive and understand external feedback.** By the time students receive their submissions with written feedback (and in my course, a grade), they have taken time away from their work and then reencountered it with purpose. Time away followed by reverse outlining and reflection orient students to the “audience” or “evaluator” perspective. This change in perspective takes the sting out of feedback because students see it coming. In fact, they often notice weak spots and suggest revision “fixes” to the same issues I note in my feedback to them. When students have to articulate observations about their own writing and make suggestions in the “fixes” notes field, they become more aware of the choices involved in communicating legal analysis and take ownership of the feedback/revision process.<sup>13</sup>

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*Reverse outlining validates students’ growth and competency in the writing process. The overlap between student and professor comments helps students to build confidence in their writing and thinking skills.*

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**Reverse outlining supports writer-focused and writing-focused context to the writing conference.**

Thinking and writing about their writing engages students in deep reflection, a key stage in the revision process, before they set foot into the writing conference. This process enables students to retain autonomy in their role as author, which results in robust, writer-driven and writing-focused conferences. Because students have already found many of the gaps in their work and have thought about what they need to do to fill those gaps, they come prepared to discuss improvement strategies. “Students who evaluate their own work become more interested in understanding the criteria and linking it to the substantive feedback than in just receiving a grade.”<sup>14</sup> Adding a cognitive wrapper, like the reflection exercise, supplements the Reverse Outline and prompts students to take a step back from their writing and to think about their individual writing process. Together, these exercises

provide critical context to the writing conference and allow me to connect with students about their specific observations and answer questions while maintaining anonymity for assessment purposes.<sup>15</sup>

**Reverse outlining validates students’ growth and competency in the writing process.** The overlap between student and professor comments helps students to build confidence in their writing and thinking skills. Rather than view external feedback as a judgment of their intelligence, the Reverse Outline and reflection exercises help students to take an “incremental approach” to their learning.<sup>16</sup> This positive-feedback loop demonstrates to students that they are in fact developing tools to evaluate and improve their work.<sup>17</sup> Feedback presented this way motivates students to improve their writing and thinking and both directs and sustains future learning.<sup>18</sup>

NOTES

1. Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 175, 181 (1997).
2. See Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227, 236-39 (2015) (“Feedback requires interpretation, but most students lack the ‘assessment literacy’ to interpret feedback effectively.”).
3. *Id.* at 237 (noting “many students fail to understand the ‘academic discourse,’ which is a prerequisite to interpreting feedback accurately”).
4. Lara Freed & Joel Atlas describe a “disconnect between feedback and learning.” Lara Freed & Joel Atlas, *Teaching Students to Use Feedback to Improve Their Legal-Writing Skills*, 32 THE SECOND DRAFT, 1, 4-5 (Spring 2019). Possible sources of disconnect include: failing to read feedback closely, not understanding feedback or how to implement it, and not valuing feedback. *Id.*
5. See generally Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603, 605-06 (2007) (noting that general literacy skills may not transfer neatly to legal communication); Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from Product to Process*, 24 REGENT U. L. REV. 83, 85 (2012) (concluding after a 2007 and 2009 study of incoming law students that “many first-year law students are unprepared for the demands of learning legal analysis and legal writing and are deeply discouraged when they do not experience immediate success”).
6. See Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 ME. L. REV. 163, 164 (2013) (suggesting attempts at multitasking result in lower reading and reasoning skills among millennials).
7. See generally Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. DCL L. REV. 447 (2003); Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003).
8. As an avid reverse outliner, I went looking for suggestions on how to teach my students this skill. I had the good fortune to find an

article on ABA for Law Students written by Rachel Gurvich and Beth Wilensky. Rachel Gurvich & Beth Wilensky, *Add Reverse Outlining to Your Writing Toolbox*, ABA for Law Students (September 5, 2017), <https://abaforlawstudents.com/2017/09/05/add-reverse-outlining-to-your-writing-toolbox/> (last visited Sept. 4, 2019). Rather than simply suggest that students read the article and head its excellent advice (although I did this as well), I decided to create an in-class exercise. The sample exercise included here relies on the outlining steps suggested in their article.

9. See, e.g., ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 423-24 (2016).

10. My colleague at Suffolk University Law School, Professor Sarah Schendel, introduced me to Professor Marsha Lovett's scholarship on wrappers in other academic disciplines. For sample wrappers in other disciplines see <https://www.cmu.edu/teaching/design/teach/examwrappers/index.html>.

11. Beazley, *supra* note 1, at 178.

12. See George, *supra* note 5, at 173-74 (explaining that attention is at the heart of learning and that focused practice encodes information in the brain and supports future retrieval).

13. The space for "fixes" is inspired by the "private memo." See Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 *TEMPLE L. REV.* 885 (1991).

14. See Bloom, *supra* note 2, at 244.

15. Suffolk LPS students submit all graded work anonymously, and we maintain that anonymity for the entire semester. Unless one of my students chooses to disclose their grade on a particular assignment, I will not know it until after I have submitted grades at the semester's end. Because students complete and submit both the Reverse Outline and reflection exercises with their names on the documents, I am able to focus on supporting students with their specific challenges and observations while maintaining anonymity by focusing on these documents and the questions they engender rather than the specific text I have already commented on. I have also supplemented these exercises with a revision exercise in which I ask students to revise two paragraphs in track-changes mode and to annotate those changes prior to the writing conference.

16. Carrie Sperling & Susan Shapcott, *Fixing Students' Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 *LEGAL WRITING: J. LEGAL WRITING INST.* 39, 75-80 (2012) (discussing how to create incremental, process-oriented assignments and feedback that support an incremental growth mindset).

17. See Bloom, *supra* note 2, at 244 (having students engage in self-assessment just before the return of work with teacher feedback reinforces their self-evaluation). Also, as Professor Bloom notes, "[u]nless students use the feedback they are given to bridge the gap between their current and desired performance, the feedback is just 'dangling data.'" *Id.* at 255.

18. See SUSAN AMBROSE ET AL., *HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING* 66-90 (2010) (discussing how students' motivation determines, directs, and sustains what they do to learn).

# Learning to Love Pro Bono: A Practical Recipe for Engaging Law Students



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Here at the University of Houston Law Center, within the Lawyering Skills & Strategies (“LSS”) Department led by the venerable Sarah Morath, we tend to use a lot of cooking analogies. Although the origin of this practice is not entirely known, it is fitting to describe our recent student-alumni pro bono event in foodie terms. We even called the event “Breakfast of Champions.” In the span of three hours on a Friday morning, we managed to bring together law students, LSS faculty, practitioners who serve on our newly-formed LSS Advisory Council, and UH law librarians, to help low-income clients in all parts of the great (and vast) state of Texas. We did so using the virtual legal advice platform provided by the ABA’s Free Legal Answers website,<sup>1</sup> and we hope you will consider doing the same at your law school. Below is our simple recipe for success.

## STEP 1: PREHEAT

To launch a virtual legal advice clinic, you will first need access to the technological platform that makes it possible. No software is required; just an Internet connection in a jurisdiction that participates in the American Bar Association’s “Free Legal Answers” program. Launched in September 2016, Free Legal Answers allows members of the public who income-qualify to post civil legal questions to a secure website and have those questions answered by a licensed attorney in their state:

Free Legal Answers is a no-cost, online version of the walk-in clinic model where clients request brief advice and counsel about a specific civil legal issue from a volunteer lawyer. It is an important part of the ABA’s efforts to expand access to legal services to low-income communities. With our partner states, the program also provides significant pro bono opportunities for lawyers. It’s a real win-win.<sup>2</sup>

Free Legal Answers has now expanded to 43 jurisdictions, with each participating state hosting its own website based on the ABA model.<sup>3</sup> In short, the platform provides access to justice for anyone with a smart phone.<sup>4</sup>

In Texas, the website is [TexasLegalAnswers.org](http://TexasLegalAnswers.org). The site was launched in June 2017, and volunteer Texas lawyers have since answered 5,977 questions from 5,703 individuals.<sup>5</sup> On average, it only takes twenty minutes for a volunteer to respond to a client question on Texas Legal Answers.<sup>6</sup> The answering pro bono lawyer remains anonymous throughout the

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*In the span of three hours on a Friday morning, we managed to bring together law students, LSS faculty, practitioners who serve on our newly-formed LSS Advisory Council, and UH law librarians, to help low-income clients in all parts of the great (and vast) state of Texas.*

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process, but even so, the State Bar of Texas provides malpractice coverage for all volunteers. A practicing Texas lawyer can easily #give20minutes, whether it is from the office, at home in pajamas, or while waiting for a plane to board.

The current ABA Standards for law school curriculum mandate that law schools “provide substantial opportunities to students for . . . participation in pro bono legal services, including law-related public service activities.”<sup>7</sup> It is commonly believed that exposure to pro bono work during law school encourages law-students-turned-lawyers to do more pro bono when they eventually go into practice—a goal of our profession that continually needs stoking.<sup>8</sup> Through the Texas Legal Answers site, students can see the high demand for pro bono legal services. Students see at first glance just how long the waiting queue of questions is on the site. They also get a feel for the substance of the legal needs of ordinary Americans: the prevalence of family law concerns, the need for an advocate in communications with a landlord, a car dealership, or an insurance company, and the general difficulty non-lawyers have navigating our complex legal system.

For our 1L students, there is another reason to get involved: to learn how legal research and writing skills learned in class translate into the real world. As described in more detail below, students can see how clients relay facts (relevant and irrelevant) and describe their legal troubles in layman’s terms.<sup>9</sup> Students practice gleaning the issues from these often somewhat jumbled client stories, looking for answers using legal research techniques and Westlaw or Lexis, and drafting a coherent response using plain

language and focusing on what matters to the client, rather than academic legal analysis.<sup>10</sup> Getting this feel for the unique style of client interaction is particularly helpful on the eve of these 1L students’ first summer jobs, where client-facing skills can help set the students apart from their peers. It is even more critical for junior associates, because in the early years of practice, there are typically few opportunities outside the pro bono context to really problem-solve and interact directly with clients.<sup>11</sup>

## **STEP 2: GATHER THE INGREDIENTS**

The University of Houston Law Center is not the first law school to have hosted a virtual clinic using the ABA’s Free Legal Answers, and we hope many more replicate this great idea.<sup>12</sup> In fact, although many professors within the LSS Department had introduced our 1L students to the TexasLegalAnswers.org website during fall semester classes—pulling down client questions for the students to research and respond to in small groups—we were inspired to host an in-person event after hearing about Suffolk Law School’s “Pizza and Pro Bono” clinic during a presentation at the 2018 LWI Biennial Conference.<sup>13</sup>

Needless to say, the ingredients are straightforward. You need (1) students, and (2) faculty and/or practitioners who are licensed to practice in your state. That’s it. We were lucky enough to also have our law school librarians on hand, and although they are not technically necessary to make a virtual clinic happen, they helped our students and practitioners alike to locate sources that few knew were out there.

For our Breakfast of Champions event, we turned to our LSS Advisory Council and, of course, our 1L students. The LSS Advisory Council was formed in the fall of 2018. The Council is made up of 12 local practitioners of all kinds: big firm lawyers, solo practitioners, plaintiff’s counsel, defense counsel, criminal defense counsel, in-house counsel, and even a permanent law clerk to one of the federal district court judges here in Houston. The role of the Advisory Council is to advise the LSS faculty on developments in the practice of law that might need to make their way into the research and writing curriculum. The Advisory Council also serves as a networking hub for students.

After internally securing a date and time for the event, we emailed the Advisory Council and asked

for members to join us. Five responded that they would participate. We then set up a SignUpGenius site for students to secure their spots. We created 15 student slots (limited per 1L section to ensure that all sections could participate)—enough for five groups of three students to each be matched with a practitioner, a faculty member, and a law librarian.<sup>14</sup> After email reminders to sign up, in-class mentions, and marketing for the event in the weekly student e-newsletter, all 15 spots filled.

### STEP 3: BAKE

On Friday, April 12, 2019, LSS Faculty, law librarians, Advisory Council volunteers, and 15 students convened in the main conference room at the UH Law Center.<sup>15</sup> Breakfast was served (breakfast tacos, of course), and the Associate Dean greeted the crowd and the Dean came by later in the morning to see the clinic in action.

The State Bar administrator for TexasLegalAnswers.org, Hannah Allison, appeared via video conference to kick off the substantive portion of the morning. She spoke briefly about the history of the site and extolled its virtue for reaching both urban and rural communities throughout the state. I then gave a brief presentation on the need for pro bono legal aid in Texas and how to actually use the TexasLegalAnswers.org site. We even had the presentation accredited for CLE credit (half an hour of Ethics), and the Advisory Council members were grateful for that extra perk.

After that, the groups of students and Advisory Council members (randomly assigned by drawing student names at the event) got to work. Each Advisory Council member logged on to TexasLegalAnswers.org and, working with the students, chose a client question from the queue to answer. Questions ranged from help with family law matters to landlord-tenant to consumer disputes.

