I have developed a method that allows me to introduce those basic concepts and basic research sources, as well as demonstrate the interrelationship between cases and statutes, during these initial orientation sessions by using interrelated examples from a developing area of law. The method begins with assigned readings in a research text and small group tours of the library. I supplement that information with examples of interrelated authority from an area of the law that, when viewed together, provides students with an overview of how an issue identified in one legal source develops over time to become “the law.”

Sources of Interrelated Legal Authority
I chose to supplement the readings in the research text with cases and statutes involving the issue of dramshop liability. It is an area of Arkansas law that has changed dramatically in the past several years, and it is a topic that entering students easily understand. Initially, I ask students to read two cases decided two years apart by the Arkansas Supreme Court, and build on that issue for the rest of the week. In class the next day, the two cases frame the discussion about identifying the parts of the case, such as the synopsis and topic and key numbers, as well as the larger discussion about case reading and case briefing. The issues
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presented in the cases allow the class to discuss the public policy concerns raised in the cases and discuss the issue of judicial activism. The following day, as I introduce statutory sources, I provide the class with the example of Arkansas’ legislative response to the cases reviewed previously. As we discuss statutory annotations, we review the cases identified in the annotations to the Arkansas statutes. When we discuss digest research, we review the West topic and key number system to find additional cases on the issue. We review citators to find the most recent relevant cases.

Benefits of This Approach
Supplementing the textual overview with examples from an interrelated group of legal authority when students are first learning to read and understand cases and statutes deepens their understanding, as beginning legal readers and legal analysts, of how the discrete sources of legal research function in relation to one another. Of course, the research texts provide clear, useful information about how to read and understand various sources of law. They explain the tools to find sources such as cases and statutes, and explain how to use annotations, digests, and citators to refine legal research. Before students understand how to conduct research, they need to understand what they are reading and how their research results fit together. Numerous excellent research texts explain to them what they are reading, but may not clearly explain how their research interrelates. The texts explain the various sources of primary authority and the research tools to find them, including cases, statutes, digests, and citators. The examples in the texts introduce students to the parts of a case; how to read and brief a case; judicial opinions and sources of common law; the principles of stare decisis; the concepts of public policy; digest research; reading statutes; annotations; multipart "Acts"; case law interpreting a statute; and citators. The texts provide clear, useful examples of the specific sources.

When students supplement their research text with interrelated authority, they see how each research tool is integrated into the overall legal analysis and how the law develops. With this initial review of an interrelated group of legal sources, they tend to make connections between the research sources earlier than when they look only at discrete research examples. They find examining the supplemental interrelated authority to be a helpful way to explain the connections between the sources. This method deepens their understanding of what they are reading.

For example, rather than reading a definition of a common law opinion and learning how to read and brief a case, students can see a common law principle develop over a series of opinions. Rather than reading about stare decisis, they can see how courts apply existing law in subsequent opinions. Rather than reading a definition of public policy, they can see how a court applies public policy to a developing area of the law. Rather than viewing examples of statutes, they can see a statutory enactment in response to a common law rule, read the specific legislative enactment, and see how decisions or laws from various branches of government impact one another. Rather than viewing examples of statutory annotations, they can use the annotations to identify case law interpreting and applying a familiar statute. Rather than seeing examples of digest topic and key numbers, they can use the topic and key numbers to conduct preliminary research and find and update previously identified cases with additional relevant authority. And they can use citators to identify and update relevant authority.

Although many first-year students are daunted by the prospect of finding appropriate authority, they are equally daunted by the idea of understanding how it all fits together. If they received a good civics education before arriving in law school, they probably know that legal sources include statutes, cases, and perhaps regulatory law. But many are unlikely to know how statutes and cases are interrelated and that they follow a hierarchy of authority.

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3 For example, at the University of Arkansas, the LRW faculty teaches research from Sloan, Basic Legal Research (5th ed. 2009). The text provides a wonderful overview of numerous research sources.
The first few days of an LRW course, particularly during an orientation program, can be an appropriate time to explain the various processes utilized in lawmaking and developing the law by the courts and the legislature. The ABA’s *Sourcebook on Legal Writing Programs* articulates several goals of a first-year legal writing program, including analyzing the legal system of the United States; analyzing facts, issues, and legal authorities; conducting efficient legal research; communicating effectively in writing and orally; recognizing and addressing professional responsibility issues; appreciating the varying roles of the lawyer, from analyst to advocate; and applying knowledge and skills to solve legal problems. As the *Sourcebook* notes, many entering students have “never been exposed to the common-law process and judge-made law; most have only a vague understanding of the legislative process and statutory law.” In the first-year curriculum, therefore, it is necessary to emphasize the “forms of legal reasoning involved in these processes.”

Introducing sources of law as an integrated whole helps deepen the entering student’s understanding of the issues, not only as legal readers, but as legal analysts. It allows me to introduce students to legal sources as if they were the results of a research exercise, similar to the process they will use throughout their careers. They apply these skills in my LRW course, which integrates research and writing projects, as is the dominant national model. Students begin to understand the recursive process of legal research. They learn to integrate research concepts from the beginning. They see the material in a manner consistent with the testing process in doctrinal courses, where they may be asked to explain the development of an area of the law on their final exams. They learn from the outset that legal research often provides results from multiple integrated research sources.

**Methodology**

**Case #1—Introduction to Judicial Opinions, and Stare Decisis, Applied**

As a homework assignment after the first day of orientation, I assign reading in the research text on reading and briefing cases. I also ask students to read two cases decided two years apart by the Arkansas Supreme Court. The first case is *Mann v. Orrell*, a common law opinion in which the court reaffirmed its longstanding common law rule denying any liability for the wrongful sale, rather than consumption, of alcoholic beverages that results in injury.

Plaintiff Mann, a police officer, was injured when attempting to quell a disturbance at a nightclub. Three minors involved in the disturbance ran to a pickup truck parked in the club’s parking lot. When they attempted to flee, Mann blocked their exit with his vehicle, got out of his vehicle, and was struck by the truck. Mann based his claim against the club on the fact that minors were allowed to consume alcoholic beverages on the club’s premises.

In class, we discuss both the procedural issues in this case and the principle of stare decisis. The club moved to dismiss, asserting that plaintiff was attempting to impose “dramshop” liability, which was not recognized in Arkansas. The trial judge granted the motion, and the Supreme Court affirmed without extensive analysis, citing to its

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4 Ralph L. Brill et al., *Sourcebook on Legal Writing Programs* (1997).

5 *Id.* at 6–12.

6 *Id.* at 7.

7 *Id.*


9 912 S.W.2d 1 (Ark. 1995).

10 *Id.* at 2.

11 *Id.*
In three short paragraphs, students see that actual cases may include additional issues that are typically redacted from their casebooks in their doctrinal subjects.

The long-standing rule established in *Carr v. Turner*\(^\text{12}\) that denies liability to “a tavern owner for injury ... when the injury results from the consumption of alcohol.”\(^\text{13}\) The court was unpersuaded by plaintiff’s theory that the club was liable because minors were allowed to consume alcoholic beverages on the premises, noting that this distinction “would ... change our long-standing rule simply because of the site where the injury occurred.”\(^\text{14}\)

It declined to impose liability on the seller of alcoholic beverages to a minor if the minor became intoxicated and caused injury to others.\(^\text{15}\)

Plaintiff also asserted a negligent entrustment issue against the vehicle owner, asserting he failed to use ordinary care by permitting someone else to drive his truck when he knew or should have known that the other driver would become intoxicated and drive recklessly.\(^\text{16}\) In three short paragraphs, students see that actual cases may include additional issues that are typically redacted from their casebooks in their doctrinal subjects. We discuss how they often will have to parse through more than one issue when they are reading “real” cases.

**Case #2—Introduction to the Development of Common Law Principles and Public Policy Concerns**

Students also read and brief *Shannon v. Wilson*,\(^\text{17}\) decided two years after *Mann*. Here, the father of a minor killed in an automobile accident brought a negligence action against owners of a liquor store where alcohol was sold to a minor and two teenage acquaintances at a drive-through window. He requested that the court modify its rule to allow whether the seller is negligent to go to a jury for determination.

Students again see a court apply the principle of stare decisis, as the Arkansas Supreme Court analyzed the propriety of modifying or reversing its previous decisions in *Carr* and *Mann*. Ultimately, the court overturned its common law rule and recognized a cause of action for dramshop liability resulting from the sale of alcohol to minors.\(^\text{18}\) In doing so, it overruled more than 30 years of precedent. Students see the relevance of the procedural history; here, as in *Mann*, the trial court granted defendants’ motion to dismiss. They recognize citations to familiar cases:

In 1995, we again held in *Mann* ... that the holdings of *Carr* and its progeny were controlling and that there is no liability to be imposed on tavern owners or liquor store owners for injury to a patron or third person when injury results from the consumption of alcohol.\(^\text{19}\)

In this lengthy decision, unlike *Mann*, the court analyzed *Carr*\(^\text{20}\) in detail. It explained that *Carr*’s common law rule originated in 1965, when the majority of states declined to impose liability on liquor store owners.\(^\text{21}\) There, in part because “it did not wish to be in the minority of jurisdictions,”\(^\text{22}\) the court declined to take a leading role in what became, decades later, a complete reversal in social and legal thinking. Years later, the court found

\(^{12}\) 385 S.W.2d 656 (Ark. 1965).

\(^{13}\) Mann, 912 S.W.2d at 2.

\(^{14}\) Id. at 3. The court cited *Carr*, where alcoholic beverages were also illegally consumed on the premises, but the injury occurred on a public street, and held that “it would be illogical for us to refuse to impose liability in *Carr*, where illegal, on-site consumption of intoxicants purportedly led to injury away from the premises, yet impose it here where illegal, on-site consumption of intoxicants purportedly led to injury ... on the parking lot of the premises.” *Id.*

\(^{15}\) Id.

\(^{16}\) Id. at 2, 4.

\(^{17}\) 947 S.W.2d 349 (Ark. 1997).

\(^{18}\) Id. at 358, overruling *Carr v. Turner*, 385 S.W.2d 656, 657–58 (Ark. 1965).

\(^{19}\) Shannon, 947 S.W.2d at 352 (citations omitted).

\(^{20}\) 385 S.W.2d 656, 657 (Ark. 1965).

\(^{21}\) Shannon, 947 S.W.2d at 353.

\(^{22}\) Id. In fact, the court in *Carr* noted that the “cases finding liability are so few that they may be reviewed quickly,” 385 S.W. 2d at 657.
itself in the minority\(^\text{23}\) with its common law rule that was grounded in ideology of the 1800s.\(^\text{24}\)
The court traced the history of appellate litigation on this issue, noting its “consistent” rejection of liability for alcohol providers in the 30 years since it decided *Carr*.\(^\text{25}\) “[W]e have [repeatedly] held that absent a change in the common-law principle by the legislature, this Court would not depart from the ruling in *Carr* and its progeny.”\(^\text{26}\)

The court discussed the legislature’s failure to act and its own duty to address changing societal circumstances.\(^\text{27}\) Noting the increased public danger posed by intoxication in light of the common use of automobiles, it observed, “the reality of modern life is evidenced by the fact that most drinking establishments and liquor stores provide patrons parking lots.”\(^\text{28}\) It stated:

> [t]he rule espoused in *Carr* was judicially created. When a judicially created rule becomes outmoded or unjust in its application, it is appropriate for the judiciary to modify it. …

Thus, as a part of our common-law doctrine, this Court is free to amend the common law.

True, as we have frequently stated, the legislature may amend or change our common law, but we are not bound to adhere to outmoded holdings pending legislative action. This Court has a duty to change the common law when it is no longer reflective of economic and social needs of society.\(^\text{29}\)

In breaking with its own precedent, the court reviewed extensive case law from other jurisdictions that demonstrated a clear trend in recognizing tort liability.\(^\text{30}\) It also looked to jurisdictions in which legislative action created liability.\(^\text{31}\)

The court was aware that it was conforming prior state law to a national trend, noting:

> Most state and federal courts that have considered this issue since the 1960’s have reevaluated and rejected as patently unsound the rule that a seller cannot be held liable for furnishing alcoholic beverages to an intoxicated or minor patron who injures a third person based upon the grounds that the sale or service is causally remote from the subsequent injurious conduct of the patron. A substantial majority have decided that the furnishing of alcoholic beverages may be a proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person.\(^\text{32}\)

The court found a duty of care to support a negligence claim in the statutes regulating the liquor industry\(^\text{33}\) and in criminal statutes that made it a felony to knowingly sell or furnish

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\(^{23}\) See id. at 353–56. Over three pages, the court cites the “overwhelming number of other jurisdictions which have found liability.”

\(^{24}\) Id. at 352. The court noted that the rule from *Carr* was formulated on principles laid down in the 1800s when people walked or rode in “horse-drawn carriages.”

\(^{25}\) Id. at 351–52, citing Milligan v. County Line Liquor Inc., 709 S.W.2d 409 (Ark. 1986) (declining to find a liquor store owner liable for selling beer to a minor, although the sale was illegal); see also Yancey v. The Beverage House of Little Rock, Inc., 723 S.W.2d 826 (Ark. 1987) (declining to find liability where the appellee twice sold alcohol illegally to a minor; the second time, the minor was intoxicated at the time of the sale and then had an accident where two teenagers were killed); First American Bank v. Associated Hosts, Inc., 730 S.W.2d 496 (Ark. 1987) (declining to find liability where an intoxicated “happy hour” customer left a bar after consuming more than a dozen drinks in three hours, then fell and was injured).

\(^{26}\) Id. at 351. “For twenty years, we have followed precedents while stating that the legislature should address this issue, and we have held to the contention that replacing the common-law rule is a matter of public policy best left to the legislature. Despite this Court’s preference for legislative action, there has been no action directly addressing this troublesome question; so, we will address this issue now.” Id. at 352.

\(^{27}\) Id. (discussing prior deference to the legislature with respect to other issues).

\(^{28}\) Id.

\(^{29}\) Id. at 353.

\(^{30}\) Id. at 353–55. In more than three pages of footnotes, the court extensively reviewed persuasive authority, citing to authority in more than 40 other jurisdictions as well as numerous secondary sources.

\(^{31}\) Id. at 355–56 (citing decisions from the Oklahoma and Wisconsin courts and Justice William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949)).

\(^{32}\) Id. at 353.

In the next class, after reviewing the textual examples, I supplement their introduction to statutes with an example of the Arkansas Dramshop Act.

Introduction to Statutes: The Legislative Response

After reading the cases, students read research text assignments introducing them to statutory research. In the next class, after reviewing the textual examples, I supplement their introduction to statutes with an example of the Arkansas Dramshop Act. The Act is a relatively short statutory scheme adopted by the Arkansas General Assembly in 1999, in response to the Shannon case and another recent Arkansas Supreme Court decision. In it, the legislature established civil liability for the sale of alcohol to minors or to clearly intoxicated persons.

Codified at Ark. Code Ann. § 16-126-101 et seq., the Act is entitled “Sale of Alcohol to Minor.” The initial section expressly notes that “[t]he General Assembly ... needs to clarify and establish its legislative intent regarding the sale of alcoholic beverages as addressed by the Arkansas Supreme Court in Shannon v. Wilson and Jackson v. Cadillac Cowboy, Inc.” The Act provides an express statement of public policy: “the knowing sale of alcoholic beverages by a retailer to a minor is contrary to the public policy of the State of Arkansas.”

The Act conforms with the decisions in Shannon and Jackson in finding that a cause of action may be alleged against liquor retailers where injury is proximately caused by the sale where the retailer knowingly sold liquor to a minor or to a clearly intoxicated person. In other cases that do not involve the sale of alcohol to minors or to clearly intoxicated persons, the consumption of alcoholic beverages, rather than the supplying of them, is deemed to be the proximate cause of injuries inflicted on third parties.

The students quickly see the legislative response to the judicial opinion, and realize that the Act establishes liability beyond what the Shannon court authorized. Again, as the class has not

35 947 S.W.2d 349, 358 (Ark. 1997).
36 Id. at 353.
37 Id. at 358 (Newbern, J., dissenting). The dissent initially recognized the value of challenging precedent: “It is indeed proper for an appellate court of last resort to overrule a prior decision when that decision was made ... when conditions have changed so as to make it outdated. Stare decisis does not require stagnation.” Noting Carr’s extensive analysis, the dissent continued: “If we were mistaken in 1965, we surely would have corrected our mistake in one of the several decisions in which the issue has been raised since that time—most recently in Mann v. Orrell. Rather, we have continuously stated that the issue is one for the General Assembly.” Id. at 359.
40 Ark. Code Ann. §§ 16-126-103, 16-126-104 (1999). The statute gives immunity to a social host who provides alcoholic beverages to an adult guest. § 16-126-106. The statutory language is whether the sale of alcoholic beverages to a clearly intoxicated person constitutes “a proximate cause of any subsequent injury to another person.” § 16-126-104. A person is clearly intoxicated when he is “so obviously intoxicated to the extent that, at the time of such sale, he presents a clear danger to others.” Id.
yet learned to use citators, they see the cross-reference to a subsequent case here, and realize they must conduct further research to understand the current status of the law in Arkansas.

Introduction to Statutory Annotations
After introducing the students to reading statutes, I show them the Dramshop Act in the annotated version of the Arkansas Code. The first reference in chapter 126, Sale of Alcohol to Minor, focuses on the legislative intent of the General Assembly. Within the text of the statute, the legislature cites two cases: Shannon v. Wilson42 and Jackson v. Cadillac Cowboy, Inc.43 When we review the annotations, we see that Jackson has been appealed.44 This gives students the opportunity to read an appeal following a remand, and to consider the implications of an intervening legislative enactment on the law of the case in a pending legal action.

Introduction to Digests
Before the next class, students are assigned reading in research texts introducing digest research. In class, after reviewing the textual examples, we look at the Arkansas digests to update the Shannon case using topic and key numbers. The students identify one relevant headnote involving liability under the digest topic Intoxicating Liquors category.45 An in-class Westlaw® topic and key number search reveals citations to only one headnote in that category that involves liability, so we start by searching for additional authority using that headnote. Doing so reveals references to the case they saw in the text of the Act, Jackson v. Cadillac Cowboy, Inc. (Jackson I),46 as well as the familiar cases of Shannon47 and Mann48 and the statutes the court used in support of its analysis supporting dramshop liability. They do not see a citation to the Dramshop Act, which prompts class discussion on using multiple research sources.

Review of Recent Cases Found in Annotations, Digests, and Other Sources
We read the common law case cited in the text of the Act. In Jackson I,49 the widow of a motorist killed by a drunk driver sued a club owner for serving the driver when he was clearly intoxicated. The trial court dismissed the complaint, and the widow appealed. Jackson I is a common law opinion, decided two years after Shannon and approximately one month before the General Assembly enacted the Dramshop Act. The class “found” this case in the text of the statute, and saw it again in their review of the Arkansas digests. This allowed us to discuss the alternative methods for updating authority. Students see the link between the cases, as they read embedded citations to now-familiar cases. They see a second court develop a policy analysis.

In the case, the court overruled Carr50 and Mann,51 holding that the widow stated a claim for liability because licensed alcohol retailers can be liable for negligence if they sell alcoholic beverages to intoxicated persons who, in turn, cause injury to third persons. The court permitted a dramshop claim to be pursued if a vendor has sold liquor negligently

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42 947 S.W.2d 349 (Ark. 1997).
43 986 S.W.2d 410 (Ark. 1999).
44 Cadillac Cowboy, Inc. v. Jackson, 69 S.W.3d 383 (Ark. 2002). At this early stage in the course, the students have not yet received online training in using Shepard’s® or KeyCite®.
45 947 S.W.2d at 349 (Ark. 1997).
46 986 S.W.2d 410 (Ark. 1999).
47 947 S.W.2d 349 (Ark. 1997).
48 912 S.W.2d 1 (Ark. 1995).
49 986 S.W.2d 410 (Ark. 1999).
50 385 S.W.2d 656 (Ark. 1965).
51 912 S.W.2d 1 (Ark. 1995).
to an intoxicated driver of any age.\textsuperscript{52} In doing so, the court again modified its common law rule. As the court did in Shannon, the court here reviewed its previous decisions declining to establish liability, beginning with the seminal case of Carr.\textsuperscript{53} It noted that it had consistently declined to recognize liability for the licensed vendor who sells liquor to an inebriated person or to other high-risk groups such as minors. But it also noted that Shannon was decided 35 years after Carr; that now, the vast majority of jurisdictions recognized vendor liability for the sale of alcohol to high-risk groups; and that Shannon recognized that the sale of alcohol to a minor that resulted in injuries was a proximate cause of those injuries. As it did in Shannon, the court cited numerous jurisdictions that had "rejected as patently unsound the rule that a seller cannot be held liable for furnishing alcoholic beverages to an intoxicated or minor patron who injures a third person on the grounds that sale or service is causally remote from the subsequent injurious conduct of the patron."\textsuperscript{54} It noted "the abundant authority from other jurisdictions that we cited in Shannon were cases that involved minors as well as intoxicated persons."\textsuperscript{55}

The court applied the same reasoning it applied in Shannon to establish a duty of care when licensed vendors sell alcohol to intoxicated persons.\textsuperscript{56} The court refused, however, to extend liability to a social host.\textsuperscript{57} The case contained a concurrence and a dissent,\textsuperscript{58} allowing us to discuss each in class.

**Introduction to Citators: Checking Jackson I in KeyCite**

As I introduce citators, I assign reading from the research text on the necessity of updating research results. As an in-class example, I conduct a KeyCite search of the Jackson I decision we read earlier. The search provides a citation to Cadillac Cowboy, Inc. v. Jackson (Jackson II),\textsuperscript{59} identifying it as an appeal after remand.\textsuperscript{60} Students did not discover the case in their original digest search, which leads to a class discussion about overreliance on specific topic and key numbers. The appeal appears in the annotations to the Dramshop Act so students are able to see how research results are often found in more than one source.

The Jackson II appeal focuses on the narrow procedural issue of the "law of the case." The court discussed the applicability of the Dramshop

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\textsuperscript{52} Jackson, 986 S.W.2d at 415. The court declined to "immunize licensed vendors of alcohol to engage in activity which is in blatant disregard of the [statutory] standard of care ... especially since we declined to do so under comparable circumstances pertaining to alcohol sales to minors in Shannon v. Wilson. Instead, we ... hold that evidence of the sale of alcohol by a licensed vendor to an intoxicated person is some evidence of negligence. We overrule Carr v. Turner, and its progeny to the extent those cases are inconsistent with this opinion." Id.

\textsuperscript{53} 385 S.W.2d 656 (Ark. 1965).

\textsuperscript{54} 986 S.W.2d 410, 414 (Ark. 1999), quoting Hutchens v. Hankins, 303 S.E.2d 584, 589 (N.C. Ct. App. 1983). The court noted that at that time, only six states imposed no vendor liability for the sale of alcohol to high-risk groups. Id.

