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The E-Comment: A Simple Exercise for Public Law Courses

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In the wake of calls to make law school students more practice ready, law schools across the country are reevaluating and redesigning their curricula. One example of this reform is the number of law schools that now require courses in legislation and regulation.² This change was examined in the August 2015 edition of the AALS Journal of Legal Education titled “Legislation/Regulation and the Core Curriculum.” In that publication, Professors Manning and Stephenson describe a Legislation and Regulation (leg-reg) course that has been part of the 1L Curriculum at Harvard Law School since 2006 to “broaden” the 1L perspective “from the essential, but by today’s standards incomplete, focus on private law topics and common law reasoning” that has dominated the law school curricula of the past.³ Professor and Manning and Stephenson argue that courses in statutory and regulatory law would help prepare students for growing practice areas that are permeated by regulations including environmental, occupational health and safety,

health care, immigration, food and drug, securities, banking and finance, labor and employment, and tax law.⁴ Yet, as Manning and Stephenson have discovered, learning about statutes, regulations, and administrative law is not always “intuitive or accessible” for students.⁵ They note that “there is relatively little about legislative procedure, notice-and-comment rulemaking, deference, and the like that is intuitive to students—that resonates with experiences that [students] have had in life.”⁶ The challenge lies in making administrative law or leg-reg course accessible by showing students “real-life issues that cut across many areas of law and many kinds of human experiences.”⁷

The e-comment exercise is my attempt to address Manning and Stephenson’s concern. This article describes an exercise that can be used in any course that has a regulatory component. An exercise where students comment on an administrative comment is nothing new, especially in the context of an Environmental Law course.⁸ And while resources exist to assist professionals and the public in writing administrative comments,⁹ little

¹ The exercise was presented at the 2015 Northwest Regional Legal Writing Conference, Legal Writing and Leadership, University of Oregon School of Law in April 2015.

² These courses are often called “leg-reg,” and typically include some component of legislation, statutory interpretation, and administrative law, and might be seminar or lecture type courses. See generally, [Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation & Administrative Law in Law School Curriculum*, 65 J. Legal Educ. 121 \(2015\)](#) (examining the effect of leg-reg courses on upper-level offerings in legislation and administrative law). The exercise describe in this article is not limited to “leg-reg” courses, but instead can be used in any course that has a regulatory component.

³ [John F. Manning and Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. Legal Educ. 45, 45 \(2015\).](#)

⁴ [James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?* 65 J. Legal Educ. 3 \(2015\).](#)

⁵ Manning and Stephenson, *supra* note 3 at 69.

⁶ *Id.*

⁷ *Id.*

⁸ [Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 Wash. U. J.L. & Pol’y 11, 49-55 \(2003\)](#) (describing a seminar in environmental advocacy, which includes an assignment where students draft an administrative comment); see also [Michael Robinson-Dorn, *Teaching Environmental Law in the Era of Climate Change: A Few Whats, Whys, and Hows*, 82 Wash. L. Rev. 619, 639 \(2007\)](#) (describing the use of case studies and simulations such as drafting administrative comments as a way to integrate doctrine and skills in an environmental law course).

⁹ Elizabeth Mullin, *The Art of Commenting: How to Influence Environmental Decisionmaking With Effective Comments*,

“[L]earning about statutes, regulations, and administrative law is not always ‘intuitive or accessible’ for students.”

has been written about instructing law students on the drafting of administrative comments. As this article explains, the e-comment exercise offers numerous benefits to the students who complete this assignment and the professors who teach it.

