BRUTAL CHOICES IN CURRICULAR DESIGN...

WHY I DON’T GIVE A RESEARCH EXAM

BY JUDITH ROSENBAUM

Judith Rosenbaum is a Clinical Associate Professor and the Director of Communication and Legal Reasoning at the Northwestern University School of Law in Chicago, Ill.

Most of us who teach legal research, whether as part of a stand-alone Legal Research course or as part of an integrated Legal Research and Writing course, would agree on the pedagogical goals we are trying to accomplish in our research training. We want students to learn that legal research is part of a process leading to oral or written analysis of legal rights and duties relevant to a client’s problem. Thus, we want students to learn about the types of primary authorities used in legal analysis: the range of finding tools that analyze the law or cite to primary authorities, or both; and the mechanics of using the various finding tools. Ultimately, but probably not until they understand the webbed relationship between authorities and finding tools, we want students to understand how to develop a research strategy so that regardless of the substantive area their issue involves, they will be able to research that issue with facility.

Legal research teachers would also probably agree that students do not remember nearly as much after completing our courses as we would like them to remember and that students and professors alike do not remember nearly as much as we would like them to remember.

1 I would like to thank Helene Shapo, who taught me just about everything I know about teaching Legal Research and Writing. Her insight and advice guide much of what I do in this field. I would also like to thank Mary Lawrence, and Mary Hotchkiss for their encouragement about my writing this article and their patience waiting for it. Last, but not at all the least, I would like to thank the creators of the research exams cited in this article. I hope you will take my comments in this article as an appropriate subject for professional debate. I am very grateful to you for your willingness to share your exams by publishing them in print and on the Internet.

2 The goal of research is to “find the relevant binding and persuasive primary authorities of law.” Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, Writing and Analysis in the Law 209 (4th ed. Found. Press 1999).

3 See Maureen Fitzgerald, What’s Wrong with Legal Research and Writing? Problems and Solutions, 88 Law Libr. J. 247, 257 (1996) (“[T]he focus of legal research and writing should be on the process of legal research and writing, which teaches students when particular sources are needed, where to look for them, and how to use them.”).

4 Susan S. Katcher, Reflections on Teaching Legal Research in Expert Views on Improving the Quality of Legal Research Instruction in the United States 46, 47 (West 1992) (suggesting that sources should be taught before introducing students to strategy).
even recent graduates often struggle putting what they do recall into practice in their jobs. Most of us would agree as well that we need to use good assessment and feedback tools in our teaching to motivate our students and to stimulate learning. We would disagree, however, on why they don’t retain what they learn in our classes as well as we would like and also on what constitutes a good assessment and feedback tool.

Although legal research assessment tools have been called by a myriad of different names, all of them seem to fall into one of two categories. These assessment tools are either exercises designed to guide students in the various legal research resources or exams designed to test what they have learned at an earlier point in the year. Of course within the categories of exercises and exams, there are further subdivisions. For example, there are bibliographic exercises, process-oriented exercises, and, increasingly, exercises that try to blend the best of both the bibliographic and the process model. With respect to exams, there are objective exams, using some combination of multiple-choice, true-false, or short-answer questions, various kinds of practical application exams, and take-home exams, presumably administered in a manner similar to the bar exam performance tests. The legal education literature is filled with articles debating the merits of bibliographic or process-oriented exercises and suggesting ideas for improving on both. Strangely, though, there has been nothing written about the merits of giving a research exam. In
this article, I would like to open that debate by explaining why I do not give a research exam. First, however, I want to make clear that when I began working on this article I intended only to explain why I do not give an objective research exam with multiple-choice, true-false, and short-answer questions. The exams described by Brian Huddleston and Mary Brandt Jensen, where a librarian trails a student through a research project either in person or by reading the student’s written narrative of the student’s thought processes while researching a particular problem, do not cause me the same concerns that an objective exam raises and are not part of the scope of this article.

The type of exam I am addressing in this article is the in-class exam taken outside the law library where there are correct and incorrect answers and the ability to identify correct answers depends on memorizing details about research sources. For example, the following extract illustrates how students may be tested on memorized material in a multiple-choice format:

I. The following are legal publications: 1. C.F.R.; 2. Restatement (Second) of Torts; 3. United States Reports; 4. Supreme Court Reporter; 5. General Digest. Which of these should always be regarded as primary sources?
   A. All of the above.
   B. 1 and 3.
   C. 1, 2, 3, and 4.
   x D. 1, 3, and 4.
   E. 3 and 4.

   A. 3 and 5.
   x B. 1, 3, and 5.
   C. 1, 2, and 5.
   D. 1 and 4.
   E. 1 and 5.

In the following excerpt, the questions are asked in a true-false format:

6. True or False: You can find a case using a digest if you know only the docket number. [3 points]
7. True or False: United States Supreme Court cases are always binding on each state supreme court. [3 points]

The following questions are asked in the short-answer format:

- Which legal periodical index would you use to find references to articles written prior to 1980? [2 points]
- It is extremely important that legal material is kept current. List two of the ways law books are updated. [4 points]
- What are three things contained in an annotated code that are not contained in an unannotated code? Please be specific. [6 points]

Some objective test questions use the “matching” format, which is somewhat of a cross between multiple choice and short answer. Following is an example of this format:

Match These ... To These

A. American Law Reports (ALR)
   B. A system of arranging, by subject, the headnotes of cases.
C. Digest
   D. The same case in a different reporter.
D. Law Reviews or Law Journals
   E. The first appearance of a decision issued by a court.
E. Official Reports
   F. Statutes enacted by a legislature, arranged chronologically.
F. Parallel Citation
   G. The public, general, and permanent statutes of a jurisdiction in a fixed subject or topical arrangement.
G. Restatements
   H. The opinions of a given court published by the court-designated publisher.
H. Session Laws

(continued on next page)

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18 Huddleston, supra n. 13.
19 Jensen, supra n. 14.
20 Lynch, supra n. 16, at 438, n. 42.
21 Darby Dickerson, Stetson College of Law, Faculty and Courses, Research and Writing I Exercises, Fall 1999 Exam <www.law.stetson.edu/darby/r&w1.htm> (last updated Aug. 19, 2002).
22 Staheli, supra n. 13, at 75
The problem with all of these test questions, regardless of whether they are asked in multiple-choice, true-false, short-answer, or matching format, is that they teach memorization. While it certainly is true that knowledge acquisition is a necessary foundation for learning, because raw facts have to be absorbed, and often memorized, before higher forms of cognitive activity can take place,24 the essence of legal research is a search for understanding25 in which finding and thinking26 continually cross-fertilize each other and these mental processes cannot be emulated by an objective test.

Some research professors have recognized that knowing the answer to a question such as how many series of ALR® are published does not really demonstrate a student's mastery of legal research ability, because these questions do not involve any analysis. These professors have attempted to devise analytical questions by building a series of multiple-choice questions based on a short hypothetical fact pattern. The following is an example of this type of exam question:

Questions 17–20 are based on the following paragraph.

Your firm has been retained to represent Britney Moore. Ms. Moore recently had the name “Justin” tattooed around her navel by a tattoo artist in Nevada. Apparently, the tattoo dye has caused inflammation and infection of her navel. You attended a meeting with a senior partner at your firm and Ms. Moore to learn more about the facts of the case and her injuries.

17. At the conclusion of the meeting, the senior partner asked you to determine potential causes of action to be pursued in Nevada and to begin researching the law immediately. What are your next steps?

A. Go to the library and begin to research Nevada law on body tattoos.
B. Go online and pull up all law review articles from Nevada journals addressing body tattoos and tattoo dye.
C. Analyze the facts and formulate a preliminary research question.
D. Go to the library and find a secondary source discussing body tattoos.
E. Make a list of all sources of law.

18. The senior partner believes that there is a statute in Nevada that regulates tattoo artists. He has asked you to research this potential statutory claim. Which of the following would be the most effective way to begin your research?

A. Find the Nevada Revised Statutes because it will provide the governing statutory language.
B. Find the Nevada Revised Statutes Annotated, either in the statute books or on Lexis or Westlaw, because the annotated statutes will provide both the governing statutory
Thus, a good researcher must place in context—in the context of a client’s problem for which controlling law must be located and analyzed. Consequently, a good researcher must:

- understand the relevant facts;
- think about legal concepts that can serve as search terms;
- go to research sources, whether in print form or online, to test out the utility of the search terms;
- evaluate the utility of the sources and information discovered and adjust the search terms if necessary;
- read explanations in secondary authority of unfamiliar areas of the law governing the issue once the relevant search terms are identified;
- read and analyze the primary authority to determine how it relates to the client’s problem;
- evaluate the usefulness of the material discovered and determine whether there are gaps that need to be filled, either by more research or by deeper analysis of the sources;
- conduct additional “spot” research when necessary or appropriate to fill in the holes;
- know when to follow a research trail to the end, when to start a new trail, and when to stop.

These tasks, which are essential to a good research strategy, are part of a recursive process, in which the researcher understands the relationship among tools, authorities, and analysis and constantly fine-tunes and adjusts the steps of the research process based on reading what he or she discovers and analyzing that material in light of the oral or written report he or she will make to the client or to a senior attorney. The problem with the objective research exam is that it is one-dimensional. The answer is there if the questions are multiple-choice, true-false, or matching format, or the answer can be recalled from memory if the questions are short answer. This type of exam does not mirror in any way the trial-and-error aspects of actual research. It fails to capture the internal feedback loop that comes from reading and analyzing the various sources consulted. It doesn’t bring up the decision points where the researcher reaches a fork in the road, such as what to do when he or she cannot find a controlling case or statute, and must decide which way to turn. The objective exam omits the critical role that timing often plays in research, where an answer must be found by a certain date in order to be ready for a client meeting or to satisfy a court deadline. It is missing the imagination and creativity, and even a little bit of the serendipity.

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28 Fitzgerald, supra n. 24, at 268. See also Seligmann, supra n. 15, at 185.
29 In practice, this involves listening to a client, reading documents, and talking to other people to get a complete picture of the problem. In our classes, the best we do to imitate this process is to enact a client interview to give our students a sense of how a lawyer synthesizes the facts. Sometimes, we simply give them a canned narrative of facts.
30 For example, sometimes the first step in research, perhaps reading a treatise, will lead to a citation to a relevant case in the controlling jurisdiction. A good researcher might go to that case, read it, decide it is helpful, and go to either a citator or a digest to find similar cases from the jurisdiction. This is what I call following a research trail to its end. Once the end of the trail is reached, the researcher must decide whether to start a new trail, such as looking at another treatise, or perhaps American Law Reports or a legal periodical or whether he or she has enough material from the first trail to begin preliminary analysis of the problem.
31 Christina L. Kunz, Terminating Research, 2 Perspectives Teaching Legal Res. & Writing 2 (1993).
33 We all must have had at least one time or another, at least in print research, the experience of looking for what we need in one section of a book and accidentally happening upon another section that turns out to be even more useful than what we were originally trying to find.

The objective research exam seems to me to put the cart before the horse, or perhaps more accurately, focuses on the cart and leaves the horse in the barn.”

“... is a regular feature of Perspectives, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other “brutal choices” that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611, phone: (312) 503-8454, fax: (312) 503-2035.

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that research actually involves. In short, the objective exam is missing the tangible, physical interaction between thinking and doing that constitutes the essence of good legal research.

Having said all this, and having taken the time to review at least some of the research exams that our profession is using—and, of course, having been a lawyer for 26 years—I can see the other side. A lot of time and thought has gone into the creation of these exams. Many of the questions are excellent. Moreover, these types of questions have a purpose since learning theory tells us that knowledge acquisition is the first step to moving from novice to expert and these objective questions force students to know the basics and give them the motivation (or prod, as the case may be) to commit the basics to memory so that they can go on to higher forms of learning such as “comprehension, application, analysis, synthesis, and evaluation.”

The objective research exam seems to me to put the cart before the horse, or perhaps more accurately, focuses on the cart and leaves the horse in the barn. It makes the answers to questions an end in themselves and not a means to an end. These questions would seem to make an excellent in-class assignment, maybe even a game that could be played in class where students work on the questions in teams and a prize is given to the team that garners the most points. But as an end-of-the-semester evaluative mechanism, these exams miss the point. The real proof of whether we have accomplished our pedagogical goals in teaching legal research is not whether our students can answer these objective questions, but, rather, whether they can harness together “finding and thinking.” or in other words whether they can get the horse out of the barn and in front of the cart.

34 Fitzgerald, supra n. 24, at 262.
35 Lynch, supra n. 16, at 426.
THE PROVERBIAL TREE FALLING IN THE LEGAL WRITING FOREST: ENSURING THAT STUDENTS RECEIVE AND READ OUR FEEDBACK ON THEIR FINAL ASSIGNMENTS

BY EMILY ZIMMERMAN

Emily Zimmerman is a Legal Writing Instructor at the Villanova University School of Law in Villanova, Penn. During the fall semester of 2002, she will teach Legal Writing at the School of Law of the City University of Hong Kong.

As legal writing professors, we spend hours of our time crafting our students' final assignments of the semester (typically, a memorandum in the first semester and an appellate brief in the second semester). Our students then spend hours of their time drafting, rewriting (we hope), and polishing these assignments—and we devote our time to helping our students understand and complete these assignments. We then spend hours reading, critiquing, and grading these assignments. Although our students are very interested in the final grades that their assignments receive, they are frequently less interested in our feedback on these assignments. In fact, students may not even pick up their final, graded assignments, full of our comments.