\textsuperscript{55} Id. at 412.

\textsuperscript{56} Id. at 413. Citing the Restatement (Second) of Torts § 286 cmt. d (1965), the court noted that "it is clear to us, as it was in Shannon, that the General Assembly has ... established a high duty of care on the part of holders of alcohol licenses, which includes the duty not to sell alcohol to high-risk groups, including intoxicated persons. ... Although these ... statutes do not specifically provide for civil liability, a duty of care ... may be found in a statute that is silent on civil liability:" Id.

\textsuperscript{57} Id. at 414.

\textsuperscript{58} Id. at 415–419. The dissent asserted that the majority opened the door to social host liability, noting that it "shudder[ed] to think of the detrimental effect that this holding will have on ... restaurants, hotels, private clubs, country clubs, VFW Halls, and Elks Clubs." Id. at 419. The concurring justice disagreed, noting that the majority opinion resolved the duty-of-care issue by discussing the legislature’s enactments regarding alcohol licensees, which "differentiates [this case] from the social-host situation." Id. at 416.

\textsuperscript{59} 69 S.W.3d 383 (Ark. 2002).

\textsuperscript{60} A KeyCite search conducted on May 5, 2010, provided the citation to the 1999 decision, Jackson v. Cadillac Cowboy, Inc., 986 S.W.2d 410 (Ark. 1999), as well as the citation to the appeal after remand, Cadillac Cowboy, Inc. v. Jackson, 69 S.W.3d 383 (Ark. 2002).
Act to the case on remand. It held that the law-of-the-case doctrine applied and that the trial court correctly applied the duty of care that was established in Jackson I, which was based on statutes that existed at the time of that decision. The court determined that the trial court was bound by mandate in Jackson I and that the newly enacted Dramshop Act did not apply.

Checking Shannon in KeyCite
Students learn the importance of citators when we check the Shannon case in KeyCite in class. They learn that courts have limited dramshop liability in several recent cases. The KeyCite search yielded 141 citing references, including a citation to Jackson II, as well as four Arkansas cases that have distinguished Shannon, such as Sluder v. Steak & Ale of Little Rock, Inc., Branescumb v. Freeman, Young v. Gastro-Intestinal Center, Inc., and Tackett v. Merchant’s Security Patrol.

Use of Secondary Authority
The supplemental materials described above also provide extensive teaching materials on secondary authority. The extensive case citations in Shannon allow for a discussion of the difference in mandatory and persuasive authority. Shannon and Jackson I contain extensive citations to various sources, such as restatements and law review articles. A KeyCite search turns up additional law review articles written about the case.

Conclusion
By the end of orientation, students know how to read cases, understand various sources of law, and begin to see the relationship between common law, statutory law, and case law, as well as the interplay between courts and legislatures. They are introduced to public policy concerns. They have seen a legislative response to a court decision. They have seen the evolution of a legal issue through a very small lens that is easy to understand and discuss. They engage in spirited discussions as we review the supplemental materials. They seem surprised that a court can “change its mind” on matters of policy; they are interested in the legislative response to common law rules; and they enjoy the discussion of public policy concerns. The examples of interrelated legal authority introduce legal sources in a more cohesive manner than introducing them as discrete topics.

61 KeyCite search conducted on May 5, 2010.
62 206 S.W.3d 213 (Ark. 2005) (distinguishing Shannon by noting that an intoxicated restaurant patron who injured himself in a single-car accident after leaving the restaurant and who brought a negligence claim against the restaurant under the Dramshop Act failed to sufficiently plead causation under the Act because a person who is himself intoxicated and causes injury to himself has no claim against the retailer).
63 200 S.W.3d 411 (Ark. 2004) (declining to extend Shannon and holding as a matter of first impression that victim had no cause of action against owner for negligence based solely upon a violation of statutory prohibition against operating an uninsured motor vehicle).
64 205 S.W.3d 741 (Ark. 2005) (declining to extend Shannon to hold a medical clinic’s employees liable for negligence after clinic released a patient while still experiencing the results of sedatives following a colonoscopy after patient refused to follow clinic’s directives not to drive after the sedation and who was killed in a one-car collision while driving home).
65 44 S.W.3d 349 (Ark. Ct. App. 2001) (limiting the public policy concerns identified in Shannon by holding that a security company did not owe motorist a duty of reasonable care to train its employees to detect and observe intoxicated persons and to employ more security guards).
Rethinking Case Briefing: Teaching Case Briefing as a Sustainable Skill

By Mary Dunnewold

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Virtually all new law students learn to brief cases, usually during the first week of law school, sometimes even earlier. In fact, many schools include materials about case briefing in their orientation materials. Case briefing is closely tied to the prevailing instructional method in law school classrooms, the case method, and is viewed as a skill fundamental to success in law school classes.

Although case briefing is taught in law school as a fundamental skill, it is often not taught as a skill that will continue to be useful to students as they transition from student status to practitioner status. Rather, case briefing is usually taught as a class preparation skill. Accordingly, once students have learned how to read a case and understand what to expect during a classroom Socratic exchange, most stop briefing cases, or do so only through marginal notation in their casebooks.

While case briefing is an important class preparation tool, especially in the first year of law school, it can also be a powerful tool beyond the classroom. In particular, students should be taught that the process of reading a case and taking notes on it, the essence of case briefing, should encompass more than the analysis of that single case. When we go beyond the limited law school class-prep case brief, case briefing involves several legal analysis “subskills” that contribute to actual legal problem solving, including applied case analysis, rule synthesis, and advocacy preparation. To incorporate these subskills and to be useful beyond the classroom, however, the traditionally described case brief format must be expanded so that the case brief becomes a working document that helps the writer think about solving a client’s problem and later produce a written product that communicates possible solutions.

This view of case briefing, which produces a product I will call the “case brief-plus,” can be taught in any law school classroom in which the discussion goes beyond the casebook and addresses how a case might be used in practice. But most students initially encounter the cognitive task of “thinking forward” from basic analysis of a reported case to problem solving for a client in the context of legal writing assignments. The legal writing classroom thus presents an appropriate venue for introducing this broader perspective on case briefing.

The legal writing classroom is also an appropriate venue for teaching an expanded vision of case briefing because as students begin work on their first legal writing assignment, they notice that the briefing method they have employed in their doctrinal courses, where the cases are collected into

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1 For purposes of this article, I am referring to a standard law school case brief, which is an organized system of notes about a reported legal opinion that helps the reader/writer later reconstruct the essential components of the opinion. A standard case brief usually includes identifying information, procedural posture, facts, issue, rule/holding, and reasoning.


3 A few legal writing texts have offered an expanded view of case briefing. See Helene S. Shapo et al., Writing and Analysis in the Law 54–55 (5th ed. 2008); Charles R. Calleros, Legal Method and Writing 99–100 (5th ed. 2006). These texts both go beyond describing case briefing strictly as a class preparation exercise and discuss how the same process applies in law practice.

Case briefing can help students consciously identify important subcomponents of legal analysis that contribute to the larger task of legal problem solving."

The Benefits of Teaching an Expanded Vision of Case Briefing

Traditional case briefing teaches fundamental case analysis skills in the most basic sense: understanding the parts of a case, identifying the rule the case gives rise to, and identifying the reasoning that supports the rule. But if taught as a broader practical skill that is useful beyond the classroom, case briefing can help students consciously identify important subcomponents of legal analysis that contribute to the larger task of legal problem solving. Further, this expanded view of case briefing can help students better understand how the subcomponents of legal analysis apply in practice. This approach can also help students understand that the cognitive task of case analysis does not stand alone, but contributes to a larger web of legal analysis and problem solving. Thus, fostering this broader perspective on case briefing will help students better understand their future role as lawyers.

Foundational Principles Underlying the Case Brief-Plus

This new context and purpose for case briefing—moving toward the solution of an actual client’s problem—requires students to understand the task of case briefing in a new way. They are no longer merely searching for a rule that they know will be there somewhere, since the case has been chosen and edited for their use. Instead, they are venturing into unknown, unedited territory with a specific goal in mind: to gather material that will contribute to a specific end—producing a product in the context of a client’s case. In the legal writing classroom, we can model how an experienced legal reader both reads a case and turns it into a product useful in the problem-solving process. Three governing ideas are useful benchmarks in helping students understand how to approach a case brief in an expanded way.

1. **Context.** To write case briefs useful outside the classroom, students must learn to identify as early as possible the context in which they are reading a case so they can pare an unedited case down to the portions relevant to their problem. This principle follows from the idea that practitioners read cases intending to apply them to a specific set of facts, not in a vacuum. Consequently, early in the process, a case brief writer must identify the problem to be solved for the client so he 1) can focus on just the relevant sections of a case, and 2) can keep the legal analysis and writing process organized, particularly if the case involves more than one issue. Thus, the legal issue raised by a client’s situation must be defined as specifically as possible before the briefi ng process begins so that the reader can be a “purposeful reader” who briefs only the relevant section of the case. Accordingly, students need to be taught to read cases in context. Provided they have defined their issue upfront, their first task when reading a case in context is to skim the text to assess the entire content. After skimming the case, they can then identify the section of the case that appears useful to them, focus their attention on that section, and disregard any remaining material, at least for the moment. This “honing process” is a skill that experienced legal readers employ, and it is essential to efficient research, case analysis, and note taking (e.g., briefing).

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Consider, for instance, a reader with a 30-page case in hand in which only two pages are relevant to the issue presented. As expert readers, we (the professors) know the readers need not take notes on (or “brief”) the entire case. But novice law students don’t know this because they are accustomed to reading edited cases in which all material is relevant. Thus, they will understand practical case briefing more quickly if the honing process is explicitly taught.

As a practical matter, then, the case brief-pluss should include at the beginning a notation about the real-life issue presented to the reader and how the case relates to that issue. For readers less experienced with legal analysis (e.g., students), defining the issue before reading the case and keeping track of the relationship between the case and the client’s situation is critical to efficient reading and legal analysis. Inexperienced readers can easily lose sight of why they are reading the case. But students can be taught that even an experienced reader working with more than one legal issue needs to keep track of which issue a particular case speaks to; thus, a notation about the issue to be addressed and the key legal phrase to be defined through the case, placed at the beginning of a case brief, will help keep the research and writing process organized.

2. Specific analysis. Second, students need to learn how to think about and document more than just the rule and reasoning from the case. In both the class preparation context and the legal writing context, a case brief functions as a system of organized notes that assists the writer in later recalling information for a particular purpose. But a case brief-plus—designed to assist with problem solving rather than class preparation—has a more expansive purpose than simple case recall. In the case brief-plus context, the notes should support the process of legal problem solving through specific, focused legal analysis.

Because a specific analysis focus is critical to efficient reading of case law, students must learn to ask themselves “what am I trying to get out of this case?” In particular, once a contextual reading has identified the pertinent sections of a case and focused the reader on a particular legal idea, the reader must focus on how the material within that section, which focuses on the particular legal idea, informs the legal analysis of the client’s problem. A practitioner reads cases specifically to discern the synthesized rule to be applied to the client’s problem, the analogical comparisons to be made between the facts of the reported cases and the facts presented by the client, and the policy that informs courts’ decisions in this area of the law. Notes about these three types of information—rule synthesis, possible analogies, and relevant policy—should be recorded in the case brief so that the reader can easily import the ideas into a later written analysis.

While similar information is recorded in a classroom case brief—that is, the reader is looking for the rule and policy that informs this area of the law—in this context, more is required. The “rule” recorded in a case brief-plus should not stop at the basic “rule of the case.” Rather, the reader needs to be both thinking about and annotating how the rule contributes to a synthesis of a larger rule and whether the case allows for a narrower or broader rule statement that may suit the persuasive purpose of the reader or her opponent. Further, while facts are recorded in a traditional case brief, a case brief-plus should include both facts and notes about possible analogical comparisons to be made to the client’s case. While a traditional case brief may include comments about the general policy implications of a case, a case brief-plus should include both notations about how the case documents existing policy in that area of

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6 Many students find the concept of a “phrase that pays” useful in keeping them on track with the concept they should focus on in a case. See Mary Beth Beazley, A Practical Guide to Appellate Advocacy 50–52 (2d ed. 2006). The “phrase that pays” is the specific legal idea that the reader is trying to define by reading and briefing the case, around which the client’s legal issue is formulated. For instance, in a negligent infliction of emotional distress case, the party seeking recovery must be “closely related” to the party whose injury, by virtue of being witnessed by the first party, caused the distress. Thus, “close relationship” would be the phrase that pays that the reader would be attempting to define by reading case law. While negligent infliction of emotional distress involves several other elements, the reader would know that she could focus her attention primarily on the section of the case addressing “close relationship.”
the law and notations detailing possible policy arguments to be made in the client’s case.

3. Documentation. Third, to be useful to a practitioner, the case brief must document the origin of information so the reader/writer, who will probably later use the information in a written product like an office memorandum or court submission, can accurately cite it. Lawyers have a duty to be truthful and honest, and plagiarism, even negligent plagiarism, can violate both these rules and law school honor codes. When performing extensive legal research and reading volumes of case law, a reader/writer can easily fail to properly document the source of information. A useful and efficient case brief documents location information so that the writer can later properly cite the information. Thus, students must learn that a case brief-plus should include meticulous notation about where information comes from within a case and that indicates quoted (as opposed to paraphrased) language.

**Identifying Specific Skills Practiced in Case Briefing**

These broad principles that students must internalize about case briefing to effectively brief cases for the nonclassroom context tie directly into three specific skills that can be explicitly articulated during the case briefing process and modeled for students in the classroom: applied case analysis, rule synthesis, and advocacy preparation. Helping students recognize that they should practice these specific skills as they brief cases will help them both develop competency with fundamental lawyering skills more quickly and better understand how to use the skills in future contexts.

First, applied case analysis can be defined as the application of case law to a specific set of facts. A practicing lawyer must integrate legal and factual knowledge to successfully solve problems, not simply discern the rule of the case. A broader case briefing approach supports and records the lawyer’s cognitive process as he applies the reported case to the facts of a new case.

Second, rule synthesis is the process of taking rule information from a collection of related cases and developing a coherent rule system that takes all relevant cases into account. Accordingly, a practitioner reading a case looks not only for the rule of that particular case, but analyzes how the case fits with the previous case (and the one preceding that) and aims to construct an overarching system of rules that governs a particular area of the law. The practitioner will note exceptions, new developments, and expansion of the existing synthesized rule. While students writing traditional class-oriented case briefs also read to discover the development of the law, they are not doing so with the intent of actually constructing a rule that will be applied to a set of facts and used as the basis for arguments and legal conclusions. But a case brief-plus should track the development and synthesis of the law with the intention of solving the client’s problem.

Third, advocacy skills play a vital role in legal problem solving. A practitioner reads a case through the lens of the client’s situation, not in isolation, and mindful of the fact that she may ultimately need to use the case in her role as an advocate. Accordingly, the practitioner not only synthesizes the rule of law and thinks about how the rule can be interpreted in a persuasive context (broadly? narrowly? as an exception?), she also thinks about the analogical arguments that can be constructed around the facts of the case. Thus, the practitioner evaluates not only how the court applies the rule to the facts of the reported case, but actively analyzes whether the facts of her case are sufficiently comparable to justify the same result. Finally, the practitioner notices any policy discussion present in the case and considers how the articulated policies can support an outcome in her case. A case brief-plus, then, should record the reader/writer’s thoughts about persuasive rule interpretation, persuasive fact comparisons, and policy application as part of an advocacy plan to be (potentially) executed later in the problem-solving process.

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7 Model Rules of Prof’l Conduct R. 3.3.
"Because a case brief is a working system of notes ... the form can, of course, be varied to suit the needs of the writer/researcher."

Example Case Brief-Plus
What, then, would a case brief-plus look like in comparison to a “normal” case brief? Because a case brief is a working system of notes that assists the legal thinker in later reconstructing the case, the form can, of course, be varied to suit the needs of the writer/researcher. In fact, an experienced practitioner may accomplish the same kind of thought recording by simply writing in the margins of a printed case copy or using a commercial tool like CaseMap on LexisNexis®. But students benefit from learning a formal organizational system because, first, teaching an organizational system to keep track of analysis models for students how expert legal thinkers organize material, even though the expert may have moved beyond actually producing the document called a case brief. Second, because the system makes explicit several skills the legal thinker must exercise when using a case in context, students can more readily understand how those skills fit together. Third, the system helps novice readers actually organize their thoughts as they move from simply reading a case to using a case in the context of problem solving.

Below is an example of what this expanded system of notes might look like when it records not only information about the reported case, but also information about the interplay between that case and the client’s situation. The example is placed in the following factual context:

You work in a small personal injury firm, and your client was injured in a recreational dog-sledding crash. Your client was a paying customer who took the ride at a winter festival. The dogs tipped the sled and your client was thrown into a tree and sustained severe injuries. You are considering bringing a strict liability action under the Minnesota dog liability statute. You’ve read the statute and a few early cases, and you know that the statute imposes strict liability when a dog “attacks or injures” a person. Now you have the case Lewellin v. Huber in front of you. You need to know if the statute covers injuries resulting from a dog-sledding accident so you can evaluate whether bringing a suit under the statute is a reasonable option to offer your client. If the statute applies, it will be an easier avenue to recovery than a negligence claim would be.

Case Brief-Plus

<table>
<thead>
<tr>
<th>Client’s Issue: Does the Minnesota dog liability statute apply to injuries that occurred when passengers fell off a recreational dog sled?</th>
<th>Phrase That Pays: “attacks or injures” (from language of the statute). Case interprets the statutory language.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citation (identifying information): Lewellin v. Huber, 465 N.W.2d 62 (Minn. 1991)</td>
<td>Mandatory authority. Updated.</td>
</tr>
<tr>
<td>Procedural Posture: District court held that statute applied; Court of Appeals affirmed in part and reversed in part. Dog owners appealed. Supreme Court reverses and remands.</td>
<td>There is a dissent that may provide the basis for some arguments. Court remands so injured party can bring common law negligence action.</td>
</tr>
<tr>
<td>Facts: Sixteen-year-old dog sitter was driving car with dog in back seat. Dog attempted to climb over seat. Driver was distracted and ran off the road. Car struck child at the side of the road. Child was killed. Parent sued. 465 N.W.2d at 63.</td>
<td>Comparison: Unlike client’s case because dog not physically “linked” to injured party, as in our case. Like client’s case because no attack and no direct contact between dog and injured person. Also, injuries arguably resulted from actions of sled driver rather than actions of dogs, just as injury in case resulted from actions of driver.</td>
</tr>
</tbody>
</table>
**Case Issue:** Under the statute, does any conduct of a dog that ultimately results in injury trigger strict liability?

**Holding:** No. Dog’s conduct of distracting a driver, whose car goes out of control as a result and kills a pedestrian by the road, does not result in strict liability under the statute even though there clearly was an “injury.” *Id.* at 66.

**Predicted Outcome for Our Case:** Probably no recovery, as in *Lewellen*, because no direct and immediate causation.

**Case Rule:** A dog only “injures” a person for purposes of this strict liability statute if there is direct and immediate causation between the dog’s actions and the injuries, without intermediate linkages.

**Synthesis of Rule:** Statute imposes strict liability. For strict liability to apply, dog need not act viciously and there need not be a direct “attack.” But the conditions surrounding the “injury” that would trigger statutory strict liability are not clearly determined. In this case, the court specifically declines to decide whether there must always be direct contact between the dog and the injured person for the statute to apply. But it does decide that causation must be direct and immediate for this heightened liability to apply. An “attenuated” chain of causation is enough under common law negligence, but not here.

**Comments on Persuasive Formulation of Rule:** Easiest to interpret the rule in this case against our client and construe the rule narrowly. Narrowly construed rule would emphasize that cause in fact is not enough; there must be direct, immediate causation with no links in the chain of causation. Could possibly construct broader, more favorable rule around idea that court has not said there must be direct contact between dog and injured party, only that there must be direct causation.
**Reasoning:** Because the statute used both “attacks” and “injures,” “injure” has to mean affirmative but non-attacking behavior. There is no “attenuated chain of causation” when a dog attacks a person. *Id.* at 64. Also, there is no attenuated chain of causation when a dog jumps on or runs into someone and causes injury. *Id.* So usually there’s no problem determining proximate causation. *Id.* at 65. But given these terms, the phrase “attacks or injures” “contemplates action by a dog that directly and immediately produces injury to the person. …” *Id.* Thus, while the court declines to decide if direct contact between the dog and the person is required, it does require direct and immediate cause, “without intermediate linkage.” *Id.*

Legislative history also supports this narrow interpretation because it shows the statute was meant to protect people subject to immediate harm from dogs, especially those “who come upon private residential premises lawfully,” like mail carriers and firefighters. *Id.* Also, during the Senate hearings, the statute was referred to as the “dog bite” statute, suggesting a narrower interpretation. *Id.* at 65, n.3

The fact that other remedies are available at common law also supports the interpretation. For instance, a negligence action would have a less restrictive causation standard and thus be available to some injured persons. So “public policy and legislative intent are best served by limiting proximate cause to direct and immediate results of the dog’s actions.” *Id.* at 66.

Specifically, in this case, there was no direct, immediate connection between the dog’s actions and the child’s injury. “The dog’s conduct was directed at the driver of the car,” whose actions introduced another link in the chain of causation so that the chain of events became “too attenuated.”

**Arguments for Our Case:** We could argue that there was a direct connection between the dog’s actions and the injury here because the dogs were the agent that actually tipped the sled. The *Lewellin* case is different because there the driver’s actions were the “intermediate link” in the chain of causation.

Counterargument might be that as in *Lewellin*, there was no direct contact between the dogs and the injured party, therefore there can be no direct causation (since this is an unsettled issue). Also, could argue that there was an “attenuated chain of causation” in our case because the driver’s actions affected the dog’s behavior, which resulted in the accident.

Policy argument for client: A person on a dog sled is potentially subject to “immediate harm” from a dog. Thus, since statute meant to protect that class of people, it should do so in this case. In contrast, in *Lewellin*, a person on the side of the road is not intuitively subject to immediate harm from a dog in a car.

Policy argument against client: Since the statute was meant to be narrowly construed, given that it was referred to routinely as the “dog bite statute,” this kind of “injury” is too indirect—too removed from an actual dog bite. Also, common law negligence action would be available to client.

**Comments:** Case appears to be correctly decided. Recovery under these circumstances would require a very broad interpretation of the statute. Rationale a little dense in the middle of the opinion.

Is new phrase that pays “direct and immediate causation”? Seems to be what must be proven.

Research lead: Topic 28 (Animals); key number 66.5 (Dogs) (formerly 68).
As legal educators we should take every opportunity to instill in students thinking and practice habits they will actually use when they become lawyers.

Comments on the Example

**Issue**: The client’s issue is framed around the “phrase that pays”—the language of the statute that must be interpreted in this case. Thus, the reader/writer can easily keep track of how this case relates to the larger analytical picture, especially if more than one issue is raised by a client’s situation.