Part I: Background

I assigned the e-commenting exercise described in this article in my Environmental Law course. I primarily teach Legal Research and Writing (LRW) and was asked to teach Environmental Law when the need arose. The Dean recognized my scholarly interests in environmental law, and I was excited to try my hand at an upper-level “podium” course. As I prepared for Environmental Law, I thought about ways to integrate a writing exercise into the course. At the same time, I was working on an article that included a discussion on the Food Safety Modernization Act (FSMA). FSMA was overhauled 2010 and, as a result, the Food and Drug Administration (FDA) was in the process of promulgating several new rules. Some of these rules were controversial, such as “Standards for growing, harvesting, packing, and holding of produce,” which had onerous water-testing, equipment, and record keeping requirements.¹⁰ In 2013, many farming organizations were soliciting their members to “comment” on these new rules and I was one of many who received emails asking me to tell the FDA, “Let a Farm Be a Farm.” This got me thinking about public participation in the notice-and-comment process and how comments influence the outcome of a rule. If a proposed rule needs to be modified or changed, how can a comment “convince” the reader to make the necessary changes? The rulemaking process is an essential part of environmental law and I thought having students comment on a proposed environmental rule might be a great way to integrate the substance of what they were learning with a writing exercise. And so the e-commenting exercise was born.

Environmental Law Institute, 2d Edition (2013); see also http://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf

¹⁰ 78 Fed. Reg. 3503 (Jan. 16, 2013) (Laurie J. Beyranevand, *Balancing Food Safety and Burdens on Small Farms*, NAT. RESOURCES & ENV'T, Fall 2013, at 17.

E-Government Act, E-Rulemaking, and E-Commenting

E-commenting¹¹ is part of e-rulemaking,¹² which is a product of the E-Government Act of 2002.¹³ With the E-Government Act of 2002, the federal government began to use information technologies to make information available to the public online, but also to perform processes that required public participation, such as the notice-and-comment process.¹⁴ E-commenting is much like traditional paper-based commenting that occurs during the notice-and-comment period except that the e-comment is written and submitted online rather than written on paper and submitted through a mail carrier (or “snail mail”).

As part of the E-Government Act of 2002, federal agencies were required to publish regulatory dockets online and to accept electronically-submitted public comments.¹⁵ Regulations.gov is the mechanism designed to achieve this requirement. Launched in 2003, regulations.gov operates “to provide public users

¹¹ E-commenting is also common term used by legal writing professors who provide written feedback online. For purposes of this article, e-commenting refers to comments to a proposed administrative rule that are submitted online using www.regulations.gov.

¹² E-rulemaking is “the use of electronic media by regulatory agencies.” Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 Mich. J. Envtl. & Admin. L. 1, 7 (2012); see also Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 Admin. L. Rev. 893, 895 (2011) (defining e-rulemaking as “using web technologies before or during the APA’s informal rulemaking process, i.e., notice-and-comment rulemaking under 5 U.S.C. § 553. This includes many types of activities, such as: posting notices of proposed and final rulemakings; sharing supporting materials; accepting public comments; managing the rulemaking record in electronic dockets; and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.”).

¹³ This act is codified in scattered sections of title 44 of the United States Code.

¹⁴ See Beth S. Noveck & David R. Johnson, *A Complex(Ity) Strategy for Breaking the Logjam*, 17 N.Y.U. ENVTL. L.J. 170, 178-79 (2008) (explaining that with the E-Government Act of 2002, “Congress legislated “e-rulemaking” to put the APA public comment process online and “improve the 179 quality and use of Federal information to strengthen decisionmaking” (quoting E-Government Act of 2002, 44 U.S.C. § 3501(4) (2000)).

¹⁵ Coglianese, *supra* note 12 at 8.

“The rulemaking process is an essential part of environmental law and I thought having students comment on a proposed environmental rule might be a great way to integrate the substance of what they were learning with a writing exercise.”

access to federal regulatory content.”¹⁶ As the website explains, regulations.gov allows the public to: “search publicly available regulatory materials, e.g., posted public comments, supporting analyses, FR notices, and rules; submit a comment on a regulation or on another comment; download agency regulatory materials as an excel file”; and “sign up for email alerts about specific regulations.”¹⁷ Thirty-nine agencies participate in the governance of the eRulemaking program and post the comments they receive online.¹⁸ Another 300 agencies’ rules and regulations are posted to regulations.gov, but because these agencies are “nonparticipating” agencies, the submitted comments are not visible through regulations.gov.¹⁹ At the time of this article, over 2,000 notices and proposed rules were available for comment.²⁰

A variety of documents can be found on regulations.gov including: proposed rules, rules, and notices from the Federal Register.²¹ Comments associated with the proposed rules and notices can also appear on the site so that the public—and students—can view what others have written in response to a proposed rule or notice.²² Over the years, regulation.gov has been modified to improve its management, functionality, and design.²³ Introducing students to this website and its contents is a fairly straightforward task, and students generally welcome the opportunity to be online during class.