It is painfully ironic that the very assignments on which we and our students spend so much of our time are the assignments on which our students are most likely not to receive our feedback. For our students, failing to read our comments on their major assignments is a huge lost learning opportunity. For us, our students not reviewing our feedback on their major assignments is a huge lost teaching opportunity and a waste of all the time that we have spent writing comments. After all, we do not spend so much of our time writing comments—actively reading our students' writing and engaging in a written dialogue with the students regarding their papers—for the sheer joy of doing so. Obviously, we spend so much time commenting on our students' assignments because we believe that the students will actually read those comments and apply them to their future writing. Although individuals may debate whether an unheard tree falling in the forest still makes a sound, we know that unread comments on students' papers are as useful to our students as comments that have never been written. Therefore, what can we do to ensure that students read our comments on their final assignments?

I admit that I have harbored a not-entirely serious desire to hand out a one-item questionnaire to my students before I grade their papers. The questionnaire would ask the students whether they actually intend to read the comments that I write on their final assignments. Of course, I would assure the students that I would read and grade their papers with equal care, regardless of their answer to my questionnaire. I, however, would not spend hours writing comments on the papers of those students who had no intention of reading any of my comments.

In reality, I recognize that this questionnaire would serve neither my students nor myself. First, allowing students to opt out of receiving feedback defeats the whole purpose of providing legal analysis and writing instruction in the first place. Our role is not just to assign interesting and challenging memoranda and briefs to our students, but to provide guidance to our students with respect to the documents that they have created. Students should not be permitted to opt out of the process of learning legal analysis and writing, but rather should be given every chance to reap the benefits of this process.

Similarly, I suspect that I would be less effective in my reading and evaluation of students' writing if I was not also writing comments on that writing. Commenting on student writing makes me a more active reader. I am engaged in the text that I am reading because I have to read the text carefully to analyze its organization and content so that I can provide meaningful feedback to the students. Knowing that I have to assign a grade to a writing assignment also requires me to read actively, but writing comments as I read makes it impossible...
The Basics

The first step toward getting our students to review their papers is making sure that our students know that there is a reason that they should review their papers. The first step toward getting our students to review their papers is making sure that our students know that there is a reason that they should review their papers. In other words, we must tell our students that we will write comments on their papers and that these comments will help them as they continue their legal analysis and writing. In this respect, it is more likely that students will get their first-semester final assignments and review these assignments without much prompting from us. Students know that they will have additional assignments to write in the second semester of their legal analysis and writing course and, in many cases, students know that they will be graded by the same professor who graded their work first semester. Students, therefore, have an incentive to review their final first-semester assignment because it may provide them with insight as to what will be expected of them in the second semester.

It can be harder, however, to inspire students to review (or even retrieve) their final second-semester assignment. At my school, students cannot pick up their final assignment (an appellate brief) until their final grades have been released. By the time grades are released and the students can pick up their briefs, the first year of law school may seem like a distant memory to the students, who may then be deep in the throes of their first legal job and geographically distant from their law school.

Despite these difficulties, we can provide incentives for our students to care what we have written on their final assignments. First, we can lay the groundwork for students to want to get their papers back even before the papers are graded and ready to be retrieved by the students. When we introduce students to their assignments, we can explain that students frequently use their final writing assignments as writing samples, that we will give the students feedback on their final assignments, and that students can use this feedback to craft even better, more polished writing samples. We can also note that even those students who have no intention of revising their writing samples should represent their own work, not our editing prowess. However, our written comments can be made with an eye toward helping students improve their own work, as opposed to retyping their own work to incorporate our changes.
assignments after receiving our feedback might, at least, want to review our feedback before deciding whether to use their assignment or portions of it as a writing sample. In addition, we can explain that while the students' final assignment is the last assignment that they will have for their legal analysis and writing course, the assignment is by no means the last analytical legal writing assignment that the students will ever have. In fact, this final assignment represents only the beginning of the ongoing process of legal analysis and writing development in which the students will engage throughout their legal careers. Explaining to our students that we consider their final writing assignment to be part of the process of their legal analysis and writing education (and not merely an end in itself) and explaining that their final writing assignment will have future practical significance in their legal career can prime our students to retrieve their final assignment and review our comments.

Once students' assignments are ready to be retrieved, we can build on the foundation that we have laid during the semester. When the students' assignments are available, I send an e-mail message to my students notifying them that they may pick up their assignments. I tell my students what materials they will be receiving: the copy of their brief with my comments, the copy of their brief with their teaching assistant's comments, and a grade sheet that tells the students their grades for the graded second-semester assignments (the appellate brief and the oral argument on that brief) and their final grade for the course. I also encourage my students to pick up their briefs, noting that I have written extensive comments on the briefs, pertaining not only to the brief assignment but also to the students' legal writing generally. I remind my students that they may use these briefs as writing samples and may want to see the comments on the briefs before doing so. Finally, I encourage the students to contact me if they have any questions regarding their briefs.

This past semester (spring 2002), within two weeks of my initial e-mail message, 22 of my 38 students had picked up their briefs or e-mailed me and requested that I mail their briefs to them. In order to encourage the remaining students to retrieve their briefs, two weeks after my initial e-mail, I sent a follow-up e-mail message to the 16 students who had not yet picked up their briefs. This message told the students that their briefs were available to be retrieved and strongly encouraged the students to get their briefs and review the feedback on them. I also offered to mail the students' briefs to them if they were unable to come by school to pick them up. Sending this follow-up e-mail message reinforced the importance of the students' review of their briefs. In addition, this message made clear to the students that, although their briefs were available for them to pick up at Student Services and not my office, I knew who had picked up their briefs and who had not. Moreover, it gave the students an easier option for obtaining their briefs, while still requiring the students to take an active role in receiving them. Within less than 48 hours of sending the follow-up e-mail message, I received 10 e-mail messages from my students requesting that I mail their briefs to them. In addition, following my second e-mail message, one brief was retrieved by a student who did not contact me.

I am a firm believer that having students retrieve their final assignments is more than half the battle in getting students to review the comments on their assignments and, thus, benefit from the feedback. Students have a great incentive to obtain their assignments and review our comments at the end of the semester and over the summer. The assignments are fresh in the students' minds and the students may want additional feedback as they head into their summer jobs and prepare their application packages for second-year summer jobs. We should encourage students to pick up their final assignments as soon as they are available and make sure that our students know that we are available to answer questions about their assignments.

### Beyond the Basics

Even those students who retrieve their final assignments might not read or understand all of our comments. Beyond encouraging our students to read our feedback, we can pursue other options...
to make the feedback on our students’ final assignments a more integral part of their legal analysis and writing course.

The simplest option is to follow up with students at the beginning of second year. Specifically, we can e-mail students who have not yet picked up their assignments and, again, encourage them to do so. We can also e-mail those students who have retrieved their assignments and encourage them, now that they are back at school, to see us if they have any questions regarding our comments.

A more complicated option, but one with potentially high returns, is to incorporate a one-on-one conference regarding the final assignment into the curriculum. Our first instinct might be to want to meet with our students to review their final assignments at the end of their first year of law school. However, there are practical and administrative reasons why we might not be able to read, critique, and meet with students about their final assignments at this time. In the alternative, students could be required to have a conference with their legal writing professor to discuss their final assignment at the beginning of the second year of law school. In fact, as discussed below, these second-year conferences might be, in some respects, more advantageous than conferences at the end of the first year.

Ideally, second-year conferences would be mandatory for all students. Of course, if we are going to require second-year conferences, the issue of how to enforce this requirement then arises. One possibility would be to make participation in the conference a requirement for receiving credit for the first-year legal analysis and writing course. In other words, students would not officially receive credit for the course until they participated in the second-year conference. This scheme would most effectively render the conferences an integral, entrenched part of the legal analysis and writing course. In reality, it might be more practicable to require second-year conferences only for students whose final assignments demonstrate significant weaknesses and to encourage all other students to meet with us about their final assignments.

For the second-year conferences to succeed, students must prepare for and meaningfully participate in the conferences. To this end, we should require our students to review the feedback on their final assignments prior to their conferences. Knowing that our students would review our feedback on their final assignments and that our comments would form the springboard for final conferences with our students would encourage us in our effort to write meaningful and constructive comments.

Moreover, these second-year conferences could serve a valuable function in the legal analysis and writing curriculum. The conferences would require students to review the feedback on their final assignments and would provide students with an action plan for their future legal analysis and writing endeavors. The conferences would be forward-looking sessions during which the student and professor together would identify both strengths and weaknesses in the student’s legal analysis and writing and would try to formulate strategies to address the student’s weaknesses. Furthermore, these second-year conferences would reinforce for students that the legal analysis and writing skills they learned in their first year of law school should be applied throughout both their law school and legal careers. In fact, having these conferences after many students would have just completed their first legal jobs over the summer could put our feedback in greater practical context for our students and enhance student interest in our comments.

These conferences would also enable students to realize how much they did indeed learn in their first-year legal analysis and writing course and how far they have come after only one year of law school. At the same time, students might be better able to review their assignments objectively and critically at the beginning of their second year than at the end of the first year, closer to the time that the students handed in their assignments.5

Students probably spend more time on their final legal writing assignment than on any of their other first-year assignments. We spend a

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5 To be sure, second-year conferences have their drawbacks. These conferences would take a significant amount of time at the beginning of the first semester, when we are already incredibly busy with our new first-year students. In addition, second-year conferences would impose a significant additional workload on us, for which we should be fairly compensated. However, the benefits of meeting with our students about their final assignments make it worthwhile to at least try to devise a workable mechanism to make that happen—regardless of the form this mechanism takes.
tremendous amount of time reading and providing feedback on these assignments. If our students are to benefit from our feedback, they must, at least, review our comments on their assignments. If students fail to do so, they lose out on a valuable component of their legal analysis and writing course and we have wasted hours of our time writing comments that will never be read. When no one hears a tree falling in a forest, that tree has, nonetheless, fallen. In contrast, when a student fails to read our feedback on an assignment, that feedback might as well not have ever been written. It is, thus, well worth the effort to ensure that our comments are heard.

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“If our students are to benefit from our feedback, they must, at least, review our comments on their assignments.”
A Tale of Two Issues: “Applying Law to Facts” Versus “Deciding What the Rule Should Be”

By Mary Dunnewold

Mary Dunnewold is a Legal Writing Instructor at Hamline University School of Law in St. Paul, Minn.

The first objective memo assigned in law school usually involves a fairly straightforward set of facts that correspond with a fairly straightforward set of rules and cases. Students are then set about the task of interpreting the existing law and applying it to the given facts. This kind of assignment introduces important basic concepts like synthesizing a legal rule from existing authority and making rule-based and analogical arguments to achieve a result.

Later assignments may, however, strike out into new territory. Instead of being asked to analyze how existing law applies to a novel set of facts, students may be asked to analyze what the law should be in a particular jurisdiction, either because the law is unsettled or because the legal question has never before arisen in that jurisdiction. This type of legal issue requires a slightly different approach. Students should understand the difference between these two types of legal questions before setting out into the library.

Applying Existing Law to Facts

When the legal issue presented requires an application of existing law to novel facts, a good starting point is to decide what main legal idea the issue involves. You can then focus on that main legal idea, or “phrase that pays,” finding and analyzing authority that either 1) establishes what rules determine when the legal idea is satisfied and when it is not; or 2) provides factual examples of when the legal idea is satisfied and when it is not. For instance, if you are analyzing whether, under a particular fact scenario, a dog has been used as a dangerous instrument, the phrase that pays is “dangerous instrument.” Useful case law may contain general principles that define dangerous instrument in this context, like “a dog is used as a dangerous instrument when it is within the control of the defendant and is trained to attack.” Or it may contain a helpful “fact story” like “In the Smith case, a defendant ordered a 100-pound Rottweiler that had attended Joe’s Guard Dog Obedience School to ‘sic ‘em,’ and the court held the dog was used as a dangerous instrument.”

Once you have determined what rules apply and what fact stories are available for comparison, you develop arguments on the basis of that information. So for the dog example, one rule-based argument might be “Here, the state can argue that the defendant used his dog as a dangerous instrument because the dog was within his control and was trained to attack.” An analogical argument might be “Like the dog in the Smith case, here the dog was a trained dog of about 100 pounds. Further, just as the defendant in the Smith case told his dog to ‘get ‘em,’ here, the defendant told his dog to ‘sic ‘em.’ Therefore, like in the Smith case, the court in this case will probably conclude that the dog was used as a dangerous instrument.” Thus, through a developed set of criteria and through comparison to existing examples, you can draw a conclusion about whether the particular legal idea at issue is satisfied in this case.

Deciding What the Rule Should Be

An analysis of and argument about what the law should be, however, involves a different kind of strategy and thinking. Consider two different scenarios that may require the legal writer to define the law. First, suppose your legal issue is whether under this jurisdiction’s first-degree robbery statute a dog can be considered a dangerous instrument. The courts in this jurisdiction have never decided the issue, so there are two possible rules the court could choose: yes, a dog can be considered a dangerous instrument, and no, a dog cannot be considered a dangerous instrument. Or second, suppose your legal issue is whether under this jurisdiction’s Heart Balm statute, fault should be a factor in deciding who gets to keep the ring after an engagement is terminated. Numerous courts in


2 Thanks to Debby McGregor for sharing this example through a problem bank.
this jurisdiction have decided the issue, but some courts have decided yes, fault is a factor, and some have decided no, fault is not a factor. So the current court must choose which rule it will apply. These two scenarios do not require analysis of whether a particular definition is satisfied, such as was the defendant “at fault” or was the dog actually used as a “dangerous instrument.” Rather, these issues require analysis about which is the better rule. Only after we decide which rule will apply can we move on to determine whether our facts fit the definitions the rule prescribes, the type of issue discussed earlier.

To analyze which is the better rule, we have to use a different set of analytical tools than we used for the first kind of issue. A primary tool used to determine the better rule is policy analysis. The judge adopting or applying a new rule will be concerned about whether the new rule implements sound policy. The policy driving the rule should be consistent with the policy within that particular area of the law and consistent with policy within that jurisdiction in general. For instance, if the judge must decide whether fault should be considered in determining who gets to keep the ring after an engagement termination, the judge may want to examine current policies in other areas of family law. Since other areas of family law currently reject a fault analysis in favor of a no-fault analysis (e.g., in marital termination proceedings), you could argue that to ensure consistent policy, the court should adopt the no-fault rule.