**Citation (Identifying Information)**: The citation is necessary in the case brief-plus, although it might be expendable in a class preparation case brief. The citation tells the reader/writer whether the case is mandatory or persuasive authority, which is crucial to later use of the case, and puts the case in historical context, which may become relevant to an argument. This section also provides a predictable place for the writer to note whether the case has been updated using KeyCite® or Shepard’s®, an essential step in actually putting a case to use.

**Procedural Posture**: While the procedural posture may not always add to the analysis, students need to learn to consider whether it does. For instance, a case may be decided on summary judgment and then appealed. The appellate court may decide a legal issue on appeal, but then remand the case for further factual decisions based on that legal decision. Students need to understand that the case can be cited for the legal decision, but that factual comparisons may not be useful.

**Facts**: This format allows a side-by-side comparison of facts that may affect the legal analysis; thus it illustrates how an expert reader would think while reading a case in the context of problem solving for a client, and it supports “applied case analysis.”

**Rule**: The rule section sets out both the basic rule of the case and the synthesized rule that the reader knows about so far, incorporating the rule of the current case. Thus, when turning to writing—using the case for an explanatory or advocacy purpose—the synthesized rule is already in place, although it may need shaping. In particular, the rule may need persuasive shaping if it is to be used in an advocacy context. But the reader’s initial thoughts about that purpose will be recorded in a predictable place.

**Reasoning**: This section provides a place for the reader/writer to keep track of immediate thoughts about analogical and policy arguments that arise out of the case. While the arguments may later be reevaluated or reformulated, they can initially be captured in a predictable place. Thus, this expanded briefing format supports the skill of advocacy planning.

**Comments**: In addition to comments on the decision, this section provides a space to record comments about research leads, new directions of analysis for the client’s case, and any other relevant information.

**Conclusion**

Given the prevailing support for teaching law students more practical legal skills, as legal educators we should take every opportunity to instill in students thinking and practice habits they will actually use when they become lawyers. Students must begin to see themselves as apprentice practitioners, not “mere” law students. Thus, early in their legal education, we should introduce them to the skills they will use working with case law outside of the classroom, including practice-oriented case briefing. An early introduction to practice-oriented case briefing will help students view briefing as a skill useful in the long term, rather than as a first-semester chore geared toward coping with the Socratic method, which they can drop when they “catch on” to law school and develop more efficient class preparation skills.

Writing a traditional case brief will undoubtedly continue to be an important aspect of class preparation for law students; students should continue to learn to brief cases in this traditional form for doctrinal classes because the exercise contributes to the development of fundamental legal analysis skills, the basic goal of first-year law classes. Moreover, if done properly, traditional case briefing does in fact assist students in preparing effectively for classes conducted through Socratic dialogue.
But early case briefing can be about more than “excavating” a case, learning the black letter rules, and being prepared for classes, exams, and the bar exam. Case briefing can be about developing a contextual understanding of a case and putting it to use to solve a particular problem. Considered within this framework, case briefing can be a powerful tool for apprentice lawyers that will continue to be useful throughout their careers, and we are in a unique position in the legal writing classroom to teach and promote this tool.

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Another Perspective

“The consensus among practitioners and academics about the core competencies needed in future lawyers is this: The best lawyers and law students are and will be those who can master and explain to their clients the relevant substantive legal issues and rules, and who have an understanding of their clients’ business. ‘Business’ may be in the traditional sense of pharmaceuticals, airplane engines and securities, or the business of life and matters relating to buying a home or seeking an order of protection against an abusive spouse. Lawyers and law students must also learn to write clearly and concisely, on point, and in a time-restricted manner. They must be able to answer a given question or make a concrete recommendation that makes practical and realistic sense for the client. As one general counsel put it, most corporate clients ‘don’t have legal problems, we have business problems that require the involvement of lawyers.’ It is incumbent upon law professors and law school administrators to teach law students about the fields of practice and the skills and substantive legal knowledge necessary to provide related legal and other kinds of advice. Practitioners must also take it upon themselves to train new lawyers in whatever manner is best suited for the legal service provider and its clients, and in a way that does not increase costs to their clients. Even the clients who work as in-house attorneys in corporate legal departments and government agencies should be helping to devise solutions to ensure there are future generations of good lawyers around to help them and their issues. When everyone affiliated with the legal industry stops blaming everyone else, stops kowtowing to misguided external influences and commits to rethinking the current system of legal education and legal service, we will start to develop a better way to educate and train lawyers.”


8 See McFadden, supra note 4, at 14–15.
Generally speaking, assessments are used to determine whether students are learning what we intend them to learn. Assessments also reveal what a professor values. Kristin B. Gerdy defines assessment as a process and instrument that promotes learning rather than simply monitoring it. She also writes that assessment is accomplished by gathering and discussing feedback from multiple and diverse sources to understand what one knows and how to improve subsequent learning.

Assessments can be formative, summative, or both. Formative assessments are viewed as being purely educational. Although they may be scored, one of their primary purposes is to provide feedback to students and professors rather than simply
providing a numerical or letter evaluation. This feedback creates opportunities to improve learning during the remainder of the course. Sophie Sparrow describes formative assessments as being "ongoing assessments designed to make students’ thinking visible to both teachers and students.”

A formative assessment can be given in many forms, including: writing essays or drafting legal documents (practice or graded); self- or peer-assessment assignments; or quizzes. The determinative factor as to whether it is a formative assessment is if it provides feedback and opportunities to improve learning by forming a learning loop. A learning loop is created when a professor facilitates a student’s active learning, the student performs, the student and professor assess the performance, and the professor provides feedback on how the student’s learning and performance can be improved.

Summative assessments, such as final exams or papers, serve to assign a grade or otherwise indicate a student’s level of achievement in relation to other students rather than to provide extensive feedback about the quality of his performance. Their “after-the-fact character forecloses the possibility of giving meaningful feedback to the student about progress in learning.” Overuse of summative assessments is a sure way to prevent a student and a professor from reaching their optimal learning level because a learning loop is not created.

A summative assessment can serve as a formative assessment if it is completed during the semester to test a developed skill (e.g., reading and understanding appellate cases). While assigning a grade or ranking the students based on this assessment would make it summative, it would also be formative if the students are given feedback so that they can learn from the experience.

**Why Professors Need to Include Assessments in Their Courses**

My research revealed that it is imperative for professors to provide students with both formative and summative assessments, with frequent formative assessment being a key factor to student success. In addition to creating a learning loop, the importance of formative assessment for students rests in its ability to dispel a student’s frustration of being provided “no basis on which to gauge whether [he is] mastering the material or making adequate progress toward the desired proficiencies … until the voyage is over.” This frustration can negatively affect a student’s performance by causing stress or panic.

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10 Sullivan, et al., *supra* note 2, at 164; Stuckey, *supra* note 1, at 256.


12 See Hess & Friedland, *supra* note 8, at 286; Stuckey, *supra* note 1, at 256.

13 See Stuckey, *supra* note 1, at 256.


15 Id.; see Hess, *supra* note 5, at 105.


17 Hess, *supra* note 5, at 105.

18 Sullivan et al., *supra* note 2, at 164.

19 Id. at 164–165.

20 Stuckey, *supra* note 1, at 260.

21 Id. at 260–261.

22 Id. at 164–165.

Many believe that formative assessments should be the primary source of assessment in law schools because the learning loop makes them an effective learning tool. This continual process of learning from the student’s feedback and adjusting teaching measures allows a professor to consistently mold himself into a stronger, better teacher, thereby alleviating some student criticisms, and perhaps even providing students with ownership of the class.

Many believe that formative assessments should be the primary source of assessment in law schools because the learning loop makes them an effective learning tool. Since a student learns from feedback, a law school’s focus should be to enhance a student’s performance through use of this feedback. Doing so is one way to provide a student with a powerful experience during the apprenticeship of law study that prepares him “for a lifetime career involving continuous growth and self-development.”

Effective Student Assessment

To be effective for adult learning, assessments must be multiple, varied, and fair. Gerald F. Hess and Steven Friedland define multiple as more than one assessment per semester, and varied as meaning different types. Fair is defined as assessing whether the goals are reached, having clear professor expectations and grading criteria before the assessment, and providing a student with feedback and practice before the assessment.

The multiple factor is a challenge for many legal writing professors, me included. We want to provide the tools and guidance for our students to become the best legal writers possible before they finish our classes. This desire often leads to having numerous formative assessments during the semester, which we painstakingly critique because we think the students only want and need our feedback. Who else could possibly provide them with the guidance they need?

In light of the tasks before me at Duncan, I have already chosen to accept that there are others at Duncan who can provide effective feedback to my writing students and thereby lighten my load; namely, the students. Having decided that, I now need to determine how many formative assessments the professors can critique without being overly burdened, and then supplement those with peer assessments.

Peer assessments are an effective collaborative learning tool that often provide better results than a student working alone while helping to ease the feedback burden of legal writing professors. Collaborative learning involves peers sharing experiences and insights. The importance of this student-to-student interaction is emphasized by the constructivism learning theory, which views cooperative learning groups as being one of the most effective learning tools in existence. This effectiveness stems from a...
student obtaining multiple perspectives on his exam-writing skills, thereby developing more complex approaches and understandings.\textsuperscript{38}

The fair factor for effective assessment can be partially satisfied by using a grading rubric. A rubric provides a framework with explicit criteria for performance into which feedback can be placed.\textsuperscript{39} This framework can help a student become an “expert learner”\textsuperscript{40} by allowing him to effectively diagnosis his writing strengths and weaknesses.\textsuperscript{41} This reduces the likelihood that the student will perceive his poor performance as being a sign of failure.\textsuperscript{42} Using a rubric also furthers the ultimate goals of various learning theories, which are to “free the student from dependency on his teacher and to assist the student in this discovery of how to best learn on his own,” thereby ensuring a student’s continued success upon graduation.\textsuperscript{43}

For formative assessment to be effective, communication of what the professor learns from the student’s performance\textsuperscript{44} must be done in a timely fashion.\textsuperscript{45} Greg Sergienko writes in his article, \textit{New Modes of Assessment}, that feedback is most effective when it follows soon after the work is performed,\textsuperscript{46} while the assignment or exam is still at the forefront of the student’s mind.\textsuperscript{47} This facilitates a student learning what he understands and what is still unclear.\textsuperscript{48} Timeliness is especially important for first-year students, who “may perceive an unsettling incongruity between classroom preparation and discussion on the one hand and evaluative techniques on the other.”\textsuperscript{49} Finally, education theory supports timely feedback as being the most effective type of feedback.\textsuperscript{50}

\textbf{Efficient Student Assessment}

I have discovered two tricks to being an efficient assessor: 1) do not reinvent the wheel each time you want to use a rubric; and 2) use a “Commonly Made Mistakes” handout that accompanies the rubric. To find a rubric that works for your assignments, check out free resources available to legal writing professionals, including the Legal Writing Institute (LWI) website. The following link contains a litany of rubrics that can be used for many legal writing assignments, including appellate briefs, memoranda, and trial briefs: \texttt{<http://www.lwionline.org/grading_rubrics.html>}. Another option is to send an e-mail to the members of the LWI listserv requesting a specific type of rubric. To join the listserv, send an e-mail to Kimberly Phillips at kim.phillips@ttu.edu or Kathy Sampson at ksampson@uark.edu. Be sure to identify your school and teaching position in your e-mail.

\begin{footnotes}
\item[38] Id.
\item[39] See Munro, supra note 14, at 124; Roach, supra note 23, at 680.
\item[40] Schwartz, \textit{Expert Learning for Law Students}, supra note 37, at 3.
\item[43] Roach, supra note 23, at 683 (“In order for a student to achieve independence, therefore, she must develop the following skills including the ability: (a) to set goals; (b) to devise a program for accomplishing each goal; (c) to establish criteria for evaluation; and (d) to create a mechanism to evaluate progress.”).
\item[44] Munro, supra note 14, at 151.
\item[47] \textit{Teaching the Law School Curriculum}, supra note 46, at 286 (quoting James B. Levy, Nova Southeastern University Law Center).
\item[48] Anderson, supra note 45, at 145.
\item[50] \textit{Teaching the Law School Curriculum}, supra note 46, at 285–286 (quoting James B. Levy, Nova Southeastern University Law Center).
\end{footnotes}
The Commonly Made Mistakes handout serves to both reduce the amount of time you spend writing comments on your students’ papers while still providing detailed feedback, and reduce the frustration caused by continually writing the same comments. The handout may contain categories such as: 1 = incomplete sentence; 2 = missing part(s) of rule explanation; 3 = did not provide adequate case comparisons. The first one or two instances when you see a problem occur, write what is wrong and any additional information needed to clarify your comment, how to resolve the problem, or both. For the remainder of the paper simply circle what is wrong and write the corresponding number by it. I have not used this type of handout before, but I foresee it as being a valuable, time-saving tool.

Conclusion

Providing students with adequate, continual feedback while not becoming consumed by this task is a hard balance for many skills professors to find. However, by understanding why and how to assess efficiently and effectively, professors can streamline this process so that assessment becomes a win-win for both students and professors.

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Another Perspective

“When a law school professor or clinician hears the word ‘assessment,’ there is a natural assumption that it refers to tools for grading students or evaluating instructors. Of course, assessments used for grading and instructor evaluation are essential to tracking student progress and teacher success. However, law schools owe more than a course evaluation to their students. Law schools should be engaged in fully preparing their students for entry into the practice of law and erasing the ‘gap’ between legal education and the practicing bar. Law schools cannot assume that just because a student has completed the requirements for a degree, the student possesses the requisite ‘skills, values and knowledge’ necessary to effectively transition to the practice of law. Rather, law schools should adopt an integrative strategy for legal education, focusing on a holistic rather than an atomistic approach. In addition to assessments for grading and instructor evaluation, law schools should provide their students with an assessment of their overall readiness to begin the practice of law. Armed with this assessment, students would be able to tailor the balance of their law school experiences and extracurricular activities to complete their preparation for a smooth transition into the legal profession. Clinical teachers are particularly well-positioned to conduct this assessment process.”

No Answers, No Words

By Sarah Gerwig-Moore

Sarah Gerwig-Moore is an Associate Professor at Mercer Law School in Macon, Ga.

We teach in an environment in which students come to us by performing well on standardized tests and meeting certain achievement benchmarks and then, years later, leave us for an uncertain job market, saddled with crushing educational debt.1 Aware of the difficulties out there facing our students,2 we college and graduate and professional teachers have our own responsibilities to them: to give them their money’s worth. For many of our students, this means giving them answers: filling their heads with so many facts and so much knowledge that they will enter the “real” world as competent, confident adults who are, above all other things, employable.

I have a confession—a dangerous one for a new (untenured) teacher. I work hard at keeping one step ahead of my most hardworking students.

And sometimes—often—I find myself facing a new teacher’s greatest fear: that my students have asked a question for which I do not have an answer. I am scared to death of it.3 I work fervently, obsessively, to prevent it, but it happens. Often.

I hate the silence that hangs in the air after a tough question. Sometimes I will say, “Good question. I’ll find out the answer.” But sometimes they ask me a question for which there is no answer.4 I can’t look it up in a book or in a case online. These are questions—the questions—that our students have come to plumb and explore and examine—and the reason why some students want their money back when we don’t give them detailed reasons and explanations.

In my appellate and post-conviction clinic, I often face these difficult questions and situations. For example, the question, “Why is there no right to counsel in state post-conviction proceedings?” is a toughie indeed.

1 The American Bar Association states the average private law school tuition was $32,567 for 2007, up 6 percent from the previous academic year. The 6 percent increase follows a general trend of 5 to 8 percent increases in tuition over the last 15 years <http://www.abanet.org/legaled/statistics/charts/stats%20-%2020.pdf> (accessed Oct. 5, 2008). In-state students at public institutions paid an average of $13,455 for tuition in 2007. Additionally, during the 2006–2007 academic year, the average student who graduated from a public law school borrowed $57,170, while the average student who attended a private institution borrowed $87,906 to finance his or her law school education <http://www.abanet.org/legaled/statistics/charts/stats%20-%2020.pdf> (accessed Oct. 5, 2008).

2 According to the ABA, the 198 accredited law schools graduated 43,518 students with either a juris doctor or LL.B. degree during the 2007–2008 academic year. Though down by approximately 400 students from the previous year, the general trend over the last 30 years shows an increase each year in the number of students law schools graduate. Furthermore, more than 150,000 students were enrolled in ABA-accredited law schools during the 2007–2008 academic year <http://www.abanet.org/legaled/statistics/charts/stats%20-%2020.pdf> (accessed Oct. 5, 2008). Such a high volume of graduates each year undoubtedly creates stiff competition among those seeking employment in the legal profession.

3 Such fears are more than reasonable. Stephen Brookfield, advising teachers how to deal with unexpected events in the classroom, tells teachers to take questions but answer them with competence, for a failure to do so “destroys credibility.” The Skillful Teacher 59–60 (2006). Aside from answering questions “clearly, quickly, and knowledgeably,” Brookfield provides no other advice for a teacher facing a question in want of an answer. Id.


5 Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999) (“[i]t is well settled that there is no federal or state constitutional right to appointed counsel in Georgia habeas corpus proceedings”) (punctuation omitted).
Sometimes we fight for, write briefs for, argue for, and lose sleep over clients and cases. And then we lose.

“Even in death penalty cases?”

“Yes.”

“Is innocence an independent ground for requesting and receiving a new trial?”

“Not as such.”

“Why not?”

And then, over days and weeks, the questions inevitably proceed from hard to impossible. Here’s the thing: in these times, not only do I not know the answers to the questions posed but I have nothing to say at all. So I cannot claim, as their teacher, to be somehow uniquely qualified to guide students toward finding the answer. I cannot even guide them to finding an answer. I don’t even have words.

Together in the clinic, we fight hard for our clients, and often we win relief for them. We’ve kept a young student from being deported to the Sudan for a nonviolent misdemeanor offense, and we have won new trials for clients who had abysmal representation in their trials or for whom the justice system did not work. But we don’t always win. Sometimes we fight for, write briefs for, argue for, and lose sleep over clients and cases. And then we lose. At the end of the legal road, when all options are exhausted and we have no more legal tricks to pull out of our pockets or our hats, we lose. And students inevitably ask, “How can this have happened?” “Is there no justice?” And these are questions to which I have no answers. I don’t even have words.

In my first year of full-time teaching, I accepted a case in the clinic where a young, poor high school dropout had been charged with (and convicted and sentenced for) aggravated child molestation for engaging in consensual oral sex with his girlfriend. He received a 10-year prison sentence without the possibility of parole. She was 16, and he was barely 18.

Though she testified at the trial that she had lied about her age, pursued him, and initiated the relationship, the jurors were bound by the letter of a “get tough” law that had not considered its own implications.

6 Id. at 190 ("[n]either the federal nor Georgia constitutions require the appointment of a lawyer for a death-row inmate to have meaningful access to the courts upon habeas corpus") (punctuation omitted).

7 Herrera v. Collins, 506 U.S. 390, 400 (1993); Davis v. State, 660 S.E.2d 354, 362-63 (Ga. 2008) (for extraordinary motion for new trial to be granted, new evidence must be "so material that it would probably produce a different verdict") (quoting Timberlake v. State, 271 S.E.2d 792, 795 (Ga. 1980)).

8 “Impossible” might be a hasty label. Ralph Waldo Emerson wrote that no question is unanswerable and that “[w]e must trust the perfection of the creation so far, as to believe that whatever curiosity the order of things has awakened in our minds, the order of things can satisfy.” Nature, Introduction. If Emerson is correct, teachers and professors suffer the burden of Atlas when it comes to preparation to answer the questions inquisitive students, and maybe even devious students, conjure.

9 Since its inception in 2006, the Habeas Project clinic has taken on 18 cases. Of those 18 cases, the clinic has won favorable outcomes in nine. As of October 5, 2008, five of the cases are either awaiting decisions from various courts or are still in the pre-hearing stages.

10 Rolland v. Martin, 637 S.E.2d 23 (Ga. 2006) (relief granted where trial counsel abandoned case before filing a motion for new trial and notice of appeal after being informed to do so by client); Edwards v. Lewis, 658 S.E.2d 116 (Ga. 2008) (relief granted for client whose appointed trial counsel had a conflict of interest); Smith v. State, 663 S.E.2d 155 (Ga. 2008) (holding created somnambulation defense in Georgia).


12 The client in this case was found guilty of aggravated child molestation, Ga. Code Ann. § 16-6-4, prior to the Georgia General Assembly’s passage, and the governor’s subsequent signing, of 2006 Ga. Laws 571, which became effective on July 1, 2006. 2006 Ga. Laws 571 amended § 16-6-4 by adding a “Romeo and Juliet” law in which a defendant who is 18 years of age or younger is guilty of only misdemeanor child molestation so long as the victim is at least 14 but less than 16 years of age and within four years of age of the defendant. Ga. Code Ann. § 16-6-4(b)(2).
His conviction had been affirmed on direct appeal, and we entered the post-conviction stage, opting to bypass state habeas and go straight to federal habeas. We simultaneously sought a sentence modification in the trial court but were told that, despite the fact that the outcome was unfortunate and that the court still had jurisdiction over the case, there was no legitimate legal ground through which to reopen the case for resentencing.

At the same time, the Genarlow Wilson case—a similar case that attracted national attention—was on the news, on the radio, and headed for the Supreme Court of Georgia on the same grounds raised in our client’s direct appeal. We had our own reasons for avoiding the national media but hoped that the attention drawn to the injustice of the determinate sentencing in those situations would help our client.

While our federal habeas was pending, our client’s ankle was broken in prison. We feared for his safety, and yet had little power in a system that is overcrowded and resource-starved.

Genarlow Wilson’s case was decided about a year after we accepted Josh’s case, and of course Genarlow’s conviction was vacated and his liberty granted. At first, we were all elated. We felt certain that this was the breakthrough we had yearned for, and our class “phone tree” alerted everyone to read the opinion with interest.

And then we read and, literally, wept. In the state Supreme Court’s opinion, the Court went beyond the record in Wilson’s case—and indeed, beyond the record in Josh’s case, which was not then pending before it—to distinguish Josh’s case from Genarlow’s because Josh was slightly older than Genarlow and because the age difference between Josh and his girlfriend was slightly greater than the one in the case before it.

Even as the court corrected a clear injustice, it failed to identify another. The students and I were crushed and angry. Why the distinction? Had our media-shy policies (again, driven by our own client-centered reasons) harmed our client and our case? Was the law so formalistic and rigid that it could not address such an unintended legislative disaster?

What, then, could I say to my students who had worked so hard and believed so fervently? What could I tell my client and his family?