Part II: The E-Comment Exercise

In the e-comment exercise, the professor can pre-select proposed rules from regulations.gov for students to comment on or the professor

could have students choose a rule that interests them. The first time I ran this exercise, I had students draft a comment letter on the proposed change to the definition of “navigable waters of the United States” under the Clean Water Act (WOTUS).²⁴ The proposed rule was in response to the Supreme Court’s interpretation of this definition, which led to some confusion among lower courts.²⁵ Because my students read the Supreme Court decisions interpreting this phrase, the proposed definition change was particularly timely and relevant to the class.

The in-class component of this exercise includes covering the substantive law behind the rule. For my example, this included reading and discussing the Supreme Court decisions in their textbook. I also discussed the proposed rule with students, as well. Proposed changes can be significant—for example, the WOTUS rule was 88 pages²⁶—so I wanted to identify specific portions of the rule for the exercise. Because I chose a live rule (or a proposed rule where comments are still being accepted), I also found newspaper articles, blog posts, bar journal articles, and other commentary on the rule. I was able to locate an article in TRENDS, the ABA Section of Environment, Energy, and Resources Newsletter, on the proposed WOTUS change.²⁷ This further illustrated for students the timeliness of the exercise and the legal community’s interest in this issue. Not all proposed

²⁴ The proposed rule was jointly announced in March 24, 2014 by the EPA and U.S. Army Corp of Engineers.

²⁵ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). Much of the confusion stems from *Rapanos*, which was decided 4-1-4, with no individual opinion (or test for determining what constitutes a navigable water) acquiring a majority. See *Kristen Clark, Navigating Through the Confusion Left in the Wake of Rapanos: Why A Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act Is Necessary*, 39 Wm. & Mary Envtl. L. & Pol’y Rev. 295, 307 (2014) (describing the circuit split that has emerged in light of *Rapanos*). The EPA and Army Corps tried to eliminate this confusion with rulemaking and guidance in 2003, 2008, and 2011. See *id.* at 308-309.

²⁶ Federal Register / Vol. 79, No. 76 / Monday, April 21, 2014 / Proposed Rules 22188

²⁷ W. Blaine Early, III, *Waters, waters everywhere: Does the proposed definition of wasters of the United States expand the Clean Water Act’s Reach?* TRENDS (November/December 2014)

¹⁶ <http://www.regulations.gov/#!aboutProgram>

¹⁷ *Id.*

¹⁸ <http://www.regulations.gov/#!aboutPartners>

¹⁹ *Id.*

²⁰ <http://www.regulations.gov/#!home>

²¹ <http://www.regulations.gov/#!help>

²² *Id.*

²³ See Coglianese *supra* note 12 at 9.

rules are this involved, so in the future it might be interesting to find a shorter and less controversial rule to show students that some rulemakings are straightforward and noncontroversial.

In addition to discussing the substantive law of the rule, I wanted to look at comments written in response and to discuss the components of a good comment letter. Like all written documents, style, substance, and organization are important considerations. Students should understand that the comment is a formal document, even though many comments the students might review are informally written. The student-writer should use a concise writing style that is grammatically correct and error free. The comment is also a persuasive document, so the student-writer should use a persuasive style.²⁸ It is also legal document, so the student-writer should state her position up front, use the law or data and other examples to support her position, state this law or data before engaging in application or analysis of the law and data, and provide citations to those laws and data. The student-writer should exhibit professionalism in her writing and rather than just pointing out deficiencies with the proposed rule, the student-writer should acknowledge the agency and its efforts and propose solutions or amendments. I devised a rubric or checklist for my students, similar to the one at the end of this article, as a reference them as they complete their assignment.