When researching a question like this, then, the researcher should look for discussion of the policy behind a particular rule and for discussion or clues about the policies implemented in this area of the law in general. Possible sources include cases from other courts that have already decided to adopt or reject a certain rule and cases from the governing jurisdiction involving related areas of law. Legislative history may also provide information about the policy intent behind a statute that must be interpreted.

In deciding which is the better rule, the legal writer may also examine what the majority of other courts have held and what the trend seems to be. For instance, if the issue is whether a dog may be considered a dangerous instrument, so this court should too. Further, if earlier courts decided that a dog cannot be considered a dangerous instrument, but all courts in the last 20 years have decided that it can, you can argue that the court should follow the “modern trend.” Also, you may base an argument on the fact that certain well-respected courts or judges or courts from neighboring jurisdictions have decided one way or the other. Research and analysis involving this kind of issue should therefore include good “mapping” of how other courts are deciding the same issue, when those decisions have been made, and what particular courts and judges have made the decision.

Finally, the legal writer deciding a “best rule” question should also be concerned about achieving the most workable and just result for the most people. Thus, the overall effect of the rule, the ease or difficulty of applying the rule, and the practical results in the case presented will all provide bases for argument.

Notice that for the most part, when thinking about what the rule should be, the facts of the particular case in front of you are not the main focus. Rather, the main focus is the proposed rule’s shape, effect, and consistency with other rules in that area of the law. This focus differs from the analytical focus for an “apply existing rule to given facts” issue, where the concern is primarily about whether our facts fit under the umbrella of the existing rule. The straight analogical analysis that was so important to us under the “apply rule to facts” issue (“like the dog in the Smith case, the dog in our case was barking menacingly; therefore it was a dangerous instrument”) does not work here. Rather, we have to make policy arguments and arguments about the “legal landscape” and how this rule fits into it.

**Conclusion**

This discussion is not intended to exhaustively examine all the kinds of analysis helpful to these two types of legal issues. But the student legal writer who sees the difference between the two types of issues and thinks carefully about how to approach each type before starting the research and analysis process will plan and work more efficiently and effectively.

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COLLEGE REUNION: AN EXERCISE THAT REDUCES STUDENT ANXIETY AND IMPROVES CASE ANALYSIS

BY JAMES PARRY EYSTER

James Parry Eyster teaches Immigration Law and Research, Writing, and Advocacy at the Ave Maria School of Law in Ann Arbor, Mich.

Legal writing instructors can help their students overcome the stress and anxiety of the first weeks of law school by relating legal analysis to the methods of inquiry students learned in their college majors. This article presents the need for such an activity, the method used, and examples of actual student responses, and concludes with a justification for celebrating the diversity of academic experience in law.

Current scholarship on pedagogy insists that real learning can only take place in a "mindful" environment, in which students are able to make the material meaningful to themselves by linking new information and concepts to those that they already know about.1 In contrast to requiring rote memorization and teaching subject matter in isolation from other topics, the teacher should seek to show students how the subject matter is similar to and different from the concepts and data with which students are already familiar.

Unfortunately, law school provides students with little that is familiar. The gulf between the subjects taught in law school and those taught to undergraduate students, regardless of their major concentration, may likely serve as the cause for the high levels of stress reported by law students. In fact, psychologists and educators have established that law school provides the most stressful learning environment of any graduate program.2

Noting my own students' uneasiness as we entered our third week of classes, I looked for a way to reduce their sense of anxiety. We were learning the basics of case analysis by examining Florida appellate decisions that depicted the evolution of intentional infliction of emotional distress (IIED) as an independent tort. The students' pinched brows and strained voices insinuated that I was intentionally inflicting emotional distress on them. Some sort of palliative was needed to revive the students' self-confidence.

I therefore created a take-home assignment that I named "College Reunion," asking students to reanalyze the same cases, using the methodologies they had mastered as undergraduates in their chosen college majors. Each student presented his or her explication with a degree of self-assurance and joy that was quite distinct from earlier in-class participation. An unexpected benefit of this assignment was that the students uncovered legally valuable insights. In addition, most of them evidenced a far closer reading and appreciation of the facts than they had previously shown when they had limited themselves to (what they considered) the legal analysis of the case. Finally, most of the students genuinely enjoyed the chance to exhibit their expertise and mastery, not only to the other students and to me, but also to themselves. The exercise reminded them that three months earlier, as graduating seniors, they had exemplified high standards of academic excellence. It also provided them with reassurance that they could likely master the legal process as well. This assignment was so successful that I encourage all legal writing teachers to use it.

To provide a sense of the range and beauty of the responses, and to better enable other teachers

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to create their own assignments, I present the following examples from my own classes. The first example presents how a student's nonlegal expertise revealed the dangers of a narrow legal reading. A psychology major analyzed an IIED case that centered on whether a defendant insurance agent's conduct was outrageous when she attempted to persuade a brain-damaged beneficiary to waive his rights to payments. The student noted that no evidence of severe emotional distress had been introduced. The plaintiff also claimed to have preexisting psychiatric problems, mental problems, and mental injuries. Remarkably skeptical on the likelihood of words alone causing emotional distress to someone who is severely brain damaged, the student recommended that psychological tests and batteries should be used to analyze the plaintiff's current mental status and such tests should be compared to a previous evaluation to establish whether further mental stress appeared. The student commented, "A correlational analysis of these new psychoses with elements associated with the situation surrounding the case may further solidify or weaken charges already." Absent substantive differences, the student questioned the merit of the plaintiff's case.

Another student, a political science major, provided useful thoughts about the social burdens that may have been at the root of the same controversy. On one hand, he saw an insurance industry that felt within its rights to manipulate and injure the same people that it was being asked to protect. Such an attitude may have been prompted by the burden that competition placed on insurance companies, encouraging them to deny liability whenever possible. The student hoped that the courts finding against the insurance company in the case being studied would "send a signal to our insurance industry concerning potential uses of the system that our present society will not accept." The student enlarged his analysis to an even more abstract level proclaiming that it is our nation's duty to protect the weak from bullies: protecting individuals from corporate aggressors.

An electrical engineering student who had been previously silent in class delighted and surprised us with detailed schematic diagrams of the same case, showing the decedent's health as an electric generator, her illness as an inductive coil, and the various actions of the insurance company as resistors of differing ohms. The student showed in a very intense way that certain choices made by the insurance company would obviously reduce and interrupt the decedent's life force. The graphic nature of the presentation weakened the strength of the insurance company's claim and the court's holding that contractual language protected the insurance company from liability.

Instead of speculating on underlying abstract policy considerations, an English major studied the sentence construction of an early Florida case that involved IIED. The student commented that the payment of money can compensate for emotional suffering, and (2) such compensation is just. This exemplifies, she stated, the current American view that money can atone for evil actions and that society should have the ability and the right to alleviate suffering. The student pondered how this cultural shift from a view that the payment of money can alone for evil actions and that society should have the ability and the right to alleviate suffering. The student pondered how this cultural shift from a view that suffering is the natural result of Adam's sin to the position that money can and should mitigate suffering has influenced the holdings in other types of cases.

Another saw the central element of IIED — whether a reasonable person would be outraged by the conduct — as a radical shift away from the Catholic definition of the nature of personhood.
While a moral view might indicate that all individuals are entitled to respect as they are made in the image and likeness of God, modernistic views that spring from the empiricism of the Enlightenment offer no firm rule, but rather ask courts and juries to judge conduct on the basis of their own emotional responses to the facts of the complained-of action.

As the reader may have noticed, some of the students' analyses resemble accepted methods of legal analysis. For example, one political science major adopted a Marxist perspective, commenting that protecting an insurance company from IIED liability betrayed the legal system's favor for the capitalist mode of production, exposing the uneven power relationships between capitalists and the proletariat in a capitalist society. This mirrors the cynicism of “critical legal studies” proponents, who believe that the logic and structure of the law are primarily derived from societal power relationships, and not from independent legal principles.

Similarly, an economics graduate unknowingly argued a “law and economics” view in finding that the courts decreased the economic efficiency of justice by establishing IIED as an independent tort. A finding of IIED is so subjective that its determination requires exhaustive analysis of the facts. In addition, because the outcome of IIED cases is so uncertain, lawyers have little ability to determine the merits of a case, increasing the amount of litigation. However, the student noted, a final determination would require analyzing the cost of increased court caseloads against the benefits of increased justice.

Thus, in expressing their own opinions based on their special areas of expertise, the students illustrated some of the viewpoints that have captured the attention of legal scholars.

Thus, in expressing their own opinions based on their special areas of expertise, the students illustrated some of the viewpoints that have captured the attention of legal scholars. While I did not speak to my students of these divergent theories of jurisprudence, the very breadth of analysis enriched the class's understanding of the legal context of the cases studied.

The entire class regarded this exercise as a great success. It generated rich class discussion, promoted deeper reading of the cases, and made it easier for students to learn about case analysis by linking new information to knowledge previously acquired. Most importantly, the exercise gave each of the students the opportunity to stand out as an expert, presenting his or her sophisticated views to classmates with assurance and pride.

Some law professors may be hostile to an exercise that maintains a student's self-esteem and reduces stress. Traditionally, the first year of law school has been seen by some as a “boot camp” that seeks to destroy a student's former self and then rebuild the individual as a lawyer. However, to be successful, a lawyer cannot restrict himself or herself to narrow stereotypes of an attorney. Even in television depictions, lawyers are shown in all shapes, sizes, and stripes. The successful lawyer is one who incorporates a legal perspective into his or her preexisting persona.5 One way to teach students to draw on their unique gifts is to encourage them to integrate their prior experiences into their legal studies through exercises like “College Reunion.”

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5 “For the lawyer must engage his work with his whole self to give the world the benefit of his moral sensibility and to receive from the world all that the world has to teach about the complexities of right and wrong.” Robert P. Burns, book review of From Expectation to Experience by James Boyd White, 50 J. Legal Educ. 147, 151 (2000).
BETTY BOOP GOES TO LAW SCHOOL

BY JUDY GIERS

Judy Giers is a Legal Writing Instructor at the University of Oregon School of Law in Eugene.

Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own “teachable moments for teachers” to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: sirico @law.vill.edu.

I left 10 years of law practice to teach legal research and writing to first-year law students. I expected my career change to produce at least three things: more time for my family; a huge pay cut; and a fun work environment. My first and second expectations were satisfied immediately upon my entry into academia. My third expectation was partially satisfied before classes began (my colleagues are a fun bunch), but I worried about classes. As a recovering litigator, it was not the performance nature of the classroom setting that had me worried, it was the legendary uptightness of first-year law students. I needed an icebreaker—but given the packed nature of my syllabus, it had to be a working icebreaker.

This exercise requires some advance setup so I use it for the third class of the year. My first couple of classes are, I suspect, pretty typical legal research and writing (LR&W) fare. In the first class, I introduce the course, talk about what a case is and show how to brief one. I assign Hodge v. Lanzar Sound, Inc., 966 P.2d 92 (Kan. 1998), (any failure-to-keep-a-proper-lookout case will do) and tell the students to bring a brief of that case to the next class. In the second class, we talk about the Hodge case. We work through the facts, the procedural posture, the rationale, and the holding. We pay particularly close attention to the duty in the case—the duty to maintain a proper lookout while driving. I assign no homework.

Since there is no homework assignment, the students arrive at the third class not knowing what to expect. The front desks are pushed back to create a “stage” area, and I have a box of props on my desk. There are two rolling chairs on the stage. Once the students have settled in, I tell them I am going out on an educational limb and they are...
coming with me. I explain that we are going to act out, argue, and decide three failure-to-keep-a-proper-lookout cases. I ask for (and usually get) 15 volunteer actors, three plaintiff’s lawyers, three defense lawyers, and a bunch of jurors (this works well with my class size of 25). I divide my volunteer actors into casts for the three vignettes, hand them their scripts and props, and send them out into the hallway with instructions to read the script, decide who will play each role, and rehearse.

Then, with my lawyers and jurors still in the classroom, we write the four elements of a negligence claim on the whiteboard and identify the breach of duty as failure to keep a proper lookout. I very quickly explain what they need to know about causation and damages. I explain to the plaintiff’s lawyers that each of them will represent the injured child (Joey Webb) and that their job will be to explain to the jury in two minutes or less why the facts as acted out satisfy each element of a negligence claim for failure to keep a proper lookout. I explain to the defense lawyers that they represent the driver in each case and that their job is to convince the jury that at least one element of the claim is missing. I explain to the jurors that their job will be to decide each case based upon the facts as presented in the vignette and the arguments of the lawyers.

Then the fun really begins. I go collect my actors and answer any questions they may have. They all come into the classroom and the first group (the Betty Boop cast) acts out the vignette above. The students really go to town with this! There is much laughter, some confusion, and outrageous overacting! When the scene ends, I (acting as the judge) call the court to order and plaintiff’s counsel presents his or her case, defense counsel presents his or her case, and I submit the case to the jury. The jury deliberates for a minute or two, announces its verdict (to great cheers and boos and hissing), and we move on to the next vignette.

The vignettes get progressively more complex. In the second vignette, the driver, Judge Upright, is not paying close attention but, since Joey dashes out from between parked cars immediately in front of the driver, there is some question as to whether the breach of duty caused the damage. The passenger, Sister Mary Margaret, exclaims that there was no way the judge could have avoided Joey. In the third vignette, the driver, Carla Careful (a law student), is paying close attention, but Joey drops out of a tree above her. Carla’s only warning is Joey’s friends on the sidewalk gesturing up at the tree and singing the Spiderman song (a great opportunity for overacting). I have been very impressed with how well the students argue these no-breach-of-duty and lack-of-proximate-cause issues.