What of the other lost cases, the black man convicted by an all-white jury whose Batson claims were not found to be persuasive? Or the indigent defendant who was counseled by an attorney whom he had never met that he should “tell the police what he knew,” and then provided the only evidence necessary to convict himself of a nonviolent, nonresidential burglary? Or the young mother convicted of murder of an infant who, by accounts of most medical experts testifying at trial, was not and could not have been born alive?

The fact that all this seems to happen more often than I would like doesn’t make it easier, and I haven’t yet developed just the right combination of words to meet the circumstances. I want to make it feel better or seem brighter—or maybe I talk just to be talking and doing something—but what I say, in the face of what we’re facing, is nothing.

Occasionally, after those moments when I haven’t known the answers, I remember the pain and fear of sitting in a classroom waiting

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14 For a comparison of the Genarlow Wilson and Josh Widner cases and the surrounding media coverage, see Alyson M. Palmer, Tales of Two Cases Show Murky Sex Law: Genarlow Wilson’s Win Made the News, but Another Teen Sex Case Looms, Daily Report, June 14, 2007.

15 Humphrey v. Wilson, 652 S.E.2d 501, 511 (Ga. 2007). The Georgia Supreme Court decided this case on October 26, 2007.

16 Id. at 506.

17 Id.

18 In Batson v. Kentucky, the U.S. Supreme Court held that a state denies equal protection to a defendant where the state puts the defendant on trial before a jury from which the state has purposefully excluded members of the defendant’s race. 476 U.S. 79, 84, 106 S. Ct. 1712, 1716 (1986).
“Perhaps struggling over the same unanswerable questions will be what our students will remember about their time here—or that even their teachers struggled with the same frustrations. …”

to be called on by my professor, stern and scary, to explain the legal holding of a case—or worse yet, to explain a footnote I hadn’t read. It ached. It was awful, but I learned.

I wonder if we as teachers never feel that again, we’ve stopped learning? And if as teachers we only teach in situations where we know all the answers, hold all the cards (close to our vest, of course), we’re not doing our jobs? If we seek always to “close the loop” we cheat our students out of their own processes toward their own understanding—or truth as they seek it.

When people ask me about what I like about teaching in the clinic, I have mixed feelings about how to answer. On the one hand, my students are dedicated, self-selected, good writers, and open to the hard shock of an immersion into any law practice. The clinic is no picnic, but not because we ourselves are working too hard or because we dislike losing: the hardest piece is that we are no longer innocent, no longer ignorant of the vast and inexplicable human suffering that coexists with our comfort.

And in our world that yearns for closure, we hate to feel unsettled, uncertain. It may in fact be our job at times to help our students toward synthesis: we must, in the terminology of the academy, “Close the loop”: engage in a project, reflect on it, evaluate it, close the loop.

But perhaps, more importantly, we are called to force students into the discomfort of not knowing. But in this process, we can’t forget ourselves, as painful as that may be.

Let me be clear: I don’t mean in a trite sort of way that we should become comfortable with not knowing, or complacent, or that we should lovingly embrace the mystery and leave it at that. This is painful and it’s real. Maybe this will draw us closer together for having experienced the same frustrations, or perhaps not. Perhaps struggling over the same unanswerable questions will be what our students will remember about their time here—or that even their teachers struggled with the same frustrations as they.

And sometimes we will learn, sometimes we can take comfort in the shared experience, and sometimes all we will be able to do is sit together and weep.

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19 Socrates, the founder of the stress-inducing Socratic method of teaching that law professors typically use, puts it bluntly: “There is only one good, knowledge, and one evil, ignorance.” Diogenes Laertius, Lives of Eminent Philosophers, book II, sec. 25.

20 J.P. Ogilvy, Leah Wortham & Lisa G. Lerman, Learning from Practice: A Professional Development Text for Legal Externs 1–9 (2d ed. 2007).
Most law schools populate the faculty who teach in their structured 1L legal research and writing programs with professors or instructors assigned specifically to those programs. In addition, some schools permit (or require) such faculty members to teach other, nonlegal writing courses during the academic year. In contrast, those faculty members hired to teach doctrinal courses rarely, if ever, cast a shadow across the legal research and writing classroom door.

Nova Southeastern University’s Shepard Broad Law Center historically has used this model in its first-year legal research and writing program titled Lawyering Skills and Values (LSV). During the 2009–2010 school year, however, a doctrinal professor voluntarily crossed that invisible barrier and joined faculty teaching LSV midway through the year-long program. In retrospect, this foray into heretofore segregated territory produced unexpected benefits for the faculty member who joined the LSV faculty for a semester, the LSV program, the LSV professors, and some strictly doctrinal professors. Although the impact on students has been difficult to gauge, anecdotal evidence suggests that, at worst, switching professors halfway through the program did no harm, and it may have made students’ legal writing more audience-focused, a goal universally promoted by legal writing teachers.

The overall positive experience of the doctrinal professor and the LSV professors suggests that there are benefits that a legal writing program can derive from such collaboration. While some programs would not be suited to this type of arrangement, under certain circumstances, with the right individuals, such collaboration could enable doctrinal faculty to develop a new appreciation of the role of the legal research and writing program in law students’ 1L experience and overall development. Moreover, the legal writing professors can benefit from subject-specific expertise of doctrinal faculty members.

The LSV Program at NSU

The LSV program consists of two required first-year courses. Focusing primarily on legal research, analysis, and writing, the courses also expose students to other skills, including client interviewing and counseling, alternative dispute resolution, professionalism, and oral advocacy.

LSV I, taught in the fall semester, uses state law to develop predictive legal writing skills. Each LSV professor selects the substantive legal problems used in the classroom and the jurisdictions in which they are set. While many LSV faculty members draft their own problems, they encourage the liberal use and adaptation of their teaching materials and problems by others, fostering a collaborative atmosphere among those teaching in the program.

In the winter semester, the students take LSV II, during which the writing problems are based on federal law and concentrate on persuasive arguments directed to a federal district court. Unlike its predecessor course, LSV II involves the use of common problem...
materials by all professors to facilitate the oral arguments that are the program capstone.

All those who teach in the LSV program are contract faculty holding professor rank and having 405(c) status with eligibility for continuing five-year contracts following successful annual reviews and a favorable faculty vote at the conclusion of their fourth year. In all other respects they are virtually identical to tenure line faculty at NSU: they are eligible for promotion to full professor, have full voting rights, have similar (although not identical) scholarship requirements, have identical service requirements, are eligible for sabbaticals, and are entitled to the same faculty development allotments, research grants, summer teaching opportunities, and research and teaching assistants. In recent history, the salary structures of those on contract and tenure track were equalized, eliminating, at least facially, the last vestige of any distinction between those faculty members having contracts and those enjoying tenure.

Because of the intense demands on the LSV faculty for ongoing student interaction outside the classroom and the continuous grading and feedback entailed by the courses’ structure, the LSV professors teach a reduced course load. Each has one section of LSV each semester, ideally consisting of no more than 25 students. In addition, all LSV professors teach one additional, traditionally doctrinal course during the academic year. Finally, unlike most (if not all) legal research and writing teachers at other schools, every LSV professor at NSU has the opportunity to rotate out of the program for one year, every five years. During that year, the professor who has rotated out teaches two non-LSV classes. This ability to rotate out allows the professor to focus on scholarship, prepare to teach new/additional courses in the areas of the professor’s interest, and rejuvenate from the highly demanding LSV program.

In the fall 2009 semester, the system of rotating out collided with the unexpected matriculation of an unusually large number of students. ...
my help, and I wanted to help. Second, I relished the opportunity to make a statement. Having a professor who usually does not teach LSV join the ranks of the LSV professors could, I hoped, help blur lines between the categories of faculty at our school. As a former contract-line, LSV professor who switched to solely doctrinal teaching on the tenure track and then was awarded tenure, I am especially interested in eliminating (or at least further blurring) those lines. In fact, I had been offering to teach a section of LSV for a few years, but the right opportunity had not previously arisen.

Once I agreed to do it, however, I wondered what on earth I had done. It likely would be fair to describe my condition as "abject terror."

First, I was terrified because of the particular circumstances of my visit to the program. I was taking over for a fantastic teacher who had come to law school after teaching high school English and being a reporter, and who regularly wowed her students with her excellent teaching skills and writing background. The task seemed especially daunting because I was doing it on overload, while continuing to teach my regular semester course load of civil procedure and a seminar.

In addition, I was terrified because I realized I had to do a whole new level of class preparation. Similar to legal writing faculty across the country, LSV faculty members at NSU often use collaborative and cooperative learning techniques rather than the Socratic method in the classroom. My use of such techniques in torts, civil procedure, and my seminars meant incorporating them in an LSV classroom was not a great stretch. The vast majority of LSV faculty members, however, use technology in some way in their classrooms; PowerPoint presentations and interactive instruction using Word documents or the Internet projected on a screen are common. The students I inherited were accustomed to frequent and creative use of technology during their LSV classes and expected this to continue in the spring.

It took about three weeks at the beginning of the semester to calm my fears and settle into a routine. The generosity of my LSV colleagues pulled me through. They urged me through my initial concerns about the shoes I was trying to fill by boosting my self-confidence with supportive statements, offers of assistance, and team meetings. Teamwork is not unknown at NSU; in doctrinal courses, groups of faculty discuss course coverage and evaluation methods. But this sort of teamwork was different. This was hands-on teamwork: discussion and debate over ways to approach the problem to maximize student success, rather than general discussions about the weight to give one topic as opposed to another within a course. These meetings took place frequently during the semester, rather than perhaps once a semester. Both types of teamwork are valuable; the sort that occurs in LSV, where faculty members labor together in real time, creates more of a bond among colleagues.

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4 I choose not to use PowerPoint as a general rule in torts and civil procedure because I want my students to control the flow of the conversation in each doctrinal class, within the context of my overall goals for the day. Even if I walk in with a lesson plan detailing the order in which I want the discussion to proceed, student responses to questions may not arise in the precise order in which I have planned the class. Having a PowerPoint presentation memorializing the order I had initially planned could prove to be useless and inhibit maximum flexibility in class flow.

The LSV faculty members also provided concrete assistance as I grappled with the technology issue. Having recognized student expectations with regard to technology, but not wishing to incorporate it simply because of those expectations, I considered whether using technology more would serve my pedagogical goals in LSV. In my previous LSV days I had sometimes felt as if I was lecturing in a boring manner; in retrospect, I could have used an aid like PowerPoint, but at that time, I simply did not know as much about it as I do now. I could see how using it now would serve my goals in the LSV classroom because LSV classes can (and in some senses must) be a bit more structured than my substantive classes are. Fortunately, the decision to use it also would complement LSV students’ expectations.

The decision to use technology, however, magnified rather than eliminated my fears. Again, the generosity of my colleagues saved me. Their willingness to liberally share PowerPoint presentations, handouts, and other materials helped in two ways. First, starting with a presentation and transforming it into my own proved to be much easier than creating one from scratch. Second, and more important, seeing their presentations clued me in to the level at which to pitch my lessons for student understanding. The program and the students had changed since I taught LSV 10 years ago, making it helpful to see where other professors targeted their expectations and what other professors believed their students needed.

Benefits for All Involved
Having gone through this experience, it seems that having a doctrinal faculty member visit LSV for a short time benefited the faculty member, the program, and, possibly, the students.

Faculty-Level Effects
For the visiting faculty member, the experience can be eye-opening and energizing. Capturing (or recapturing) the close relationship LSV professors enjoy with their students is an entirely different experience from the large-classroom experience, and affords a different perspective on the students and their capabilities and concerns. It also affords a different perspective on the program and a better understanding of the stressors on LSV faculty. (Of course, it is not a complete understanding of those stressors because it is temporary, but it is at least a glimpse into the experience.)

Having taught in the program previously, although at a time when the structure of the program was entirely different than its current iteration, Professor Cerminara was familiar with the goals and general methodology used to teach legal research and writing. Professor Cerminara also already used collaborative, experiential learning in her doctrinal classes, making those techniques easily transferable into the LSV classroom. Therefore, because she already used the interactive exercises that are the mainstay of LSV and most legal writing programs, she did not experience the difficulty purely Socratic professors could have found in the transition.

The LSV program benefited as well, in several ways, many of which are nonquantifiable or inchoate. Perhaps the most significant intangible benefit was that having a well-respected, tenured, doctrinal faculty member visit, even for a short time, highlighted the importance of the legal writing program in the overall curriculum and the contributions of those who teach in the program. Rather than simply increasing LSV class sizes, the administration recognized that doing so would both impose a hardship on the professors and reduce the value of the student experience. Choosing not to do that sent a powerful message. Although unknown at this juncture, it is likely that Professor Cerminara’s stint in LSV benefitted the program in an additional intangible way. Consistent with her intention when volunteering to enter the program, her visit may have blurred the lines between contract and tenure faculty, and perhaps between skills and doctrinal faculty, even more than they already were blurred. As a tenured faculty member with roots in legal writing, Professor Cerminara had always been supportive of the program. As a result, LSV faculty members enthusiastically received her into the program and doctrinal faculty members were less startled by the visit than they might have been had a professor who had never been associated with the program.
volunteered to teach LSV for that semester. These were small steps, surely, but perhaps steps that will have a long-term impact on attitudes.

Moreover, LSV faculty benefited tangibly in an entirely fortuitous and unanticipated way. The winter problem focused on personal jurisdiction; conveniently, Professor Cerminara regularly teaches civil procedure to 1Ls. Having a subject-matter expert teaching LSV helped alleviate the chronic problem legal writing professors face of having to learn a new subject from the ground up. Her presence in the program also increased the collaboration between the LSV faculty and the doctrinal faculty by providing a direct line to those teaching civil procedure, increasing their understanding of what the LSV faculty and students were doing that semester.

The LSV professors teaching the students that Professor Cerminara had in her civil procedure class derived even more direct benefit. Because she was intimately familiar with the LSV problem, Professor Cerminara helped ensure that the students properly understood the substantive law in a manner relevant to their problem.

Faculty not teaching LSV, primarily those teaching civil procedure, also derived an unexpected benefit. In discussing his students’ final exam performance with Professor Cerminara, one professor commented on the dichotomy in student answers to an essay question addressing issues similar to those posed in the LSV problem. Professor Cerminara was able to explain that the divergence in analysis was likely attributable to the identity of the party the students represented in LSV—those arguing on behalf of plaintiff analyzed the question using a recent, but not yet widely accepted test, while defendant’s counsel promoted the application of a more traditional test. This information permitted the doctrinal professor to grade his exams with a better understanding of the students’ knowledge base.

Effects on Students
Students may or may not have been affected. There is no scientifically valid data available by which to judge whether students benefited, were negatively impacted, or were not affected by a new professor appearing in their LSV classroom at the beginning of the winter semester. Both the previous professor and Professor Cerminara emphasized that one was not taking over for the other midcourse and that the program consists of separate courses: LSV I in the fall and LSV II in the winter. They also emphasized that the semester demarcation matched a style demarcation (predictive to persuasive writing), so that the change in professor accompanied a change in style expectations. None of the student evaluations or end-of-year cognitive protocols yielded comments, positive or negative, about the change of professors.6

A post-semester e-mail requesting thoughts from students on a voluntary basis produced only a few, inconclusive comments. At best, they might indicate that a change of professor helped the students recognize the need to write with their readers’ needs in mind. Although some expressed initial concern about the transition, by the end of the semester their feelings were generally neutral.

Recommendations
Overall, the NSU LSV program’s experience with a doctrinal faculty member visiting LSV indicates that it is probably a better idea in some programs than in other programs. Similarly, unsurprisingly, it would work with some faculty members better than with others.

Programs emphasizing teamwork, with coordinated syllabi and a common major assignment in the affected semester, are better candidates for such an experience than programs in which each legal writing professor (or pair or small group of professors) creates his or her own schedule and materials. The visiting faculty member is most likely to acclimate better with the support and assistance of multiple legal writing experts doing the same thing.

6 Because no question specifically addressed the change in professors, it is unlikely that students would have commented unless they had strong feelings one way or another.
Additionally, as one might expect, certain faculty members, within and outside of the legal writing program, are likely to make the most of and benefit the most from the experience. The program and LSV faculty members would benefit most from visits by those teaching in a substantive area covered by that semester’s problems. Inside the program, it is likely that some faculty members would be better suited to relinquish their classes to persons visiting than others. The best situation would be to have the “outside” faculty member take over the class of a legal writing faculty member who will pave the way for the switch to the new professor by taking a cooperative, prophylactic approach to the switch.

Conversely, some faculty members probably should not visit the legal writing classroom. Those who are strictly wedded to a mostly Socratic classroom should not attempt it, unless they are ready for a hardworking adventure. Use of cooperative and collaborative learning techniques is not only de rigueur but also good practice in legal writing courses; either proceeding Socratically or making the switch suddenly will likely pose problems for both professor and students.

Professors who are technology-shy also do not make the best candidates. It is possible to teach (and to teach well) without using technology in the classroom,7 but using it is helpful. Moreover, so much legal research is Internet-mediated now, whether through the Internet itself or through services such as Westlaw® and LexisNexis®, that familiarity with it is necessary to teach research skills.

Similarly, professors who do not want to give up one of their regularly scheduled classes to teach LSV probably should not take on these duties. The circumstances at NSU did not allow for anything but an overload, but the obligation is one that no one should undertake as an overload except under such extraordinary circumstances. This word of warning applies especially to those who have not previously taught legal writing. Indeed, while it is difficult, and perhaps unfair, to eliminate a huge category of doctrinal faculty from consideration, it may be that persons who have never taught a skills course should think especially long and hard before choosing to visit one for a semester. The need for prompt and consistent feedback to students on a series of assignments is unfamiliar to most law school faculty members, and a semester-long visit in 1L legal writing is probably not the place to begin.

Even with such cautionary recommendations, this overall positive experience indicates that a doctrinal professor’s journey into the legal research and writing classroom can produce pedagogical benefits and may help eliminate long-standing status differences.

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7 At least one LSV professor eschews use of technology in the classroom, with great success.
The Stellar Parenthetical Illustration: A Tool to Open Doors in a Tight Job Market

By Laurie A. Lewis

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Introduction

When I first began teaching legal research and writing six years ago, I treated parenthetical explanations somewhat cursorily, instructing students that their primary purpose was to indicate the weight of cited authority. Over time, however, my treatment focus gradually shifted. I began teaching students that incorporation of illustrative parentheticals could bolster their legal analysis. Now I recognize that not only can the one-sentence illustration be used to expand upon analytic points, but that one well-crafted touches upon five areas of a student’s practice-ready skills. These skills include research, use of mandatory and persuasive authorities, rule synthesis and application, clarity and conciseness in writing, and citation form.

Further, I have found that a student who achieves competency not only in formatting citations but also in drafting clear, concise, illustrative parentheticals demonstrates an understanding of rule permutations. In an increasingly tight legal job market, such competency can open doors both within and outside law school. Doors can open to better grades, journal invitations, publication offers, internship and externship placements, and jobs, including clerkships. Consequently, I have adjusted my curriculum to teach both the form and substance of citations containing parenthetical illustrations to make students more practice ready.

The Parenthetical Illustration: What Is It and How Can It Be Used Effectively?

Legal analysis is rule-based, which means legal rules are applied to a set of facts in a dispute to reach a conclusion. Such analysis often involves the application of an abstract rule to specific facts. Cognitive experts suggest, however, that humans are less likely to understand concepts described in the form of abstract principles than those that are expressed in narratives.

“[The] narrative’s communicative capacity is rooted in the way that the mind interprets, processes, and understands information.” Thus, a legal writer can most effectively communicate rule-based analysis by supplementing abstract rules with narratives illustrating how such rules operated in case precedent.

In the legal writing setting, abstract rules prevail. We legal writing professors are unlikely to assign research problems that result in a student’s finding a statute or a case setting out the applicable rule in a clear and organized manner. Usually the

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1 See The Bluebook: A Uniform System of Citation R.10.6 (19th ed. 2010).
2 An increasing emphasis upon the practice-ready skills students attain during law school is reflected in the American Bar Association’s recent shift to considering outcome measures as indicia of law school accreditation standards. See generally Catherine L. Carpenter et al., Interim Report of the Outcome Measures Committee, American Bar Association Section of Legal Education and Admissions to the Bar, May 12, 2008, available at <http://www.abanet.org/legaled/committees/OutcomeMeasures.doc>.
4 Id. at 2271.
There are four primary types of parenthetical illustrations: elucidation, elimination, affiliation, and accentuation.

Four Types of Parenthetical Illustrations for Communication
There are four primary types of parenthetical illustrations: elucidation, elimination, affiliation, and accentuation. Each of these illustrations clarifies a rule, or offers a nuanced perspective. Such illustrations are not, however, meant to replace the in-text rule explanation and narrative analogy. If something is important, it should appear in the text. It is only after fully discussing the authorities critical to an argument that an authority accompanied by a parenthetical illustration is used.

Elucidation: This is the most important function of the illustrative narrative. The writer provides a specific example of how a rule is applied in a previous case. The narrative helps clarify the rule by placing it in context.

Rule: A promisor makes a promise with an expectation of reliance when, in light of all the surrounding circumstances, the reasonable promisor should have expected reliance.

Parenthetical Illustration: (finding that a promisor should have expected reliance on promise to back debtor when he expressed no reservations about doing so and then no dissatisfaction with this arrangement for two years despite receiving monthly statements from promisee detailing the goods and services provided on credit)

Elimination: This type of illustration can serve to eliminate rule interpretations other than the one the legal writer intends.

Rule: While no special form of words is necessary to create a promise, to show that a promise is made, the promisee must state a voluntary, unambiguous commitment to engage in some future action rather than providing a mere statement of prediction or intention.

Parenthetical Illustration: (holding that a promise was not made to provide a loan when the banker stated he would “take this to the loan committee and within two days we ought to have something ready for you,” because it was a statement of prediction rather than a commitment to some future action)

Affiliation: This type of illustration can be used to make a rule more meaningful. The legal writer employs familiar terms to enhance the reader’s understanding.

Rule: To establish duress as a defense to a contract, the party alleging duress must show that he or she acted “involuntarily” in entering the contract.

Parenthetical Illustration: (finding that because a property settlement agreement between divorcing spouses gave the wife nothing, this factor supported a finding that the wife signed the agreement involuntarily)

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6 See Charles R. Calleros, Legal Method and Writing 87 (5th ed. 2006), “Synthesis of authority is particularly important in analysis of case law. … Courts express their legal analyses in the context of individual controversies, and an isolated holding in a judicial opinion is often too limited to support an accurate prediction about how the decision will influence subsequent cases.” Id.

7 Legal writers vary on their preferences for citation placement. See generally Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008). I ascribe to Garner’s view that citations should be placed in footnotes, in part not to break up the textual flow of analysis. Moreover, teaching students to do footnote citations prepares them for having to use either these or endnotes in journal writing competitions.