For example, my group pulled the following question from the waiting queue:

I am paternal gma to 3 kids ages 4,3&1. The 4yr.old has lived with me since 3days old. The 1yr.old lived w/ me for 10 months. The middle child lived with my sister for at least the last 2yrs. Cps removed the children from their parents. That's a whole nother story but where we r now is kids are in foster care

and cps will not consider me for placement nor allow me visitation. I have standing under Tx. Fam.code 102.003(9) to file for custody. On the 88th day after cps removed I filed my petition in intervention along with a supporting affadavit. Providing enough copy's and a list with email and physical addresses of all parties and requested citations be served. Now what?? . . . And how do I request a hearing? I want them home as quick as possible.<sup>16</sup>

Then, with the help of law librarians, the students started researching the answers to their group's chosen client question. Working together, the practitioners, faculty, and law librarians were able to help guide the students through good research practices, such as reminding them to start with secondary sources for unfamiliar areas of law. The groups talked about what they were finding in real time, and then the students in each group split the responsibility of drafting a response.

In our matter, the law librarian for our group directed the students to a specific secondary source on Texas family law and CPS practice that is only available on Lexis and explained how to look up docket information for the case in question (which was in a semi-rural county). The three students then decided that one student would research whether the grandmother had standing to intervene in the lawsuit she described; one student would research the factors that go into decisions for grandparent visitation; and one student would look into the applicable local procedures for setting a hearing.

When it came to drafting, the groups discussed the importance of understandable, culturally-sensitive language in client communications.<sup>17</sup> In our group, we talked about what information was important to relay and what terms we might use to do so effectively. We talked about using words such as “show up” instead of “appear,” and describing the grandchildren as “living with you” instead of “in your possession.” The students each drafted a blurb covering their portion of the research. One student excerpted part of the grandparent visitation statute for the client to reference. Another student gave the client the phone number to the court coordinator and described how to request a hearing. And each draft blurb included words of empathy and understanding to go along with the basic legal information called for by the question.<sup>18</sup>

The students e-mailed their answer portions to the Advisory Council member in their group, who in turn submitted the final answer online. Notably, answers on TexasLegalAnswers.org are confidential and anonymous. The website works like an e-mail exchange once the attorney draws down a question from the queue to answer, but the attorney is identified with only a number unless he or she chooses to self-identify in the substance of a message.

All in all, the participating Advisory Council members, students, and faculty learned just how easy it can be to help someone who knows far less than a first-year law student. We are planning to repeat the event in Spring 2020.

## STEP 4: SALT TO TASTE

If you do decide to try this one at home, there are a few small things we would like to note with hindsight as our guide. First, to make the clinic more efficient, we suggest choosing ahead of time the client questions from the online queue. A day or two before the event, each practitioner (or faculty—as long as he or she has a valid Bar number to get into the website) should spend an hour or so looking through client questions for something that lends itself well to quick legal research. By doing so, the groups can avoid spending time during the clinic choosing a question, and the practitioner likely will also feel more comfortable answering a question that he or she has previously thought about. Additionally, skimming client prompts quickly during the event can lead to more complicated legal questions than may appear on first impression.

Second, give some thought to what time of day works best for the outside practitioners and students. You might consider polling those interested in participating to find out beforehand and thereby maximize the number of people who can come (and thus the number of clients who are served).

Finally, given the inevitable last-minute emergencies of practicing lawyers, try to include faculty who have active Bar licenses and who can serve as “back up” practitioners for the event with their own log on credentials for your state’s Free Legal Answers website. It never hurts to be prepared.

## STEP 5: ENJOY

We hope that you will consider using the ABA Free Legal Answers platform to host a virtual clinic at your institution. The exercise pushes students to use their research and writing skills to help real people in layman’s terms, inculcates students about the need for and value of pro bono legal services, and offers networking opportunities for students with local practitioners.

**Prep Time:** 6 Weeks

**Hands-On Time:** 4 Hours

**Serves:** 5-15 clients,  
15-30 law students,  
5-10 local practitioners,  
4-8 legal writing faculty,  
4-8 law librarians

**Calories:** 0<sup>19</sup>

### NOTES

- <https://abafreelegalanswers.org/>.
- ABA Launches Free Legal Q&A Service to Broaden Access to Justice Opportunities (Sept. 22, 2016) (quoting then ABA President Linda Klein), [https://www.americanbar.org/news/abanews/aba-news-archives/2016/09/aba\\_launches\\_freele/](https://www.americanbar.org/news/abanews/aba-news-archives/2016/09/aba_launches_freele/).
- <https://www.abafreelegalanswers.org/supportus>. You can find out if your state participates by clicking your state from the drop-down menu on the [ABAFreeLegalAnswers.org](https://www.abafreelegalanswers.org) home page.
- Free Legal Answers is mobile-friendly. [https://www.americanbar.org/groups/probono\\_public\\_service/projects\\_awards/free-legal-answers/](https://www.americanbar.org/groups/probono_public_service/projects_awards/free-legal-answers/).
- Statistics current through June 10, 2019. <https://www.facebook.com/ProBonoTX/photos/a.1760707160841594/2388132648099039/?type=3&theater>.
- <https://probonotexas.org/get-involved/pro-bono-anywhere>.
- AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2018-2019, Standard 303(b)(2).
- See, e.g., Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *FORDHAM L. REV.* 2415, 2431 (1999) (suggesting that law schools can increase pro bono participation with “educational efforts that focus attention on the urgency of unmet needs and on the profession’s obligation to respond,” and that “[e]nlisting well-respected practitioners and faculty as mentors and role models could assist those efforts”); see also Jill Chaifetz, *The Value of Public Service: A Model for Instilling A Pro Bono Ethic in Law School*, 45 *STAN. L. REV.* 1695, 1703 (1993) (recommending that to achieve widespread attorney involvement in pro bono, pro bono programs should begin in law school, and stating that without such programs, “students will lose the initiative to pursue public interest careers,” which “will ultimately perpetuate the current failure of the majority of lawyers to participate in public interest work”).

9. Kevin J. Currin, *Pro Bono: The New Associate's Compass to Success*, Oct. 27, 2015, <https://www.stroock.com/publication/pro-bono-the-new-associates-compass-to-success/> (listing the many goals for a new associate at a large law firm—including building drafting skills and soft skills related to client interaction—and explaining that doing pro bono work helps associates work toward those goals).

10. *Id.*; see also Marni Lennon Esq., *Giving Back Through Pro Bono Advocacy Is A Win-Win for All Law Students*, April 26, 2017, <https://www.americanbar.org/groups/litigation/pages/giving-back-through-pro-bono-advocacy/> (urging law students to become active in pro bono to work on their research and writing, client counseling, and public speaking skills; learn the ins and outs of the legal system; and distinguish themselves in the job market).

11. See Currin, *supra* note 9.

12. Baylor Law School, <https://www.baylor.edu/law/news.php?action=story&story=186591>; Nebraska College of Law, <https://law.unl.edu/node/1393/>; and Suffolk University School of Law, <https://sites.suffolk.edu/legaltech/2017/05/24/students-provide-low-income-residents-digital-pro-bono/>.

13. See Kathleen Elliott Vinson & Samantha A. Moppett, *Digital Pro Bono: Leveraging Technology to Provide Access to Justice*, 92 ST. JOHN'S L. REV. 551 (2018).

14. There were actually four librarians for five groups. Three of the librarians stayed with one group for the entirety of the clinic, and the other floated between two groups.

15. Our entire Lawyering Skills & Strategies Department lent a hand, including director Sarah Morath, Kate Brem, Megan Davis, Alissa Gomez, Whitney Heard, Hilary Reed, Lauren Simpson, Ken Swift, and Irene Ten Cate. We were also joined during the event by law librarians Robert Clark, Dan Donahue, Emily Lawson, and Brittany Morris-Easley.

16. Identifying information has been removed for purposes of confidentiality.

17. In June 2015, the ABA issued a guidance memo relating to Standard 302—the Standard that lists minimum learning outcomes for accredited law schools—that named “interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, *cultural competency*, and self-evaluation” as skills that law schools should consider teaching. Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 384-85 (2017) (citing Managing Director’s Guidance Memo, Sections 301, 302, 314, 315, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_learning\\_outcomes\\_guidance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf)).

18. *Id.* at 386 (hailing the ABA’s inclusion of cultural competency on the list of skills law schools should teach as a start towards addressing implicit bias in the legal profession).

19. In Texas, breakfast tacos don’t count.



# What's a Writing Specialist Good For Anyway?



Terri LeClercq

I have used education, opportunity, and sheer luck to make the title “legal writing specialist” into a great life. In part because of my Ph.D. in English, I was hired to help the writing program at the University of Texas—and held that job for 23 years. But over the years, I have had many opportunities—some sought-out, others by chance—that expanded my career well beyond that initial role. Based on my experiences, here are some ideas to start you thinking about expanding your own reach.

## STEP INTO CLASSROOMS BEYOND YOUR OWN

Writing specialists have much to share—and much to learn—beyond their traditional writing courses. Like most of my fellow writing specialists, I counseled individual students, led workshops, and aided in the first-year writing program. I also taught Advanced Legal Writing, Writing for Law Journal Editors, and an Introduction to American Law for LLM students. After a bit, colleagues invited me into their courses and seminars to discuss scholarly writing and other related topics, such as Negotiations & Drafting and Real Estate Transactions & Drafting; naturally, I learned more than the law students. Clinicians also invited me to their classrooms and courtrooms to fine-tune their students’ persuasive edges. In my spare time (that’s a joke), my husband, Jack Getman, and I directed a Summer Outreach Program and taught introductory classes on both plain writing and the Socratic method at three University of Texas undergraduate colleges where U.T. Law had had traditionally experienced difficulty recruiting minority students.

Other law schools invited me to offer short advanced-writing courses, summer classes, week-long retreats that focused on, for example, persuasion or more recently, reaching audiences outside of legal audiences. There are also opportunities for writing specialists overseas. Legal writing professionals are frequently invited to help foreign law schools, courts, and agencies. For example, Qatar University invited me for two weeks of undergraduate law lectures, and the University of Ottawa invited me to all-college presentations twice.

## PUBLISH WITH BAR JOURNALS

State and local bar publications need relevant, high-quality content, and writing specialists are perfect sources. U.T. Law librarian Roy Mersky recommended me to the *Texas Bar Journal*, and from 1985-1995, I cranked out a monthly column on



plain language that extended both my name and advice throughout Texas—quite a boon! These relatively short, monthly columns eventually expanded into full-blown books. In 1995, The University of Texas Press chose the best-of articles and published them in *Expert Legal Writing*<sup>1</sup> with an introduction by my friend Tom Phillips, Chief Justice of the Texas Supreme Court and a strong proponent of clear legal writing. That same year, our big-hearted colleague Richard Neumann recommended to Little, Brown publishers that they collect and publish those bar journal columns, and thus in 1995 I danced around the room to see my second book, *Guide to Legal Writing Style*,<sup>2</sup> appear among titles for legal writing classes.

## SHARE YOUR KNOWLEDGE IN CLES

Presenting in front of audiences full of practicing lawyers is another great way to raise your profile and open professional doors. Some of our graduates told their employers about my interest in clear writing, and several of the firms invited me into their offices to work with both new and experienced writers (and staff). Those attorneys serve on state bar committees; when it came time to find speakers for the next CLEs, they offered my name. The Texas State Bar invited me to offer one-hour, even three-hour sessions about clear writing for their section meetings on real estate, wills and estates, construction law, animal law—you name it.

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*[T]here's no reason that writing specialists have to spend their time focused solely on "traditional" forms of writing. The same creativity required to draft a compelling brief or to write a killer op-ed can be showcased in other creative ways.*

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Not only can these presentations allow you to develop subject matter expertise and visibility in the field, they can give you access to a base of potential legal writing clients. After my presentations, some of those participants invited me into their law firms, where I worked with the entire firm—with new hires, with paralegals, and with staff. If they had weak writers, I returned and helped mentor those people until they could fly on their own. It was a sound investment for the firms. So offer to present a legal writing session to a state bar conference. At the end of the hour, ask them to tell you one new idea or technique they now have.

You may also find opportunities to present to practicing lawyers through your home law school. For example, my law school holds regular CLEs for alumni and nearby attorneys, and they actually paid me to give three-hour presentations. Offer your school's relevant administrator a chance to bring alumni back for a CLE course in legal writing. This is, of course, a win-win-win. You are providing the school a chance to offer a positive connection with their alumni; you are showing the school that you have a valuable product and they should notice you/reward you; in the audience will be attorneys who appreciate what you have to offer and might bring you into their law firm for even more seminars.



## BECOME A LEGAL WRITING CONSULTANT

Beyond simply teaching other lawyers how to improve their writing, you can help do it for them. Some of those attorneys you have now reached will be creating serious, important, hurried filings and briefs. Make yourself available for editing or reviewing for persuasive techniques. If you enjoy this work and if they find it valuable, you could have a great part-time vocation.