By the time we get through the third vignette, things are pretty relaxed. The students are laughing, I’m laughing, and we’ve all forgotten that law school is a high-stress, scary business. I call the class to order (a relaxed order, I admit) and we talk about what we just did. Even if they didn’t get it at the beginning, by this time the students understand what it means to look at a fact scenario element by element, to argue it element by element to a jury, and to decide it based upon the presence or absence of each element.

I have used this exercise with four first-year classes so far, and it has been a big hit each year. It really helps to break the ice and get students to take chances in class. The opportunity to work with each other on something silly and completely ungraded builds a real esprit de corps that helps my LR&W students to work cooperatively with each other for the rest of the year. And, it’s fun.

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SEARCHING CASE DIGESTS IN PRINT OR ONLINE: HOW TO FIND THE "THINKABLE THOUGHTS"

BY SCOTT MATHESON

Scott Matheson is Reference Librarian at the Lillian Goldman Law Library, Yale Law School, New Haven, Conn.

This article outlines how to use digests in print and online to find case law on a specific topic. The West Key Number System®, sometimes called the “universe of thinkable thoughts,” is the foundation of U.S. case law digests. The system organizes legal concepts into broad groups, then into smaller and smaller parts and subparts. What follows is a basic guide to effective use of this powerful system, whether searching in print or online.

Many books have an index. Statutory sets have an index. Sometimes law students ask where the index to West’s National Reporter System® is. They are seldom amused (or enlightened) when I point to the wall of the reading room filled with the Decennial Digest. Often by the time they ask for an “index,” they have already tried searching for a relevant case in an online database with no success. The student’s question raises the question for me of when to refer students to the print digests and when to suggest that they search the headnote field in cases on Westlaw®.

Regardless of where I suggest the student end up searching, I usually pull down West’s Analysis of American Law, a handy publication that presents the entire digest system in one volume. I explain to the researcher that this is the outline of the index—a sort of list of broad legal concepts each broken down into more discrete topics.

This allows students several options. If they have already found one case that they believe is on-point, then I suggest picking a favorite headnote or two and browsing around the Analysis to see if an adjacent key number might be more on point. Students seem to find the posting notes (brief explanations included for some numbers) particularly helpful.

If the researcher has not found a case that seems helpful at all and only has a vague notion of the issue he or she is looking for, the Analysis is useful in conjunction with the Descriptive-Word Index from the latest digest. The Index is helpful for translating ideas like “will” or “inheritance” in digest topics like “Dower and Curtesy” (topic 136) or “Descent and Distribution” (topic 124). Once a concept has been translated into a digest heading, perusing the Analysis allows the researchers to easily narrow down just the right topic and key number. For example, a case about the inheritance rights of a surviving wife might be assigned the topic and key number Descent and Distribution k 52(2). Once students have picked a key number they think is just right, I suggest that they read the first case they find that has been assigned that number to make sure the key number is the correct one for their issue.

When the student is coming from an annotated code, looking for a case that has analyzed a concept discussed in the statute, he or she may already have a key number suggested by the annotation in the statute. Alternatively, he or she may have a case that seems on point. Consulting the headnotes in the case should yield a useful key number. Again, scanning the Analysis at this point can reassure the researcher that he or she has the correct key number.

Regardless of how the student finds the key number, a few moments spent with the Analysis can save a lot of time in the long run. I explain to students when I explain how to use the print digest system—they want to search for as few key numbers as possible to get their “perfect case.” One library I have used thought the Analysis was so useful that it placed copies with the Decennial Digest and the state digest, and at the reference desk.

Once the student has decided on a few key numbers that describe the concept or issue he or she is researching, the student is left with a pure

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1 West’s Analysis of American Law (2002 ed.)

2 It is important to understand how key numbers are expressed in print: Descent and Distribution k 52(2) and how they are expressed in Westlaw: 124k52(2). The words Descent and Distribution are replaced with the equivalent topic number in the online world. The Analysis provides a numbered list of topic and key numbers in the front of the book.
bibliographic question; that is, whether to use the
print digest system or to search for the key number
in an online database. This is where the reference
librarian can really show off the elegance of the
digest system. It also allows the construction of an
incredibly precise online search. Which route to
choose is influenced by many factors; I’ll outline a
few that I usually go over with student researchers
when we get to this fork in the road.

**Price:** For students, price is usually a moot
point as they don’t directly pay for either the costs
of the print digests or the costs of their online
research. It is always something I encourage them
to consider: if they have the option, they should
weigh the greater time investment for using the
print version against the greater cash investment
for using the online version.

**Display:** Some researchers (myself included)
prefer the format of the print digests to the on-
screen display, even though it means that they may
spend a few more minutes searching for their key
numbers. The print display lets the researcher
easily browse the adjacent key numbers; this is
more difficult in the online environment.

**Scope:** A state-specific digest or the federal
digest, if available, can be a great time-saver for
some types of questions. For others, the Decennial
Digest is the only way to get the scope needed.
Online, state-specific (or jurisdiction-specific)
digest searches are available, but so are subject-
specific digest searches. Researchers can search for
their key numbers in subject databases, e.g., only
tax cases or only labor cases. This is helpful when
searching for a key number that describes a
subject-specific concept. Sometimes this is not
helpful, for example when searching for a key
number that describes a procedural issue that could
crop up in any type of case.

**Speed:** Speed depends on how many key
numbers are involved, the jurisdictions involved,
and the desired results. If the researcher only wants
the two or three most recent state cases with a
specific key number, it might actually be faster to
find the cases in the state digest. Most experienced
researchers can pull the appropriate volume and
check a key number (or a range of key numbers)
before they can start a computer, let alone log in,
select a database, and enter a search. Conversely, if
a 50-state survey of the entire 20th century
through the present is the researcher’s goal,
searching for the key numbers online will save
countless hours of research, note-taking, and
photocopying.

**Currentness:** Updating cases, of course, is
always best done online; similarly, an online search
will reveal the most recent cases with a given key
number long before they can be printed and
delivered in advance sheets. That said, this factor is
not always decisive. A properly updated print
digest search—working through the Decennial
Digest and the General Digest to the newest bound
reporters and advance sheets (with their “back of
the book” digests)—can also be fairly
comprehensive, if a bit tedious.

**Availability:** Some researchers may not have
access to the print digests, while others may not
have access to an online research service.
Additionally, a number of factors affect the
availability of online services. As reliable as many
services are, a power or phone outage could cut off
access to an online service. Conversely, another
student may have the required print digest volume
off the shelf.

**Assignment:** Sometimes a professor (or
supervising attorney) may require a student to
work in one format or the other. Most research can
be done either in print or online, as long as
students understand the difference in the methods.
These differences in the mechanics of finding cases
with a given key number are important, but are
secondary to the importance of understanding the
system that makes the search possible. Explaining
the system to students and showing them the
Analysis is a big part of making sure they
understand the system they are using—whether in
print or online.

The question of whether to turn to the print
digest or an online digest service is important
today, especially in an educational setting. But, as
more firms do away with bulky print digests, and
as new lawyers are more and more pressed for time,
this consideration will become less important.
What will (hopefully) remain important is the
researcher’s ability to understand and use the
underlying index—the West Key Number
System—and to use it effectively, in print or
online.

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"However" is Not a Fanboys

By Martha Faulk

Martha Faulk is a former practicing lawyer and English instructor who teaches legal writing seminars through The Professional Education Group, Inc. She is co-author with Irving Mehler of *The Elements of Legal Writing* (Macmillan Publishing Co., 1994). She is a regular contributor to the Writing Tips column in Perspectives.

"However" is usually the most contentious word discussed in the Legal Writing seminars I conduct. It’s surprising, isn’t it, that a rather simple little adverb—specifically, a conjunctive adverb—is cause for so much disagreement among legal writers? This sometimes very heated disagreement concerns the placement of "however" in a sentence and the proper punctuation for its use. Although "however" is not an essential legal word, it would be hard to imagine legal writing without it. In this column, we’ll explore the grammatical context for the word and also suggest that you may use the word wherever and however you like in a sentence.

We begin our search for guidance in the dictionary. According to the most recent edition of *The American Heritage Dictionary*, "however" as an adverb has the following meanings: "1. In whatever manner or way. 2. To whatever degree or extent. 3. In spite of that; nevertheless. 4. On the other hand; by contrast." When "however" is used as a conjunction, it means "In whatever manner or way." The meaning will be determined by the context in which it appears.

Although "however" is not a term of art, that is, a specialized legal word, legal writers would be hard-pressed to write without it. It is especially useful as a synonym for "in spite of that," or "nevertheless." Since legal reasoning necessarily requires analysis of the contrary or opposing position, "however" provides a signal to the reader that the writer is about to consider a contradictory or qualifying idea by using a transitional meaning such as "on the other hand; by contrast." Without "however," legal writers would have fewer transitional words with which to signal a change in direction to the reader.

**FANBOYS Explained**

So, why all the fuss about this little word? To answer that question, we’ll first consider the grammatical classification of "however." As our rather cryptic title suggests, "however" is not a FANBOYS. Although some secondary school teachers suggest this acronym as a mnemonic device for their students, many legal writers may not be familiar with it.

This handy little acronym represents the seven most common coordinating conjunctions. They are *For*, *And*, *Nor*, *But*, *Or*, *Yet*, and sometimes *So.* Coordinating conjunctions—FANBOYS—are grammatically empowered to join together two independent clauses into a compound sentence with only a comma preceding the conjunction. That empowerment comes about because the FANBOYS words bring together similar grammatical units called independent clauses, also defined as complete thoughts that stand on their own.

Example: The lawyer researched the case, but she was unable to find any useful information.

**Commas Before Coordinating Conjunctions**

The comma before the coordinating conjunction "but" appropriately signals the reader that two independent clauses are combined into one compound sentence. Now, if we substitute "however," the conjunctive adverb, for the FANBOYS word "but" in this example, then we must change the punctuation because "however" is not a FANBOYS. Since "however" is not classified as a coordinating conjunction—remember, it’s a conjunctive adverb—it must be preceded by a stronger punctuation mark than a comma, usually a semicolon.

Example: The lawyer researched the case; however, she was unable to find any useful information.

Even on those rare occasions when "however" functions as a conjunction (meaning "in whatever manner or way"), it still does not fall into the category of a coordinating conjunction, a

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FANBOYS able to link together independent clauses. In the example below, "however" functions as an ordinary conjunction meaning “in whatever manner or way.”

Example: You may organize your argument however you choose.

In the above example, “however,” because of its meaning in the sentence, doesn’t require any punctuation at all because the sentence is not a compound sentence. As our examples illustrate, “however” may be used as a conjunctive adverb or as an ordinary conjunction, but it is never classified as a coordinating conjunction, a FANBOYS, because it lacks the grammatical power to coordinate two independent clauses.

Thus, it’s easy to see that writers may be confused about the classification of “however” and argue about where it belongs and how it affects punctuation.

**Conjunctive Adverb Cousins**

Let’s place “however” where it belongs— with its cousins, other conjunctive adverbs. According to Karen Elizabeth Gordon’s unique and interesting grammar handbook, The Deluxe Transitive Vampire, here are some additional examples of conjunctive adverbs: accordingly, afterwards, also, besides, consequently, earlier, furthermore, hence, however, indeed, later, likewise, moreover, nevertheless, nonetheless, otherwise, similarly, still, then, therefore, and thus.

You’ll recognize these words as useful tools in any lawyer’s lexicon. They lead the reader through the text by providing transitional signals about chronology (earlier, later), shifts in direction (however), and also logical clues (accordingly, therefore). As you consider using these connective words, perhaps you hesitate about their placement because you’ve heard that there are grammatical “rules” prohibiting their use at the beginning of a sentence.

**Proper Placement**

In the past, many writers were advised against placing “however” at the beginning of a sentence. Strunk and White recommend against “starting a sentence with ‘however’—it hangs there like a wet dishrag.” Such a discouraging image has no doubt influenced many lawyers and other writers as well. Yet, in an apparent contradiction, Zinsser also gives this advice about words he labels as “mood changers”:

“Learn to alert the reader as early as possible in a sentence to any change in mood from the previous sentence. At least a dozen words will do this job for you: ‘but’, ‘yet’, ‘however’, nevertheless ...”

Zinsser does not explain why “however” is the only disparaged word in the list. Perhaps, like Strunk, he dislikes the sound of the word.

**Free “However”!**

Since the advice of Zinsser and Strunk and White seems idiosyncratic and inconsistent, why not give “however” the freedom to do its job as a signal or mood-changing word in the best place possible? Modern commentators agree that “however” should be placed where it most effectively emphasizes the words the writer wants to emphasize. Webster’s Dictionary of English Usage asserts that “there is no absolute rule for the placement of however; each writer must decide each instance on its own merits, and place the word where it best accomplishes its purpose.”

However you decide to use “however,” remember that it’s not classified as a FANBOYS and must have a semicolon in front of it when it connects two independent clauses. If, however, you wish to place the word at the beginning of your sentence over someone else’s objection, you may be assured that you have modern authority on your side.

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7 William Zinsser, On Writing Well 107 (2d ed. 1980).

8 Id. at 106.


10 Id. at 515.
LEGAL RESEARCH AND WRITING RESOURCES: RECENT PUBLICATIONS

COMPILED BY DONALD J. DUNN

Donald J. Dunn is Associate Dean for Library and Information Resources and Professor of Law at Western New England College in Springfield, Mass. He is a member of the Perspectives Editorial Board. This bibliography includes references to books, articles, bibliographies, and research guides that could potentially prove useful to both instructors and students and includes sources noted since the previous issue of Perspectives.


A review of this special style manual "created for the purpose of improving and standardizing the hundreds of civil appellate briefs that the Office files each year in state and federal courts." Id. at 686.