The writing aspect of the assignment took place outside of class. The students chose a stakeholder affected by this rule and drafted a three to four page letter supporting or opposing the proposed rule. Students had a few weeks to complete the assignment. I did not review any drafts, but the exercise could be designed such that students receive written feedback before submitting the final assignment for a grade. The students submitted the letter to me and could also submit the letter to the Environmental Protection Agency via the regulations.gov website if they chose to. On the website, students

could read comments made by others, as well as, track the status of the proposed rule.²⁹

A. Transferring Skills: Persuasive Writing 2.0

The primary reason I like this exercise is that it provides an opportunity for students to transfer the persuasive writing skills acquired during their first year legal writing course in a new context.³⁰ While learning theorists have studied the concept of transfer for quite some time, transfer has only recently made its way into discussions on legal education.³¹ Transfer theory is quite complex with different “types” and “hierarchies,”³² but for purposes of this article, it is easiest to think of transfer as “using information and skills that you learned in one context in another context.”³³ The transfer that I was hoping to see take place in this exercise was the use of logos, pathos, and ethos, commonly taught in the first year writing course for brief writing, in the comment that is submitted to an agency. But as Professor Tonya Kowalski has noted, the “problem of transfer is one of changing contexts.”³⁴ Small changes in context (changing

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²⁹ The ability to read other comments could lead to some issues with plagiarism. I am not sure how to address this except to tell students that they are prohibited from reading comments on the proposed rule until after their comment is submitted. This is also why having an in-class example with effective comments is so important. Students can be encouraged to use these comments as samples.

³⁰ Studies show that students struggle with transferring skills, especially in the clinic setting. “Despite receiving rigorous training in doctrinal law, formal analysis, writing, and oral presentation in their first three semesters of law school, clinic students often struggle to “transfer” much of that learning to their clinic work.” See [Shaun Archer, James P. Eyster, James J. Kelly, Jr., Tonya Kowalski, Colleen F. & Shanahan, *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. Legal Educ. 258, 269 \(2014\)](#). “[T]ransfer theory addresses how to help learners connect prior learning to new contexts.” [Tonya Kowalski, *Toward A Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 Clinical L. Rev. 285, 291 \(2010\)](#).

³¹ In 2010, Professor Tonya Kowalski wrote the first piece of legal scholarship to provide a “comprehensive overview of transfer theory.” See [Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 Seattle U. L. Rev. 51, 59 \(2010\)](#). Professor Kowalski provides for a summary of articles that mention transfer as a concept in law school pedagogy. *Id.* at 53.

³² *Id.* at 61.

³³ Megan McAlpin, *Transferring Writing Skills from Law School to Law Practice Ready to Write*, OR. ST. B. BULL., October 2015, at 13.

³⁴ Shaun Archer et. al., *supra* note 30 at 272 (2014).

²⁸ See *infra* Transferring Skills section for more on this topic; see also Sarah J. Morath, *Standout from the Crowd: Drafting Persuasive Comments in an Era of “Notice-and-Spam”* (in progress).

from a brief to a comment letter, for example) can create a sense of inapplicability of a skill.³⁵

Because transferring knowledge from one class and context to another is not always easy, students completing the e-comment exercise may need a refresher on persuasive writing.³⁶ To aid in transfer, learning theorists suggest generalizing the problem to broaden its context and making direct references to past training.³⁷ Professor Kowlaski describes this as “cueing students to ‘reach back’ to prior learning.”³⁸

I begin by describing the similarities and differences between comments on proposed rules and appellate briefs. While the goals of each are different, both are intended to be persuasive legal arguments. The goal of an appellate brief is to explain why a lower court made an error in its judgment or was correct in its judgment. The goal of the notice-and-comment procedure is to provide for public participation in the crafting of a legislative rule or regulation.³⁹ This process ensures that an agency has all the facts and information, and is aware of possible alternatives, before a rule goes into effect. Although the goals are different, the persuasive tone is the same.⁴⁰ Both documents are written pieces of advocacy. A member of the public could write a comment in support of a proposed rule (similar to the attorney who writes that the judgment should be affirmed), or could write in opposition to a proposed rule (similar to the attorney who writes that the judgment should be reversed). In

both, the writer is writing to persuade the reader that her argument is sound. To further illustrate these similarities, I show my students the following quote from an attorney at Foley and Lardner.