These days, there are even opportunities to consult as an expert on the subject of legal communication and usage. Beginning in 2001, I helped the Federal Judicial Center edit and publish model class action notices for Federal Rule of Civil Procedure 23(c)(2).<sup>3</sup> A Houston federal judge—exasperated with weak class-action notice in an ongoing Texas case—“invited” both plaintiff and defense attorneys to create a \$100,000 fund that he offered to me to investigate and help change the mystifying public notices that most of us disregard. I joined the Federal Judicial Center as its writing consultant, working with dedicated federal employees and other outside consultants. That experience led to a separate role reviewing and editing briefs, and to being designated as a legal writing expert before courts. It is quite a thrill to help resolve a contract or state constitutional issue.<sup>4</sup> Recently, I joined an amicus brief in a Ninth Circuit case involving class-action notices,<sup>5</sup> and I testified in a case on behalf of 1950s musicians against Walt Disney’s music contracts.<sup>6</sup>

## ADVOCATE FOR A CHERISHED CAUSE

On the other end of the compensation spectrum, there is no end of worthy causes—and the government agencies and non-profit organizations that support them—that need writing expertise. My initial publishing successes in the field of legal writing gave me the courage to publish about other topics that I cared deeply for. After ten years of my exhausting and depressing research into federal and state prison conditions, our own *Legal Communication & Rhetoric: JALWD* published my polemic diatribe against four U.S. senators’ disgraceful rhetoric, “Rhetorical Evil and the Prison Litigation Reform Act.”<sup>7</sup> That publication topped my wish-list and remains a career highlight.

I parlayed that publication into other opportunities to engage with the subject. Because both the charity and the cause were near to my heart, I created one-page handouts for inmates on behalf of the Texas Civil Rights Project, listing veterans’ benefits, etc. Plus, I continue to edit the newsletter for the Texas Inmate Families Association (and write a column on grievance writing). I also speak both nationally and internationally about prison conditions, a journey that began when my daughter and I were arrested for civil disobedience. I am not recommending that path, but it definitely allows a writing specialist to see lots of the world!

Offering to help charities is a two-edge sword for most of us: yes, we want to help those who need us the most. Yet, like musicians who are frequently asked to play “for exposure” but no money, and for artists and jewelry-makers who are supposed to donate goods “to get their names out in silent auctions,” we are asked to undervalue our time. Your decision to take on this needed charity work depends



on your “extra” time and your quality-of-life decisions. But there are plenty of relatively low-investment ways to let your writing skills support noble causes:

- Focus on a local issue that matters to you and write an op-ed for your newspaper. You may include a school-affiliation disclaimer, but if you can represent one of your clinics, etc., you will have a stronger “set of chops.”
- Think about your favorite local charities and their web presence or mailouts. Do you have suggestions to make them more persuasive or simply more comprehensible? If so, make an appointment and offer to help their team. You might edit a monthly newsletter, or, if you understand web design, offer to work with their personnel. You might help create easy-to-read, one-page handouts for their walk-in clients.
- Make an appointment with your favorite legislator. Ask if you can contribute to speech writing. These folks are burdened with too much and have too-soon deadlines. They also have over-burdened staff. Who would turn down a writing specialist’s offer to contribute? (If they do, then that’s the wrong legislative office!) When I taught at the University of Nevada School of Law, I helped an advanced writing student craft a speech that she eventually gave before the Nevada state legislature; she was a wonderful advocate for a subject that affected her life (birth control availability in the Utah and Nevada hinterlands).

## EXPAND INTO NEW, CREATIVE GENRES

Lastly, there’s no reason that writing specialists have to spend their time focused solely on “traditional” forms of writing. The same creativity required to draft a compelling brief or to write a killer op-ed can be showcased in other creative ways. For example, my passion for prisoners’ rights led me to learn the art of writing dramatic dialogue for graphic novels and to fight prison officials to get a graphic novel into prisons across the country: *Prison Grievances: when to write, how to write*.<sup>8</sup> Sure, I wish I could tell you that writing specialists automatically have all the tools to create a graphic novel. But I did not know, then, that you first write dialogue; add location and speaker descriptions; spend forever and lots of money finding a graphic artist; ditto finding a “bubble-filler” (can’t make that up...); learn the art of creating front and back covers; learn how to create Library of Congress I.D. numbers; learn to create bar codes with sales price ... and learn how to market your own title. Self-publishing is an art form; publishing a graphic novel is yet another sphere, far beyond what we learned in English departments, unless you were clever enough to minor in computers and the graphic arts.

You can use your creative skills as well as your on-paper writing skills. You may find your outlet writing song lyrics or poetry or trying your hand at graphic novels. The world, ladies and gentlemen, is your oyster because you have the skills.

As I insisted to the audience at the 2018 annual Legal Writing Conference (when they presented me with the Golden Pen Award), “**You** can do it—**we** can do it. So, let’s!”



## NOTES

1. TERRI LECLERCQ, *EXPERT LEGAL WRITING* (1995).
2. That book went through five editions and morphed into a self-published text with Karin Mika, titled *Legal Writing with Style*.
3. See, e.g., Todd B. Hilsee & Terri R. LeClercq, *The Federal Judicial Center's Model Plain Language Class Action Notices: A New Tool for Practitioners and the Judiciary*, 4 *Class Action Litig.* (BNA) 182 (Mar. 14, 2003).
4. Our substantive legal writing colleagues also function this way, of course; probably the best and wisest of them all is Burton Award winner Joe Kimble, WMU-Cooley professor emeritus and author of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (2012) and a favorite speaker/expert for both the judiciary and federal agencies.
5. See Brief of Plain-Language Notice Experts, et al. as Amici Curiae in Support of Objector-Appellant and Supporting Reversal, *Low v. Trump University, LLC*, 881 F.3d 1111 (9th Cir. 2018) (No. 17-55635), 2017 WL 2730076. The question before the court was about the fiduciary duty of candidate Trump's large legal team to explain opt-out provisions in Rule 23(c)(2) notices—provisions I had helped the Federal Judicial Center clarify earlier.
6. See *Gilkyson v. Disney Enters., Inc.*, 198 Cal. Rptr. 3d 611 (Cal. Ct. App. 2016).
7. Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 *LEGAL COMM. & RHETORIC* 47 (2018).
8. TERRI LECLERCQ, *PRISON GRIEVANCES: WHEN TO WRITE, HOW TO WRITE* (2d ed. 2014).

# Another Tool (the Case Parenthetical) for Teaching Legal Analysis



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As a legal analysis, writing, and research professor, I find that most first-year law students rely too heavily on extensive case law recitations in their legal writing. To sharpen students' analyses, I recommend the use of case parentheticals. The concise format of case parentheticals forces students to be succinct and more strategic. In a nutshell, parentheticals not only foster analytical thought; they also constitute an important component of good legal writing style.<sup>1</sup>

Writing professors should teach students that regurgitating case law—a common practice among first-year law students—is no substitute for adept legal analysis. Put in architectural terms, case law should be a structure's supporting beams, not its entire framework. Case parentheticals are unique because they require the writer to convey concisely the essence and relevance of the cited cases. By incorporating one case parenthetical into a legal analysis, the writer has laid a supporting foundation; by incorporating a series of case parentheticals into a legal analysis, the writer often has constructed an unshakable legal castle.

But case parenthetical use does not come naturally to many students. Evidence of this proposition

manifests itself in three ways: avoidance, repetition, and overreliance. First, unfamiliarity with case parentheticals causes many students to avoid using them. Making matters worse, helpful resources are scant. Neither the *Bluebook* nor legal writing stylebooks provide much in the way of explanatory guidance;<sup>2</sup> the *Bluebook* is vague,<sup>3</sup> and legal writing stylebooks offer inconsistent advice.<sup>4</sup> Consequently, students are unsure about how and when to use case parentheticals, so they avoid them. Second, many students fail to recognize that a case parenthetical should support the writer's analysis, not simply duplicate it. Finally, some students depend too heavily on case parentheticals, not realizing that they are not always good substitutes for full case illustrations and analysis.

I have found that thoroughly and deliberately teaching case parentheticals helps my students learn the advantages associated with this writing tool and how using parentheticals can sharpen their analysis. To effectively teach parenthetical use and form, I devote class time to examining the role case parentheticals can play in legal writing and leading students through a series of practical exercises.

## THE ROLE OF CASE PARENTHETICALS IN LEGAL ANALYSIS

Case parentheticals have many positive attributes. They synthesize authority<sup>5</sup> and summarize judicial reasoning,<sup>6</sup> enabling legal writers to convey salient

information in a pithy fashion.<sup>7</sup> Furthermore, case parentheticals are versatile; they can serve one or more of the following four key functions: (1) supporting a rule, (2) countering or distinguishing adverse authorities, (3) quoting relevant case language, and (4) summarizing facts.

### Supporting a Rule

A case parenthetical often conveys useful information that supports the writer's explanation of the law.<sup>8</sup> By using a case parenthetical, a writer can provide salient facts that cement a case's connection to the stated legal proposition. A case parenthetical, however, is not a substitute for a detailed case illustration, nor is it an occasion to compare and contrast facts at length. Rather, a case parenthetical allows a writer to distill information down to its essential ingredients—a key skill that helps legal writing students sharpen their analytical abilities.

The following example demonstrates how case parentheticals can support a rule. Suppose a controversy arises involving the application of the shopkeeper's privilege, a common defense merchants use when sued by detained suspected shoplifters.<sup>9</sup> Rather than describing the details of the case law, the writer can state the applicable rule and then use case parentheticals to demonstrate its application,<sup>10</sup> as follows:

In determining whether a store detained a customer for a reasonable amount of time, courts consider whether the store's investigation was efficient and organized. *See, e.g., Dillard Dep't Stores, Inc. v. Silva*, 106 S.W. 3d 789, 795 (Tex. App. 2003) (sixty-minute detention reasonable because store immediately called police); *Guijosa v. Wal-Mart Stores, Inc.*, 6 P.3d 583, 592 (Wash. Ct. App. 2000) (forty-minute detention reasonable as store interviewed eyewitnesses and simultaneously contacted police).<sup>11</sup>

Note that the case parentheticals often provide only the holding and relevant facts—the length of the detention and the actions the store took during that time period; they rarely elaborate on a court's reasoning. When a writer considers it necessary to include judicial reasoning, a full case illustration is likely more appropriate.<sup>12</sup>

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*The concise format of case parentheticals forces students to be succinct and more strategic.*

*In a nutshell, parentheticals not only foster analytical thought; they also constitute an important component of good legal writing style.*

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### Countering or Distinguishing Adverse Authorities

In briefs, case parentheticals help students learn how to use case law strategically. Specifically, by incorporating case parentheticals, a writer can discuss adverse authority without providing unnecessary details that might otherwise confuse or distract readers.<sup>13</sup>

For example, suppose a student wants to argue that a court should allow a divorced custodial parent to move out of the state with her children. Suppose further that the student finds both favorable and unfavorable case law. While the student may know what to do with supportive cases, he or she is often flummoxed as to how to address adverse authority, frequently discussing it in detail and then trying to distinguish it. This tactic creates verbose and confusing prose. Case parentheticals can help. Once the student recognizes the determinative facts of the adverse authority, the student can use case parentheticals strategically, as shown below:

A custodial parent can move out of state if doing so is in the child's best interests. *Bisbing v. Bisbing*, 166 A.3d 1155, 1156-57 (N.J. 2017). In contesting Plaintiff's relocation, Defendant inappropriately relies upon distinguishable case authority. *See O'Connor v. O'Connor*, 793 A.2d 810, 823-24 (N.J. Super. Ct. App. Div. 2002) (denying out-of-state domicile change where parents shared physical custody of the child and the move would have prevented the child from seeing his grandparents and cousins).

I show my students how the case parenthetical in this example enables the writer to highlight a

distinguishing set of facts without delving into the entirety of the adverse authority, an exercise that would undoubtedly prove distracting to the reader.

## QUOTING RELEVANT CASE LANGUAGE

Case parentheticals also help students break the bad habit of using long block quotes. Readers typically do not want to wade through block quotes and often skip over them; in contrast, readers can easily swallow and digest a one- or two- sentence quote in a parenthetical.

To illustrate this point, I offer students two examples of case parentheticals containing quotations from the cases. The first example, found in the *Art of Advocacy*,<sup>14</sup> borrows from a brief that describes the scope of the Sherman Act, an antitrust law that prohibits monopolies:

Section 2 condemns only limited types of unilateral conduct. See *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (“[M]erely possessing monopoly power is not itself an antitrust violation.”).

The second example describes the application of Title IX, a law that governs a school’s liability for sexual harassment occurring during school:

For there to be liability under Title IX, a school must know of the harassing behavior. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999). Precise guidelines do not exist as to what evidence constitutes actual knowledge. *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1348 (D. Ga. 2007) (“Knowledge must encompass either actual notice of the precise instance of abuse that gave rise to the case at hand or actual knowledge of at least a significant risk of sexual abuse.”).

After showing these passages to students, I ask them to specify what the case quotes accomplish. Most take stock of the fact that the court’s own verbiage elaborates upon the text that precedes the citation. Because there is no room in the parenthetical for extraneous details and words, students recognize how the parenthetical helps the writer achieve focus and brevity.

## SUMMARIZING FACTUAL INFORMATION

Sometimes case parentheticals provide the ideal opportunity to summarize important factual information. Consider the following example, referencing groups of people who have historically been excluded from jury participation. Four short parentheticals instantaneously convey this point:

Discrete groups in our society often have been excluded from jury pools. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women); *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946) (daily wage earners); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican Americans); *Smith v. Texas*, 311 U.S. 128 (1940) (African Americans).<sup>15</sup>

In the above example, the writer uses only one fact from each case to illustrate the proposition, omitting extraneous information.