Designed primarily for use in vocational, two-year, four-year, and graduate paralegal programs. Includes cyberlaw exercises, sample documents, and illustrations.


Two bibliographies that provide the starting points for those doing research on either the European Union Data Protection Directive or the Convention on Biological Diversity.


A basic introduction to legal information and legal research designed to help first-year law students easily work their way through the complexities of basic legal research. Written in an informal style.


Points out that advocacy should often focus on the “bad consequences” that might follow if a particular course of action is not pursued. Focuses on constitutional law cases.

Barbara P. Blumenfeld, Integrating Indian Law into a First Year Legal Writing Course, 37 Tulsa L. Rev. 503 (2001).

Discusses the reasons the author (director, Legal Research and Writing, University of New Mexico School of Law) incorporates Indian law into her first-year legal writing course.


Provides an extensive introduction to legal analysis and addresses different types of legal writing, e.g., law school, law offices, advocacy, appellate briefs, pretrial advocacy, and writing to parties. Includes a Teacher's Manual.


An annotated legal dictionary that provides words and phrases in English with the correct French translation and French with the correct English equivalent. Indicates the sources of each definition provided.


Describes “the fundamental concepts that must be taught in an international law moot court course...” Offers “suggestions for integrating international law into the first semester legal writing program as well.” Id. at 418.

The latest manual for use by practitioners and scholars who must reference Florida-specific materials.


Provides detailed coverage of appellate practice as well as trial-court motions practice. Covers the processes of writing, editing, and presenting effective written arguments, and also preparing and delivering persuasive oral arguments.


Offers sound advice and practical, proven techniques for improving all kinds of legal documents. Each of the 50 sections includes basic, intermediate, and advanced exercises. Includes an appendix on “How to Punctuate.” A very useful source.


A comprehensive guide to the essential rules of legal writing by one of the leading experts in the field. Answers a wide array of questions about grammar and style, with detailed, authoritative advice on punctuation, capitalization, spelling, footnotes, and citations.


A part of the publisher’s “Working with the Law” series. Deals with the law in Canada.


A listing of books, articles, book reviews, student case notes, panel discussions, and unpublished papers of this major leader in the area of legal research. Accompanies various tributes to this individual.


“[O]utlines sources and techniques that are useful in researching the development of the Caribbean Court of Justice (‘CCJ’).” This guide also discusses research materials regarding Caribbean legal systems.


Provides an expanded discussion of the sources one would need to use in researching Washington state law and law-related sources. Has increased emphasis on Web sites.


An annotated listing of 25 sources one interested in the topics would want to consult. Arranged by category.


Based on information gained from a survey of ABA-accredited law schools regarding advance legal research course offerings. “[A]nalyzes whether the number of such courses has increased in recent years and whether there is uniformity in course structure and methodology. Variations based on the size of the student body, the number of professional librarians, and law school ranking are addressed.” Id.

"[E]xplores the educational potential of Web-based tutorials and pathfinders. ... [D]iscusses how the multimedia environment can effectively reach a broad range of learner types, explaining how the disciplines of information architecture and information visualization can contribute to designing a successful tutorial and pathfinder." Id. Includes a bibliography of sources.

Christine Hurt, Network Effects and Legal Citation: How Antitrust Theory Predicts Who Will Build a Better Bluebook Mousetrap in the Age of Electronic Mice, 87 Iowa L. Rev. 1257 (2002).

Explains how The Bluebook became the dominant product in the legal citation industry and how and why the Maroonbook failed, and discusses how the ALWD Citation Manual has emerged as a major source that has the potential to supplant The Bluebook.


Arranged in eight sections—primary documents, the context, work, and findings of the Truth and Reconciliation Commission; comparative Truth Commission processes and transitional justice; international law and the International Criminal Court; history, memory, and healing; civil, political, and economic issues; ethical, philosophical, and theological concerns; and Web site and Internet sources.


"[P]rovides a research framework for students, scholars and professors of law who are interested in the Pinochet case." Id. Discusses historical and procedural background, identifies key sources, and describes useful finding tools.

Susan P. Liemer, The Quest for Scholarship: The Legal Writing Professor’s Paradox, 80 Or. L. Rev. 1007 (2001).

 Discusses how legal writing professors find time to write and argues that legal writing professors could be much more prolific if law schools provided them with the same kind of support for scholarship that other law professors receive, e.g., a summer research grant and no teaching load.


"[T]race[s] the development of statutory law from the 1753 Marriage Act to the present, examining some of the most important reference sources, including both contemporary treatises and later works which interpret these legal developments." Id.


Brings together all relevant reports and hearings, various bill versions, and excerpts from the Congressional Record regarding this Act. An important contribution to the field of copyright law.

Brings together the major print and electronic sources of administrative and legislative information, including bills, codes, regulations, attorney general opinions, executive orders, ethics opinions, and administrative orders and decisions. Covers all 50 states, the District of Columbia, and U.S. commonwealths and territories.


A substantial revision of the leading text in the field of legal research. Includes almost 200 new illustrations, with increased emphasis on Web sites. The chapters on "Legal and General Research and Reference Aids," "Legal Citation Form," and "Electronic Legal Research" have been expanded and updated, and "Legal Systems of the United Kingdom" has replaced the former chapter on "English Legal Research." Includes a separate Assignments book and an Instructor's Manual prepared by Mary Ann Nelson of the University of Iowa Law Library.


An abridged, paperback version of Fundamentals of Legal Research, 8th ed. Like the parent volume, it contains almost entirely new illustrations and with substantial revision and updating of the various chapters.


Designed to link the classroom to the courtroom. A case simulation problem that traces the steps in a federal action from the filing of a complaint and motion for temporary restraining order, through the filing of a notice of appeal from a depository opinion and order.


Covers all three components of the basic legal writing course, namely research, writing, and analysis.


A supplement to The Legal Writing Handbook containing class-tested exercises and an answer key.


"[C]ompiles and summarizes recent legal and educational literature on the constitutionality and viability of student dress codes in the public schools. The annotations cover the legal issues and the practical problems of drafting and enforcing dress policies that will pass the scrutiny of the courts." Id.


Covers the sources needed to research this topic. Lists major primary and secondary authorities, combining leading cases and articles with a research strategy designed to serve as a starting point for exploring the topic in depth.

A legislative history of the federal law of encryption technology as it made its way to the enactment of the Electronic Signatures in Global and National Commerce Act, which established the validity of electronic signatures.

Wayne Schiess, Ethical Legal Writing, 21 Rev. Litig. 527 (2002).

Shows that lawyers get into trouble in their legal writings by failing to research well, misstating facts, misrepresenting the law, not citing the law correctly, plagiarizing, not obeying court limits on documents, making personal attacks, and not writing well.


Discusses in simple terms what law students need to know about law school and how to get the most out of the law school experience. Also discusses the problems law students encounter most frequently and solutions to those problems.


Designed to accompany the text by the same name. Contains exercises at four levels, progressing from basic to advanced source features. Includes both print and electronic sources in each exercise.


A description of Web sources that can help consumers locate information. Emphasis is on products and services for those with disabilities, not on the Americans with Disabilities Act.


Designed for upper-level legal writing courses. Emphasizes persuasive writing strategies while combining theory with practicality.


© 2002 Donald J. Dunn
Holding a Citation Carnival ............. 8: 18–20
How a Bankruptcy Lawyer Does Legal Research. 5: 101–105
"How Can I Find a United States Treaty?" ............. 7: 29–30
"How Do You Update a West Key Number?" ... Beyond the Digest .................. 4: 99
"How Do You Update the Code of Federal Regulations?" ............. 5: 28–29
How Many Cases Do I Need? ............. 10: 10–11
How They Write: Our Students' Reflections on Writing .................. 6: 24–28
How to Display Effectively in the Classroom: Critiquing the Tools ............. 3: 78–79
How to.... "Make Reviewing Fun"—Legal Research Scavenger Hunts. 4: 63–64
How to Master All You Survey ............. 6: 8–13
How to... Orient Foreign Lawyers in a Law Firm Library. 5: 21–22
How to... Research Federal Court Rule Amendments: An Explanation of the Process and a List of Sources. 6: 115–118
How to... Structure Your Legal Memorandum ............. 8: 30–33
How to... Use the Internet to Find and Update the United States Code. ............. 7: 23–26
Implications of Cognitive Theory for Teaching. .................. 1: 77–78
Incorporating Diversity and Social Justice Issues in Legal Writing Programs. ......... 9: 51–57
Instilling an Appreciation of Legal Ethics and Professional Responsibility in First-Year Legal Research and Writing Courses. ......... 4: 5–7
Internet Lunch Breaks: A Low-Tech Solution to a High-Tech Demand. ......... 6: 88–89
Introducing the AALL Uniform Citation Guide. ......... 8: 60–64
Introduction to Legal Writing: A Course for Pre-Law Students. ......... 3: 28–30
"Introduction to the Internet": A Training Script. ......... 8: 124–128
Joining Hands to Build Bridges ......... 7: 60–64
Jury Instructions: An Underutilized Resource. ......... 7: 90–93
Just One Damned Thing After Another: The Challenge of Making Legal Writing "Spatial". ......... 7: 119–122
Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy. ......... 10: 109–113
Law School Writing Programs Shouldn't Teach Writing and Shouldn't Be Programs. ......... 7: 1–7
Legal Research: A Fundamental Lawyering Skill. ......... 1: 2–3
Legal Research and Raising Revenue at the State Law Library. ......... 7: 88–89
Legal Research and the Summer Job. . . . Advice from the Law School and Advice from the Law Firm. ......... 7: 110–115
Legal Research and Writing Pedagogy—What Every New Teacher Needs to Know. ......... 8: 103–107
Legal Research and Writing Resources

Recent Publications


Legal Research for Blind Law Students

Speech Technologies and the World Wide Web


Legal Research in Practice: How a FERC Lawyer Does Research

- 1: 46–51

Legal Research in Practice: How a Labor Lawyer Does Legal Research

- 1: 11–13

The Legal Research Practicum: A Proposal for the Road Ahead

- 1: 77–80

The Legal Writing Conference: A Rookies Perspective

- 1: 36–37

Legal Writing Institute

- 1: 31

Legal Writing Institute Publishes Journal and Holds Fifth Biennial Conference

- 1: 62

Legal Writing Scholarship:

Point/Counterpoint

- 7: 68–70

Legal Writing Through the Eyes of First-Year Law Students: Their 25 Rules for Survival

- 6: 92–93

Lessons from My First Year: Maintaining Perspective

- 6: 103–104

Letter to the Editor

- 4: 62; 4: 92

Library Needs of the Federal Government Attorney

- 5: 17–20

Life Without Grades: Creating a Successful Pass/Fail Legal Writing Program

- 6: 119–121

LRW/Lawyering Skills Conference Scheduled for Fall 1999

- 7: 77

The MacCrater Report Conference: A Review

- 2: 54–56

Making the Most of Reading Assignments

- 5: 61–62

Managing a Research Assignment

- 9: 9–13

Managing Metadiscourse

- 2: 23–24

Mandatory v. Persuasive Cases

- 9: 83–85

Materials for Teaching Plain English: The Jury Instructions in Palsgraf, Revisited

- 8: 137–139

Memo Structure for the Left and Right Brain

- 8: 95–96

Microsoft PowerPoint: A Powerful Training Tool

- 5: 59–60

"Mistakes Were Made": A Brief Excursion into the Passive Voice

- 7: 82–83

Much Ado About That ... Or Is It Which?

- 6: 112–114

The National Legal Research Teach-In

- 1: 65–66

National Library Week: A Law Firm Teaching Opportunity

- 1: 68–69

Never Use a Preposition to End a Sentence With

- 8: 24–25

New LR&W Teachers Alert! 14 Ways to Avoid Pitfalls in Your First Year of Teaching

- 6: 6–7

1993 Teach-In Events

- 2: 13–17

Nonlegal Analogies in the LRW Classroom

- 8: 26–29

Notes from Legal Writing Organizations

- 2: 19

Observations from the Legal Writing Institute Conference: Thinking About Writing Introductions

- 3: 41–43

Obtaining Copyright Permissions

Online Resources

- 9: 129–132

On Legal Writing

- 2: 57–60

On Legal-Writing Programs

- 2: 43–46

On the Lighter Side

Pursuant to Partners' Directive, Lawyer Learns to Obfuscate

- 3: 18

Opening Our Doors to the World: Introducing International Law in Legal Writing and Legal Research Courses

- 5: 1–4

Order What Are Your Words In? How Foreign Languages Can Help You Teach the Structure of Legal Writing

- 10: 124–125

Organizing Facts to Tell Stories

- 9: 90–94

Organizing the Fruits of Your Research: The Honigsberg Grid

- 4: 94–95

Our Question—Your Answers

## The Synthesis Chart: Swiss Army Knife of Legal Writing

- 9: 80–82

## Take Charge of Your Training Room

- 3: 8–9

## A Tale of Two Programs

- 5: 65–68

## Taping: It’s Not Just for Grand Juries Anymore

- 7: 87

## Teachable Moments

- 4: 19; 4: 99;
- 5: 28–29; 5: 79–80;
- 7: 29–30; 7: 123–126

## Teachable Moments for Students

- 8: 93–94; 9: 5–8;
- 9: 83–85; 9: 145–147;
- 10: 20–22; 10: 81–83;
- 10: 114–116