If you are seeking substantial changes or a major turnaround in the [proposed rule], *make your comments look and sound like a legal brief (more on style and tone later). The more your comments look like you are seriously geared up for a legal challenge, the more seriously agency personnel will take your comments.* In this regard, carefully consider the case law on judicial review of agency rules, and prepare to attack any element of the proposal where there may be weakness. This would include arguments regarding statutory authority and interpretation as well as adherence to all prescribed procedures.⁴¹

As an advocacy document, both the brief and the comment will be more effective if the student-writer employs traditional rhetorical devices of persuasion: logos, ethos, and pathos.⁴² As a legal writing professor, my students have written an appellate brief in their second semester and so I can remind Environmental Law students of these concepts. We spend time looking at comments from other rules and examine what is and is not effective about the comment. Last year I used the FDA’s proposed change to the nutrition label that was announced in 2014. One proposed change involved separating out “added sugars” from “sugars” on the label, so that “added sugars” would be accounted for independently from “sugars.” As a class we looked at both effective and ineffective comments, paying particular attention to whether the comment was persuasive and whether the writer had demonstrated an effective use of logos, ethos, and pathos. An example of an ineffective comment might be:

This rule is fabulous! It will help the general public in recognizing what they are actually eating rather than what they should be eating. I

³⁵ *Id.*

³⁶ This is called “backward-reaching retrieval.” *Id.* at 271.

³⁷ *Id.*

³⁸ *Id.* at 272.

³⁹ 5 U.S.C. 553 (b) & (c) (2012); William Funk, *When Is A “Rule” A Regulation? Marking A Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 Admin. L. Rev. 659 (2002) (stating that “legislative rules are subject to the notice-and-comment rulemaking requirements of 5 U.S.C. 553”). Professor Funk also explains that the terms rule and regulation are generally considered synonymous. See *id.* at n. 7.

⁴⁰ “If, for example, the writer’s purpose in writing a brief is to persuade the court, then under this criterion, the brief is well written if in fact it persuades the intended audience (i.e., the court).” Mark K. Osbeck, *What Is “Good Legal Writing” and Why Does It Matter?*, 4 Drexel L. Rev. 417, 423 (2012).

⁴¹ Richard G. Stoll, *Effective Written Comments in Informal Rulemaking*, Admin. & Reg. L. News, at 15, 15-16 (Summer 2007) (emphasis added).

⁴² For an expanded discussion of the use of these rhetorical devices in administrative comments see Sarah J. Morath, *Standout from the Crowd: Drafting Persuasive Comments in an Era of “Notice and Spam”* (in progress).

“The goal of an appellate brief is to explain why a lower court made an error in its judgment or was correct in its judgment. The goal of the notice-and-comment procedure is to provide for public participation in the crafting of a legislative rule or regulation.”

fully support this change to the nutrition labels. As a nutritional professional, I feel that this is certainly a step in the right direction in relation to controlling America's obesity epidemic.⁴³

At first, this might seem like an effective comment—a health professional, with knowledge of nutrition concepts, stating his or her support for the change. But is it persuasive? Do we trust the writer's statement and if we trust it, is it clear why?