## PRACTICAL EXERCISES

The following two exercises are designed to help students effectively use case parentheticals to strengthen their legal analysis. I lead the students through the first exercise in class, and I assign the second exercise as homework.

The in-class exercise in Appendix A provides a paragraph that discusses two cases. In class, I ask the students to rewrite the paragraph using case parentheticals. Using PowerPoint, I show the paragraph rewritten with case parentheticals and allow students to compare their work to the rewritten paragraph. Students tend to successfully complete this assignment, and many appreciate for the first time how case parentheticals can make their writing more concise.

The out-of-class assignment in Appendix B builds upon the first exercise and is thus more elaborate. The goal of this exercise is for students to use case parentheticals to support the provided rule by highlighting key facts of the cited cases. I provide a fact pattern, three case summaries, and the legal rule.<sup>16</sup> The issue in the exercise is the enforceability of a restrictive covenant, specifically regarding its time restriction.<sup>17</sup> I distribute case summaries that convey important facts, court holdings, and reasoning

regarding what time restrictions are reasonable when an employer seeks to prevent a former employee from competing. I instruct the students to use case parentheticals to illustrate when courts permit time restrictions and when they prohibit them. In our next class, the students meet in groups to discuss their work, and I ask each group to choose the best parenthetical to present to the entire class. By the end of this exercise, students are more comfortable with case parentheticals and can recognize their effectiveness.

In sum, while case parentheticals are not a substitute for detailed legal analysis, they can help focus students on the salient aspects of the relevant case

law and make their writing more succinct and, in many cases, easier to follow. By teaching students how to use case parentheticals, legal writing professors not only help students improve their legal analysis but also provide an additional device for students to put in their writing toolboxes—a tool that will enhance their legal analysis and add depth to their writing.

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## Appendix A

### IN-CLASS EXERCISE

Using case parentheticals, revise the verbiage in the following examples.

#### Example #1:

Some trade agreements so unreasonably restrict competition that they violate federal law per se. For example, in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940), the United States Supreme Court held that a horizontal price-fixing agreement was so unreasonable that it was per se illegal. Similarly, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911), the United States Supreme Court held that a vertical price-fixing agreement was per se illegal. Finally, in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam), the United States Supreme Court also held that a horizontal market division was per se illegal.

#### Sample response:

Some trade agreements so unreasonably restrict competition that they violate federal law per se. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (holding horizontal price-fixing agreement is per se illegal); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (holding vertical price-fixing agreement is per se illegal); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam) (holding horizontal market division is per se illegal).<sup>18</sup>

#### Example #2:

The Supreme Court has stricken several gender-based classifications as violating equal protection when those classifications were based on overbroad generalizations about the different capabilities of men and women. For example, a single-sex military school violated equal protection by making overbroad assumptions about candidates based on their gender. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996). Similarly, the Supreme Court has held that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138-40 (1994).

#### Sample response:

The Supreme Court has stricken several gender-based classifications as violating equal protection when those classifications were based on overbroad generalizations about the different capabilities of men and women. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (involving single-sex military schools); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138-40 (1994) (involving gender-based peremptory challenges in jury selection).<sup>19</sup>

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# Appendix B

## OUT-OF-CLASS EXERCISE

### Facts

Susan and Steven Muller own and manage the Muller Investigative Agency (“Agency”) in New Haven, Connecticut. They have twenty-six clients: nineteen in New Haven, three in Hartford, two in Greenwich, and two in New York City. Over the course of two decades, they have cultivated strong bonds with most of their clients, many of whom have an ongoing need for detective services.

Steven Muller hired Janie Jones and required her to sign a restrictive covenant as part of her employment contract. The relevant portion of the covenant reads as follows:

Because of the sensitive and important information that will be disclosed to Janie Jones in the course of her employment with the Muller Investigative Agency, she agrees that she will not work as a private detective within the State of Connecticut for a period of five years from the date of the termination of her employment with the Muller Investigative Agency.

Janie worked for the Agency from September 2015 until July 2019, when she was fired due to inadequate generation of new business.

Janie moved to Greenwich, Connecticut, which is approximately fifty miles from New Haven. She would like to open her own detective agency and solicit clients in southern Connecticut and has promised the Mullers that she will not solicit their two clients in Greenwich. Notwithstanding, the Mullers intend to enforce the restrictive covenant to prevent Janie from working as a detective in Connecticut from July 2019 through June 2024.

### Text Provided to Students

In considering whether a restrictive covenant’s time restriction is reasonable, courts consider many factors, including the number of the employer’s customers, how long the employer has been in business, and whether the employee had access to client lists and other confidential information.

### Case Synopses

*Scott v. General Iron & Welding Co.*<sup>20</sup>

Defendant, General Iron and Welding Company, Inc., was in the business of welding metals and had been located in Meriden, Connecticut for many years. Plaintiff began working for Defendant as an apprentice welder. He had no previous training or experience in the field. In the course of Plaintiff’s employment, Defendant routinely promoted him up the corporate hierarchy. Many years later, the parties met to discuss the future benefits and opportunities that would accrue if Plaintiff were to assume the title of chief engineer, including access to design and engineering knowledge and access to Defendant’s customer list. After the discussion, the parties signed an agreement that included a restrictive covenant.

At the time the agreement was signed, Defendant had more than one thousand customers, which had been cultivated over many years. These customers were located throughout multiple Connecticut townships. As of the signing of the restrictive covenant, all customer lists became available to Plaintiff, and he was introduced to customers and called upon them himself to solicit business for Defendant. Shortly thereafter, a salary dispute arose between the parties, and Plaintiff resigned.

Plaintiff challenged the five-year restriction contained in the restrictive covenant. This restrictive covenant had two prongs: the first prohibited Plaintiff from disclosing confidential information not generally known in the industry, and the second prohibited her from disclosing Defendant’s customer list.

The court held that Plaintiff’s knowledge of Defendant’s customer list potentially threatened Defendant’s business and, therefore, Defendant was entitled to protect that list and other confidential information for a reasonable period of time. The court concluded that a five-year restriction was reasonable, finding that it had taken years of effort for Defendant to acquire its customer base.

*New Haven Tobacco Co., Inc. v. Perrelli*:<sup>21</sup>

Plaintiff employer, a wholesale tobacco business, and Defendant employee entered into an employment contract that contained the following covenant:

Because of the importance and value of the information disclosed to the Employee, as part of the consideration for his employment, the Employee agrees that he will not directly or indirectly sell products similar to those of the Employer to any of the customers that he has dealt with or has discovered and become aware of while in the employ of the Employer for a period of twenty-four months from the termination of his employment.

After voluntarily terminating his employment relationship with Plaintiff, Defendant opened his own wholesale tobacco business and sold "products similar to those of the Employer" to some of Plaintiff's customers within the twenty-four-month restrictive covenant period.

Plaintiff's available customer market was limited to the greater New Haven area and was entitled to legal protection at least for a reasonable time. Because the protection of a customer list is legally recognized, and there was no evidence to indicate that its protection would permit Plaintiff to create or maintain a monopoly, the court concluded that a covenant that prevented Defendant from transacting business with Plaintiff's customers for a two-year period after job termination was reasonable.

### Model Answer Illustrating the Effective Use of Case Parentheticals

In considering whether a restrictive covenant's time restriction is reasonable, courts consider how long it took the employer to acquire customers and whether the employee had access to client lists and other confidential information. See *Scott v. Gen. Iron & Welding Co.*, 368 A.2d 111 (Conn. 1976) **(five-year restriction reasonable where employer had over 1,000 customers acquired over many years)**; *New Haven Tobacco Co. v. Perrelli*, 559 A.2d 715 (Conn. App. Ct. 1989) **(two-year restriction reasonable where employee had access to protected client list)**.

### NOTES

1. See Alexa Z. Chew, *Stylish Legal Citation*, 71 ARK. L. REV. 823, 826 (2019) (suggesting that when done correctly, citations, including case parentheticals, enhance writing, not burden it).
2. *Id.* at 841.
3. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 107-08 (Columbia Law Review Ass'n et al., eds., 20th ed. 2015) offers limited examples of case parentheticals, emphasizing their use to quote and cite, but it fails to elaborate upon the broad range of other information they can include.
4. Chew, *supra* note 1, at 865 ("Some experts [(e.g., Stephen V. Armstrong and Timothy P. Terrell)] advise writers to include a parenthetical after every citation to a case not discussed in the text....Other style experts [(e.g., Bryan Garner)] point to parentheticals as a prime cause of citation clutter.").
5. *Id.* at 866 ("Use parentheticals when 'synthesizing authorities and lines of authorities.'") (quoting ROSS GUBERMAN, POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES 136 (2015)).
6. See *id.* at 867.
7. Eric P. Voigt, *Explanatory Parentheticals Can Pack a Persuasive Punch*, 45 McGEORGE L. REV. 269, 275 (2013).
8. Chew, *supra* note 1, at 864.
9. Customers who have been accused of shoplifting will often sue the store that detained them for false imprisonment. Stores can invoke the shopkeeper's defense to this claim by proving the following three elements: (1) the store had reasonable suspicion there was shoplifting, (2) it detained the customer for a reasonable amount of time, and (3) it detained the customer in a manner that was reasonable. *Guijosa v. Wal-Mart Stores, Inc.*, 6 P.3d 583, 589 (Wash. Ct. App. 2000).
10. Depending upon need and context, writers should include case illustrations within the text to enable readers to compare contrasting fact patterns. See MICHAEL SMITH, ADVANCED LEGAL WRITING 51-52 (2002).
11. Style manuals differ on whether case parentheticals should include articles such as *the* and *an*. However, discussion of this issue is beyond the scope of this article.
12. Chew, *supra* note 1, at 867 (citing RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS 202, 263 (2d ed. 2003)).
13. Voigt, *supra* note 7, at 301.
14. NOAH A. MESSING, THE ART OF ADVOCACY 66 (2013).
15. ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 168 (2d ed. 2014) (drawing from the ACLU's brief in *Berghuis v. Smith*, 559 U.S. 314 (2010)).
16. By providing the legal rule, I remove uncertainty regarding the legal proposition, allowing students to better focus upon the task of formulating the parentheticals.
17. Restrictive covenants are enforceable if they are reasonable. *Scott v. Gen. Iron & Welding Co.*, 368 A.2d 111, 114 (Conn. 1976). In assessing reasonableness, one element courts consider is the covenant's time length. *Id.*
18. *NYNEX Corp. v. Discon*, 525 U.S. 128, 134 (1998).
19. Voigt, *supra* note 7, at 279 (citing MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 109 (3d ed. 2010)).
20. 368 A.2d 111 (Conn. 1976).
21. 559 A.2d 715 (Conn. App. Ct. 1989).

# Give It a Try, It's Not So Bad: Utilizing Distance Learning in First-Year Legal Research and Writing Courses



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Like it or not, online education is now mainstream in American higher education.<sup>1</sup> Traditional, established state and private universities offer classes and entire degrees online.<sup>2</sup> Online education is particularly prevalent in graduate education.<sup>3</sup>

Online J.D. education is also growing. In summer 2018, the American Bar Association (“ABA”) approved expansion of online education from the previous limit of fifteen credits in a law school career to one-third of the entire course of study.<sup>4</sup> Additionally, whereas the ABA previously barred any distance-learning credits in the first year, the rule change now allows for up to ten credits in the first year.<sup>5</sup>

In addition to teaching Legal Research and Writing (“LRW”), I have taught fully online courses for over ten years.<sup>6</sup> I first created an Employment Law course that I still teach today, and about seven years ago I developed an online, upper-division general drafting course. While you may not be ready to teach a fully online course, distance learning tools can provide creative and useful additions or class substitutions for a brick-and-mortar LRW course.

This article will first address a couple of preliminary organizational considerations and look at some possible ways that distance learning can be used in an LRW course, and then close with a few tips and tricks to keep in mind when creating distance-learning videos.

## ORGANIZATIONAL CONSIDERATIONS

### **The distance learning exercises can be supplemental or in lieu of in-class time.**

This article is not about creating fully online courses, but the ABA rules also allow you to substitute distance learning for up to one-third of the required class before the course is considered to be distance learning.

If you choose to have the exercises in lieu of in-class time, steps should be taken to ensure participation and completion. These steps are normally built right into well-designed distance-learning exercises. For example, in the citation exercises described below, students are required to submit exercises that can be successfully completed only by working through

the distance-learning materials. Now, certainly a skeptic could point out that there is nothing requiring students to necessarily watch the videos, or do the assigned readings, but the same can be said for in-class time where we know sometimes students do not pay full attention during lectures (ever have a student ask a question about something you just discussed?) and that students do not always complete all of the assigned readings. Other exercises might be better utilized as supplemental to the required in-class times, such as the editing exercise discussed below.

### Organization is the key.

My distance-learning courses have been well received by students, and fill up year after year, in large part because students find them to be clearly organized. Students understand exactly what is required to complete a particular unit (and a fully online course is really just a collection of individual exercises) and the order in which to complete the required components.