8 Smith, supra note 5, at 35–41. Smith provides general descriptions and specific examples of each type of illustration.

9 See Nancy L. Schultz & Louis J. Sirico Jr., Legal Writing and Other Lawyering Skills 291 (5th ed. 2010).

10 Smith, supra note 5, at 39–40. Both the rule and its illustration are Smith’s.
Accentuation: This type of illustration emphasizes the rule’s effect, and can be quite dramatic in presentation.

Rule: Under Rule 9(B) of the Local Rules of Appellate Procedure, an appellant’s brief may not exceed 30 pages.11

Parenthetical Illustration: (refusing to address “Appellant’s Ninth, Tenth, Eleventh or Twelfth Assignments of Error as these assignments of error are contained in the portion of appellant’s brief that exceeds the page limit under Loc.R. 9(B))”

When and When Not to Use Parenthetical Illustrations
As the above examples demonstrate, parenthetical illustrations can be helpful in numerous circumstances.12 While not essential for grasping the overall rules, narratives can bring a case alive for the reader. The writer who uses parentheticals to advantage in a brief can elicit a reader’s sympathy or arouse a reader’s outrage. Not only does the reader better grasp the rule’s operative effects, he or she is more likely to both remember and understand the legal concept when it is placed in context.13 The result can be a persuasive legal analysis with more support and depth of reasoning.

It is equally important, however, that the student understand when not to use a parenthetical illustration. It should not be used if a rule from a precedent case is controlling on the issue being analyzed.14 Rather, the reader should be provided a full textual rule illustration around that case rather than a parenthetical illustration. If the rule is not controlling, and is therefore suitable for a narrative parenthetical, the next consideration is whether the illustration can be set out effectively in a single sentence.15 If not, then the illustration should be textual. Finally, parenthetical illustrations should never be used solely as a means to save space, as when students feel constrained by page and word limits.

Teaching the Parenthetical Illustration for Skill Development
Five areas of practice-ready skills are related to mastery of parenthetical illustrations: research, use of mandatory and persuasive authorities, rule synthesis and application, clarity and conciseness in writing, and citation form. I introduce the illustrative parenthetical with the open memorandum about week 10 of the fall semester, with this assignment being due around week 15.16 In addition to a class PowerPoint lecture explaining the four types of parenthetical illustrations and how they can be used persuasively in legal analysis, I also provide examples from the closed memorandum cases. For the next class, I ask students to bring examples of their own based upon these familiar cases, as well as to complete some exercises on parenthetical illustrations.

The exercises are designed to test understanding of the “dos and don’ts” of drafting parenthetical illustrations, including form and substance. Regarding form, the illustration starts with a lowercase letter, begins with a verb ending in “ing” describing the court’s action, includes articles but

11 Id. at 41. Both the rule and its illustration are Smith’s.

12 In her editing tips for briefs, Edwards suggests explicitly to “add explanatory parentheticals to citations.” Linda H. Edwards, Legal Writing: Process, Analysis, and Organization 360 (5th ed. 2010). Edwards states that parentheticals can be helpful when the citation is not textually discussed but is being used as additional authority, as support for a more minor point, or to quote a “nugget of language” or highlight unique case facts. Id. at 360-63. See also Laurel Carrie Oates & Anne Enquist, The Legal Writing Handbook: Analysis, Research, and Writing 157 (5th ed. 2010). “Occasionally, you will not need to include a full description of an analogous case … if you are using the case to illustrate a single point or if you … want to illustrate one aspect of a rule … you can use parentheticals.” Id.

13 The novice legal reader will remember a legal concept better once he or she understands the “story” of the parties. See Ruth Ann McKinney, Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert 21 (2005).

14 Smith, supra note 5, at 46.

15 Id.

16 While writing two versions of the closed memorandum, students will have already learned about explanatory parenthetical information as it relates to weight of authority, and about basic case citation form. They practiced constructing citations not only for their closed memoranda, but also for three sets of research exercises and in Bluebook Workshops conducted by my teaching assistants. Students therefore receive continual feedback, including on citation questions in pop quizzes and a comprehensive research examination.
A student’s decisions about how to use cases reflect an understanding of the weight and importance of different authorities.

not ending punctuation (unless a full sentence quote), and does not exceed one sentence in length.\textsuperscript{17} Regarding substance, the illustration supplements but does not contain the rule, provides specific case facts but not specific party names, explains what the court decides in the context of the legal proposition at issue, and is neither overly broad nor too detailed.\textsuperscript{18} Reviewing some student examples in class and asking for suggestions on how to improve them reinforces understanding of both the drafting and utility of parenthetical illustrations.

I also instruct on the use of signals, given these often accompany parenthetical illustrations in string citations.\textsuperscript{19} Signals such as \textit{see}, \textit{accord}, and \textit{contra} can be particularly useful in persuasive writing. Citing to an adverse authority and including a parenthetical illustration, for example, limits its impact while informing the court that you have considered it.\textsuperscript{20} Students should be cautioned, however, against having too many string citations. This may weaken rather than strengthen their analysis.\textsuperscript{21} Moreover, sometimes the court will not read string citations, or even become irritated if these are excessive or serve no purpose.\textsuperscript{22}

Research and Use of Mandatory and Persuasive Authorities

Research is required to uncover the relevant case law around a given problem.\textsuperscript{23} How well a student researches is reflected not only in what cases are found, but also in what cases are kept. Often I am asked “how many cases do I need?” I answer that while there is no set number, the quantity of cases required to adequately support an analysis depends upon relevant mandatory and persuasive authorities, and how analogous those are to the given problem. A student’s decisions about how to use cases reflect an understanding of the weight and importance of different authorities. Further knowledge is reflected by decisions about how much to discuss a case, whether as a textual narrative or one in parenthetical form. Thus, skills in researching and choosing authorities and determining their treatment factor into drafting a parenthetical illustration.

Rule Synthesis and Application

As noted earlier, rule synthesis is pivotal in writing a persuasive analysis. Learning to synthesize multiple cases into a set of legal principles is one of the hardest tasks a first-year student is asked to do.\textsuperscript{24} Yet, some proficiency with this task precedes writing effective case illustrations. First, the primary rule and its explanation must appear in the text. How a student formulates the synthesized rule will impact choice of support for the rule as well as selection of other aspects of the rule for inclusion in illustrations.\textsuperscript{25} Second, rule application should focus upon analogies to dispositive cases. How a student determines what facts to highlight from supporting authorities will bear upon an illustration’s

\textsuperscript{17} See \textit{The Bluebook}, supra note 1, at R.1.5; Smith, supra note 5, at 51–58. Yet another aspect of form is the citation formatting before adding a parenthetical illustration, and rules related to order and content of parenthetical information. See \textit{The Bluebook}, supra note 1, at R.10.

\textsuperscript{18} See generally Smith, supra note 5.

\textsuperscript{19} See \textit{The Bluebook}, supra note 1, at R.1.2, R.1.3, and R.1.4.

\textsuperscript{20} See Schultz & Sirico, supra note 9, at 291.

\textsuperscript{21} A string citation should be used only when it contributes significantly to the analysis, and never just to demonstrate research expertise. See Mary Barnard Ray & Jill J. Ramsfield, \textit{Legal Writing: Getting It Right and Getting It Written} 63 (4th ed. 2005).

\textsuperscript{22} “Remember that the doubting legal reader will check most authorities and will be annoyed if each is not pertinent.”\textit{Id.}

\textsuperscript{23} By the time students are assigned the open research memorandum and are asked to incorporate parenthetical illustrations, they will have been instructed on electronic and book research in the classroom, sometimes by our research librarians, and also in Westlaw\textsuperscript{®} and LexisNexis\textsuperscript{®} training sessions.

\textsuperscript{24} See Amy Bitterman, \textit{The Rule Proof Variations}, 18 Perspectives: Teaching Legal Res. & Writing, 109, 109–10 (2010). “Faced with explaining numerous decisions, the tendency of most students is to deal with precedent by focusing on the facts of specific cases without analyzing how those decisions relate to one another. … [S]tudents fail to take the next step in the inductive reasoning process of moving to general conclusions.”\textit{Id.} at 109.

\textsuperscript{25} “What you write in the parentheticals that illustrate the legal propositions you have laid out absolutely must be sufficient to get your point across. … Here is the place for case parentheticals—they are a buttress to your points through clear, careful, and properly detailed illustration.” Michael D. Murray & Christy H. De Sanctis, \textit{Advanced Legal Writing and Oral Advocacy: Trials, Appeals, and Moot Court} 81 (2009).
persuasiveness, whether used for elucidation, elimination, affiliation, or accentuation. The illustration showcases a student’s understanding of the nuances of the law and further persuades the reader of his or her position. Thus, skills both in rule synthesis and application are prerequisite to drafting an effective parenthetical illustration.

Clarity and Conciseness in Writing
Most students benefit from a refresher on how to write, including grammar basics. Some legal writing texts have large sections devoted to effective writing style. Other books are devoted entirely to legal document construction and word usage. Effective word choice, precise comparison, strong subject-verb connection, using plain English, and respecting proper grammar rules all contribute to well-written parenthetical illustrations. The sharp, persuasive illustration may require many drafts before the student gets it “right.”

Providing students with examples of how to make their illustrations tight yet complete, specific yet not too detailed, and creative yet true to the law assists their learning. More helpful, however, is having them practice writing parenthetical illustrations. I expect students to incorporate a modest number into their open memoranda in the first semester, and more into their motions and appellate briefs in the second semester. On each document, I comment specifically upon clarity and conciseness, skills that strengthen the persuasive power of parenthetical illustrations.

Citation Form
No matter how clear and concise a rule synthesis and application in a parenthetical illustration, however, lack of proper citation form dilutes its effectiveness. Exacting attention to detail, specifically to The Bluebook or ALWD Citation Manual, is critical. I tell my students that when opposing briefs are submitted and one contains poor citation form, the judge is apt to pick up the other side’s brief, perhaps thinking the one with more accurate citation form is also the one with more reliable legal analysis.

I begin instruction on citation form with the closed memorandum and continue it up through the appellate brief, building incrementally upon students’ knowledge base and equipping them to write increasingly more sophisticated citations. My grading rubrics include criteria for citations. Criteria for parenthetical illustrations encompass citation form as well as the narrative’s substance. Citation form is the fifth and final practice-ready skill area embodied in an illustration. Taken together with research, use of mandatory and persuasive authorities, rule synthesis and application, and clarity and conciseness in writing, these skills are illuminated in the stellar parenthetical illustration.

Competency in Drafting Parenthetical Illustrations Opens Doors
Our students face a tough legal job market. We strive to do what we can to help them gain a favorable footing in the job search process. One specific thing I aim to do is teach how to draft stellar parenthetical illustrations. In my experience, the student who achieves competency in this writing

26 A complete description of the law requires that the student not only synthesize the rule, but also puts the legal principle in context by including relevant facts only. An in-depth analysis “identifies the facts that will satisfy the rule. … The cases are used judiciously to support or explain and justify the synthesized rule,” John C. Dernbach, Richard V. Singleton II, Cathleen S. Wharton, Joan M. Ruhtenberg & Catherine J. Wasson, A Practical Guide to Legal Writing and Legal Method 179 (4th ed. 2010).

27 See, e.g., Calleros, supra note 6, at 239–78; Oates & Enquist, supra note 12, at 453–714; Robin Wellford Slocum, Legal Reasoning, Writing, and Persuasive Argument 235–60 (2d ed. 2006).

28 Two well-known books are Terri LeClercq’s and Richard Wydick’s, which contain a series of lessons with practical exercises designed to lay a solid legal writing foundation. See generally Terri LeClercq, Guide to Legal Writing Style (4th ed. 2007); Richard C. Wydick, Plain English for Lawyers (5th ed. 2005).

29 I comment on briefs that careless citation errors detract significantly from the quality of the documents. It is not just about points subtracted for citation form, but rather, it is also how the documents as a whole reflect the students’ thoughtfulness, care, and accuracy in drafting arguments.

30 The 40,000 law students who graduated last spring are entering one of the worst job markets in decades. “This year’s classes have it particularly bad, according to lawyers and industry experts. Though hiring was down last year as well, they said 2009 graduates applied for one of the worst job markets in decades. This year’s classes have it particularly bad, according to lawyers and industry experts. Though hiring was down last year as well, they said 2009 graduates applied for jobs before law firms had felt the full brunt of the downturn.” Nathan Koppel, Bar Raised for Law-Grad Jobs, Wall St. J., May 5, 2010.
skill gets noticed. This is because in successfully employing a parenthetical illustration, the student first has to think and reason clearly. Without clear thinking, there can be no clear legal analysis. A student only reaches the stage of writing a stellar illustration after learning how to research; choose between authorities; synthesize rules; apply rules to specific facts; write clear, succinct prose; and use proper citation form. And all of this must be done within the customarily accepted guidelines for writing parenthetical illustrations. But once the student reaches this stage, doors open both inside and outside the law school’s walls.

First, doors open to better grades, both on written assignments and exams. In a writing course, if a student buttresses points with additional authorities accompanied by illustrative parentheticals, then the analysis has a stronger foundation and can be the basis for a student’s receiving a higher grade. Illustrative parentheticals can also be used to identify when a student goes wrong in the thinking process. I frequently ask students to incorporate them in an analytic outline for conferencing purposes prior to submitting a paper. Then in conference, I flag inappropriate or weak use of authorities. The student leaves better prepared to write, including convincing illustrations, thereby producing a better work product. In a doctrinal exam, responding quickly to issues with parenthetical illustrations when time is at a premium can also bolster a student’s grade.

Second, doors open to journal invitations. Most law school journals base invitations on a writing competition in which competitors must use endnotes or footnotes. This is when the citation format itself is critical. Assessment of the competition paper includes a sizeable grade on the footnotes. Focus on proper citation form throughout the year therefore pays off. Further, I find that requiring students to use footnotes for all documents (other than the closed memorandum) boosts their confidence for the write-on competition. In addition to formatting citations accurately, when a competitor incorporates parenthetical illustrations into the analysis, journal editors are all the more impressed. Consequently, a student may have a greater likelihood of being invited to join.

Third, doors open to publication offers. If a student joins a journal, then he or she has an opportunity to hone research and writing skills, including drafting citations. In writing a note or a comment for potential publication, the journal member who has experience writing illustrative parentheticals has an initial advantage in constructing scholarly footnotes. Hence, a publication offer may ensue. Even if not a member of a journal, however, a student can use parenthetical illustrations in papers for writing courses, and be offered publication outside the law school.

Fourth, doors open to internships and externships. When students apply for these, a writing sample is customarily requested. Most students use a paper from their legal research and writing course. If this document includes not only

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32 I routinely do so prior to their submission of the appellate brief, worth 50 percent of the semester grade. Students feel more confident in completing the writing process. Further, incorporating illustrations in their analytic outline facilitates initial choices among authorities. They can more readily identify any gaps in support of their arguments, and plug in cases accordingly.

33 Some students tell me that writing illustrative parentheticals in their exam answers enables them to more completely describe the law around a given issue.

34 See Eugene Volokh, Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review 237 (3d ed. 2007). “Checking and editing footnotes is a big part of the law review’s job, so the editors are looking for people who are good with footnotes.” Id.

35 Former students who become journal editors and grade competition papers tell me that sometimes they recognize my students’ papers (although anonymous during the grading process) by the completeness of footnotes, including illustrative parenthetical information.
excellent citation form but also strong parenthetical illustrations, then the student may stand out and be offered an interview. As even unpaid positions are highly competitive, getting a foot in the door via a writing sample is advantageous in securing the internship or externship.36

Fifth and finally, doors open to jobs, including clerkships. Especially in this bleak job market, many students seek clerkships as a first step in their legal career. Each year, I have an increasing number of academically strong students asking for clerkship recommendations. As they did well in my class, they likely achieved some proficiency in crafting illustrative parentheticals. Thus, not only do the students have strong recommendation letters from me, but their writing samples are apt to be attractive to judges. Other employers also emphasize writing skills in the hiring process.37 With more frequency than before, even when I am not asked to write a letter but to serve as a reference, employers call or e-mail me and specifically inquire about students’ writing strengths. For these situations and others, I strive to teach students skills that will open doors to them in law school and beyond.

Conclusion
A carefully crafted parenthetical illustration can be a powerful tool in persuasive legal analysis. It can also reflect skills in research, use of mandatory and persuasive authorities, rule synthesis and application, clarity and conciseness in writing, and citation form. The student who attains competency in drafting illustrations is more practice-ready, and may find doors opening to better grades, journal invitations, publication offers, internship and externship placements, and jobs, including clerkships. Teaching how to draft stellar parenthetical illustrations in the first-year writing curriculum, therefore, can provide students with a competitive advantage in this tight job market. © 2010 Laurie A. Lewis

36 This past spring, for example, one first-year student I helped place into a summer internship was one of 80 applicants for an unpaid position with a nonprofit organization, and another student was one of 110 applicants for an unpaid summer internship with a federal government agency.

37 A former student who is an associate with a large, prestigious corporate law firm in Washington, D.C., tells me that when potential hires are equal in qualifications, it is the writing sample that often is dispositive.
Legal education is built around a core irony: almost no human disputes are resolved via trials, and yet we dedicate years to teaching law students how to resolve disputes via litigation.

I. Recalibrating Our Teaching Scales—from Litigation to Negotiation

A. Litigation—Law School Norm but Real-World Anomaly

We in law school do a pretty good job of teaching law students how to resolve their clients’ problems via litigation. For three long years, every one of their substantive courses supports this trial focus because casebooks are filled with precisely that—cases. Law students who are fed an exclusive diet of cases come to believe that cases are the sole method to resolve clients’ problems.

And the legal writing curriculum perpetuates this trial-centeredness: we show our students how to find the court rules and civil procedures in our problem’s jurisdiction; we and teams of law librarians and Westlaw® and LexisNexis® representatives train them rigorously in legal research so they can unearth those fossils of prior disputes that are legal opinions; we spend months in class and in conferences showing students how to draft that trial brief with finesse; our students sweat bullets learning how to make the most cogent of oral arguments before the judge; finally, when the court rules against them on that trial brief, they’re taught to write appellate briefs for the next level of court.

The problem is, trials are a statistically irrelevant way of resolving human disputes.

To begin with, there are, of course, many human dilemmas that have no legal dimension. But even if we focus on conflicts that lawyers can and do help their clients to resolve, the vast majority of such “litigable” conflicts are instead resolved otherwise, through direct negotiations, avoidance,
apologies, self-help, politics, demand letters, or the lawyer’s advice that it’s not worth it to litigate.¹ For this majority of human problems, therefore, the best training we can offer our students is not how to litigate, but how to evaluate: how can you distinguish the tiny fraction of conflicts that could or should be litigated? And for that vast majority that should not be litigated, what non-litigation legal skills can you offer your client to help resolve the conflict?

Of course, there is the rare conflict that does become a filed lawsuit. But here, too, we need to transform the perceived expectation that a trial is the final chapter in a story begun by a complaint—in reality, lawsuits almost never see a courtroom. As study after study has shown, the settlement rate for lawsuits is 95 to 98 percent.² And when we factor in the reality that few human conflicts ever become filed lawsuits in the first place, it is safe to say that less than 1 percent of disputes in the United States are resolved via trials.

Of course, lawyers must be experts in the law and adept at navigating lawsuits. But the most important skills we can teach our students may not be how to succeed at trial, but rather how to settle, how to negotiate, and how to be effective mediation-advocates.

### B. An Apprenticeship in Negotiation-Lawyering

Legal reality demands that our students become experts in negotiation by the time they graduate. Although the first-year legal writing class cannot and should not be a course in negotiation, the class can jump-start this training by teaching students a few basics. We would be remiss to allow students to believe that negotiation is just courtroom advocacy moved to a different location. Instead negotiation-lawyering is different from litigation-lawyering in that it incorporates the law but includes different interests, relies on a different cast of players, and uses different procedures and tactics than litigation.

The following three differences are the most important ones that distinguish negotiation-lawyering from litigation-lawyering, and students readily perceive and integrate these differences when we explain them.³

**Different Interests.** The first distinctive feature of negotiation is that it is much broader in the interests that it responds to. It includes the law, but extends to personal, emotional, financial, reputational, moral, and time-frame issues that pure law does not recognize. Yet, despite this broad focus, all negotiation is “local”; whatever peculiar, outlandish, or reasonable motivations are at play in the lives of the particular parties to this dispute, these issues will enter into negotiations. For example, a wronged employee may best be made whole not by damages, but by an apology from higher-ups, instituting new

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² The most famous study is perhaps the one conducted by Marc Galanter for the American Bar Association in 2004, and although later studies have quibbled about whether trials are truly “vanishing,” the numeric data remains consistent. Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 461 (2004); John Lande, Shifting the Focus from the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or, I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter, 6 Cardozo J. Conflict Resol. 191 (2005); Wayne D. Brazil, Should Court-Sponsored ADR Survive?, 21 Ohio St. J. on Disp. Resol. 241, 243–44 (2006); Gerald R. Williams & Charles B. Craver, Legal Negotiating (2007).

Finally, negotiation requires a skillful wielding of the various interests, knowing when to use the law, emotions, people, disclosures or obfuscations, and silence or information.”

company practices, or changed work conditions. Or in intellectual property infringement suits, allegations of past infringements are frequently resolved through future collaborative licensing deals between the prior adversaries. None of these solutions is available via litigation.

Therefore, we must teach our budding negotiation advocates to both expand their focus beyond the law to encompass potentially every human dimension to a dispute, and yet recognize the specific dilemmas and interests at issue for their particular clients.

**Different Players.** The second distinctive aspect to negotiation is its incorporation of nonlegal players. Whereas litigation is a drama featuring lawyers, judges, courtrooms, and legal personnel, negotiations include clients, mediators, and the presence of nonparties’ interests. The most important nonlawyer in the room is, of course, the client. After all, it is the client’s business, or marriage, or life, or rights, or property that is at stake. Although law school gives the false impression that it’s all about the law and the lawyers, in reality it’s the clients who are in pain or who hope to make a business deal; it is they who hire a lawyer to help them and they who decide whether to take that deal or continue the fight. So the first strange power shift our law students need to anticipate in negotiations is that they will step out of the limelight that litigation shines upon them and instead will be their client’s collaborator.

Even stranger for the law student is the presence of “outsiders” in a negotiation; such people may be physically present or their presence may be merely incorporated by reference as the client considers their needs or preferences. For example, divorce negotiations are regularly peopled with financial advisers, accountants, real estate agents, grandparents, and new lovers, some of whom come to the negotiating table and some of whose advice or interests are driving the negotiations from a distance. Similarly, in civil cases parties would never negotiate without considering the interests and reactions of their underwriters, financiers, merger partners, regulators, investors, or customers, or without considering the impact of the current settlement options on pending or potential related lawsuits.

What is most surprising for law students who have been trained to exclude all but the “parties in interest” is the realization that these “third parties” are not tertiary in the least, but indeed central to negotiating the issue. If power sharing is strange vis à vis the client, how much more strange it is to accommodate “third-party principals” in the negotiation, either physically or implicitly.