The lack of ethos in the above example become apparent when compared to the following introduction to a comment:

Since its establishment in 2008, the Consortium has developed, supported, and engaged in collaborative educational and professional opportunities for students and faculty at the University of California San Francisco and the University of California Hastings College of the Law. The mission of the Consortium is to support interdisciplinary collaboration on a wide variety of subjects at the intersections of law, science, and health policy. The Consortium concentrates on three broad areas: education, research, and clinical training and service. We submit these comments as part of our clinical service mission, to share the expertise on our campuses in the pursuit of improved individual and public health.

The Consortium recognizes the magnitude and complexity of the task delegated to FDA and commends FDA for its efforts to update these regulations with consideration of 21st century public health problems related to the American diet, including the crucial problem of the impact of added sugars on obesity and other chronic diseases. Nevertheless, the proposed rule can be strengthened to better accommodate the realities of food consumption by our citizens.⁴⁴

The writers of this comment instilled a sense of trust or ethos in the reader by clearly stating their expertise on this issue, by thanking the agency

for its efforts, and by making suggestions to “strengthen,” rather than redo the work that has already been completed. The ineffectiveness of the first comment becomes even more apparent when students view a comment where the writer has stated her qualifications, has demonstrated familiarity with the proposed rule by noting what the agency has stated and what others have stated, or has included citation to data or scientific reports.

Once students have viewed both effective and ineffective comments and have identified logos, pathos, and ethos, in each, they are better equipped to effectively transfer these skills when drafting their own comment on a proposed rule.⁴⁵ Students who practice transfer during law school will be better prepared to transfer what they have learned in law school to practice and this is one exercise that allows for this opportunity in the context of persuasive writing.

B. Learning a New Concept in a Familiar Format: Rulemaking Online

The second reason I like this exercise is because it exposes students to the rulemaking process in a fun way. Although Administrative Law courses have been a staple in upper level curriculum, many law schools now include some kind of required public law or leg-reg course in the first year.⁴⁶ Much of this is a result of curricular reform in law schools, efforts to make students “practice ready,” and the desire students to more than just the judge-centered perspective.⁴⁷ As one professor remarked, a “litigation-focused first

“Students who practice transfer during law school will be better prepared to transfer what they have learned in law school to practice and this is one exercise that allows for this opportunity in the context of persuasive writing.”

⁴⁵ While the focus of my exercise is the transfer of persuasive writing skills, we also discuss other skills students should be comfortable with transferring like organizational structure. For example, students should state their position and desired outcome at the beginning. Do you agree with the lower court decision or the proposed rule? What are you asking the court (in the brief) or the agency (in the comment letter) to do? Students should also be reminded of the “golden rule:” explain the law before you apply it.

⁴⁶ Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 *Tex. L. Rev.* 819, 837 (2008) (briefly describing the introduction of public law courses in legal education in light of the Carnegie Report); see also Richard B. Stewart, *On the “Administrative and Regulatory State” Course at N.Y.U. Law*, 7 *N.Y.U. J. Legis. & Pub. Pol’y* 39 (2004) (describing a new course at New York University on the administrative and regulator state).

⁴⁷ See *supra* notes 1-6. For a good discussion of first year legislation and regulation courses see Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 *J. Legal Educ.* 166, 170 (2008).

⁴³ Comment on file with author.

⁴⁴ Comment on file with author.

year curriculum ... disadvantages the many law school graduates who will ultimately be engaged in largely administrative, political, regulatory, ADR-oriented, or transactional work in their professional lives.⁴⁸ When I decided to incorporate the comment exercise in an upper-level Environmental Law course, one of my goals was to expose students to administrative law concepts like notice-and-comment rulemaking,⁴⁹ and the regulatory state.⁵⁰

I also thought students would find the online aspect of this exercise “fun,” or at least not as onerous as writing an appellate brief! Most of my students are Millennials or digital natives, which means they prefer reading things online rather than in print.⁵¹ They have a natural aptitude for technology because they grew up plugged in,⁵² which makes exploring regulations.gov an enjoyable, rather than tedious task.

C. Participating in the Process: E-Commenting

A final benefit of this exercise is the opportunity for students to engage in a legal process and have an impact on a legal outcome. Because students can submit their comment to the agency through regulations.gov, they feel involved in crafting an outcome on a real rule. They can follow the status of their rule as it makes its way through the notice-and-comment process.