It is important to break up longer portions of an exercise into more manageable components. For example, if I were to create a unit on *Bluebook* case law citation (as discussed below), I would not want to have a forty-five to sixty minute lecture that covers all components of *Bluebook* case law full and short citation, perhaps preceded by a rather lengthy reading assignment. Instead I would break that assignment down into individual components (I have used Interactive Citation Workstation, which similarly breaks the components of case law analysis down into smaller parts). Here is how a sample distance-learning unit syllabus might look:

#### 1. Case Name

- A. Reading: assigned ICW chapter and applicable *Bluebook* pages
- B. Watch: video lecture on case names
- C. Complete: exercise on the course website (Blackboard, Canvas, or other learning-management system)
- D. Complete: ICW exercises for that chapter

#### 2. Case Reporter

- A. (repeat above for the case reporter)

## POSSIBLE USES FOR DISTANCE LEARNING IN A LEGAL RESEARCH AND WRITING COURSE

Distance learning is useful in those “wish I could be there” moments. Are there times when you wish you could be working with the student one-on-one, at the student’s own speed? Where you could walk the student through a task? One advantage of distance-learning tools is that they can expand the classroom and time on task and allow the student to move through a task at the student’s own speed, with guidance from the professor. Here are a couple of possible uses for distance learning that really allow you to “be there” with the student.

### Create a guided editing exercise.

Many of us do in-class guided editing exercises and find them effective, but there are limitations. An entire memo cannot be edited and reviewed in one class period, nor do all students move at the same pace in the editing process. By utilizing distance-learning tools, a student can edit the entire rule of law (instead of just a small portion) and all case explanations (instead of just one, or even part of one) for even a multiple-issue memorandum at the student’s own pace and before being required to move on to the next topic.

Even a simple narrated PowerPoint presentation can be a useful tool. You can discuss what a student should look for in a particular section of the student’s memorandum, perhaps with some examples. The student can then pause the presentation and work through that section of the memorandum, fully and completely, and even replay the section when needed. Your voice will guide the student through the editing process.

More advanced features can make the editing video even more effective. One tool is to utilize a live screen capture where you actually edit a piece of text. When the student gets to that section of editing in the exercise, the student can click on a link and watch and listen to you describe why a particular rule statement, for example, is not effectively presented, while you edit the text. Another feature that is easy to incorporate is a link to an annotated sample document. At the point in your editing video where you are explaining how to, for example, properly format a case-law argument, you can provide a link to an annotated sample that provides an example and additional information.

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The key advantages of these videos are time and control. An in-class editing exercise is never going to provide enough time to thoroughly address all content and proofreading aspects of the editing process. Further, different students need different amounts of time to edit a section or document, and distance-learning tools provide each student with the time necessary to complete the task.

Some students may feel as though they know how to edit a particular section well enough so as to not need the additional links; some may simply not be willing to spend the additional time. Either way, the student is in control, and you have provided the opportunity for further, in-depth understanding of the nuances of the document.

### **Create a how-to-read-a-case exercise.**

Reading case law is critical to success at the start of law school, but many students enter law school lacking proficiency and experience in reading and analyzing complex text<sup>7</sup> and, in part because of the pressure/fear inherent in the first-year Socratic method, quickly revert to relying on commercially produced case briefs. Not only does this choice hurt a student’s development of this critical skill, but it delays the student’s ability to utilize case law in the way necessary to perform written legal analysis.

Many LRW courses begin with case reading and briefing, but the same limitations we find with editing a draft are inherent in this process as well. As the LRW professor breaks down a particular case, not every student is going to fully understand all of the different components and nuances of reading a case,

at least not at the same speed. Another way to present case-law reading would be for each student to watch a video of the professor discussing the case, while simultaneously watching the professor scroll through and highlight the text on the screen. The video could stop throughout for the student to answer questions.

For example, the first case-reading video could be used to describe the initial components of a full case opinion (which differs from their casebooks), such as the caption, syllabus by the court, head notes, etc. Then the video could be paused (or end) and the student required to answer questions about that portion of the case. This process could be repeated for the facts of the case, the court’s discussion of applicable law, and the court’s application of the law to reach its conclusion. Again, the key to this process is that each student would work through the section at the student’s own pace, with guidance by the professor. Further, some level of mastery could be guaranteed through the student’s answering of the questions, perhaps with the requirement that the student keeps attempting the questions until all have been answered correctly.

### **Teach citation.**

While the above are two singular exercises, you also could take a larger leap into distance learning and teach some or all of the *Bluebook* citation skills via distance learning. *Bluebook* skills are well suited for online teaching because the rules we generally cover in a first-year course do not often change, which means that your materials are going to be applicable year-to-year (see the discussion below on creating generic videos). Further, while the use of games or a flipped classroom can make the learning of *Bluebook* citation more palatable, the material itself is not, to most students (and professors) very intriguing. You may find your students appreciate the ability to work through the material at their own speed; further, citation is one of those skills that simply takes a bit of time and experience but is not overly difficult for students to master, which again makes it a good candidate to be taught by distance learning.

Utilizing distance learning to teach all or a portion of your citation creates another useful tool: flexibility. If you determine that you normally spend two or three days total of class time in a semester teaching and practicing citation skills that are now taught

wholly online, you can use those class periods to create a more beneficial schedule for your students. For example, if you require the distance-learning units to be completed during one or more weeks when the students are not heavily involved in writing assignments (i.e., “doubling up” classes), you could have fewer classes during heavy writing periods. Or perhaps you could end the semester a week earlier to reduce the load on students right before finals.

## VIDEO CREATION TIPS

If you decide to utilize distance learning within your course, you will almost assuredly want to create videos of some type.<sup>8</sup> Below are a few tips and concepts learned through trial and error.

### Keep videos short and the camera off you.

Try to keep your videos around ten minutes or less. Videos that are longer than that run the risk of losing student attention. Breaking up longer exercises into individual components, as discussed above, should keep the videos short. Longer videos are okay if you are planning to have the student pause the video and work on a paper or another part of the exercise, as with the editing exercise described above.

While a talking-head video can be easier to put together, utilizing other tools to actually show and edit text is going to be a more effective attention grabber and holder. While there are programs that allow for split screens, you should always consider that your videos might be watched on smaller screens, such as tablets or even phones, and that splitting the screen would make it very difficult for the viewer to read or follow any on-screen text.

### Keep your videos as generic as possible.

Developing videos is time-consuming, so you would like to be able to reuse them year after year, with minimal editing. To accomplish this you need to plan to (1) be generic where possible and (2) carefully plan your more specific references. As to the first item, always consider whether a generic reference can be used in place of a more specific item that might need to be changed in the future. For example, when I created some of the videos for my Employment Law course, I referenced the Secretary of Labor, whose interpretations were often relevant to analyzing the

law. I made the mistake of including the name and photo of the then-current Secretary of Labor. Now, every time there is a new Secretary of Labor I have to edit the video. Similarly, if you are creating a *Bluebook* video, it is best to simply reference the rule number rather than a specific page of the *Bluebook*, which could change with new printings or editions.

Now, certainly there are times when you want to be very precise and specific, such as when you create an editing video that pertains to a particular assignment. Here is where planning can help you minimize future editing. If you are creating, for example, a video on editing an office memorandum, you might have a section on editing and developing a rule of law, and in that section you want to reference the specifics of the current assignment. If you have a portion of your video that is more generic on how to develop and edit a rule of law generally, and then have a section that pertains only to the current assignment, in the future you will need to edit only that more current portion. If you are constantly weaving the two portions together, then you will need to re-create the entire section.

### Create multipurpose videos.

If you teach another course (or would like to), consider whether you can create videos that might be used in more than one course. For example, if you teach a contract drafting portion in your LRW course and an upper division drafting course, you may be able to create one or more videos on drafting skills or researching forms and checklists that can be used in both.

Distance learning can provide effective and flexible tools for a first-year LRW course, limited only by a professor’s imagination. Once you try creating a distance-learning unit, you may find you really enjoy the creativity inherent in the process and may even decide that you want to create your own fully online course!

## NOTES

1. See INST. OF EDUC. SCI., NAT'L CTR. FOR EDUC. STATISTICS, *Fast Facts*, <https://nces.ed.gov/fastfacts/display.asp?id=80> (last visited Mar. 14, 2019) (showing that in fall 2015 over 5.9 million students took online courses in higher education, with over 3 million students taking one or more online courses as part of their overall degree and almost 2.9 million students taking only online courses).
2. See, e.g., U.S. NEWS & WORLD REPORT, *Best Online Bachelor's Programs*, <https://www.usnews.com/education/online-education/bachelors/rankings> (last visited Mar. 14, 2019) (listing Arizona State, Ohio State, Loyola Chicago, and Penn State among the top fifteen online bachelor's programs).
3. See, e.g., U.S. NEWS & WORLD REPORT, *Best Online Graduate Engineering Programs*, <https://www.usnews.com/education/online-education/engineering/rankings> (last visited Mar. 14, 2019) (Columbia, UCLA, and Southern California were the top online graduate engineering programs); U.S. NEWS & WORLD REPORT, *Best Online Master's in Nursing Programs*, <https://www.usnews.com/education/online-education/nursing/rankings> (last visited Mar. 14, 2019) (Johns Hopkins and Ohio State were the top online graduate nursing programs).
4. AMERICAN BAR ASSOCIATION 2018-19 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 19 (Standard 306(e)) (2018).
5. *Id.*
6. Kenneth R. Swift, *The Seven Principles of Good Practice in (Asynchronous Online) Legal Education*, 44 MITCHELL HAMLINE L. REV. 105, 111-13 (2018) (describing the author's online courses).
7. See generally Susan Stuart & Ruth Vance, *Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, 48 VAL. U. L. REV. 41, 56-57, 65-66 (2013).
8. This article does not provide tech recommendations or reviews. The author has utilized Camtasia Studio for many years (<https://www.techsmith.com/video-editor.html>). Microsoft PowerPoint also provides for the easy-to-create video functions from a presentation. See MICROSOFT, *Turn Your Presentation into a Video*, <https://support.office.com/en-us/article/turn-your-presentation-into-a-video-c140551f-cb37-4818-b5d4-3e30815c3e83> (step-by-step instructions).

# Catching On: How Post-Critique Assessments Deepen Understanding and Improve Legal Writing



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Legal writing professors view the individualized assessment of student papers as one of their most important tasks.<sup>1</sup> Professors devote considerable time and effort to reading and commenting on student papers.<sup>2</sup> This exchange between professor and student has been termed the legal writing professor's equivalent to the Socratic method.<sup>3</sup> The American Bar Association likewise views individualized assessment as central to legal writing pedagogy: the “form and extent of individualized assessment of a student's written products” is one of its measures of a legal writing program's rigor, found in Interpretation 303-2 of Standard 303 for the accreditation of law school programs.<sup>4</sup>

Given individualized assessment's crucial role, professors will want to ensure that their comments are not only placed on the student's paper, but that the student understands, absorbs, and carries those comments forward to the next assignment. And, the professor should be able to confirm that the comment itself was effective and helpful; students report that some are not.<sup>5</sup> Students often fail to

learn from professors' critiques, repeating the same errors in assignment after assignment, much to the chagrin of professor and student alike. Scholars have offered many explanations for this behavior.<sup>6</sup> These students have likely never received such extensive feedback on any prior writing and have no experience in processing it. They might feel overwhelmed and discouraged, particularly when these comments on their first writing assignment may be the only law school feedback they have received up to that point. Perhaps they don't understand the comments or, faced with so many, don't know where to even start. They may be overconfident in their writing skills, not comprehending that written legal analysis requires a completely new skill set.

These problems are particularly acute for students with deficiencies in analytical reasoning skills. A professor's written critique is itself a form of complex writing, so the student receiving it must apply critical reading skills to properly decode and understand the message. Critical reading means interaction with a text and its ideas—passive reading, without more, tends to yield lackluster results.<sup>7</sup> But many law students struggle with critical reading, particularly those with grades that place them further down the law school class.<sup>8</sup> Thus, those students most needing their professors' guidance in legal writing will likely have the hardest time decoding and absorbing that guidance.

Once the professor's critique of student papers is complete, therefore, the Socratic exchange between professor and student should continue so the student can use the critique to its best effect. Six different

techniques to accomplish this goal are set out below.<sup>9</sup> Each one is employed after the student receives the critique, and each helps the student engage with the critique, put it into effect, reflect on the improvement, and then carry the principles forward to the next assignment. The techniques are designed with the professor's existing grading load in mind, aiming to put the onus on the student to work interactively with the professor's comments, creating new work product and demonstrating understanding. The professor can in turn cross-check and confirm that the student has indeed absorbed the comments and acted on them.

## 1. SHOW ME YOU KNOW

As an initial step, students take the critiqued paper and then make the professor's proposed revisions in track changes. (This also familiarizes students with the track changes feature of Word, which students may not yet have encountered.) The revision process serves as a discrete assignment, either earning students points to augment the initial grade or a separate allotment of points. It's best to announce the revision assignment for the first time only after the critiqued papers are returned to students, so that students do not broach the initial assignment under the impression that they can fix mistakes later or that their work product should be anything less than a final, polished version. Students tend to find this new assignment encouraging, understanding that they now have an opportunity to remedy what didn't go well in the initial assignment and to master the complexities of that assignment before turning to the next.