**Different Tactics.** The final distinction of negotiation is tactical; litigation is intensely tactical too, of course, but negotiation tactics are somewhat broader and different in nature from those used in litigation. On the one hand, negotiation requires creative brainstorming, thinking outside the box, and collaboratively working with the other players toward shared interests, and yet doing so in the client’s best interest. On the other hand, a negotiator needs to be levelheaded and objectively reasonable and able to evaluate the merits of a solution, balance risks, and compare costs and benefits. Finally, negotiation requires a skillful wielding of the various interests, knowing when to use the law, emotions, people, disclosures or obfuscations, and silence or information.

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4 The field of collaborative negotiation theory is vast and ever growing. The foundational text is Fisher & Ury, supra note 3.

5 There is definitely a science to negotiation, whatever its creative component. This quantitative, objective aspect will appeal to the law-and-economics inclined, but should be understood by even the least mathematically adept. Raiffa, supra note 3.

6 The current trend in negotiation theory and practice is to recognize that this is a multifaceted skill, and that the best negotiation lawyering is problem solving—ethical, efficacious, and prepared. Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, 7 Harv. Negot. L. Rev. 143 (2002); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984).
After completing our legal writing class, our 1Ls will no more be experts at negotiation-lawyering than they are experts at trial advocacy. However, our role is to begin their apprenticeship and show them how these tools are used in combination.

II. Integrating Negotiation and Mediation into the Legal Writing Curriculum

In the real world of human problems, negotiations can occur at any and every stage of a dispute. For pedagogical efficiency, however, we have chosen to schedule negotiations at the most critical and common junctures in the evolution of a dispute: 1. when the memo is completed, the point at which the students know enough law and facts to evaluate whether it’s worth it to go further with the case; 2. when the trial brief is completed and the students understand the litigation value of their case; and 3. when the case is appealed.

A. Preparing to Negotiate

In training 1Ls to negotiate their legal writing problem, we start with emphasizing the three essential differences between negotiation-lawyering and litigation-lawyering mentioned above. First, students must understand that they are their client’s agent and that this is the client’s life; yet they are also the client’s fiduciary, and the client is relying on the attorney for essential advice. Second, students must recognize how the real world they left behind when entering law school will return with a vengeance in negotiations—emotions, ulterior motives, and nonmonetary and extralegal values may be the most potent factors in a negotiation. The law, however, is never absent: they must know the law inside and out, but they must appreciate its place within the totality of factors at play in the negotiation. Finally, students must become comfortable wielding the tools of negotiation, which include a big-picture mind-set, creativity, and brainstorming abilities; strong advocacy skills; appropriate power sharing with the appropriate players in the drama; and a genius for tactics, strategy, and people sense.

The next teaching agenda is to show the students how to create those documents that facilitate negotiation. To that end we require the students to create a negotiation-preparation document prior to each negotiation, a step frequently taken by many attorneys. Negotiation preparation is a relatively individualized practice in the real world, and we therefore allow some idiosyncrasy in our students’ negotiation-preparation documents. They can take the form of a bulleted outline or be brief prose statements. Whatever the form, however, the students’ documents must concisely but completely address all six of the following issues:

1. The legal strengths and weaknesses of their case (with brief justifications as to why these are strengths or weaknesses);
2. The case’s nonlegal strengths and weaknesses;
3. The monetary value of the case as captured through various types of damages;
4. The nonmonetary value of the case and nonmonetary assets that might be negotiated;
5. The risk-value of the case, outlining as precisely as possible the likelihood of various outcomes; and
6. The settlement options that show some thoughtful brainstorming about how this dispute might be resolved.

We collect these negotiation-preparation documents, in part to ensure that the students have done the preparation, but mostly to provide feedback so they can learn for the next time around. We do not expect that each student will come to a single right answer or outcome, but there are “more-right” and “less-right” answers; our evaluation criteria focus primarily on how thorough and balanced a particular student’s preparation was with regard to the legal and

7 The basic and essential preparation questions are the six that we list here and that we require our students to address. Professional negotiators do far more, of course; for those who want to train their students toward that professional-level mastery or show their students how the pros do it, the following texts are particularly useful: David A. Lax & James K. Senenius, 3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals (2006); Roger Fisher & Danny Ertel, Getting Ready to Negotiate (1995).
nonlegal issues at play, and how realistic and creative the strategies and solutions are.

B. Conducting Negotiations

Over the course of the legal-writing year, we schedule two pre-negotiation analyses, a negotiation simulation, a premediation statement, and a final mediation simulation. The first pre-negotiation analysis occurs at the end of the objective memo, in part because this is a common negotiation moment in the real world, and in part because this is the first time the students have a full legal understanding of the law and facts of their case. Because the entire class is working on the same side of the issue with the same client, we assign a negotiation-preparation document, but do not conduct the negotiation itself since no students are on the other side of the dispute. Our ultimate intention with this first document is to have the students begin thinking and preparing for negotiations. Even without an active negotiation, however, the results of their negotiation-preparation documents have been masterful. The students clearly show that they can move from the pure law of a memo to the big picture of negotiation, and whatever the problem we have worked on, they have consistently proposed sensible solutions to the dispute that show creative brainstorming and yet a realistic sense of the legal value of their case.

The second negotiation follows the trial brief—again, because that echoes the stage when negotiations often occur in reality and because by that time the students are well-versed in the litigation strength of their case. Because members of the class have been preparing to litigate opposite sides of the case, for this round the students do negotiate the dispute after turning in their negotiation-preparation documents. These negotiations have been a resounding success; indeed, this class may be the most excited and engaged moment during the entire year of legal writing. Students routinely say how much they love doing this negotiation. Not only does the negotiation provide excitement, but it also reveals the students’ growing skill with the procedure: the groups have settled at a rate that is comparable to the national rate for mediation at the trial level (approximately 65 percent); every one of their settlement results has been realistic and workable; and their negotiation-preparation documents are even more professional than they were the first time around at the memo stage.

Thus our experience has been that with some focused instruction in negotiation, our 1Ls love the process and can achieve realistic, creative results in their negotiations that mimic the outcomes achieved by negotiation-advocates in the real world.

C. Drafting a Settlement Agreement

Due to time constraints as well as teaching limitations, we do not have the students draft up their settlements as settlement agreements. However, for those whose curriculum allows the time to teach the intricacies of settlement agreements (which would be even more rewarding for the students if it were taught in conjunction with a contracts course), it would be an extremely useful exercise for the students to complete this negotiation component by learning how to write up their settlement.

D. Preparing to Be Mediation-Advocates

Mediation is playing an increasingly important role in modern lawyers’ lives. There have always been attorneys and clients who have chosen to turn to mediation at some stage in their dispute or negotiation, but what has transformed the litigation universe of the past 20 years is the increasing use of court-ordered mediation. Indeed, mediation is mandated by state and federal courts throughout the country, at both the trial and appellate level, and for disputes ranging from civil to family, juvenile, criminal, and bankruptcy, and even those involving the current housing foreclosure crisis. There are those in the legal world who criticize court-ordered mediation as coercive, or contrary to due process rights, or antithetical to the very voluntariness that is at the heart of negotiation. However, the number of courts and the scope of cases being sent to court-ordered mediation have increased exponentially,

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Excellent resources exist to teach the drafting of settlement agreements, the most thorough of which is Settlement Agreements in Commercial Disputes: Negotiating, Drafting and Enforcement (Richard A. Rosen ed., 2000).
In our program, we require all of our students to prepare for mediating their appellate problem, drafting a mediation statement as the final document of their spring problem.

III. A Mediation Simulation: Front Row Seats in the Inner Sanctum

A. Simulation as the Best Form of Reality

As law professors, we face an insuperable barrier to modeling mediation for our students: confidentiality. While students can go to court and visit real-life trials and watch expert practitioners in action, the same is not true of real-life mediations, which are absolutely private affairs. So confidential are they, that settlement and mediation discussions are universally prohibited from being disclosed under evidentiary rules, with only the narrowest of exceptions. Therefore, this major legal skill can never be seen by our students for them to model or experience before heading out into a legal world that will be filled with such mediations. To answer this dilemma, we have created a mediation simulation that is conducted in conjunction with our spring semester appellate problem.

In deciding to conduct a simulation, we use only one student-attorney per side (as is true in reality, of course), but this raises the pedagogical equity issue that very few students will be able to experience being a mediation-advocate from the inside. We have felt that the student-audience gains the different, but equally valuable experience, of witnessing the entirety of the drama, by knowing all of the facts that are confidential to each player in the drama, and by being privy to each side’s confidential caucuses with the

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9 The legal world has not evolved a rigid or expected format for mediation statements. The best concise explanation for young attorneys as to how to draft mediation statements is the following: Wayne Schiess, The Mediator, in Writing for the Legal Audience, ch. 7 (2003). An excellent and more thorough explanation can be found in John W. Cooley, Preparing the Case for Mediation and Mediation Preparation Checklist, in Mediation Advocacy, ch. 3, Appendix B (2d ed. 2002).
The core dispute can be related to any topic, but it must be one where the students know the law and the facts of the problem intimately.

B. The Building Blocks
Our primary intention in building the mediation simulation is for it to be as realistic as possible, while also as transparent as possible, so our students can perceive the otherwise hidden dramas that occur in a mediation. To that end, and as explained in more detail below, we have designed the simulation so that it will reveal the essential workings of a real-life mediation.

The Dispute. The core dispute can be related to any topic, but it must be one where the students know the law and the facts of the problem intimately. In our case, we have scheduled the mediation simulation to occur at the end of the spring semester’s advocacy training when the students have worked on the same dispute at both the trial and appellate levels, and have had oral argument experience with the dispute as well. It would be possible, however, to schedule mediation to occur at either the trial level, or the appellate level, or indeed at both stages in the litigation—in real cases, there are often multiple attempts at mediation over the course of resolving a dispute. Although any stage in a dispute can be and often is mediated, research into real mediations has shown (and our own experience has borne this out) that there is a difference between mediating prior to a trial decision and mediating at the appellate level. In a word, appellate mediations have a “loser” from the court below. Generally, 1L advocacy problems are carefully designed to achieve a legal equilibrium between the parties, but the “loser” component in an appeal often comes out at least rhetorically in mediation.

The Public Facts and the Private Facts.
Negotiations draw upon every relevant dimension in the parties’ lives, as explained above. In reality, no party or attorney is merely his or her one-dimensional legal self. Therefore, in simulating the multidimensionality that is at play in real negotiations, we create for each party and each attorney sufficient details to flesh out their professional, family, corporate, and personal lives and the financial, extralegal, and practical details that might be relevant to the dispute. When designing the confidential facts for each participant, they must be multidimensional in a way that reflects the lived reality that this participant might actually bring to the table. More than that, however, care must be taken to ensure some realistic conflict between the players’ hidden lives without indulging in melodrama on the one hand or building to an obvious, single-track solution on the other. In essence, these private facts must be designed, but not overdesigned, allowing for an unplanned evolution during the mediation.

Every player in the drama is provided with a packet that contains a one-page basic scenario setting out a summary of the case so far, as well as the public facts, which usually include commonly known financial data (depending on the case, this might be damage valuations, corporate financials, salaries, or property values). In addition, each participant receives a set of confidential private facts that are germane only to that participant, and which that participant is instructed to keep confidential except when or if it is felt that revealing a particular fact to a particular person at a particular moment in the mediation would be in his or her best interest. These facts include hopes, fears, “bad facts” (skeletons in the closet), and potential tradeable assets (whether financial or nonfinancial).

10 For an example of the types of public facts and private facts that we created for our mediation simulation, and their relationship to the information used in a set of spring appellate advocacy problems, see A.G. Harmon, *The Complete Advocate: A Practice File for Representing Clients from Beginning to End* (2010).
The Attorneys. A student is selected for each side of the case who has advocated for that side in the written component of the advocacy training. Ideally, each designated advocate should be a student who exhibited a particular mastery of the problem, who possesses good public speaking skills, and who will not be rattled by performing this new skill publicly in front of his or her peers and under the often emotional drama of settlement negotiations.

Some preparatory work needs to be done in advance. First, we require that each student-advocate prepare a confidential mediation statement ahead of time and send it to the mediator, as is usually the practice in real mediations. In addition, we recommend to our student-advocates that they meet with their clients briefly ahead of time to talk through potential mediation strategies, so they are not strangers to each other. Finally, we have found it helpful to have each student-advocate meet with the professor. This step is not to receive coaching from the professor (far from it), but to walk the students through a new process that they will be performing for the first time in their lives before all of their peers. It also allows the professor to deflect anything that might upset the negotiations out of ignorance (e.g., the student says he intends to threaten or propose X, Y, or Z, but being a 1L, does not know this is in fact illegal); if the professor can catch such missteps in advance, the student can avoid an ill-formed strategy.

The Clients. In real disputes, it is the client’s interests or emotional dramas that are at stake, and in reality, as explained above, the lawyer must navigate the power sharing inherent in negotiations where the client makes the ultimate decisions. Still, the lawyer serves as the client’s guide and fiduciary. Therefore, it is an essential part of the mediation simulation that clients be present and that they be realistically “client-like.” Pedagogically, it is essential that the student-advocates experience dispute resolution with the client as an active participant at their side and as an active adversary on the other side of the table. And it is equally essential that the student-audience be able to witness the network of interactions between the various attorneys and clients as the mediation progresses.

For the clients, as for the attorneys, we create a set of private facts that expand beyond the “legally significant” facts that were at the core of the spring advocacy problem. These private facts, like the attorneys’ private facts, are intended to be both multidimensional and realistic for that client, whether corporate or private. The same fact-creation principles that we outlined above guide our creation of these facts, and doing so often requires that we consult, for example, real doctors or accountants or architects to get the necessary facts.

For the past two years, we have employed actors from our school’s drama department to be the clients. To begin with, these actors have no legal training whatsoever—as would typically be the case for real clients. In addition, their theater training has made them skilled at taking the outline of a persona and filling in the contours realistically, making them believable clients. Moreover, being actors, they are uninhibited in front of an audience and the believability with which they become the client is infectious, encouraging the student-advocates to interact with “their client” in an equally believable way. We have found it so successful to use actors to be our clients that even if our law school had no affiliated theater department, we would most likely contact a local college’s theater department or a local actor’s guild to find actors.

The Mediator. Our practice has been to invite an experienced mediator who is also a law professor to conduct the mediation. We have wanted someone skilled in mediation to conduct the simulation, as mediation is a difficult procedure to master.

11 Client preparation, in reality, can be as extensive a process for mediation as it is for litigation. If there is time in the curriculum, it is possible to train the mediation-advocate in client-preparation techniques and then schedule at least one extended client-preparation session. For a useful outline about how to prepare clients for mediation, see Cooley, Preparing the Client for Mediation, in Mediation Advocacy, ch. 4, supra note 9.

12 See note 10, supra.
We have also wanted students to witness the best practitioners’ expertise. This individual should be someone who is comfortable working with law students, who knows how to push them in ways that will help them learn, and who can, during the debriefing at the end, explain what happened so that it makes sense. In any location with courts or law schools, there are likely to be many experienced mediators as well as ones who have worked with law students. Those we have contacted are quite willing to engage in this exercise, but a professor skilled in mediation could also conduct the simulation, if needed.

The Stage and the Audience. We have staged our mediation in the school’s moot courtroom, but any space would work where the parties, attorneys, and mediator could sit around a table when working together. However, the space should also afford an option for excluded parties to leave the room while the mediator is caucusing with the other side, and for the student-audience to be accommodated in an unobtrusive way.

The rest of the 1L class is the student-audience, sitting in darkened silence around the mediation that occurs at the spotlight center of the moot courtroom. These student-audience members are provided with a universal copy of the facts, both the public facts and all of the players’ private facts (and once the mediation is over, the players are provided with the same universal copy so that they can see where their private facts fit into the totality of all of the facts). By knowing all of the facts, the student-audience gains an intimate experience about how each side is using its facts strategically, which fears or motivations and which hidden assets or “bad facts” are being revealed in offers or rejections, and how ignorance of facts plays into the evolution of a dispute or its resolution. This is a pedagogical advantage to a mediation simulation that cannot be equaled by having each student conduct his or her own mediation of the dispute, and about which members of the student-audience have commented long after the mediation has ended.

The Schedule. We have scheduled the simulation for two hours, with 90 minutes devoted to the mediation itself and 30 minutes spent on debriefing at the end. In some cases, the dispute has resolved in that time, and, in other cases, it has all but resolved. It is true that real mediations for each of the disputes that we have worked on might last slightly longer (perhaps three hours, and of course mediations for large commercial disputes can last for several days) and indeed it might be possible to schedule a simulated one for slightly longer than we have if the school’s schedule and student patience could withstand it. It would not be useful, however, to schedule a simulation for much less than 90 minutes. Mediations are slow-evolving dramas on the whole and neither the student-advocates nor the student-audience would benefit from an overly truncated simulation.

Debriefing. After a settlement is reached, or after time has run out, the drama ends. Each year, we have asked the mediator to spend some time debriefing the process for the participants as well as the audience. He has explained the things that he witnessed throughout the mediation and why he said or did various things at various junctures and how that shaped the mediation, and he has offered pointers to the students. From the other side, we have also asked the participants to debrief each other and the audience as to why they did what they did, what private facts they had, and what hopes, strategies, or fears were motivating them to say or do what they did. This debriefing is also a time for the student-audience who knew all the facts but experienced none of the internal drama to ask questions and suggest their own take on the process. The debriefing is one significant advantage that the simulated mediation has over a real mediation. Even if our law students could gain entry into a confidential mediation, they would never have the internal workings of the process revealed to them—behind the confidentiality of all real mediations are the inner mysteries of strategies and intentions. The debriefing is a unique opportunity to see the anatomy of a mediation.

Recording. We have asked the information technology experts at the law school to record these simulations. (We get the necessary releases from all of the participants to permit the recording, with the understanding that the recording will only be
used for instructional purposes within the law school.) We use the recording in teaching future classes about mediation advocacy, reassuring those students that their predecessors survived and even thrived, and alerting students to potential pitfalls in advance. But an equally important use of the recording is its cross-curricular potential: the recording provides a teaching tool for mediation courses in the law school, allowing those students to see a “real” mediation in a way they could never witness in confidential mediations occurring in the outside world.

**Conclusion**

Pedagogically, our experience has been that with just a bit of guidance, students can master the attitude, the negotiation skills, and the preparation documents they will need as attorneys when negotiating their clients’ disputes. Over the course of the year and via several negotiation documents and actual negotiations, the students evolve into admirably competent negotiation-advocates. The results of their negotiations are both professional and realistic, and their negotiation-preparation documents reveal creativity, a realistic sense of the legal and nonlegal value of their case, and a growing understanding of their professional ethics relationship with their client.

Likewise, the results of conducting a mediation simulation have been positive in every dimension and made the effort of staging the simulation more than worth the time put into it. To begin with, our students enjoy the simulation as a dramatic aspect of what has been a months-long, but essentially bookish enterprise. In addition, it has allowed them to see firsthand something that is otherwise unseeable. Another advantage of conducting a collectively witnessed simulation rather than individual mediations has been that it allows our student-audience an Olympian, total-knowledge view of the negotiation process; they have a unique opportunity to see the interplay of multiple parties’ facts, and to perceive the role of ignorance, strategy, and the mediator in the entire process. And finally, as we had hoped but could not have known in advance, the settlements coming out of each of the simulations have been analogous to the results that these same disputes would have produced in a real-life mediation, proving to our students that they really can be adept negotiators on behalf of their clients.

If 99 percent of their clients’ litigable disputes will ultimately be resolved via negotiation, our 1Ls have begun to master the skills and documents they will need as successful negotiation-advocates.

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**Another Perspective**

“Litigation is certainly different from baseball. Lawyers play critical roles in evaluating cases and are always cast as their clients’ advocates. In planning their next win, however, those advocates would do well to take Lincoln’s advice and spend part of their time planning outcome strategies that match the right people to the best dispute resolution process. Nearly 99% of filed cases are resolved without evidentiary rules at trial, yet far less time is generally spent designing dispute resolution processes and preparing for negotiation. Comparatively small amounts of time in negotiation preparation increase the prospects of a satisfactory deal. That preparation may be staged. Formal legal analyses outline the range of remedies based upon legal causes of action. Economic analyses help parties value the probabilities of various outcomes in an iterative way. Psychologists help us understand how different people process the same data differently, often in an irrational manner. Together, these disciplines help us better prepare for negotiations, whether that means purchasing a new car or resolving a litigated case.”

“[I]t occurred to me that I really wasn’t teaching my students anything about outlining, either as to how to do it or, more importantly, why to do it.”

Outlining from Scratch: How to Make the Process Meaningful

By Edward (“Grumpy Ed”) Telfeyan

Edward Telfeyan is Professor of Law at University of the Pacific, McGeorge School of Law in Sacramento, Calif.

Over the course of my 10 years of teaching legal writing, I’ve had numerous occasions to get grumpy. Among those have been the times I have provided my students what I thought were perfectly clear instructions, only to find out that they did not understand them.

One of those instances occurred in my first few years when I would tell the students to “outline your memo before you write it.” In those early years, I thought I was being very clear when I explained to my students that outlining was the best way to organize their thoughts and develop a solid organization for the memo they were going to write.

I even went so far as to give them a sample outline. Here’s a typical one from those early years:

I. First rule stated
   A. Case establishing first rule
      1. Facts of case
      2. Holding of case
      3. Court’s rationale
   B. Case following first rule
      1. Facts of case
      2. Holding of case
      3. Court’s rationale

II. Second rule stated
   A. Case establishing second rule
      1. Facts of case
      2. Holding of case
      3. Court’s rationale
   B. Case following second rule

III. First rule applied
   A. Review of case establishing rule
   B. Comparison of client’s case
   C. Review of case following rule
   D. Comparison of client’s case

IV. Second rule applied
   A. Review of case establishing rule
   B. Comparison of client’s case
   C. Review of case following rule
   D. Comparison of client’s case

V. Conclusion

How, I wondered, could anything be more clear?

Of course, most of the memos I got in those early years rarely came anywhere close to what I thought I should be getting. I graded them accordingly and soon established a reputation (one of many I’m not proud of) as an arbitrary grader. That reputation then led to some dangerously nasty student evals, all of which made me grumpier and grumpier.

And then, finally, one day around the end of my third year, it occurred to me that I really wasn’t teaching my students anything about outlining, either as to how to do it or, more importantly, why to do it. All I was doing was giving them another reason to tune me out, giving them very little more in terms of substantive assistance than what they had learned about outlining back in the sixth grade.

That revelation led me to think about my own work as an attorney. How and why had I outlined (especially in the early days of my practice)? As I thought about my own use of the technique, I had an epiphany of sorts. Simply stated, I discovered why outlining had been so valuable.
to me in my practice. Its value is captured in this truism: The process generates the analysis.