⁴⁸ *Id.* An attorney at the U.S. Sentencing Commission has remarked “[l]aw school curricula, including the mandatory first-year curricula, ...needs to include less litigation-oriented courses and more business law, transactional, and regulatory courses.” See Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. Rev. 55, 85 (2012).

⁴⁹ Akron added a Legislative and Regulation Course in the fall of 2014, but that course does not include an exercise on commenting on a proposed regulation.

⁵⁰ One author has remarked that “most administrative lawyers” are “bound to mention the notice and comment rulemaking process” as “what characterizes the American regulatory state.” See Mariano-Florentino Cuéllar, *Notice, Comment, and the Regulatorystate: A Case Study from the Usa Patriot Act*, Admin. & Reg. L. News, Summer 2003, at 3.

⁵¹ Kari Mercer Dalton, *Bridging the Digital Divide and Guiding the Millennial Generation’s Research and Analysis*, 18 Barry L. Rev. 167, 169 (2012). This article is a great resource for teaching legal research and analysis to Millennials or digital natives.

⁵² See *id.*

In addition, this exercise allows me to engage students beyond the lectern and thus is a form of active learning.⁵³ In my case, this active learning exercise was a more effective way for students to absorb the law surrounding the WOTUS rule and allowed students to practice the skills needed for writing persuasive administrative comments. Furthermore, because students advocate on behalf of a stakeholder of their choice, this exercise is a type of simulation⁵⁴ or role-playing exercise. In role-playing activities students assume the role of another person.⁵⁵ Rules often affect a number of stakeholders including advocacy groups, landowners, residents, trade groups, and businesses. The exercise can be designed so that students choose the stakeholder they wish to represent. Legal educators have documented the benefits of role-playing exercises and role-playing exercises are considered effective ways to teach doctrine, skills, and values.⁵⁶ As one group of legal scholars noted, “[p]lay pedagogy engages and energizes the class, enhances learning, and enables us as teachers to more easily assess student learning.”⁵⁷

⁵³ A working definition of active learning is “[t]he process of having students engage in some activity that forces them to reflect upon ideas and how they are using those ideas. Requiring students to regularly assess their own degree of understanding and skill at handling concepts or problems in a particular discipline. The attainment of knowledge by participating or contributing. The process of keeping students mentally, and often physically, active in their learning through activities that involve them in gathering information, thinking, and problem solving.” See Kate E. Bloch, *Cognition and Star Trek: Learning and Legal Education*, 42 J. Marshall L. Rev. 959, 969 (2009).

⁵⁴ The ABA define a simulation course as an “experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.” ABA Standard 304(A)

⁵⁵ http://www.streetlaw.org/en/landmark/teaching_strategies/role_play

⁵⁶ Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. Legal Educ. 568, 578 (1995); see also James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 Gonz. L. Rev. 389, 403 (1997) (“Active learning by simulation, role play, and similar methods is beneficial because: 1) setting goals for students encourages student learning; 2) students like to participate, and they will learn in order to be able to participate; and 3) active participation and identification with a problem or role encourages relevant study.”)

⁵⁷ Bryan Adamson, Lisa Brodoff, Marilyn Berger, Anne Enquist, Paula Lustbader, & John B. Mitchell, *Can the Professor Come Out and Play?—Scholarship, Teaching, and Theories of Play*, 58 J. Legal Educ. 481, 497 (2008).

“[B]ecause students advocate on behalf of a stakeholder of their choice, this exercise is a type of simulation or role-playing exercise.”