## Teachable Moments for Teachers

- 8: 13; 8: 95–96;
- 9: 80–82; 9: 142–144;
- 10: 18–19; 10: 117–118

## Teach-In Activities in Law Schools

- 1: 67

## Teaching Advanced Electronic Legal Research for the Modern Practice of Law

- 9: 120–123

## Teaching Citation Form and Technical Editing: Who, When, and What

- 3: 4–5

## Teaching English Legal Research Using the Citation Method

- 6: 108–111

## Teaching Federal Legislative History: Notes from the Field

- 5: 96–100

## Teaching Legal Analysis

- 2: 52–53

## Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives

- 4: 72–77

## A Teaching Model for Academic and Private Law Librarians

- 1: 6–13

## Teaching Oral Argument

- 7: 17–20

## Teaching Paragraphs

- 8: 13

## Teaching Research as Part of an Integrated LR&W Course

- 4: 78–81

## Teaching Research in a Corporate Setting

- 1: 70–71

## Teaching Student Editors to Edit

- 9: 124–128

## Teaching Students to Make Effective Policy Arguments in Appellate Briefs

- 9: 73–79


- 9: 110–115

## Teaching the Poetry of the Question Presented

- 9: 142–144

## Teach-In Programs in Corporate Law Libraries

- 1: 72–73

## Teach-In Reflections Past, Present, and Future

- 4: 20–23

## Technology for Teaching

- 8: 79–84;
- 8: 124–128; 9: 86–89;

## Telling Clear Stories: A Principle of Revision That Demands a Good Character

- 5: 14–16

## Ten Commandments of Memo Writing: Advice for the Summer Associates

- 4: 83–84

## Ten Magic Tricks for an Interactive Classroom

- 8: 1–3

## Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process

- 10: 20–22

## Terminating Research

- 2: 2–3

## There’s a New Test in Town: Preparing Students for the MPT

- 8: 14–17

## Thinking About Writing Introductions

- 3: 41–43

## Tips for Summer Associates

- 7: 65–67

## Tips for Using a Computer for Legal Writing and Research

- 6: 86–87

## Tips on Writing and Related Advice

- 5: 113–114

## “To Note or Not to Note”

- 10: 84–86

## Tools of the Trade: Using Software to Conduct Legal Research with a Disability

- 4: 1–4

## The Top 10 Answers, Please

- 9: 18–19

## The Top 10 Things Firm Librarians Wish Summer Associates Knew

- 8: 140–142

## Training Users on Internet Publications Evolved from (And Still In) Print

- 10: 89–91

## Trial by Fire... Creating a Practical Application Research Exam

- 7: 99–104

## Two Programs Are Better Than One: Coordinating Efforts Between Academic Support and Legal Writing Departments

- 9: 148–152

## Tying It All Together

- 10: 18–19

## Understanding Color As a Design Element

- 2: 10–12

## Unpublished vs. Unreported: What’s the Difference?

- 5: 26–27

## U.S. Congressional Materials

- 1: 28–29
Why Law Review Students Write Poorly .............................................. 10: 117–118
Why We Should Teach Primary Materials First ................................ 8: 10–12
"Why Won't My Westlaw Search Work on Lycos?" ............................ 7: 123–126
Why You Should Use a Course Web Page .............................................. 10: 15–17
The Willow Laptop TV .................................................................................. 3: 78–79
Winning the Font Game: Limiting the Length of Students’ Papers ................. 4: 10–11
The Writer’s Golden Rule .............................................................................. 7: 78–81
Writing About Research ............................................................................... 3: 51–55
7: 10: 92–97; 8: 126–131
“You Can Call Me Al, in Graceland”: Reflections on a Speech Entitled “We Have Diamonds on the Soles of Our Shoes” ................................................. 3: 38–40

AUTHOR INDEX
Allee, Jacqueline
ABA Legal Writing Committee ................................................................. 1: 61
Anderson, Helen A.
Generation X Goes to Law School: Are We Too Nice to Our Students? 10: 73–75
Anzalone, Filippa Marullo
Advanced Legal Research: A Master Class ............................................. 5: 5–11
Aranas, Pauline M.
Who Should Teach CALR—Vendors, Librarians, or Both? 8: 89–92
Armstrong, Stephen V. and Timothy P. Terrell
Writing Tips... Conjugosis and Declension .......................... 4: 8–9
Writing Tips... Editing: Overcoming the Dr. Strangelove Syndrome ........... 5: 77–78
Writing Tips... Fighting “Tippism” ........................................ 6: 71–73
Writing Tips... Just One Damned Thing After Another: The Challenge of Making Legal Writing “Spatial” .................................. 7: 119–122
Writing Tips... Organizing Facts to Tell Stories .................................. 9: 90–94
Writing Tips... Resisting the Devil’s Voice Write Short, Simple Sentences ...... 3: 46–48
Writing Tips... The Dangers of Defaults ........................................ 10: 126–131
Arrigo-Ward, Maureen J.
Analogization: Lost Art or Teachable Skill? ........................................... 1: 36–41
Book Review: Thinking Like a Writer ............................................. 2: 61–62
Caring for Your Apostrophes ..................................................... 4: 14–15
Warning the Prospective Legal Writing Instructor, or “So You Really Want to Teach?” ........................................................................................................... 4: 64–67
Artz, Donna E.
Tips on Writing and Related Advice .................................................. 5: 113–114
Bach, Tracy
Teachable Moments for Teachers... Teaching the Poetry of the Question Presented .................................................................................................................. 9: 142–144
Baker, Brook K.
Incorporating Diversity and Social Justice Issues in Legal Writing Programs ................................................................. 9: 51–57
Barkan, Steven M.
From the Editor: Introducing Perspectives ........................................ 1: 1
From the Editor: Perspectives on the First Volume .................................. 2: 1
Bassett, Peggeen G., Virginia C. Thomas, and Gail Munden
Teaching Federal Legislative History: Notes from the Field .................. 5: 96–100
Baum, Masha L.
Teachable Moments for Students... Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process .......................................................... 10: 20–22
Behles, Deborah N. and Bradley G. Clary
Roadmapping and Legal Writing ................................................................ 8: 134–136
Beneke, Paul
Brutal Choices in Curricular Design ... Give Students Full CALR Access Immediately ......................................................... 8: 114–117
Brutal Choices in Curricular Design ... Start with Enacted Law, Not Common Law ......................................................... 10: 76–80
Bennett, Edward B., III
Tools of the Trade: Using Software to Conduct Legal Research with a Disability ......................................................... 4: 1–4
Berch, Rebecca White
Observations from the Legal Writing Institute Conference Thinking About Writing Introductions ......................................................... 3: 41–43
Berring, Robert C.
A Sort of Response: Brutal Non-Choices ............................................. 4: 81–82
Bintlfiff, Barbara
Teachable Moments... “Shepardizing Cases” ........................................ 4: 19
Teachable Moments for Students... “How Can I Tell the Effective Date of a Federal Statute?” ............................................. 8: 93–94
Teachable Moments for Students... Mandatory v. Persuasive Cases ................................. 9: 83–85
Why Is Web Searching So Unpredictable? ........................................ 7: 84–86
Blaustein, Albert P.
On Legal Writing ................................................................................ 2: 57–60
Bloch, Beate
Brief-Writing Skills .......................................................................... 2: 4–5
Blum, Joan
Brutal Choices in Curricular Design ... Why You Should Use a Course Web Page .................................................................................. 10: 15–17
Blumenfeld, Barbara
A Photographer’s Guide to Legal Writing ........................................... 4: 41–43
Boris, Edna Zwick
Writing Tips... Sentence Sense “It” Problems ...................................... 4: 96–98
Writing Tips... Sentence Sense “We,” “Our,” “Us” Problems ........................... 5: 125–127
Writing Tips... Sentence Structure and Sentence Sense “And” Problems ........................................... 3: 85–86
Bresler, Kenneth
On the Lighter Side: Pursuant to Partners’ Directive, Lawyer Learns to Obfuscate .... 3: 18
Brill, Ralph L.  
ABA Adopts New Standards Relating to Legal Research and Writing  
5: 71–72

Broida, Mark A.  
Can Legal Skills Become Legal Thrills? Knowing and Working Your Audience  
4: 44–47
A Tale of Two Programs  
5: 65–68

Browne, Kelly  
The Top 10 Answers, Please  
9: 18–19
The Top 10 Things Firm Librarians Wish Summer Associates Knew  
8: 140–142

Browne, Kelly and Joan Shear  
Which Legal Research Text Is Right for You?  
10: 23–29

Brunner, Karen B.  
National Library Week: A Law Firm Teaching Opportunity  
1: 68–69
1993 Teach-In Events  
2: 13–17

Butler, Ritchie, David T. and Susan Hanley Kosse  
Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research  
9: 69–72

Callinan, Ellen M.  
Legal Research and the Summer Job ... Advice from the Law Firm  
7: 110–115
Legal Research in Practice: How a Labor Lawyer Does Legal Research  
5: 11–13
The National Legal Research Teach-In  
1: 65–66
Recite Right: Redaction Preparation and the Law School Library  
1: 42–46
Research Instruction Caucus: News and Views  
1: 16–17; 1: 58–60;  
2: 17–18
Simulated Research: A Teaching Model for Academic and Private Law Librarians  
1: 6–13
Take Charge of Your Training Room  
3: 8–9

Callinan, Ellen M. and Dianne T. Lewis  
How to ... Orient Foreign Lawyers in a Law Firm Library  
5: 21–22

Cane, Paul  
The Ten Commandments of Memo Writing ... Advice for the Summer Associates  
4: 83–84

Caputo, Angela  
Technology for Teaching ... Four Pointers to Effective Use of PowerPoint in Teaching  
10: 132–136

Cerjan, Martin  
Teachable Moments ... How Can I Find the Current Status of a Treaty Called the "Convention on the Rights of the Child"?  
5: 79–80

Cherry, Anna M.  
Using Electronic Research to Detect Sources of Plagiarized Materials  
9: 133–135

Ching, Bruce  
Nonlegal Analogies in the LRW Classroom  
8: 26–29

Clary, Bradley G.  
"To Note or Not to Note"  
10: 84–86

Clary, Bradley G. and Deborah N. Behles  
Roadmapping and Legal Writing  
8: 134–136

Clayton, Mary  
Legal Research for Blind Law Students: Speech Technologies and the World Wide Web  
6: 100–102

Clough, Spencer E.  
The Chalkboard  
3: 78–79

Coggins, Timothy L.  
Bringing the "Real World" to Advanced Legal Research  
6: 19–23

Cohen, Beth D.  
Instilling an Appreciation of Legal Ethics and Professional Responsibility in First-Year Legal Research and Writing Courses  
4: 5–7

Cohen, Eileen B.  
Using Cognitive Learning Theories in Teaching Legal Research  
1: 79–82

Colomb, Gregory G.  
Writing Tips ... Framing Pleadings to Advance Your Case  
10: 92–97

Colomb, Gregory G. and Joseph M. Williams  
Writing Tips ... Shaping Stories: Managing the Appearance of Responsibility  
6: 16–18
Writing Tips ... So What? Why Should I Care? And Other Questions Writers Must Answer  
9: 136–141
Writing Tips ... Telling Clear Stories: A Principle of Revision That Demands a Good Character  
5: 14–16
Writing Tips ... The Writer's Golden Rule  
7: 78–81
Writing Tips... Well Begun Is Half Done  The First Principle of Coherent Prose ... 8: 129–133

Cooney, Leslie Larkin and Judith Karp
Ten Magic Tricks for an Interactive Classroom. ........................................... 8: 1–3

Daniel, Neil
Managing Metadiscourse. .......... 2: 23–24
Writing Tips................. 1: 50–51; 1: 87–90;
 ........................................... 2: 23–24; 2: 63–65

Davis, Wendy B.
Consequences of Ineffective Writing. ... 8: 97–99

DeGeorges, Patricia A.
Teach-In Programs in Corporate Law Libraries. ......................... 1: 72–73

Duggan, James E.
Book Review ... Net Law: How Lawyers Use the Internet .......... 6: 32
Technology for Teaching ... Using CALI Lessons to Review (or Teach) Legal Research and Writing Concepts .......... 9: 86–89

Dunn, Donald J.
Brutal Choices in Curricular Design ... Why We Should Teach Primary Materials First ... 8: 10–12
Legal Research: A Fundamental Lawyerling Skill ......................... 1: 2–3
Legal Research and Writing Resources
Recent Publications .......... 1: 56–58;
 ........................................... 1: 91–92; 2: 25–26;
 ........................................... 2: 68–69; 3: 10–12; 3: 49–50;
 ........................................... 4: 100–102; 5: 31–34; 5: 81–83;
 ........................................... 8: 34–36; 8: 100–101; 9: 20–23;
 ........................................... 10: 98–100; 10: 139–141

Dunnewold, Mary
Common First-Year Student Writing Errors. ......................... 9: 14–15
Establishing and Maintaining Good Working Relationships with 1L Writing Students ... 8: 4–7
“Feed-Forward” Tutorials Not “Feedback” Reviews ................. 6: 105–107
How Many Cases Do I Need? ................. 10: 10–11

Durako, Jo Anne
Brutal Choices in Curricular Design ... Peer Editing: It’s Worth the Effort .......... 7: 73–76
Building Confidence and Competence in Legal Research Skills Step by Step ... 5: 87–91

Edelman, Diane Penneys
How They Write Our Students Reflections on Writing. .......... 6: 24–28
Opening Our Doors to the World: Introducing International Law in Legal Writing and Legal Research Courses. .......... 5: 1–4

Edwards, Linda H.