Once I made that connection, everything opened up for me. I now understood what outlining could do for my students and, over time, I developed the approach to teaching it that I will now attempt to share in this article.

(I teach this approach in conjunction with the predictive memo assignments I give my students. Thus, as presented here, it conforms to a traditional CREAC paradigm. But it is equally useful, with slight modifications for a C-RAC paradigm for persuasive briefs.)

So we’re talking about a process, a method, if you will, to get from the identification of an issue in a legal memo assignment to the completion of the writing of that memo. Let’s consider the steps in that process and see where outlining can play a helpful role.

These are the steps and the concomitant role of outlines in each:

Step One: Conduct structured research—create research outline

Step Two: Apply law to client’s facts—create application outline

Step Three: Explain law that is relevant to client’s facts—create explanation outline

Step Four: Establish CREAC approach to the memo—combine explanation and application outlines (the writing template)

Step Five: Write the text of the memo—convert the writing template to legal prose

The first step, after the facts of the fact pattern have been digested and the issue to be analyzed has been identified, is to ascertain the relevant law. And to find that law, we teach our students the importance of legal research. Can outlining play a useful role in that step? Absolutely.

Legal research can be one of two distinctly different experiences. It can be a hunt for a needle in a haystack, with as much anxiety and frustration as that metaphoric experience would likely entail. Or, it can be a treasure hunt, marked by the uncovering of a series of clues, each one bringing us closer to our goal.

For many students, legal research is that first experience repeated over and over again. If anything, the availability of LexisNexis® and Westlaw® has made it even more so. Just plug in a few magical words and see what comes up. Read a few lines in the headnotes and figure out if the case has any relevance. That, in essence, epitomizes the needle in a haystack approach to legal research, and the results often reflect that scattered and haphazard approach.

The treasure hunt, on the other hand, lends itself beautifully to outlining. The treasure hunt approach identifies rules that can resolve identified issues, and fleshes out those rules with cases, as in the following example.

Our fact pattern takes place in California and concerns an easement across Blackacre from Whiteacre to access a lakefront beach. It’s a simple right-of-way that, by the express terms of the grant deed that created it, runs with the land.

At the time of the grant, back in 1910, both lots contained single-family residences on large parcels of land. But now, 100 years later, the character of the surrounding land has changed. The new owner of Whiteacre wants to build a hotel on it and then allow his patrons to use the easement across Blackacre to get to the beach. The owner of Blackacre, still a single-family residence, obviously objects to the idea of possibly hundreds of hotel patrons traipsing across his property.

So we have a simple issue: Can the easement be terminated by changed circumstances (specifically defined by the facts of the case)?

At this point the needle-in-a-haystack students are off to the races, frantically looking for cases that seem to have similar facts or deal with a similar issue. They are the ones who usually come in for an office conference with a stack of cases they’ve printed from Westlaw or LexisNexis. They have some minimal understanding of the
Essentially, we are outlining our substantive understanding (our expertise) of the law that will direct the analysis we develop for our client’s issue.

The treasure hunt students, on the other hand, have an outline that represents the substantive expertise they’ve gained from their research. That outline would be developed step-by-step as the student’s research proceeded.

Let’s assume (in our example) that the treasure hunt student first finds a potentially relevant statute (California Civil Code section 811). It says, in part, that an easement will be deemed extinguished (the legal word for terminated) if it is either misused or excessively used.

Now we have a basic rule that we can put in outline form, something like this:

An easement will be extinguished if it is:
- Misused
- Excessively used

The treasure hunt has now begun, because with this very basic, preliminary outline of a seminal rule of law, we have a structure to work with.

Obviously, we now need to find out what circumstances might constitute misuse or excessive use sufficient to satisfy the requirements of the statute.

Case research soon reveals a veritable plethora of cases on both subjects. (For purposes of this example, I’ve reduced the “plethora” to four.) What do we do with them? We build them into our outline, so that it might end up looking something like this:

An easement will be extinguished if it is subjected to
- Misuse
  - *Crimmins v. Gould*, citation (private right-of-way extended to public highway; held: extinguished.)
  - *Reichardt v. Hoffman*, citation (private right-of-way intended for both servient and dominant

  tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage.)

  Rationale of *Reichardt* indicates extinguishment not appropriate when offending use can be curtailed through injunction.

  Dicta in *Crimmins* makes same point.

Excessive use

  *Bartholomew v. Staheli*, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished.)

  *Wall v. Rudolph*, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump.)

Note that in building the outline we accomplish two things. First, we begin to gain real substantive expertise through the systematized approach to our research. And, second, we start to understand the analysis we will be needing to make of our client’s issue.

Obviously, this example is overly simplified, but can you see that the approach (the process) we are using can easily be extended to all the research we will need to do on this issue? Thus we would want to conduct additional research that would lead to an additional part of the outline that will identify how an easement’s original purpose is identified/defined and whether subsequent changes in the surrounding environment will allow changes in its use. And we’ll want to conduct research to define the limits of injunctive relief that might be available if an extinguishment is not going to be recognized, with an added part of the outline resulting from that research.

For each part of the outline, the process will be the same. Essentially, we are outlining our substantive understanding (our expertise) of the law that will direct the analysis we develop for our client’s issue. We are outlining the law, if you will, much as we did when we studied for exams.
Thus, when we’ve completed our research, we will have a research outline that represents the body of authority we need to consider as we develop our analysis of our client’s issue.

This leads to our next outline, which I call the application outline.

Again, remember the point of the outlining approach I’m recommending—the process generates the analysis.

So, now that we have a research outline, how can we use it to generate our analysis?

We are now ready to put the gained substantive expertise to work. Reminding the students of the value of a thorough understanding of the client’s facts is very helpful at this point. (I constantly stress to my students the need to be completely conversant with the record before attempting any serious analysis.)

Assuming that preliminary step has been achieved, the application outline will represent the joining of substantive expertise with the facts of the record to resolve the issue presented by that record. Thus, we can now develop the outline of our analysis by considering, point by point, each of the items in our research outline.

So, to return to our example, here was the research outline we developed:

An easement will be extinguished if it is subjected to Misuse

_Crimmins v. Gould_, citation (private right-of-way extended to public highway; held: extinguished.)

_Reichardt v. Hoffman_, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage.)

Rationale of _Reichardt_ indicates extinguishment not appropriate when offending use can be curtailed through injunction.

Dicta in _Crimmins_ makes same point.

Excessive use

_Bartholomew v. Staheli_, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished).

_Wall v. Rudolph_, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump).

Looking at each case in the outline we can now begin the task of analysis by asking: Do we have a basis for a finding of misuse?

First, from our outline, we consider the possible application of the _Crimmins_ case, where a private right-of-way was extended to a public highway, thereby changing the use of the easement. Our case is less clear-cut, but we probably will find the better view to be a counter-analogy to that case, resulting in a finding of no misuse.

The _Reichardt_ case doesn’t appear relevant, at least on its facts, but we might want to provide an analysis of the rationale from that case as applied to our client’s facts since the client is complaining that his enjoyment of his property is hindered by the defendant’s current use of the easement.

Now let’s develop an outline of these analyses.

I. Easement will not be extinguished by misuse

A. _Crimmins v. Gould_, citation (private right-of-way extended to public highway; held: extinguished)

1. Our case (private right-of-way maintained as such; no extension to public thoroughfare).

2. Change of dominant tenement from residence to hotel is not basis for misuse under _Crimmins_.

B. _Reichardt v. Hoffman_, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage).

1. Our case (no effort by dominant tenement to block servient’s use of his property).
2. Added traffic on servient’s property is not basis for injunction for misuse, because it is not offensive to intended use of easement as was the case in Reichardt.

What about the concept of excessive use?

Using our research outline, we review the cases under that theory for extinguishment. (Note that we are now indeed developing our analysis on this point.) The Bartholomew case appears analogous (at least at first blush). There the dominant tenement was changed from a farm to a nudist colony. As a result, traffic on the easement increased considerably. We do have a similar situation in our case, suggesting an extinguishment would be appropriate.

The Wall case also appears analogous. There, the dominant tenement was converted from a farm to an oil sump with much damage to the servient tenement resulting from the new kind of traffic that used the easement. The client’s property may also be seeing a new kind of traffic, but the difference may not be as dramatic as in Wall. Still we might argue that hundreds of hotel patrons traipsing across Blackacre will create far more damage (trash accumulation, loss of grass and plants) than would be expected from a single-family residence.

And so we can develop an outline of these analyses:

II. The easement may be extinguished by excessive use or its current use enjoined.

A. Bartholomew v. Staheli, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished).

1. Similarly in our case the dominant tenement was converted from a single-family residence to a commercial hotel resulting in a dramatic increase in the use of the right-of-way.

2. Bartholomew notes that the degree of difference in the dominant tenement need not be dramatic; only the result of the change need be.

3. Thus, the easement would be extinguished by application of the rule from Bartholomew through an analogy to that case.

B. Wall v. Rudolph, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump).

1. Change in use not as severe in our case in terms of damage, but possible change in nature of traffic (from single-family residents who are regular neighbors to hotel patrons who have no continuing connection to the property).

2. Amount of damage likely to Blackacre will be dramatic as compared to previous use (littered food and trash, worn-down grass, and injured plants).

3. Thus, an injunction against use of dominant tenement as a hotel could be obtained.

And so we would have a completed application outline that would represent the second half of the discussion section of a predictive memo.

But what about the first part of the paradigm, the explanation section? Why have we essentially “worked backward” in this approach (since the explanation precedes the application in our CREAC paradigm)?

Developing an outline for this portion of the memo is relatively easy because it will simply mirror the substantive aspects of the application outline. In other words, once we have an outline of our application of the cases, we should be able to explain the law by laying out the relevant substance from those same cases.

Look again at the application outline we have developed in our example:

I. The easement will not be extinguished by misuse.

A. Crimmins v. Gould, citation (private right-of-way extended to public highway; held: extinguished).

1. Our case (private right-of-way maintained as such; no extension to public thoroughfare).

2. Change of dominant tenement from residence to hotel is not basis for misuse under Crimmins.
B. Reichardt v. Hoffman, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage).
   1. Our case (no effort by dominant tenement to block servient’s use of his property).
   2. Added traffic on servient’s property is not basis for injunction for misuse as in Reichardt.

II. The easement may be extinguished by excessive use (or its current use enjoined).
A. Bartholomew v. Staheli, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished).
   1. Similarly in our case the dominant tenement was converted from a single-family residence to a commercial hotel resulting in a dramatic increase in the use of the right-of-way.
   2. Bartholomew notes that the degree of difference in the dominant tenement need not be dramatic; only the result of the change need be.
   3. Thus, the easement would be extinguished by application of the rule from Bartholomew through an analogy to that case.
B. Wall v. Rudolph, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump).
   1. Change in use not as severe in our case in terms of damage, but possible change in nature of traffic (from single-family residents who are regular neighbors to hotel patrons who have no continuing connection to the property).
   2. Amount of damage likely to Blackacre will be dramatic as compared to previous use (littered food and trash, worn-down grass, and injured plants).
   3. Thus, an injunction against use of dominant tenement as a hotel could be obtained.

Our explanation outline will mirror it in terms of the substantive rules we provide, as is hopefully apparent in this example:
I. An easement can be extinguished if it is misused.
A. Crimmins v. Gould
   1. Private right-of-way extended to public highway, with result of easement now used by public instead of being limited to private use.
   2. Extinguishment ordered by court because public use changed intended use of easement, and the changed use could not be enjoined.
B. Reichardt v. Hoffman
   1. Private right-of-way intended for co-use by dominant and servient tenements; dominant tenant blocked use to servient tenant.
   2. This “misuse” insufficient in quality to justify extinguishment of easement.
   3. Dominant tenant instead enjoined from blocking use by servient tenant.

II. An easement can be extinguished if it is used excessively
A. Bartholomew v. Staheli
   1. Dominant tenement converted from farm to nudist colony with right-of-way easement experiencing dramatic increase in use as result.
   2. Excessive use of easement, leading to increased damage to the servient tenement justified extinguishment by the court.
B. Wall v. Rudolph
   1. Dominant tenement converted from farm to oil sump with greatly increased damage to servient estate resulting from dramatic increase in use (and in type of use) made of easement right-of-way.
   2. Court enjoined the use for oil sump purposes rather than granting an extinguishment of the entire easement.

If you consider what we’ve done in this explanation outline, you’ll see that we have...
This point is also a valuable result of the outlining process since it stresses a cardinal rule ... that we never apply anything that we haven’t first explained and we only explain that which we will apply.

But notice the other result of the completion of the explanation and application outlines. We now have a complete template from which to write the discussion section of our memo. Here’s what that template looks like in our example:

I. An easement can be extinguished if it is misused.
   A. *Crimmins v. Gould*
      1. Private right-of-way extended to public highway, with result of easement now used by public instead of being limited to private use.
      2. Extinguishment ordered by court because public use changed intended use of easement, and the changed use could not be enjoined.
   B. *Reichardt v. Hoffman*
      1. Private right-of-way intended for co-use by dominant and servient tenements; dominant tenant blocked use to servient tenant.
      2. This “misuse” insufficient in quality to justify extinguishment of easement.
      3. Dominant tenant instead enjoined from blocking use by servient tenant.

II. An easement can be extinguished if it is used excessively
   A. *Bartholomew v. Staheli*
      1. Dominant tenement converted from farm to nudist colony with right-of-way easement experiencing dramatic increase in use as result.
      2. Excessive use of easement, leading to increased damage to the servient tenement justified extinguishment by the court.
   B. *Wall v. Rudolph*
      1. Dominant tenement converted from farm to oil sump with greatly increased damage to servient estate resulting from dramatic increase in use (and in type of use) made of easement right-of-way.
      2. Court enjoined the use for oil sump purposes rather than granting an extinguishment of the entire easement.

III. The easement will not be extinguished by misuse.
   A. *Crimmins v. Gould*, citation (private right-of-way extended to public highway; held: extinguished).
      1. Our case (private right-of-way maintained as such; no extension to public thoroughfare).
      2. Change of dominant tenement from residence to hotel is not basis for misuse under *Crimmins*.
   B. *Reichardt v. Hoffman*, citation (private right-of-way intended for both servient and dominant tenement blocked by dominant tenant; held: no extinguishment, only an injunction against blockage).
      1. Our case (no effort by dominant tenement to block servient’s use of his property).
      2. Added traffic on servient’s property is not basis for injunction for misuse as in *Reichardt*.

IV. The easement may be extinguished by excessive use (or its current use enjoined).
   A. *Bartholomew v. Staheli*, citation (dominant tenement converted from farm to nudist colony resulting in dramatic increase in use of right-of-way; held: extinguished).
      1. Similarly in our case the dominant tenement was converted from a single-family residence to a commercial hotel resulting in a dramatic increase in the use of the right-of-way.
      2. *Bartholomew* notes that the degree of difference in the dominant tenement need not be dramatic; only the result of the change need be.
Outlining can be a great tool for our students if it is presented in a way that allows them to appreciate the value of a systematized approach to their assignment.

Outlining can be a great tool for our students if it is presented in a way that allows them to appreciate the value of a systematized approach to their assignment. And that value is best stated in the expression, “the process generates the analysis.”

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3. Thus, the easement would be extinguished by application of the rule from Bartholomew through an analogy to that case.

B. Wall v. Rudolph, citation (dominant tenement converted from farm to oil sump with much damage to servient tenement resulting from oil spillage onto property; held: no extinguishment, only an injunction against use as oil sump).

1. Change in use not as severe in our case in terms of damage, but possible change in nature of traffic (from single-family residents who are regular neighbors to hotel patrons who have no continuing connection to the property).

2. Amount of damage likely to Blackacre will be dramatic as compared to previous use (littered food and trash, worn-down grass, and injured plants).

3. Thus, an injunction against use of dominant tenement as a hotel could be obtained.

And what is now left to do? Nothing other than the mechanical task of writing out what we already have set forth in outline form.

In other words, we have used the first three steps in the process—research, rule application, rule explanation—to our benefit by systematizing each step in the creation of outlines. And, by focusing on the creation of each outline so that together they reflect the actual substantive work involved in creating an analysis, we have constructed a complete template from which we can now write the main part of our predictive memo.

And that formerly onerous task—writing the discussion section of the memo—is now nothing more than a mechanical exercise of converting the complete outline (the template) to legal prose.

In conclusion, we outline our research to gain meaningful substantive expertise; we outline our application of the relevant research to identify our analysis of the issue presented; and we outline our explanation of the relevant law/rules to provide the basis for the analysis that follows.

(Note, too, that by “working backward” in the construction of the application and explanation outlines, we adhere tightly to the basic requirement of the legal paradigm: that we never apply anything that we haven’t first explained and only explain that which we will apply.)
I take a well-developed CREAC section from a longer multi-issue memo with clearly demarcated CREAC sections, and I scramble the sentences into a random order.

CREAC Scramble: An Active Self-Assessment Exercise

By Meredith Aden

Meredith Aden is the Director of Legal Writing at Mississippi College School of Law in Jackson.

When I started teaching legal writing, one of my primary learning objectives for students was using and applying the CREAC paradigm to organize and develop their legal analysis. I taught CREAC in class, gave the students a short CREAC assignment early in the semester, and provided written feedback. But when I received the drafts of the students’ next assignment, I quickly realized that despite my best efforts, many students did not understand CREAC or struggled to translate the feedback to the closed memorandum drafts.

I needed a new approach to stress the importance of CREAC, to engage the students in the learning process, and to help them understand CREAC. I wanted to shift the focus from teaching to learning, and I wanted to expand the opportunities for assessment early in the semester. So, in the fall of 2008, I developed a new strategy to help the students learn how to use CREAC.

The process involves several stages of assessment and evaluation of student work during the first few weeks of the semester. First, I teach the CREAC paradigm in class. Next, the students complete a short CREAC analysis assignment on a simple issue using a fact pattern and one or two short, simple cases. The analysis assignment is a largely formative assessment. Although it is graded, it is an extremely small portion of the grade (3 to 5 percent). I have found that the students take the assignment more seriously and give a better effort when the assignment is graded. However, I emphasize that the real learning objective of the assignment is for the students to practice using CREAC before undertaking the more heavily weighted memorandum assignments.

The students gain a better appreciation for using and understanding CREAC after trying it for themselves and receiving feedback on their papers.

To reinforce CREAC and to help the students internalize the feedback on their assignments, the students next complete an assessment exercise I call the CREAC Scramble. I take a well-developed CREAC section from a longer multi-issue memo with clearly demarcated CREAC sections, and I scramble the sentences into a random order. I number them and place them into a three-column table with the scrambled, numbered sentences in the center column. I label the left column “reordered sentence” and the right column “part of CREAC.”

I distribute the CREAC Scramble during class, and the students first work individually to label each sentence as a “C,” an “R,” an “E,” an “A,” or a “C.” Then the students renumber the sentences to put the CREAC back together in a logical order following the CREAC paradigm.

After the students work individually on the CREAC Scramble, they move into groups of three to four students to compare their renumbered, labeled sentences and to agree on the correct label and number for each sentence. As the students are working in the small groups, I observe the groups and listen to the various discussions about the correct label and order for each sentence.

Cite as: Meredith Aden, CREAC Scramble: An Active Self-Assessment Exercise, 19 Perspectives: Teaching Legal Res. & Writing 60 (2010).

1 This assignment could easily be adapted to other paradigms, such as IRAC and CRAC.

2 This assignment does not necessarily have only one correct answer. Many of the sentences, particularly in the “E” and “A” categories, may have slightly different ordering of sentences, which is fine. The most important part of the assignment is for the students to correctly label each part of CREAC and to have each section progress in a logical order.
Toward the end of class, I bring everyone back together to discuss the assignment and to reach an agreement on the answers to the assignment. Afterward, I give students the opportunity to ask questions, and I pass out two different answer keys. The first is a chart in which each sentence is correctly reordered and labeled. The second is the CREAC in its original paragraph form, so the students can see how the CREAC would appear in a real office memorandum. The answer keys enable students to assess their progress in using and understanding the CREAC paradigm.

This assignment is an excellent tool that compels the students to contemplate what makes each part of CREAC different. To advocate for their positions about each sentence, the students have to articulate to each other why they believe a sentence should be labeled with a certain letter, and why the numbering should be in a certain order. And, it provides another opportunity for self-assessment. When a student advocates that a sentence should be labeled incorrectly, the other students teach each other about the different parts of CREAC and how to distinguish among them. Peer teaching reinforces CREAC and provides the students with an active learning experience that helps them assess their progress using the CREAC paradigm. Armed with information from multiple assessments, the students are more confident and more successful at using CREAC.

A copy of the CREAC Scramble assignment is available in the 2010 Legal Writing Institute Idea Bank.

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Another Perspective

“Getting students to acknowledge legal writing as a ‘knowledge transforming task’ will not be easy. To accomplish this task, legal writing teachers must make it a manageable one. However, they cannot assign students such a task without giving them strategies to assist with the process. Teachers need to better understand the behaviors that constitute critical thinking, as well as the types of thinking required by various lawyerly tasks, to explicitly teach these behaviors to students.

Joseph Williams has pointed out that learning to write and think is not just a matter of cognitive growth, but also of socialization into a discourse. Law students have to move from their former discourses into a new one, a transition that is not always smooth. The transition also takes time. To expect students to become ‘experts’ in the space of one year, given the limited number of knowledge transforming assignments that one can reasonably expect the students to undertake in that time period, is unrealistic. Teachers must give the students what they need: ‘continued and repeated guidance from experts so that they can accultur ate surely and steadily.’ If law schools do not provide enough time and opportunity for students to become accustomed to this new discourse through a preliminary legal writing course and later master it through advanced legal writing courses, legal writing faculty risk relying on the profession to teach students what they should have learned in law school. By giving students the opportunity to practice being members of the legal community in law school, they are much more likely to enter the profession as competent professionals; a goal identified by the MacCrate report and surely the goal of every caring law teacher.

Using Bloom’s taxonomy illustrates to students the complexity of their task. By disclosing to students that the skills of Synthesis and Evaluation are higher cognitive thinking skills, students will not expect to be experts from the outset. They will, moreover, take their task seriously, realizing that the kind of analysis required of them is challenging and requires more than a cursory review of the cases. Students are juggling complex information, rules, interpretations, and applications while trying to process, synthesize, and evaluate them in a logical way for the reader. Reminding students of these complex cognitive tasks and encouraging them to focus on their thinking skills prior to their writing skills will start students off on the right foot.”

—Christine M. Venter, Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills, 57 Mercer L. Rev. 621, 642–43 (2006).
In this era of texting and Twitter, it is easy to forget that much of the practice of law still revolves around letter writing.

By Maureen B. Collins

Maureen B. Collins is Clinical Professor of Lawyering Skills at John Marshall Law School in Chicago, Ill.