Role-playing can also encourage students to consider various perspectives and further helps students develop a sense of professional identity. For example, the student may confront an ethical dilemma (environmental problems are full of ethical dilemmas) and be charged with advocating for a position she might not agree with on a personal level.⁵⁸ Students can reflect on these issues and consider how the resolution is consistent with her professional identity.⁵⁹

D. Adaptable and Expandable

A final benefit of this exercise is a benefit the professor or school reaps: the exercise's adaptability and expandability. While I used this exercise in my Environmental Law course, it could be adapted for any public law course, clinic, or simulation course that has a regulatory component. It could also be used in an advanced advocacy course. In addition, the exercise could be expanded to include an oral component, such as speaking at a real or mock public meeting or hearing. Professors could invite administrative lawyers or judges to meet with students. Or students can work with each other in either a group or in peer review setting to complete the "see one, do one, teach one" trilogy of learning.⁶⁰

Part III: Conclusion

With leg-reg courses becoming ever more popular, legal educators should look for creative ways to engage students in its most likely an unfamiliar aspect of the law. The e-comment exercise is up

⁵⁸ Jan L. Jacobowitz, *Cultivating Professional Identity & Creating Community: A Tale of Two Innovations*, 36 U. Ark. Little Rock L. Rev. 319, 324 (2014) (suggesting that to teach professional identity in law school, professors "need to create 'situations' in which [] students can be confronted with ethical questions and reflect on the decisions they make, and be guided by [professprs] as they form their own professional identities").

⁵⁹ "Professional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values. A lawyer with an ethical professional identity is able to exercise practical wisdom and to live a life of satisfaction and well-being." Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. St. Thomas L.J. 195, 201-02 (2012).

⁶⁰ See generally Christine N. Coughlin et. al., *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum*, 26 Ga. St. U. L. Rev. 361 (2010) (describing the see one (reviewing samples), do one (apply theory and skill), and teach one (demonstrating mastery)).

to the task. With an unending supply of proposed rules to choose from, the exercise is always timely and can be easily tied to substantive areas of the law. As a short writing exercise, the e-comment exercise provides additional opportunity for students to practice persuasive writing skills acquired during the first year of law school, without overwhelming professor performing the review!

Checklist E-Comment Exercise

Organization

- Has the writer started with information about the writer and who the writer represents?
- Has the writer stated her position up front?
- Has the writer described the law or data before explaining her argument?
- Has the writer ended by restating her position?
- Has the writer concluded with a term of appreciation ("thank you") and signature?

Style

- Has the writer used a clean writing style (concise, grammatically correct, error free)?
- Has the writer used a persuasive tone through the devises of logos, ethos, and pathos?
- Has the writer made the reader *think* the writer is correct through:
 - Clearly identifying the problem (legal, factual, procedural)
 - Using empirical data, statistics, or financial information
 - Including citations to law, statutes, and other legal (or non-legal) authorities
 - Suggesting specific language to use in the rule
 - Offering alternatives or proposing solutions
 - Using analogies where appropriate
- Has the writer made the reader *trust* the writer is correct through:
 - Establishing authority to comment (describe experience; describe organization or industry)

“With an unending supply of proposed rules to choose from, the exercise is always timely and can be easily tied to substantive areas of the law.”

- Showing that you performed a thorough review of the draft rule and prior comments
 - Using good writing mechanics and presenting a polished document
 - Using an appreciative, civil, and respectful tone
 - Has the writer made the reader *feel* the writer is correct through:
 - Specific examples to illustrate concerns
 - Supporting information (a compelling study or article)
 - Vivid narratives (personal stories, firsthand accounts)
- Format**
- Has the writer used heading for long comments?
 - Has the writer formatted the information in a manner similar to a letter?
 - Has the writer included the docket number for the proposed rule?

Micro Essay: Practice Ready

Help Wanted

Have you ever seen a Help Wanted advertisement like this?

For Hire: Law firm seeks newly graduated and barred attorney to handle highly complex legal matters with zero to minimal supervision.

Eek! I never have and I hope I never will. Although self-reliance has always been demanded of lawyers, confusing the term “practice ready” with omnicompetence is a mistake. Starting out, attorneys should show up for their first day of work being not only self-reliant, but also knowing when to hold up their own Help Wanted signs. Asking for help demonstrates credibility, an awareness of limitations, and a desire to learn.

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