To avoid delays that might negatively affect subsequent writing assignments, the revision assignment should happen quickly, preferably launched on the day students receive their critiqued papers. Students appreciate the opportunity to work during class time on the revision assignment, schedule permitting, and then to follow up with additional work at home. When the professor allows students to tackle the revision assignment in class, students with questions about a comment's meaning can ask the professor for clarification immediately, thus avoiding the frustration that can result from communication gaps between the two. What the professor views as obvious—proofreader's marks or queries about other possible approaches to an argument, for example—students may view as obscure or idiosyncratic.<sup>10</sup>

Once the revisions are made, students turn in both the old and new assignments (a clean copy and one with track changes shown), allowing the professor to move rapidly through the papers. A cover sheet listing the necessary attachments will help students stay organized and streamline the professor's task. If a student's revision misses the mark, the professor can ask for additional work. (A lack of understanding on the student's part may also prompt the professor to add further description to such comments going forward.) This revision assignment is the first step in ensuring that students have reviewed and absorbed the critique. The professor returns the checked revisions to the students, so the students can see the areas for further work.

## 2. THE INDIVIDUALIZED CHECKLIST

So that the critique has its maximum benefit, the professor will want to ensure that students retain the critique's lessons and carry them forward to subsequent assignments. To do that, students return to engage with the comments again, this time categorizing each comment, describing the specific area of concern, and then crafting a personal checklist of the issues. Such checklists have emerged as a valuable tool for a diverse range of high-risk professions that require mastery of extensive knowledge and exacting detail, such as medicine and aviation.<sup>11</sup> In some senses, legal writing is no different, with the broad range of learning it entails and the value it places on precision, with a concomitant risk to clients if legal writing is even slightly deficient. A checklist cannot of course compensate for mistakes of ignorance, those mistakes that come from a lack of knowledge necessary to carry out a task. It can, however, help stamp out mistakes of ineptitude, or the simple failure to apply correctly the knowledge that we do have.<sup>12</sup>

Though the revision checklist can be created either concurrently with the revision assignment or afterwards, depending on the course's pacing and the professor's preferences, using a checklist in conjunction with the revision assignment can be particularly valuable. Students tend to assume that the professor has marked all errors in their papers. They then fall into the trap of mechanically inputting the professor's edits without analyzing the entire paper for similar errors.<sup>13</sup> Integrating the checklist

with the revision assignment would reinforce the idea that the student, not the professor, is ultimately responsible for identifying and remedying all problems in the writing, not just the examples the professor points out.

By sorting and naming the comments, students can keep their particular issues organized and can start to see the areas in which they most need to work. To be useful, however, the checklist must be carefully designed and selective, excluding obvious matters—such as format guidelines that have not proven problematic—but including specific areas for attention.<sup>14</sup> It is well worth spending class time discussing the checklist’s creation and future use. Checklist items can be organized by section of a

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legal writing assignment, for example, with some corresponding to the introduction, others to the statement of facts, and so forth. Some errors—the use of the possessive, for example—may occur throughout a paper and can be placed first on the checklist, with a reminder to check for that item globally. Professors can also encourage students to include a section for checklist items specific to a particular assignment, such as a frequent misspelling of a name or transposing letters of an acronym.

All legal writing weaknesses are not equal—professors should develop a hierarchy of priorities and communicate the priorities to students as part of the initial critique.<sup>15</sup> Once students have gathered and listed the checklist items, they can go on to

add an additional layer of information, namely the importance of each checklist item. While this ranking can be challenging to both professor and student, most would place the paper’s achievement of its overall purpose (such as a basic, logical argument) above a stray typographical error or misuse of a plural possessive. Students can select from a variety of ways to code checklist items for importance, such as the presence and number of asterisks for greater importance, or a combination of bolded and underlined text (or both) to indicate importance. Students can also color code a hard copy of the checklist, perhaps with orange for middling errors and red for the most serious. A writer is unlikely to ignore a checklist item with a large red dot next to it.

To encourage students to use the checklist and to ensure that students do not repeat the same mistakes, the checklist then forms the first page of the subsequent assignment, with a point value assigned to it. The professor discusses the value of going through that same checklist applied to the new assignment and ensuring that those mistakes are left in the past. If the checklist meets the professor’s criteria and all items are checked off, students earn extra points on that new assignment.

### 3. PARAGRAPH PRIDE

After a revision assignment, students are asked to identify the paragraph they improved the most and explain what steps they took to improve it. Having students articulate what they enhanced and how they did so fosters critical reading of their own work, thereby promoting analytical skills and independence. What’s more, it channels law student competitiveness inward and focuses students on their own process.

For students who view intelligence as a fixed trait rather than something that can be gained through work and effort, a legal writing professor’s critique can be a devastating confidence blow, making it that much harder to benefit from the feedback.<sup>16</sup> Such students need to be made to understand that written legal analysis is a learned skill rather than an innate ability. Self-assessment and demonstrated incremental improvement—such as by identifying a concrete area of improvement in a paragraph—might facilitate this process.<sup>17</sup>

## 4. POWER UP

Rather than having students revise an entire assignment, the professor could instruct students to perform a few, perhaps up to three, discrete tasks and resubmit for additional feedback. Some students feel so overwhelmed when receiving a detailed critique that they are unable to focus their revision efforts.<sup>18</sup> A short set of specific improvements would direct students' attention to a manageable list of goals. Professors should, of course, critique the entire paper, but if students don't feel the stress to figure out how to immediately implement all that feedback, perhaps they can more readily absorb the whole critique.

An example of a targeted improvement assignment is the Case Illustration Power Up. After grading an assignment reveals class-wide problems in crafting compelling case illustrations and corresponding analysis, the professor, after providing individualized written feedback, reviews the concepts again in class and then requires students to rewrite just a single set of case illustration and application paragraphs (students choose which one, if their paper contains multiple). Students would then submit the old paragraphs alongside the new ones for an additional round of professor feedback. This feedback would be much quicker to provide, compared with reviewing an entire revised paper, and would allow students to quickly see the benefit from concentrated effort in a specific area.

## 5. RECYCLE

To force reluctant students to engage with the professor's critique, the professor can create new assignments that require students to build on a prior (critiqued) assignment.<sup>19</sup> Take, for example, learning to write a statement of facts for a persuasive brief. Many legal writing programs start students with objective analytical writing before moving on to persuasive writing. The statement of facts in an objective memorandum should be as close to purely objective as possible, whereas the statement of facts in a summary judgment motion should be subtly persuasive. After teaching this lesson, the

professor could assign students to transform the statement of facts from an earlier objective memorandum into a persuasive statement, incorporating all relevant professor critique in the process. Both students and professor could jump into this assignment more quickly, as they are already familiar with the facts, allowing a practice exercise focusing solely on the new skill before using that skill in the next big writing assignment.

## 6. A LIVE CRITIQUING PRESCRIPTION

To increase student engagement and understanding, some professors have turned to live critiquing—that is, critiquing face-to-face with the student, with the professor often reading the paper for the first time and providing immediate reaction to the listening student. Several legal writing professors have pioneered and analyzed live critiquing, so its benefits are now well known.<sup>20</sup> But students may struggle to capture the live critique and then incorporate the lessons of live grading into their papers.<sup>21</sup>

To combat this problem, the professor can make real-time revisions on the assignment using the Word track changes function; at the session's close, the professor can memorialize the encounter using a pre-printed "prescription" template. On this template, professors can provide the most significant lessons they would like students to carry forward into the next assignment. The top three focus areas should be identified and marked, so students can put their effort first toward areas that matter most. Live grading can then follow the same revision and checklist methods described above. In this way, live critiquing captures the bottom-line benefits of traditional grading, while also capturing the immediacy and depth of the live-critique experience.

Professor critique "remains the most effective tool in the writing instructor's arsenal."<sup>22</sup> Yet this tool is but a dull instrument if students cannot or will not use it. We strive to develop students into their own best critics.<sup>23</sup> These methods for helping students catch on aid them in processing and internalizing the crucial lessons that only professor critique can provide.

## NOTES

1. See Anne Enquist, *Critiquing & Evaluating Law Students' Writing: Advice From Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119, 1126 (1999) (In a survey, twenty-nine of thirty-five seasoned legal writing professors deemed comments on student papers of the "utmost importance."); see also Aida M. Alaka, *Phenomenology of Error in Legal Writing*, 28 QUINNIPIAC L. REV. 1, 23 (2009) ("Like their colleagues teaching at the undergraduate level, legal writing instructors view commenting on student papers as a key part of the teaching and learning experience.").
2. See Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 652 (2007) ("Critiquing student work is also one of the most demanding elements of teaching legal writing because it is time consuming and intellectually challenging.").
3. See Enquist, *supra* note 1, at 1142 (quoting comments of Professor Mary Beth Beazley). See generally Mary Kate Kearney & Mary Beth Beazley, *Teaching Students to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMPLE L. REV. 885 (1991).
4. See ABA Standards for the Approval of Law Schools 2017-18, [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017\\_2018\\_standards\\_chapter3.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf)
5. See Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 145, 161-62 (1996).
6. See generally Carrie Sperling & Susan Shapcott, *Fixing Students' Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 39 (2012); Alaka, *supra* note 1; Barnett, *supra* note 2; Jessie C. Grearson, *From Editor to Mentor: Considering the Effect of Your Commenting Style*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 147 (2002).
7. See Anne M. Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students*, 82 ST. JOHN'S L. REV. 609, 670 (2008).
8. Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603, 604 (2007).
9. For each of the six assignments, the authors created an assignment template. Professors wishing to receive the template packet are welcome to email the authors at the following email addresses: Professor Shu at [dandrashu@gmail.com](mailto:dandrashu@gmail.com) or Professor Vukadin at [kvukadin@stcl.edu](mailto:kvukadin@stcl.edu).
10. See Enquist, *supra* note 5, at 161.
11. See ATUL GWANDE, *THE CHECKLIST MANIFESTO* 34 (Picador 2010).
12. See *id.* at 8-10 (discussing the distinction between mistakes of ignorance and ineptitude).
13. See Alaka, *supra* note 1, at 29-32.
14. See, e.g., John Kay, *How I Learned the Power of Checklists*, FINANCIAL TIMES (Aug. 28, 2012) <https://www.ft.com/content/dcaf323c-f0f9-11e1-89b2-00144feabdc0>.
15. See Enquist, *supra* note 1, at 1133 (describing the consensus that legal writing professors should order legal writing errors so that students know which are most important).
16. See Sperling & Shapcott, *supra* note 6, at 45-47.
17. See *id.* at 72-83 (suggesting methods to change student mindset to facilitate better absorption of law professor critique).
18. See Barnett, *supra* note 2, at 673 ("Many students will never before have received such extensive or detailed comments. Both the volume and detail of the comments can make the rewriting process daunting for many students.").
19. See Alaka, *supra* note 1, at 56 (advocating creating second-semester legal writing assignments that require use and self-assessment of first-semester assignments).
20. See, e.g., Daniel L. Barnett, "Form Ever Follows Function": *Using Technology to Improve Feedback on Student Writing in Law School*, 42 VAL. U. L. REV. 755, 783 (2008).
21. *Id.*
22. Alaka, *supra* note 1, at 61.
23. Grearson, *supra* note 6, at 150.

# Curricular Integration: The Missing Element in Legal Education



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The ability to write and communicate persuasively is perhaps the most important skill needed to competently practice law.<sup>1</sup> Law firms and judges have consistently emphasized the importance of developing effective persuasive writing and communication skills, while simultaneously criticizing graduates' writing skills and preparedness for law practice.<sup>2</sup>

In response to this criticism, many law schools have implemented curricular changes that increase the number of credits and required courses devoted to legal writing instruction.<sup>3</sup>

But that is not enough. It is not even close.

Rather, legal writing instruction must be carefully integrated into and throughout the first-year curriculum (and, preferably, the upper-level curriculum as well). By effectively integrating legal writing into the curriculum, law schools can develop an outcomes-based and assessment-driven program of legal education that enables students to attain the following real-world competencies:

- **Persuasive written and oral communication.** Law students will focus on developing compelling narratives that apply substantive law to various factual and legal contexts, taking into consideration the relevant court rules and standards of review.
- **Comprehensive litigation and transactional drafting experience.** Law students will have extensive experience drafting and redrafting the many real-world litigation or transactional documents that they will encounter in practice (e.g., motions to dismiss, interrogatories and document requests, subpoenas, and trial briefs).
- **An understanding of context.** Law students will have a comprehensive understanding of the context and order in which litigation documents are drafted and how persuasive writing skills apply differently based on the specific document being drafted.

- **Narrative storytelling.** Law students will demonstrate proficiency in drafting persuasive factual narratives that incorporate literary techniques to enhance persuasion.
- **Rewriting and editing.** Law students will receive intensive instruction in rewriting and editing skills to ensure that students can effectively and efficiently revise their work product.
- **Development of analytical skills.** From the first semester, law students will apply the substantive law learned in casebook courses to real-world documents, thereby enhancing their analytical thinking skills.
- **Metacognition.** Law students will develop an understanding of how they learn and, in conjunction with instructor feedback, develop strategies to improve the quality and efficiency of their work product.

Of course, the million-dollar question is: how can law schools integrate legal writing into the curriculum in a manner that garners faculty support, particularly among casebook professors, and realistically achieves the objective of establishing a program of legal education that trains students to think, write, and practice like lawyers?