In this era of texting and Twitter, it is easy to forget that much of the practice of law still revolves around letter writing. From the transmittal letter to the demand letter, these missives serve a variety of purposes, and take an array of shapes and forms. There are, however, principles common among most types of letters. They should be concise and accurate, and take their audience into account. They should reflect well on their authors, and on the clients those authors represent.

To Write, or Not to Write. Consider whether a written letter is the best method of achieving your purpose. As lawyers, we have an urgent need to document everything, and this often serves us well. If you need to negotiate a matter with some degree of speed, you may want to pick up the phone and call. If, on the other hand, you want to fire an opening salvo and to reinforce the strength of your position, by all means write. Whether you write or call may also depend on the relationship you have with the intended recipient. The more adversarial the relationship, the greater the need to document. Remember though, that your letter may one day be marked “Exhibit A” and attached to a complaint. E-mail presents the greatest opportunity for mishap. Writers often treat it like an informal means of communication, ignoring both the formalities and mechanics of good writing. If you want to “write” a letter, but deliver it immediately, create the letter as an attachment to a simple transmittal e-mail. Doing so will help to avoid the temptation to fire off an ill-considered “letter,” and the tendency to treat the e-mail as some lesser form of communication.

Issues of Audience and Tone. The tone of the letter, and the level of formality, will vary with the circumstances. A letter to an adversary is likely to be more formal than a letter to a client with whom you have a longstanding relationship. The tone may also be dictated by the level of legal sophistication of the recipient. A letter to a residential real estate client will be different than a letter you send to in-house counsel at a large corporation. At all times, though, the tone and content are governed by ethical considerations1 and notions of professional civility. A letter can be made less formal by using first names and personal pronouns (“Dear Cara,” “we need to resolve this issue”). Word choice plays an obvious part. A letter “demanding” that a party “cease and desist” will be interpreted differently than a letter “suggesting” that a party’s “actions be examined for compliance with ...”. Even sentence length can make a difference. If you want to take a more “bottom line” approach, pepper your letter with short, curt sentences featuring concrete words. If you want to set a more casual tone, use longer sentences and more “relaxed” language. Regardless of the choice, be sure that the tone of the letter reflects the audience, the circumstances, and the purpose of the communication.2

The Purpose of the Letter. Letters are sent for a variety of reasons. They may serve to:

- send documents
- confirm a conversation
- argue a point in litigation
- offer advice
- issue a demand

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1 For more information on this subject, see Melissa H. Weresh, Legal Writing: Ethical and Professional Considerations (2009).

2 For excellent and more detailed advice on letter writing in practice, see Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice, ch. 7 (2004).
Most letters fall into four basic categories: transmittal, demand, advice, and litigation. Sometimes the categories are combined, sometimes they are ignored. What follows is a primer on the basic types.

**The Transmittal Letter.** This letter accompanies documents. It should be short (and usually sweet) and explain to the recipient what he should do with the enclosures. The transmittal letter should consist of three paragraphs. In the first, identify what is being transmitted—describe the enclosures, listing them if necessary. In the second paragraph, instruct the recipient. Why are the documents being sent? What is the recipient being asked to do? How? By what date? As to the final paragraph … well, are you sure you need one? If so, this is the place to reiterate any important instructions or deadlines, and to conclude with pleasantries (“If you have any questions, please feel free to …”).

**The Demand Letter.** The purpose of the demand letter is pretty straightforward: to demand that a party take action or stop action. The most important aspect of the demand letter may not show up in print. It is essential that, before writing the letter, you ascertain that your client has the superior position. Also ensure that your client understands the ramifications of initiating contact with a potential adversary. Imagine, for example, that your client is driving along the highway and spots a sign featuring a trademark similar to hers. She contacts you, you write a letter to the “offending” party, and you receive a response you didn’t anticipate: Your client is being sued because the “offending” party has actually been using the trademark longer than your client. These unintended consequences can be avoided by some prewriting research.

If a demand letter is appropriate, consider what you want to accomplish. Your “mission” is often best achieved by sending a three-paragraph letter. I use the term “paragraph” loosely here. In the initial paragraph, identify who you represent and the purpose of the letter. In the second paragraph or section, establish your client’s position and establish the recipient’s “violation.” This second paragraph may be just a few lines, or it may be a few pages. This will be dictated by the audience, the depth of the facts, and the extent to which you identify the applicable law. It will also be impacted by the tone you want to establish. A shorter, more informal letter may be a first “shot across the bow.” A more detailed letter laying out the legal foundation suggests that the sender is more serious about aggressively pursuing her position.

This second paragraph should also identify the “demand.” Be specific and keep the client’s goals in mind. If the client wants the recipient to discontinue an activity, clearly identify the activity, when the activity should stop, and how compliance will be monitored. The letter should also suggest the ramifications of noncompliance with the demand. This too, will differ with circumstances and strategy.

The final paragraph should reiterate any expectations and deadlines. This may also be the place for pleasantries or additional threats of gloom and doom in the event of noncompliance.

**Opinion/Advice Letters.** The opinion letter is usually a response to a request for information from the client: What are my rights in this situation? Can and should I do this? How can I protect my interests? A well-written opinion letter identifies the issue and the factual assumptions upon which the opinion is based, analyzes the issue in light of the relevant law, and, frequently, offers suggestions or recommendations for a course of action.

In the first section of the letter, identify the issue you were asked to address, your process if appropriate, and your conclusion. Don’t make the reader wait until the bottom of the letter. Spell out the conclusion at the beginning and support it with a comprehensive analysis later in the document.

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3 For a considered analysis of the process of writing demand letters, see Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. Ass’n Legal Writing Directors 32 (2008).
Next, lay out the factual assumptions that underlie your analysis. This is an important, but often overlooked, step in the process. Certainly your analysis depends upon your understanding of the facts as explained to you. Set out those assumptions, clearly and concisely, and add a caveat if necessary (“Based on the facts set forth below …”).

The analysis section should be organized around the legal issues. The level of detail regarding case law should be tailored to the recipient’s need and level of legal sophistication. It should be an objective assessment of risk. This doesn’t mean that you can’t present the best possible argument to support an action you know your client wishes to take. It does mean, however, that you identify the level of risk associated with that action.

Most clients will want recommendations as a follow-up to the analysis. In this section, you can identify the relative merits of the options and, where appropriate, recommend a choice. The alternatives should be explained and any deadlines should be identified.

Conclude the opinion letter by informing your client of the next step in the process, and asking for instructions. Reiterate deadlines or requested actions here, and close with a sentence highlighting your willingness to be of further service. If your client is going to pursue the matter, you want to be the attorney to assist.

**Litigation/Letters to an Adversary.** There is a tendency to think of litigation as a matter of briefs and pleadings but, in truth, a good part of the action takes place in the form of letters between the attorneys.

Next, lay out a factual and legal summary of your position. The depth of this summary depends upon the circumstances, and the phase of litigation. This may also be the place to suggest compromise, or to warn of future action. Matters of tone should be considered here, as should professional responsibilities.

Finally, close by reiterating your position. Suggest or demand a course of action, whichever is appropriate. This would also be the place to establish a time frame, and perhaps, to suggest an alternative course of action. Consider what level of pleasantry is called for. Are you trying to establish a rapport or bang your fist on the desk? Any letter to an adversary should be well-thought-out and crafted with particular care.

**Mechanics.** There is more variety, now, in what is considered the proper form. Writers differ over the size of an indentation (and whether one should exist at all) and the number of spaces after a period. (Although I cling firmly to the belief that there should be two.) Set out below are some of the basic mechanics of putting a letter together that reflect the general conventions of the day.

A letter should include the sender’s address (often in the form of letterhead), and a date at the top. These are often centered. The recipient’s formal name, title, and address should appear at the left margin. In many cases, the letter will include a RE: line followed by the information identifying the matter to the recipient. It should not include internal references like your own client number. Dropping down several lines, the letter should begin with a salutation. Typically, this takes the form of a “Dear …”. The salutation should include a title like Mr., Ms., or Dr. and the recipient’s last name only. In less formal instances, where there is a cooperative and continuing relationship, it is appropriate to use only the recipient’s first name. In most formal letters, the salutation is followed by a semicolon. In less formal letters, it may be followed by a comma. Dropping down two lines, the letter should begin with an introductory paragraph, which identifies the purpose of the communication.
Most letters are single-spaced with a one-inch margin. Longer letters may be double-spaced and include internal headings as appropriate. At the close of the letter, it is customary to include a short paragraph summarizing instructions or expectations, and advising how best to respond to the sender. The signature block will be centered or at the left margin. It includes a phrase like “Sincerely,” and is followed by five blank lines for the sender’s signature. The sixth line should feature the printed version of the sender’s formal name. If there is an enclosure in the letter, the abbreviation ENCL. is usually included at the left margin, several lines below the signature. If a copy of the letter is being sent to another party, it may be noted with a CC: (second recipient’s name). When there is more than one other recipient, those names should be listed in a column under the first CC: name.

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Another Perspective

“It has occurred to me, however, that there is a dearth of material addressing a need that a few lawyers have demonstrated—the art of writing a really bad brief. Many briefs exhibit a number of serious shortcomings, but usually these are isolated, and do not occur consistently in one magnificent opus. In a confessedly feeble effort, I will attempt to point out some of the areas in which the devotees of bad brief writing may attempt to be more comprehensive in their efforts.

A really bad brief should hit a judge right between her tired eyes. It should be so outstanding that, instinctively, the reader will exclaim: ‘This is the worst brief I have ever read!’ That appraisal will not come easily because judges who have been on the bench for more than a year will have digested a number of briefs that contain more than their fair share of remarkable deficiencies. However, the goal of the brief writer should not be to win the prize from rookie judges—after all they have had relatively limited exposure. The aim should be focused on the grizzly, veteran judges who have grumbled over the years about innumerable below-standard briefs, but have never been socked with one that is not just bad, but really terrible.

Much of what I have written thus far, of course, is general commentary, but it is worthwhile to observe that generality—and lots of it—is truly helpful in writing a bad brief. Extremely vague references to the Declaration of Independence, natural law, freedom and justice, and the Constitution are staples that should not be overlooked. One must be cautious, however, in mentioning the Constitution. The breadth to which it has been interpreted in connection with due process leaves open the possibility that the Constitution may turn out to be relevant to the case at hand. In general, however, citing to the sections setting out age limits for House and Senate members may be sufficiently bewildering to be effective. A carefully non-specific paean to justice, of course, is appropriate and, if the writer is a legal scholar, adding equity in a minor key is equally powerful.

Yet it may be that some reliance on case law simply cannot be avoided—or that the writer lacks the courage to take that daring route. Yielding to this ‘felt necessity,’ however, need not be fatal. A creative writer has many opportunities to cause havoc. For example, mis-citing to volumes or page numbers of an opinion can cause the judge to waste time looking for it. That, of course, is a plus. In this connection, it is preferable to err in giving the volume number, rather than the page. After all, if the right volume is cited, the judge can always check the index in that book to get the correct page number. If the volume number is incorrect, then the problem is far more difficult and, hence, one that the writer should favor.

It must be conceded, however, that the relative difficulty of ferreting out correct volume and page numbers has been somewhat changed by the advent of Westlaw and Lexis. For example, if the volume and page are incorrect, a researcher may still find the case using the names of the parties. Nevertheless, if the caption of the case is U.S. v. Jones, for example, there are a sufficient number of cases by that name so that the computer will choke on the volume and the result will be satisfyingly chaotic. However, if the names of the parties are insufficiently generic, the brief writer should give some thought to misspelling the parties’ names as well as doctoring the volume and page numbers. After all, there is nothing wrong with wearing a belt and suspenders.”

Compiled by Barbara Bintliff

Barbara Bintliff is the Joseph C. Hutcheson Professor in Law and Director of the Tarlton Law Library at the University of Texas School of Law in Austin. She is a member of the Perspectives Editorial Board. This bibliography includes references to books, articles, bibliographies, symposia, and research guides that could prove useful to instructors of legal research and writing and their students. Also included are citations to related resources that may be of interest to those who teach legal research and legal writing. It includes sources noted since the previous issue of Perspectives, but does not include articles in Perspectives itself.


This pathfinder presents selective resources, both domestic and international, on earth jurisprudential topics. Earth jurisprudence is an emerging field encompassing “environmental law, rights of indigenous people, international human rights, business law, and jurisprudence. Earth Jurisprudence promotes healthy ecosystems and explores the role of humans as integral members of a comprehensive Earth community. It seeks creation of legal norms and dispute resolution that foster mutual human-Earth relationships and invites a fundamental rethinking of the basis of law.” Id. at 122.


The author describes the results of a series of year-long, one-on-one conversations with 10 first-year law students that suggest that “many of the theories articulated in the literature on critiquing student papers may not always hold up in practice and may explain why some legal writing instructors perceive their comments to be ignored.” Id. at 5. She concludes that many of the most common legal writing instructional practices, while well grounded in pedagogical theory, do not reach all students, and demonstrates that legal writing instruction may be insufficient to “cure chronic basic-skill errors.” Id. at 1.


Describing the current environment in the first year of law school as a “no research” one, the author makes a case for including research instruction across the curriculum. She describes the “three R’s” of research—to reinforce, refocus, and repeat initial skills learned in the first year—as justification for expanded research instruction. Id. at 550–551.


“This article seeks to slightly shift the landscape of legal writing theory, from one which primarily asks the writer to consider the audience, to one which also incorporates principles of client-centeredness which require the writer to focus equally on the client…. This article begins by exploring current theory from legal writing scholarship which focuses on the writer’s need to write for the audience…. After establishing the rhetorical connection to the audience, and the devices used to write for the audience, the article next explores the development of client-centered lawyering, which traditionally focuses on achieving the greatest client satisfaction, beyond merely winning the case…. Third, the article proposes application of principles from client-centered theory to legal writing theory, suggesting a shift from relying solely on a ‘know your audience’ approach to now also including a ‘know your client’ approach…. Finally, the article concludes by examining practical examples of incorporating client-centered principles into advocacy writing.” Introduction.

"*Connecticut Legal Research* was written for legal researchers at various levels, including first-year law students, paralegals, and Connecticut practitioners. For those just learning the basics of legal research, the book explains basic research skills and strategies and introduces Connecticut sources both in print and online. It also explains how to research analogous federal materials and the law of other states, allowing a student to use the book as the sole text in a legal research course. More experienced researchers will also benefit from having a text that brings together all of the print and online sources in Connecticut, and provides a step-by-step manual for researching each Connecticut source both in print and online. Researchers can use the book to find specific websites that contain Connecticut legal materials and follow the steps outlined to access those materials." Publisher.


The major advantages and disadvantages of using pending, live United States Supreme Court cases in the legal writing program are highlighted, along with a description of how legal writing faculty prepare problems from the certiorari briefs and conduct the appellate advocacy program.


The author reviews a range of surveys and articles on legal research education, and then presents and analyzes the results of a 2007 survey of law firm librarians that "identified the most important research tasks in the law firm setting and the proper format or formats in which those tasks should be performed." Introduction. He concludes with recommendations for more effective coverage of resources in law school legal research classes.

Kate Paulman, Comment: *Bringing Life to Legal Writing: How to Use Literary Journalism in Capital Litigation*, 77 UMKC L. Rev. 1147–1169 (2009).

This comment advocates using literary journalism, a writing style that "transplants" the reader into the story, to allow legal writers to better tell their clients' stories in capital cases. Literary journalism as a writing style is explained, and the author shows how to use it in document production, from the drafting stage to closing arguments, providing numerous examples.


"This article explores the reasons why the current legal writing curriculum is not meeting the needs of the modern law student, ultimately proposing that instructors consider and implement various aspects of the legal research and writing model pioneered by JURIST (<http://jurist.law.pitt.edu>). … Through years of experimentation, JURIST has developed an innovative method of teaching practical research and writing skills to student authors and editors by developing a model product and implementing a structured program with a team of professional staffers and dozens of students on a daily, real-time basis." Id. at 175.

Special Report: *Teaching Drafting and Transactional Skills: The Basics and Beyond*, 2009 Transactions 1–424. Articles include:

Wayne Schiess, Craig Smith, Pamela Wilkins, Danton Berube & Irene Segal Ayers, *Teaching Transactional Skills in First-Year Writing Courses*, 2009 Transactions 53–71. Comments from five professors, with different perspectives, on teaching transaction skills (and especially drafting skills) in the first year. Methods of accomplishing this include replacing the legal writing class with legal drafting, teaching students how to create binding legal texts instead of teaching them how to write persuasively, adding a "transactional planning module" in the first-year writing course, preparing the first-year students for advanced transactional drafting in
the 1L writing course, and integrating transactional drafting in the first-year research and writing program.


This article details three separate ways to teach transactional skills. The authors “outline their methods and designs for teaching transactional skills, with particular emphasis on document drafting. Although their methods vary, the professors have a common message: to effectively teach contract drafting, professors and students must embrace group learning—even if this requires stepping outside of their comfort zones.” Introduction.


Various approaches to developing contract drafting exercises are described by three experienced teachers.


The author describes step-by-step use of two online applications for student collaboration—Google Docs and Zoho Writer—and includes discussion of advantages and disadvantages. She notes that students often show more interest in using new technologies, which makes shared editing easier, although these applications lack the rich functionality of word-processing software. Use of Twitter and Facebook is also covered, in less detail.


Three experienced contracts drafting teachers provide numerous tips and suggestions on ways to grade and critique drafting assignments.


“As students have embraced the online world, professors are finding ways to keep pace while continuing to instill the rigors of traditional legal learning. The following professors have found new ways to incorporate technology into their everyday teaching. This article discusses their successes and provides insights into how others may follow their lead.” Introduction.


“This guide for upper-level law students, paralegals, and practitioners is founded on the premise that legal writing becomes easier when you work with, rather than resist, existing expectations, structures, and resources. Rather than providing greater detail on the same skills that are covered in first-year legal writing programs, the book gives readers who already have a basic understanding a new framework for viewing legal writing. After an introduction to the Tao Te Ching, an ancient Chinese philosophical text, each chapter is built [on] a principle for legal writing applied from the Tao: be flexible, don’t rush, break it down, know when to stop, reflect, let go.” Book News, Inc.

Ken Strutin, Basic Legal Research on the Internet, LLRX.com, June 24, 2010 (available online at <http://www.llrx.com/features/basiclegalresearchinternet.htm>).

“This article explores the corner of the Internet landscape that concentrates on legal research. For the most part, these databases and search tools are free, although some might require a library card. Essentially, this is a short list of ‘go to’ sites that most researchers will find useful.” Introduction.

“Facebook, MySpace and other Social Networking Sites (SNS) are rich sources of incriminating, exculpating, impeaching and mitigating evidence. Yet, investigations that lead legal professionals into SNS raise questions about the ethical implications of surreptitious research. While there are ethics opinions and court decisions about pretexting in the real world, there is scant authority on the virtual approach, which has only recently begun to be addressed. The ethical limits of how far an attorney, and by implication investigators and researchers, may go is being debated with precious little guidance outside certain specific areas of practice, i.e., law enforcement, civil rights and intellectual property infringement. The court decisions, ethics opinions and articles collected here provide background on the current legal thinking about covert investigations and include recent publications addressing online pretexting and the privacy limits of social media.” Introduction (footnotes omitted).

Teaching Legal Research: Special Issue, 28 Legal Ref. Serv. Q. 179–319 (2009). Articles include:


The author presents several ways to help law students analyze a legal problem and organize their legal research projects.


“The goal of this essay is to suggest a method of ensuring good outcomes in legal research training. It begins with a list of skills that students need and follows with a discussion of the means to ‘test’ students’ achievement of those skills. It concludes with a proposal for a multifaceted research curriculum.” Id. at 203.


Using two examples, the author illustrates the process of developing contextual legal research problems, each of which is designed to show the process for conducting legal research.


The authors first evaluate individual instructional technologies, and then turn their attention to the issues raised in teaching a graded, online legal research course. They conclude that online instruction has great potential for reaching the Millennial generation of law students and may accommodate their learning styles and preferences as well as in-class instruction.


“This article considers the question of whether there is a need for law schools to offer certification for specialization in legal research skills and discusses various approaches to legal research skills certification. The author argues that it is unnecessary to offer legal research certification as it is presupposed that a basic legal education should include instruction in how to find and read the law. Anything less is a failed legal education.” Introduction.


“This article is a perspective on what research skills new associates in legal practice need. … A checklist of research skills is included along with recommendations on what law schools and law firm librarians can do to assist law students and new attorneys in learning these skills.” Introduction.

“As of November 17, 2009, Google offers the ability to search for U.S. case law as part of its Google Scholar search. You can now conduct free searches for full-text opinions of cases and legal journals in addition to general articles and patents, which were previously available on Google Scholar. Searches are conducted the same exact way you would conduct a search on Google.com. That is, there is no need for Boolean connectors anymore if you don’t want to use them, and you still might get the exact case you’re looking for. This article gives an overview on the new features Google Scholar provides for the legal research market.” Introduction.


Capitalizing on the new “technology-savvy, multi-tasking” generation of law students, id. at 405, the author suggests ways in which podcasts can be used to enhance students’ educational experience. Of particular note is the discussion of an “annotated sample good memorandum” podcast and the “personal podcast/critique of student memorandum.” Id. at 423.


“Judicial use of Wikipedia as a source of evidence or a basis for making decisions is a serious problem, because the nature of Wikipedia undermines the common law system. … Wikipedia is not only merely a secondary source, but the articles are subject to change on a daily, sometimes hourly, basis. For these and other reasons this comment will explore, federal judicial opinions should not cite Wikipedia. Wikipedia may be a starting point for research, but this comment will discuss many of the reasons why federal judges and members of the federal bar should not cite Wikipedia as a source. Additionally, Wikipedia’s reliability is questionable at best, and for this reason alone Wikipedia should not be cited as an authoritative source on any topic.” Id. at 231.


The federal circuits are split on the issue of recoverability of CALR expenses. The author describes the three ways a court may approach the issue as: “(1) categorize the expense as a cost under 28 U.S.C. § 1920 and award the expenses to the prevailing party in every case; (2) categorize the expense as an overhead expense and award it, if at all, subsumed in the attorney’s hourly rate if there is a fee shifting statute; and (3) categorize the expense as one related to attorneys’ fees and award it as a separate expense from the attorney’s hourly rate if there is a fee shifting statute.” Id. at 456–457. This comment argues for the third approach, with computer-assisted legal research fees recoverable under Rule 54(d)(2) of the Federal Rules of Civil Procedure.


“The Deep Web covers somewhere in the vicinity of 1 trillion pages of information located through the world wide web in various files and formats that the current search engines on the Internet either cannot find or have difficulty accessing. The current search engines find about 200 billion pages at the present time of this writing. … This report and guide is designed to give you the resources you need to better understand the history of the deep web research, as well as various classified resources that allow you to search through the currently available web to find those key sources of information nuggets only found by understanding how to search the ‘deep web’.” Introduction.
New Editions:


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Index to Perspectives: Teaching Legal Research and Writing

Prepared by Mary A. Hotchkiss

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