Edwards, Linda and Paula Lustbadder
Teaching Legal Analysis. .......... 2: 52–53

Egler, Peter J.
Teachable Moments for Students ... What Gives Cities and Counties the Authority to Create Charters, Ordinances, and Codes? .......... 9: 145–147

Esposteo, Shaun
Our Question—Your Answers .......... 4: 12–13

Evangelist, Susan S. and Roy M. Mersky
Guidelines for Writing Book Reviews. ................. 1: 15

Faulk, Martha
Writing Tips... Much Ado About That ... Or Is It Which? ................. 6: 112–114
Writing Tips... Never Use a Preposition to End a Sentence With .......... 8: 24–25
Writing Tips... Sounding Like a Lawyer. ................. 10: 5–7
Writing Tips... The Best Sentence .......... 9: 3–4

Feeley, Kelly M. and Stephanie A. Vaughan

Fine, Toni M.
Legal Research in Practice: How a FERC Lawyer Does Research. ................. 2: 46–51

Finet, Scott
Advanced Legal Research and the World Wide Web .......... 5: 52–54

Ford, Kristin
Teachable Moments for Students... Researching Uniform and Model Laws. .......... 10: 114–116
<table>
<thead>
<tr>
<th>Title</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Houdek, Frank G. and Penny A. Hazelton: Index to Perspectives...</td>
<td>5: 35-47</td>
</tr>
<tr>
<td>Houston, Barbara Bevis: Practice Pointer: A Checklist for Evaluating Online Searching Skills Or, When to Take Off the Training Wheels</td>
<td>3: 13-15</td>
</tr>
<tr>
<td>Huddleston, Brian: Trial by Fire... Creating a Practical Application Research Exam</td>
<td>7: 99-104</td>
</tr>
<tr>
<td>Jamar, Steven D.: The ALWD Citation Manual — A Professional Citation System for the Law</td>
<td>8: 65-67</td>
</tr>
<tr>
<td>Using the Multistate Performance Test in an LRW Course</td>
<td>8: 118-123</td>
</tr>
<tr>
<td>Jarret, Peggy Roebuck and Mary Whisner: &quot;Here There Be Dragons&quot;: How to Do Research in an Area You Know Nothing About</td>
<td>6: 74-76</td>
</tr>
<tr>
<td>Jarret, Peggy Roebuck, Nancy M. Currer, Penny A. Hazelton, and Mary Whisner: Develop the Habit: Note-Taking in Legal Research</td>
<td>4: 48-52</td>
</tr>
<tr>
<td>Johansen, Steve J.: Brutal Choices in Curricular Design... Life Without Grades: Creating a Successful Pass/Fail Legal Writing Program</td>
<td>6: 119-121</td>
</tr>
<tr>
<td>Jones, Leslediana: Our Question—Your Answers</td>
<td>5: 120-124</td>
</tr>
<tr>
<td>Jones, Nancy L.: Extending the Classroom: The Writing Resource Center and the Teaching of Legal Writing at the University of Iowa</td>
<td>1: 83-85</td>
</tr>
<tr>
<td>Jones, Rachel W. and Barbara Bintliff: Teachable Moments for Students... Mandatory v. Persuasive Cases</td>
<td>9: 83-85</td>
</tr>
<tr>
<td>Karp, Judith and Leslie Larkin Cooney: Ten Magic Tricks for an Interactive Classroom</td>
<td>8: 1-3</td>
</tr>
<tr>
<td>Kelley, Sally J.: How to... Use the Internet to Find and Update the United States Code</td>
<td>7: 23-26</td>
</tr>
<tr>
<td>Kennedy, Bruce: Finding Recent Legislative Developments &amp; Documents</td>
<td>1: 26-27</td>
</tr>
<tr>
<td>Kimble, Joseph: On Legal-Writing Programs</td>
<td>2: 43-46</td>
</tr>
<tr>
<td>Kleinschmidt, Bruce: Taping: It's Not Just for Grand Juries Anymore</td>
<td>7: 87</td>
</tr>
<tr>
<td>Klugh, Druet Cameron: Teachable Moments for Students... Are You Positive About “Positive Law”?</td>
<td>10: 81-83</td>
</tr>
<tr>
<td>Koshollek, Mary: A Plan for In-House Training: One Firm's Experience</td>
<td>5: 106-112</td>
</tr>
<tr>
<td>Koslov, Marcia J. and Paul George: Introducing the AALL Uniform Citation Guide</td>
<td>8: 60-64</td>
</tr>
<tr>
<td>Koss, Susan Hanley and David T. ButterRitchie: Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research</td>
<td>9: 69-72</td>
</tr>
<tr>
<td>Kunsch, Kelly: Teachable Moments... “What Is the Standard of Review?”</td>
<td>6: 84-85</td>
</tr>
</tbody>
</table>
Metteer, Christine
Introduction to Legal Writing: A Course for Pre-Law Students .................. 3: 28–30

Miller, Michael S.
Recognizing and Reading Legal Citations ........................................ 2: 70–72

Miller, Michael S. and Dee Van Nest
Breaking Barriers—Access to Main Street: Pathfinder on the Americans with Disabilities Act ............... 2: 73–84

Miller, Steven R.
Technology for Teaching ... Teaching Advanced Electronic Legal Research for the Modern Practice of Law .................. 9: 120–123

Mirow, M. C.
Confronting Inadvertent Plagiarism ...... 6: 61–64

Mitchell, Paul G.
From Black and White to Color .......... 2: 9
Teaching Research in a Corporate Setting .................. 1: 70–71

Mooney, Christine G.
When Does Help Become a Hindrance: How Much Should We Assist Students with Their Graded Legal Writing Assignments? .......... 10: 69–72

Mowrer, J. Reid

Munden, Gail, Pegeen G. Bassett, and Virginia C. Thomas
Teaching Federal Legislative History: Notes from the Field .................. 5: 96–100

Newby, Thomas R.
Law School Writing Programs Shouldn’t Teach Writing and Shouldn’t Be Programs ............. 7: 1–7

Novak, Jan Ryan

Nyberg, Cheryl Rae
How to Master All You Survey .......... 6: 8–13

Nyberg, Cheryl Rae and Michael R. Gotham
Joining Hands to Build Bridges ........ 7: 60–64

Oates, Laurel
Legal Writing Institute Publishes Journal and Holds Fifth Biennial Conference ......... 1: 62

Olson, Chris
Understanding Color As a Design Element .................. 2: 10–12

Olson, Kent C.
Waiving a Red Flag: Teaching Counterintuitiveness in Citator Use .......... 9: 58–60

Orr-Waters, Laura J.
Teaching English Legal Research Using the Citation Method .................. 6: 108–111

Legal Research and the Summer Job ... Advice from the Law School ........... 7: 110–112

Partin, Gail A.
Teach-In Reflections Past, Present, and Future .................. 4: 20–23

Patrick, Thomas O.
Using Simplified Cases to Introduce Synthesis .................. 3: 67–73

Persyn, Mary G.
The Willow Laptop TV .................. 3: 78–79

Pether, Penelope
Book Reviews ... Legal Analysis: The Fundamental Skill and Professional Writing for Lawyers: Skills and Responsibilities ............. 7: 116–118

Platt, Ellen
How to ... Research Federal Court Rule Amendments: An Explanation of the Process and a List of Sources .................. 6: 115–118
Jury Instructions: An Underutilized Resource .................. 7: 90–93
Teachable Moments ... “How Do You Update a West Key Number?” ... Beyond the Digest .................. 4: 99

Potthoff, Lydia
Teachable Moments ... “How Do You Update the Code of Federal Regulations?” .................. 5: 28–29

Ramy, Herbert N.
Lessons from My First Year: Maintaining Perspective .................. 6: 103–104
Two Programs Are Better Than One: Coordinating Efforts Between Academic Support and Legal Writing Departments .......... 9: 148–152
Rine, Nancy A.  

Romantz, David S. and Kathleen Elliott Vinson  
Who Will Publish My Manuscript? .... 7: 31–33

Rosenbaum, Judith  
Brutal Choices in Curricular Design ... Using Read-Aloud Protocols As a Method of Instruction ........... 7: 105–109  
Technology for Teaching ... CALR Training in a Networked Classroom ........... 8: 79–84

Rosenthal, Lawrence D.  
Are We Teaching Our Students What They Need to Survive in the Real World? Results of a Survey ........... 9: 103–109

Rowe, Suzanne E.  
The Brick: Teaching Legal Analysis Through the Case Method ........... 7: 21–22

Ryan, Linda M.  
Designing a Program to Teach CALR to Law Students: A Selective and Annotated Bibliography of Resource Materials ........... 4: 53–58  
Seeing the Forest and the Trees: Introducing Students to the Law Library ........... 3: 31–35

Sanderson, Rosalie M.  
"Real World" Experience for Research Students ........... 7: 71–72

Schless, Wayne  
Common Student Citation Errors ........... 10: 119–123

Schlueter, Kay and Catherine Harris  
Legal Research and Raising Revenue at the Texas State Law Library ........... 7: 88–89

Schultz, Nancy L.  
The New Test in Town: Preparing Students for the MPT ........... 8: 14–17

Scott, Wendy and Kennard R. Strutin  
The Legal Research Practicum: A Proposal for the Road Ahead ........... 6: 77–80

Scully, Patrice  

See, Brenda  
Legal Writing Through the Eyes of First-Year Law Students Their 25 Rules for Survival ........... 6: 92–93  
Teachable Moments for Teachers... Tying It All Together ........... 10: 18–19

Selby, Barbie  

Selden, David  
Electronic Research Skills Assessment Survey As an Instructional Tool ........... 9: 95–98

Seligmann, Terry Jean  
Holding a Citation Carnival ........... 8: 18–20

Seligmann, Terry Jean and Thomas H. Seymour  
Choosing and Using Legal Authority: The Top 10 Tips ........... 6: 1–5

Seymour, Thomas H. and Terry Jean Seligmann  
Choosing and Using Legal Authority: The Top 10 Tips ........... 6: 1–5

Shafer, Melissa  
Shakespeare in the Law: How the Theater Department Can Enhance Lawyering Skills Instruction ........... 8: 108–113

Shapo, Helene S.  
Implications of Cognitive Theory for Teaching ........... 1: 77–78  
Notes from Legal Writing Organizations ........... 2: 19

Shapo, Helene S. and Christina L. Kunz  
Brutal Choices Should the First-Year Legal Writing Course Be Graded in the Same Way As Other First-Year Courses? ........... 2: 6–8  
Brutal Choices in Curricular Design ... Making the Most of Reading Assignments ........... 5: 61–62  
Brutal Choices in Curricular Design .... Standardized Assignments in First-Year Legal Writing ........... 3: 65–66  
Brutal Choices in Curricular Design .... Teaching Citation Form and Technical Editing: Who, When, and What ........... 3: 4–5  
Brutal Choices in Curricular Design .... Teaching Research As Part of an Integrated LR&W Course ........... 4: 78–81  
Brutal Choices in Curricular Design .... Winning the Font Game: Limiting the Length of Students’ Papers ........... 4: 10–11

Shapo, Helene S. and Mary S. Lawrence  
Brutal Choices in Curricular Design .... Designing the First Writing Assignment ........... 5: 94–95  
Brutal Choices in Curricular Design .... Surviving Sample Memos ........... 6: 90–91
Tonner, Grace C. and Jan M. Levine
Legal Writing Scholarship: Point/Counterpoint ................. 7: 68–70

Vance, Ruth C.
The Use of Teaching Assistants in the Legal Writing Course .......... 1: 4–5

Van Nest, Dee and Michael S. Miller
Breaking Barriers—Access to Main Street: Pathfinder on the Americans with Disabilities Act .......... 2: 73–84

Vaughn, Lea and Mary Whisner
Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives .......... 4: 72–77

Vaughan, Stephanie A. and Kelly M. Feeley

Vinson, Kathleen Elliott
New LRW Teachers Alert! 14 Ways to Avoid Pitfalls in Your First Year of Teaching .......... 6: 6–7

Vinson, Kathleen Elliott and David S. Romantz
Who Will Publish My Manuscript? .......... 7: 31–33

Wallace, Marie
Finishing Touches .......... 1: 74–76
Practice Pointer: Looseleaf Services .......... 1: 63–64

Watkins, H. Eric
Letter to the Editor .......... 4: 92

Weston, Heidi J.
Speaking of “Teachable Moments” ... Teaching the Ah Hah! .......... 4: 93

Whisner, Mary
Managing a Research Assignment .......... 9: 9–13

Whisner, Mary and Lea Vaughn
Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives .......... 4: 72–77

Whisner, Mary and Peggy Roebuck Jarrett
“Here There Be Dragons”: How to Do Research in an Area You Know Nothing About .......... 6: 74–76

Whisner, Mary, Penny A. Hazelton, Peggy Roebuck Jarrett, and Nancy McMurrer
Develop the Habit: Note-Taking in Legal Research .......... 4: 48–52

Whiteman, Michael
The “Why” and “How” of Teaching the Internet in Legal Research .......... 5: 55–58

Wigal, Grace
Brutal Choices in Curricular Design ... Repeaters in LRW Programs .......... 9: 61–68

Will, Linda

Williams, Brian S.
The Legal Writing Conference A Rookies Perspective .......... 3: 36–37

Williams, Joseph M. and Gregory G. Colomb
Writing Tips ... Shaping Stories: Managing the Appearance of Responsibility .......... 6: 16–18
Writing Tips ... So What? Why Should I Care? And Other Questions Writers Must Answer .......... 9: 136–141
Writing Tips ... Telling Clear Stories: A Principle of Revision That Demands a Good Character .......... 5: 14–16
Writing Tips ... The Writer’s Golden Rule .......... 7: 78–81
Writing Tips ... Well Begun Is Half Done: The First Principle of Coherent Prose .......... 8: 129–133

Wise, Virginia

Woicik, Marck E.

Zappen, Edward F., Jr.