## INTEGRATING LEGAL WRITING AND CASEBOOK COURSES IN THE FIRST YEAR

Integrating legal writing and casebook courses has one fundamental requirement: **assignment sequencing**, which consists of horizontal and vertical sequencing. *Horizontal sequencing* involves requiring students to draft real-world litigation documents chronologically (i.e., in the order they would in practice). Effective sequencing can be accomplished regardless of the structure or length of a law school's legal writing program. Specifically, before the beginning of the Fall 1L semester, legal writing faculty members should collectively agree to sequence writing assignments chronologically to simulate real-world litigation. For example, in the Fall semester, students could draft two predictive memoranda, a client letter, and a complaint. In the Spring semester, students could draft a motion to dismiss, an answer,

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*By effectively integrating legal writing into the curriculum, law schools can develop an outcomes-based and assessment-driven program of legal education that enables students to attain [many] real-world competencies.*

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and a brief in support of a motion for summary judgment (including discovery and a simulated oral argument).<sup>4</sup> This sequence would allow first-year students to draft and redraft several real-world documents in the order they would draft them in practice, enabling them to understand the context within which particular legal documents are drafted and to apply persuasive writing techniques differently based on the document being drafted.

*Vertical sequencing* involves timing each assignment to coincide with relevant topics that the students are learning in their casebook courses. To accomplish this objective, before the Fall 1L semester, legal writing professors should draft a multi-issue, litigation-based writing assignment that includes legal issues from students' first-year courses (and that incorporates a simulated client interview to enable students to gather additional facts about the litigation). In doing so, legal writing faculty should collaborate with casebook professors to determine what topics from each course will be included in the writing assignment and when the casebook professors plan to cover these topics. Thereafter, legal writing professors should include one or two substantive issues from each course and schedule assignments that coincide with the specific time period when students are learning these issues. This will enable students to learn by doing in a real-world context that enhances students' analytical and writing skills.

For example, assume that during the first semester, 1L students take Legal Writing, Contracts, Civil Procedure, and Torts. Below is a sample multi-issue hypothetical that demonstrates how all writing assignments will be horizontally and vertically sequenced.

Scott Grisham, a resident of Los Angeles, California, is a professional writer who often ghostwrites books for well-known public figures. In January 2019, a five-term state senator from New Jersey, Mitchell Johnson, who had been defeated in a recent senatorial election, contacted Grisham via telephone and requested that Grisham ghostwrite his memoir, *My Political Life in the Garden State*. After a lengthy discussion, Grisham agreed to ghostwrite the memoir for a sum of \$36,000, to be paid in two installments: \$18,000 up front and \$18,000 upon completion, with the balance due only if the senator was “satisfied that the content and writing quality were consistent with the parties’ expectations.” The agreement was not memorialized in writing.

Senator Johnson quickly paid the first installment, and, after approximately six months, Grisham delivered the final manuscript to Senator Johnson. Unfortunately, after reviewing the manuscript, Senator Johnson contacted Grisham and stated that “the manuscript’s last four chapters are terrible” and that Grisham “would not receive a dime for such shoddy work.” Grisham threatened to sue Senator Johnson if he did not make payment within thirty days.

Approximately two weeks later, Senator Johnson traveled to Los Angeles to give a speech to the Future Leaders of America, and Grisham, who was a member of the organization’s board of trustees, was in attendance. After the speech, Grisham approached Senator Johnson and requested that they have dinner to “patch things up” and come to an agreement regarding the remaining balance. Senator Mitchell agreed.

As Grisham and Senator Mitchell were traveling to the restaurant in Grisham’s car, the car’s brakes suddenly failed. (It was later discovered that the brakes had a mechanical defect and that the manufacturer of the vehicle had recently recalled all models of the vehicle. All owners were contacted via email to alert them to the danger. Grisham had not checked his email in several days and never saw the message.) Unfortunately, the car went through a red light and was struck by another vehicle. Grisham suffered minor injuries, but Senator Mitchell suffered a concussion, a broken leg, and a collapsed lung, which required treatment for three weeks at nearby Los Angeles Hospital.

Upon recovery, Senator Johnson returns to New Jersey and comes to your office to inquire about the possibility of filing a lawsuit against Grisham. How will you advise Senator Johnson?

The above hypothetical includes the following issues from the students’ first-year courses:

| COURSE          | ISSUE                                       |
|-----------------|---|
| Contracts       | Enforceability of contract, breach, damages |
| Civil Procedure | Personal jurisdiction                       |
| Torts           | Negligence, products liability              |

Using this hypothetical, legal writing professors should first decide on horizontal sequencing for the Fall and Spring 1L semesters. In the Fall semester, for example, students could draft a closed memorandum analyzing whether the contract between Grisham and Senator Johnson was enforceable or whether Senator Johnson breached the contract (which would require an analysis of available defenses). Next, students could draft a memorandum analyzing whether Grisham would be subject to personal jurisdiction in New Jersey or whether Grisham is liable for the injuries that Senator Johnson sustained based on negligence. Students could then draft a client letter to Senator Johnson describing the potential claims and likelihood of success on the merits. Finally, students could conclude the semester by drafting a complaint to be filed on Senator Johnson’s behalf. In the Spring semester, students could draft a motion to dismiss Senator Johnson’s complaint, an answer, and a brief in support of a motion for summary judgment.

After completing horizontal sequencing, legal writing professors should decide on vertical sequencing to ensure that each assignment will coincide with the time frame in which students are studying the relevant law in their casebook courses. Thus, for example, the first memorandum regarding contract enforceability or breach would be assigned immediately after students have learned the applicable principles in Contracts. Similarly, the second memorandum would be assigned

immediately after students have studied personal jurisdiction in Civil Procedure and negligence in Torts. The benefit, of course, is that students would be incorporating the legal doctrines they are studying into real-world documents, thus enhancing both their understanding of the substantive law and their writing skills.

Below is an example of the assignment and topic sequencing for the first two memoranda.

| CONTRACTS                   | CIVIL PROCEDURE               | TORTS  |
|-----------------------------|-------------------------------|--|
| <i>Offer and acceptance</i> | Federal question jurisdiction | Intentional torts  |
| <i>Breach</i>               | Diversity jurisdiction        | Unintentional torts  |
| <b>Memorandum No. 1.</b>    | <i>Personal jurisdiction</i>  | <i>Negligence</i>  |
|                             | <b>Memorandum No. 2</b>       | <b>Memorandum No. 2 rewrite with additional issue (negligence)</b> |

Thereafter, students would draft a client letter and complaint based on the substantive law that they have already studied and applied. Importantly, the same hypothetical would be used throughout all semesters of the required legal writing program, and legal writing professors would collaborate with casebook professors regarding the sequencing and timing of assignments.

Law schools that devote more than two semesters to required legal writing courses would have even more options. They could spread these assignments out, allowing students to spend more time drafting and revising each document. Or they could follow the model described above and, in the subsequent semester(s), require students to draft a hypothetical legal opinion and an appellate brief (with oral argument).

The critical component in any model is horizontal and vertical sequencing, which will ensure that law students draft each document in the order they would in practice, and in a manner that coincides with the substantive law topics they are learning in casebook courses. Of course, law students might complain that using a single hypothetical throughout the course is

boring or tedious. However, in law practice, particularly litigation, cases often take years to be resolved. Thus, using a single hypothetical is training students to practice law.

Ultimately, this model demonstrates that legal writing and casebook courses can complement each other in a way that enhances student learning and provides a real-world context for their legal education.

Of course, some may argue that this model is too ambitious and unrealistic, particularly regarding the level of collaboration required among legal writing and casebook professors. Such a concern, however, is misplaced when considering how this type of curricular integration can be achieved. To begin with, casebook professors are merely required to inform legal writing professors of the topics being covered in their courses and the approximate dates upon which such topics will be covered. Casebook professors are not required to administer any assignments in their courses or to alter the depth or breadth of their coverage of the topics.

In addition, although this model requires increased collaboration among legal writing professors, such collaboration is beneficial, not detrimental. Specifically, this model enables legal writing professors to develop a legal writing program that is consistent among all class sections, that has a truly practical emphasis, that develops the lawyering skills necessary to competently practice law, and that empowers legal writing professors to collaboratively design an integrated and innovative program of legal education. Furthermore, this model is an effective tool for programmatic assessment, as the various assignments can be used to assess whether students are attaining some or all of the law school's stated learning outcomes. Likewise, this model can be part of a broader effort to map the curriculum and, in so doing, identify whether the curriculum is providing students with the skills relevant to law practice. Finally, this model enables students to develop a comprehensive portfolio of real-world legal documents that demonstrate to prospective employers the students' preparedness for the practice of law.

In fact, this model was designed and implemented at Indiana Tech Law School (which closed in June 2017), and the results were immediately apparent. The students gained invaluable experience and

proficiency in drafting the most common litigation documents, learning the context within which specific legal documents were drafted, understanding how persuasive writing techniques applied to particular documents, developing their rewriting and editing skills, and appreciating how legal doctrine applied to real-world cases. One scholar who reviewed this integrated model stated,

Perhaps one of the best models for skills integration throughout the curriculum has been developed by Indiana Tech Law School, which has implemented a curriculum that “horizontally” (exercises are sequenced in the order they would be performed in law practice: initial client interview, legal research and draft memorandum, draft motion to dismiss or answer, file interrogatories) and “vertically” (doctrinal issues in the hypothetical case are timed to coincide with relevant topics covered in the doctrinal courses) integrates skills exercises throughout the three years of law school.<sup>5</sup>

If other law schools develop this model, they can rightfully claim to be at the forefront of preparing students for the practice of law.

## THE BENEFITS OF AN INTEGRATED CURRICULUM

Integrating legal writing instruction throughout the first-year curriculum (and beyond, where possible) can be done in an efficient and assessment-driven manner that enables students to attain core lawyering competencies.

### **Integration enables students to learn by doing.**

Learning by doing is particularly meaningful in the first year because students can apply substantive legal concepts to real-world documents and specific factual contexts. In so doing, students will simultaneously refine their analytical and writing skills and develop an understanding not merely of what the law is, but also of how various legal principles intersect when drafting real-world documents. In this way, integration helps students understand the “big picture” at the same time they are receiving practical skills training.

### **Integration allows law schools to administrate effective formative and summative assessments.**

The American Bar Association’s Revised Standards require law schools to adopt program-wide learning outcomes and to develop formative and summative assessments that determine whether students are

attaining those outcomes.<sup>6</sup> Integrating legal writing throughout the curriculum provides both casebook and legal writing professors with practical formative and summative assessments by which they can ascertain whether students are achieving a law school’s published outcomes (e.g., substantive legal knowledge and practical writing skills).

### **Integration facilitates a comprehensive and reliable curriculum mapping model.**

Curriculum mapping allows law schools to learn whether specific skills are sequenced in a cohesive and progressive manner, whether there is unnecessary repetition of or insufficient emphasis on particular competencies, and whether the curriculum maximizes students’ attainment of program-wide learning outcomes.

### **Integration teaches students how to practice law.**

The integration of legal writing and casebook courses facilitates a real-world pedagogy in which students learn how to think and practice like lawyers. Indeed, by designing a multi-issue hypothetical that contains legal issues from all first-year courses, and that sequences assignments chronologically, law schools can emphasize the context in which law is practiced and show students how persuasive writing skills apply differently based on the document being drafted.

### **Integration does not require extensive collaboration or infringe on casebook professors’ academic freedom.**

Importantly, the integration model proposed in this article does not require extensive collaboration with faculty who teach casebook courses; nor does it infringe on their academic freedom. Casebook professors do not need to take on additional responsibilities or assignments; rather, assignment and topic sequencing occurs solely within the legal writing program. In fact, to facilitate effective assignment sequencing, casebook professors need only inform legal writing professors what topics they are covering in their courses and when. As such, this type of integration is likely to receive faculty support while also ensuring that legal writing courses are fully integrated into the curriculum.

## CONCLUSION

Sometimes, incremental change is the only choice by which to effectuate progress; attempting to achieve perfection can often be the enemy of the good. At other times, however, bold steps are necessary to achieve the types of changes that a particular circumstance

requires and that the urgency of the moment demands. This is one of those times. Legal education needs to evolve, and that evolution begins with collapsing the artificial divide between theory and practice and designing a curriculum that truly bridges the divide between law school and the legal profession. Legal writing professors have a unique opportunity to be at the vanguard of the transformative and innovative change that is necessary in legal education.

To achieve this goal, however, legal writing professors should not be satisfied with merely increasing the number of credits or courses devoted to required legal writing instruction. Rather, legal writing professors should be leaders in developing an integrated and competency-based curriculum that prepares students to think, write, and practice like lawyers. In so doing, the quality of legal education will be enhanced, and the value of legal writing professors to the academy—particularly as faculty members worthy of equal status—will be beyond dispute. This article provides a blueprint by which to accomplish this objective. Law schools—and legal writing professors—who choose to adopt this model can credibly claim that their programs of legal education will prepare graduates to succeed in law practice from day one.

#### NOTES

1. See, e.g., BarBri, *State of the Legal Field Survey* (2014), <https://www.thebarbrigroup.com/2014-state-of-the-legal-field-survey/>.
2. See, e.g., Mark Osbeck, *What is "Good Legal Writing" and Why Does it Matter?*, 4 DREXEL L. REV. 417, 419-20 (2012); see generally LexisNexis, *Hiring Partners Reveal New Attorney Readiness For Real-World Practice* (2015), [http://www.lexisnexis.com/documents/pdf/20150325064926\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf).
3. See, e.g., Haydon Smith, *Law School Overhauls Research, Writing Curriculum*, GW HATCHET (Feb. 4, 2019, 3:03 AM), <https://www.gwhatchet.com/2019/02/04/law-school-overhauls-research-writing-curriculum/>.
4. Although legal writing curriculums cannot comprehensively simulate the discovery process, students will benefit from exposure to and instruction in drafting basic discovery documents, such as interrogatories and document requests.
5. Richard E. Redding, *The Counterintuitive Costs and Benefits of Clinical Legal Education*, 2016 WIS. L. REV. Forward 55, 60 (2016).
6. See ABA Standards and Rules of Procedure for Approval of Law Schools 2018-2019, available at [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf). Standard 301(a) states, "A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession." Standard 301(b) states, "A law school shall establish and publish learning outcomes designed to achieve these objectives."

# Brain Breaks for the Legal Writing Classroom



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The legal writing classroom is a rigorous, challenging classroom. Our goal as teachers is to create an active learning classroom where students are absorbing, processing, and applying information to develop the knowledge, skills, and values necessary for the practice of law.<sup>2</sup> During each class meeting, students will tackle a variety of topics. Those topics include argument generation, citation format, critical reading, forms of reasoning, genre conventions, paragraph structure, professional responsibility, research strategies, stylistic conventions, and weight of authority. Because of the amount of information and the speed at which information is presented, students can become mentally over-taxed, overwhelmed, and exhausted.

This essay shares a technique that could be used in any legal writing classroom to invigorate tired student learners. That technique is the brain break. The brain break is more than a recess break or “down time.” A brain break is a focused, planned learning activity that requires student learners to mentally switch

gears. “Switching gears” alters the nature of the cognitive task that the brain has been completing. This “break” alleviates cognitive overload while increasing engagement.

Learning is a complex undertaking that requires the brain to complete tasks of varying degrees of complexity quickly.<sup>3</sup> When designing and implementing classroom instructional strategies, the professor needs to acknowledge the concept of cognitive overload.<sup>4</sup> Cognitive overload occurs when the brain is overwhelmed with information and tasks, thereby inhibiting further learning.<sup>5</sup> A brain break is an example of an instructional strategy that can alleviate cognitive overload without sacrificing learning time.<sup>6</sup> Brain breaks have been used in all levels of education because they work, and their use is supported by education theory, cognitive psychology, and neuroscience.<sup>7</sup>

The brain break may be used at multiple points in the legal writing classroom throughout the course semester.<sup>8</sup> A brain break may be used as a classroom warm-up, especially when students have multiple class meetings in a row. For instance, you may begin a class meeting by displaying one of the brain teasers on the board for the students to immediately respond to when class begins. A brain break may be used as a transition between topics to be covered within one class meeting. For example, as one topic is completed, the students may participate in a team building exercise before addressing the next topic. Not only can a brain break provide an opportunity to link different ideas covered within one class, but

a brain break allows students to physically move around the classroom, energizing them for the next phase of the class meeting. A brain break may also be used as a closing exercise to wrap up the material covered in a particular class meeting. For instance, in the final minutes of class meeting, rather than repeating the key learning outcomes, you can project one of the visual puzzles. Taking just a minute to complete and two minutes to discuss, the students end class with an activity that reinforces the topic of the class meeting.

Many resources share example brain breaks for primary and secondary education.<sup>9</sup> This essay shares examples of brain breaks applicable to the legal writing classroom. These examples have been grouped into the following three categories: (1) brain teasers and lateral thinking puzzles, (2) illusions and visual puzzles, and (3) team building exercises. Each of the examples takes five minutes—or even less—of class time.

## BRAIN TEASERS AND LATERAL THINKING PUZZLES

Answer the following questions:

1. Do you know how many four cent stamps are in a dozen?
2. Does England have a Fourth of July?
3. A plane crashes on the border between two countries. Where are the survivors to be buried?
4. Holding a match, you enter a dark room in which there is a kerosene lamp, an oil heater, and a candle. What do you light first?

Did you answer all the questions correctly?<sup>10</sup> Did you see the tricks?

These questions are examples of brain teasers and lateral thinking puzzles.<sup>11</sup> Although none of these questions are related to legal concepts, brain teasers and lateral thinking puzzles are quick, fun ways<sup>12</sup> to showcase the power of framing, the importance of sentence construction, and the possibility of reader misunderstanding. For instance, when discussing the response to the final question, the students consider why they may have incorrectly answered the question. The students, guided if needed by the professor, note how the structure of the question manipulates the response. The final question uses a serial list to

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*The brain break is more than a recess break or “down time.” A brain break is a focused, planned learning activity that requires learners to mentally switch gears, alleviating cognitive overload while increasing engagement.*

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present three options, suggesting on the initial read that three choices are available. In fact, the question presents four options because the first option is presented in the introductory clause. Briefly sharing the trick helps the students apply the brain break to legal writing concepts.

Another classic brain teaser is the nine dot puzzle. Nine dots are arranged in a set of three rows. Use four straight lines, with each line beginning where the other line ends, to connect all nine dots. Do you know how to connect the dots?<sup>13</sup> The answer, and the process of developing the answer, allows for class conversation about the relevance of defining problems, the limitations that may be placed on problem solving, and the need to consult others to solve problems.

## ILLUSIONS AND VISUAL PUZZLES

What our eyes see can be deceptive, as illusions and visual puzzles demonstrate.

Many will be familiar with the drawing that shows both a young woman and an old woman. Another classic example is the drawing of an animal that may be a rabbit or may be a duck. Illusions and visual puzzles are frequently shared on social media. A few years ago, social media was abuzz as to whether an image showed a black-and-blue dress or a white-and-gold dress.<sup>14</sup>

These illusions show how important perspective and context can be. With some illusions, as with the rabbit versus duck, the viewer may need to physically change position by tilting his or her head to see the “other” animal. For others, such as the dress, the difference in perception relates to the photoreceptors of our eyes. Each person can see only one of the color combinations. Students can better understand how

perspective and context matter after completing one of these illusions.

The following is an example of another kind of visual puzzle. Without taking any notes, spend thirty seconds to memorize the following list:<sup>15</sup>

|          |           |
|----------|-----------|
| Elephant | Mole      |
| Panda    | Crocodile |
| Hippo    | Kangaroo  |
| Tiger    | Alligator |
| Parrot   | Sloth     |
| Zebra    | Penguin   |
| Dolphin  | Lemur     |
| Fox      | Rhino     |
| Koala    | Giraffe   |
| Gorilla  | Cheetah   |

Now, without looking at the list, write down as many items on the list as you remember.

So how many did you remember? How did you remember the items? Did you see a pattern? Did you remember the first item on the list? What about the last? Did you include lion on your list of recalled items? If you did, you are not alone. A lion isn't on the list but would fit with different categories, such as zoo animals or large cats, which you may have used to help memorize the items. The perceived pattern and the order of the items influence recall.

This exercise shows the students the power of organization. Organization helps the reader engage with the text and recall the key aspects of the text. When the writer doesn't supply his or her organizational principles, the reader may be forced to process what appears to be a jumble of slightly related words. Students will think about IRAC and paragraphing with new insights after completing this exercise.

## TEAM BUILDING EXERCISES

Don't worry. I'm not suggesting that we use "trust falls" in the legal writing classroom. In fact, we already frequently use team building exercises in the legal writing classroom. "Think-pair-share" is a common example of a team building exercise. An adaptation of "think-pair-share" is the "four word build."

Students are given a prompt and asked to individually write four words that respond to the prompt. After each student has identified four words, the students form groups of two. As a group, the two students must identify four words, and only four words, that the group believes best respond to the prompt. No guidance as to the criteria to be used is provided. The students then form a group of four. The group of now four students must identify four words, and only four words, that the group believes best respond to the prompt. The groups then combine again. The now group of eight students must identify four words, and only four words, that the group believes best respond to the prompt. Depending upon the size of your class, you may combine more or less groups.

The groups must work to evaluate, prioritize, and combine the lists. As the groups combine, students physically move around the classroom. Physical movement enhances the learning process. The act of moving acts as a muscle and brain stimulant. Students become energized, thereby encouraging conversations about the prompt.<sup>16</sup>

The following prompts may be used:

- *Define the function of the office memo.*
- *Describe a demand letter.*<sup>17</sup>
- *Identify the characteristics of a persuasive legal writing text.*

## CONCLUSION

Learning is a shared responsibility between the professor and the student. Brain breaks, far from being gimmicks, promote student engagement and student learning. The examples shared in this essay can introduce, connect, or reinforce concepts in your legal writing classes. When your students seem to be a bit sluggish, give them a brain break!

## NOTES

1. Thanks to those who attended presentations of this topic at the 2018 Southeastern Legal Writing Conference and the 2019 Biennial ALWD Conference. Their willingness to complete the brain breaks was much appreciated.
2. See, e.g., Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 *Geo. J. LEGAL ETHICS* 355, 380-98 (2016) (applying learning theories, such as generative learning, spaced learning, and metacognition, to the legal writing classroom).
3. See, e.g., Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 *LOY. L. REV.* 791, 800-08 (2013) (summarizing the brain's structure and the cognitive processes); Abigail Loftus DeBlasis & Elizabeth Adamo Usman, *Unrealized Potential: How Shifting the Focus to Student Learning Outcomes Could Reduce Law Student Distress*, 95 *U. DET. MERCY L. REV.* 179 (2018) (arguing that the new ABA standards can be used by law schools to promote student learning and minimize student distress).
4. James McGrath, *Planning Your Class to Take Advantage of Highly Effective Learning Techniques*, 95 *U. DET. MERCY L. REV.* 153 (2018) (outlining various instructional techniques, including interleaved practice); Patti Alleva & Jennifer A. Gundlach, *Learning Intentionally and the Metacognitive Task*, 65 *J. LEGAL EDUC.* 710 (2016) (exploring intentional teaching strategies to enhance student learning using the civil procedure classroom as an example).
5. See, e.g., Bernadine Cocks et al., *Breaking the Camel's Back: Can Cognitive Overload Be Quantified in the Human Brain?*, 97 *PROCEDIA-SOCIAL & BEHAVIORAL SCIENCES* 21 (2013).
6. For an examination of cognitive overload and strategies to address cognitive overload, see generally Terri L. Enns & Monte Smith, *Take a (Cognitive) Load Off: Creating Space for First-Year Legal Writing Students to Focus on Analytical and Writing Processes*, 20 *LEGAL WRITING: J. LEGAL WRITING INST.* 109, 111-14 (2015).
7. Brain based learning theory draws together education theory, cognitive psychology, and neuroscience. Brain based learning theory is thus informed by the brain's structure and how the brain functions. See generally Jayalakshmi Ramakrishnan & R. Annakodi, 2 No. 5 *Brain Based Learning Strategies*, *INT'L J. INNOVATIVE RES. & STUD.* 236, 236-40 (May 2013) (summarizing brain based learning theory and instructional strategies supported by brain based learning).
8. See, e.g., *id.* at 239 ("Be sure to give your students a brain break every five to 10 minutes. This could be in the form of a think-pair-share, a movement activity, a well-placed joke . . . the possibilities are endless. Be creative.").
9. E.g., JOSHUA MACNEILL, 101 *BRAIN BREAKS & BRAIN BASED EDUCATIONAL ACTIVITIES* (2017).
10. The answers are 12, yes, survivors aren't buried, and the match.
11. For other examples of lateral thinking puzzles, see PAUL SLOANE & DES MACHALE, *OUTSTANDING LATERAL THINKING PUZZLES* (2005).
12. Jonathan C. Erwin, *Giving Students What They Need*, 61 No. 1 *EDUC. LEADERSHIP* 19, 22 (Sept. 2003) (encouraging teachers to "[e]ngage your students in brain teasers, such as Mental Math, or Lateral Thinking Puzzles") (internal citations omitted).
13. Need a hint? Make sure to "think outside the box."
14. To see images of the dress and learn more about the reason for the different responses, see Carmen Fishwick, *The Science Behind the Colour Illusion*, *THE GUARDIAN*, Feb. 27, 2015, <https://www.theguardian.com/technology/blog/2015/feb/27/science-thedress-colour-illusion-the-dress-blue-black-gold-white>.
15. You could create a list that draws from state capitals, local street names, or items in the kitchen. Don't share with the students what connects the items on the list. Also, don't number the items on the list or alphabetize the list. The list should appear to have no organizational principles.
16. See, e.g., Eric Jensen, *Moving with the Brain in Mind*, 58 No. 3 *EDUC. LEADERSHIP* 34 (Nov. 2000).
17. The group may develop the following list of four words: negotiation, notification, adversarial, and remedies. Another group may develop the following list of four words: stop, enforce, ultimatum, and consequences.
18. Research on teaching and learning in contexts other than legal education can inform teaching and learning in law schools. See, e.g., Donald J. Kochan, "Learning" *Research and Legal Education: A Brief Overview and Selected Bibliographical Survey*, 40 *SW. L. REV.* 449 (2011).



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