Zimmerman, Clifford S.
Creative Ideas and Techniques for Teaching Rule Synthesis .......... 8: 68–72

Zimmerman, Emily
Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy .......... 10: 109–113
### SUBJECT INDEX

**ABA LEGAL WRITING COMMITTEE**
Allee, Jacqueline
ABA Legal Writing Committee .............. 1: 61

**ABA STANDARDS**
Brill, Ralph L.
ABA Adopts New Standards Relating to Legal Research and Writing .............. 5: 71–72

**ADVANCED LEGAL RESEARCH**
Anzalone, Filippa M arullo
Advanced Legal Research:
A Master Class ......................... 5: 5–11
Coggins, Timothy L.
Bringing the “Real World” to Advanced Legal Research ......................... 6: 19–23
Miller, Steven R.
Technology for Teaching ... Teaching Advanced Electronic Legal Research for the Modern Practice of Law .............. 9: 120–123
Silverman, Marc B.
Advanced Legal Research:
A Question of Value ..................... 6: 33–36

**ANALOGY**
Arrigo, Maureen J.
Analogization: Lost Art or Teachable Skill? .................. 1: 36–41
Ching, Bruce
Nonlegal Analogies in the LRW Classroom .................. 8: 26–29

**APPELLATE PRACTICE AND PROCEDURE**
Kunsch, Kelly
Teachable Moments ... “What Is the Standard of Review?” .................. 6: 84–85
Sirico, Louis J., Jr.
Cardozo’s Statement of Facts in Palsgraf, Revisited .................. 6: 122–123

**ASSIGNMENTS**
Dunnewold, Mary
Levine, Jan M.
Designing Assignments for Teaching Legal Analysis Research, and Writing .................. 3: 58–64
Shapo, Helene S. and Christina L. Kunz
Brutal Choices in Curricular Design ... Making the Most of Reading Assignments .............. 5: 61–62
Brutal Choices in Curricular Design ... Standardized Assignments in First-Year Legal Writing .............. 3: 65–66
Sloan, Amy E.
Creating Effective Legal Research Exercises .................. 7: 8–12

**AUTHORITY**
Seligmann, Terry Jean and Thomas H. Seymour
Choosing and Using Legal Authority: TheTop 10 Tips .................. 6: 1–5

**BANKRUPTCY**
Holt, Barbara Cornwall and Michael Gearin
How a Bankruptcy Lawyer Does Legal Research .................. 5: 101–105

**BIBLIOGRAPHIES**
Dunn, Donald J.
Legal Research and Writing Resources: Recent Publications .................. 1: 56–58;
........................................ 2: 68–69;
........................................ 3: 49–50;
........................................ 4: 68–70;
........................................ 5: 81–83;
........................................ 6: 124–125;
........................................ 7: 94–96;
........................................ 8: 127–128;
........................................ 9: 99–100;
........................................ 10: 98–100;
........................................ 10: 139–141
Hazelton, Penny A.
Surveys on How Attorneys Do Legal Research .................. 1: 53
Ryan, Linda M.
Designing a Program to Teach CALR to Law Students: A Selective and Annotated Bibliography of Resource Materials .................. 4: 53–58

**BOOK REVIEWS**
Arrigo, Maureen J.
Book Review: Thinking Like a Writer .................. 2: 61–62
Duggan, James E.
Book Review ... Net Law: How Lawyers Use the Internet .................. 6: 32
Hazelton, Penny A.

Martin, April
Book Review: Acing Your First Year of Law School: The Ten Steps to Success You Won’t Learn in Class .............................. 9: 155

Mersky, Roy M. and Susan S. Evangelist
Guidelines for Writing Book Reviews ........................................ 1: 15

Pether, Penelope

Simoni, Christopher

Wojcik, Mark E.
Book Review: Legal Research .................................................. 3: 16–17

BRIEFS
Bach, Tracy
Teachable Moments for Teachers ... Teaching the Poetry of the Question Presented .................................................. 9: 142–144

Bloch, Beate
Brief-Writing Skills ................................................................. 2: 4–5

Margolis, Ellie
Teaching Students to Make Effective Policy Arguments in Appellate Briefs .................................................. 9: 73–79

CITATIONS
Clary, Bradley G.
“To Note or Not to Note” .................................................. 10: 84–86

Esposito, Shaun
Our Question—Your Answers ............................................. 4: 12–13

George, Paul and Marcia J. Koslov
Introducing the AALL Uniform Citation Guide ........................................ 8: 60–64

Jamar, Steven D.
The ALWD Citation Manual—A Professional Citation System for the Law .................................................. 8: 65–67

Miller, Michael S.
Recognizing and Reading Legal Citations ........................................ 2: 70–72

Schies, Wayne
Common Student Citation Errors ........................................... 10: 119–123

Seligmann, Terry Jean
Holding a Citation Carnival .................................................. 8: 18–20

Shapo, Helene S. and Christina L. Kunz
Teaching Citation Form and Technical Editing: Who, When, and What .................................................. 3: 4–5

COGNITIVE LEARNING THEORY
Cohen, Eileen B.
Using Cognitive Learning Theories in Teaching Legal Research .................................................. 1: 79–82

Shapo, Helene S.
Implications of Cognitive Theory for Teaching ........................................ 1: 77–78

COLOR
Mitchell, Paul G.
From Black and White to Color ............................................. 2: 9

Olson, Chris
Understanding Color As a Design Element ........................................ 2: 10–12

COMPUTER-ASSISTED LEGAL RESEARCH
Aranas, Pauline M.
Who Should Teach CALR—Vendors, Librarians, or Both? .................................................. 8: 89–92

Beneke, Paul
Brutal Choices in Curricular Design ... Give Students Full CALR Access Immediately .................................................. 8: 114–117

Duggan, James E.
Technology for Teaching ... Using CALI Lessons to Review (or Teach) Legal Research and Writing Concepts .................................................. 9: 86–89

Hazelton, Penny A.

Hogan, Jessica R.
Teachable Moments... “Why Won’t My Westlaw Search Work on Lycos?” .................................................. 7: 123–126

Houdek, Frank G.
Our Question—Your Answers ............................................. 1: 14; 1: 49–50; 3: 6–7
Houston, Barbara Bevis

Kosse, Susan Hanley and David T. Butler
Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research. .......... 9: 69–72

MacMurren, Nancy
Butterflies Are Free—But Should CALR Printing Be? .......... 8: 89–92

Rosenbaum, Judith
Technology for Teaching ... CALR Training in a Networked Classroom .......... 8: 79–84

Ryan, Linda M.
Designing a Program to Teach CALR to Law Students: A Selective and Annotated Bibliography of Resource Materials .......... 4: 53–58

Selden, David
Electronic Research Skills Assessment Survey As an Instructional Tool .......... 9: 95–98

Snyder, Fritz
High-Tech Law Students When to Train Them on CALR .......... 8: 21–23

Todd, Kay M.
Principles of Power Research: Integrating Manual and Online Legal Research to Maximize Results and Minimize Costs .......... 1: 93–97

COPYRIGHT
Harris, Catherine K.
Pathfinder to U.S. Copyright Law .......... 2: 32–38

Hemmens, Ann
Obtaining Copyright Permissions Online Resources .......... 9: 129–132

CORPORATE LIBRARIES
DeGeorges, Patricia A.
Teach-In Programs in Corporate Law Libraries .......... 1: 72–73

Mitchell, Paul G.
Teaching Research in a Corporate Setting .......... 1: 70–71

DISABILITIES
Bennett, Edward B., III
Tools of the Trade Using Software to Conduct Legal Research With a Disability .......... 4: 1–4

Clayton, Mary

Miller, Michael S. and Dee Van Nest
Breaking Barriers—Access to Main Street: Pathfinder on the Americans with Disabilities Act .......... 2: 73–84

ENERGY
Fine, Toni M.
Legal Research in Practice: How a FERC Lawyer Does Research .......... 2: 46–51

ETHICS
Cohen, Beth D.
Instilling an Appreciation of Legal Ethics and Professional Responsibility in First-Year Legal Research and Writing Courses .......... 4: 5–7

GOVERNMENT LIBRARIES
Scully, Patrice

GRADING
Anderson, Helen A.
Generation X Goes to Law School: Are We Too Nice to Our Students? .......... 10: 73–75

Huddleston, Brian
Trial by Fire ... Creating a Practical Application Research Exam .......... 7: 99–104

Johansen, Steve J.
Brutal Choices in Curricular Design ... Life Without Grades: Creating a Successful Pass/Fail Legal Writing Program .......... 6: 119–121

Mooney, Christine G.
When Does Help Become a Hindrance: How Much Should We Assist Students with Their Graded Legal Writing Assignments? .......... 10: 69–72

Shapo, Helene S. and Christina L. Kunz
Brutal Choices: Should the First-Year Legal Writing Course Be Graded in the Same Way As Other First-Year Courses? .......... 2: 6–8
Staheli, Kory D.
Evaluating Legal Research Skills Giving Students
the Motivation They Need . . . . . . . . . . . . . . . 3: 74–76

**HEALTH LAW**
McMurrer, Nancy
Researching Health Law
Issues . . . . . . . . . . . . . . . . . . . . . . . . . . 5: 115–119

**INTERNET**
Announcements . . . LR&W Internet
Discussion Lists . . . . . . . . . . . . . . . . . . . . 4: 61
Bintliff, Barbara
Why Is Web Searching So
Unpredictable? . . . . . . . . . . . . . . . . . . . . . 7: 84–86
Duggan, James E.
Book Review: Net Law: How Lawyers Use the
Internet . . . . . . . . . . . . . . . . . . . . . . . . . . . 6: 32
Finet, Scott
Advanced Legal Research and the
World Wide Web . . . . . . . . . . . . . . . . . . . . . 5: 52–54
Gleason, Diana
Technology for Teaching: "Introduction to the
Internet": A Training Script . . . . . . . . . . . . 8: 124–128
Hogan, Jessica R.
Teachable Moments . . . . . . . . . . . . . . . . . . 7: 123–126
Kelley, Sally J.
How to . . . Use the Internet to Find and Update
the United States Code . . . . . . . . . . . . . . . . 7: 23–26
Simoni, Christopher
Our Question—Your Answers . . . . . . . . 4: 59–61
Stroup, Richard
Internet Lunch Breaks A Low-Tech Solution to a
High-Tech Demand . . . . . . . . . . . . . . . . . . . 6: 88–89
Whiteman, Michael
The "Why" and "How" of Teaching the Internet in
Legal Research . . . . . . . . . . . . . . . . . . . . . 5: 55–58

**JURY INSTRUCTIONS**
Platt, Ellen
Jury Instructions An Underutilized
Resource . . . . . . . . . . . . . . . . . . . . . . . . . 7: 90–93
Sirico, Louis J., Jr.
Materials for Teaching Plain English: The Jury
Instructions in Palsgraf, Revisited . . . . 8: 137–139

**LABOR**
Callinan, Ellen M.
Legal Research in Practice How a Labor Lawyer
Does Legal Research . . . . . . . . . . . . . . . . . . 5: 11–13

**LAW FIRMS**
Browne, Kelly
The Top 10 Answers, Please . . . . . . . . . . 9: 18–19
The Top 10 Things Firm Librarians Wish
Summer Associates Knew . . . . . . . . . . . . . 8: 140–142
Brunner, Karen B.
National Library Week: A Law Firm Teaching
Opportunity . . . . . . . . . . . . . . . . . . . . . . 1: 68–69
Callinan, Ellen M.
Legal Research and the Summer Job . . . Advice
from the Law Firm . . . . . . . . . . . . . . . . . . . 7: 110–115
Callinan, Ellen M. and Dianne T. Lewis
How to . . . Orient Foreign Lawyers in a Law
Firm Library . . . . . . . . . . . . . . . . . . . . . . 5: 21–22
Cane, Paul
Ten Commandments of Memo Writing . . . Advice
for the Summer Associates . . . . . . . . . . . . 4: 83–84
Houston, Barbara Bevis
A Checklist for Evaluating Online Searching
Skills Or, When to Take Off the Training
Wheels . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3: 13–15
Koshollek, Mary
A Plan for In-House Training: One Firm's
Experience . . . . . . . . . . . . . . . . . . . . . . . 5: 106–112
Rine, Nancy A.
Research in a Law Firm: How to Find
(Quickly) What You Never Had to Look
For in Law School . . . . . . . . . . . . . . . . . . . 2: 27–31
Rosenthal, Lawrence D.
Are We Teaching Our Students What They
Need to Survive in the Real World? Results
of a Survey . . . . . . . . . . . . . . . . . . . . . . . . 9: 103–109
Selby, Barbie
Tips for Summer Associates . . . . . . . . . . 7: 65–67
Will, Linda
The Law Firm Librarian As Teacher:
Slouching Toward 2000 . . . . . . . . . . . . . . . . . . . . 6: 14–15

**LAW SCHOOLS**
McCarthy, Kathleen J.
Teach-In Activities in Law Schools . . . . . . . . . . 1: 67
LEGAL ANALYSIS

Dunnewold, Mary
How Many Cases Do I Need? ............ 10: 10–11
Edwards, Linda and Paula Lustbadder
Teaching Legal Analysis ............. 2: 52–53
Haigh, Richard
Pulp Fiction and the Reason of Law ... 6: 96–99
Patrick, Thomas O.
Using Simplified Cases to Introduce Synthesis ............. 3: 67–73
Rowe, Suzanne E.
The Brick: Teaching Legal Analysis Through the Case Method ............. 7: 21–22
Zimmerman, Clifford S.
Creative Ideas and Techniques for Teaching Rule Synthesis ............. 8: 68–72

LEGAL RESEARCH
(See also Advanced Legal Research; Computer-Assisted Legal Research; Teaching Methods—Research)

Baum, Marsha L.
Teachable Moments for Students... Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process ............. 10: 20–22
Callinan, Ellen M.
Legal Research and the Summer Job ... Advice from the Law Firm ............. 7: 110–115
Dunn, Donald J.
Legal Research: A Fundamental Lawyering Skill ............. 1: 2–3
Ford, Kristin
Teachable Moments for Students... Researching Uniform and Model Laws ............. 10: 114–116
Hazleton, Penny A.
Our Question—Your Answers ............. 6: 29–31
Surveys on How Attorneys Do Legal Research ............. 1: 53
Henle, Alea
Training Users on Internet Publications Evolved From (And Still In) Print ............. 10: 89–91
Howland, Joan S.
Principles of Power Research: Integrating Manual and Online Legal Research to Maximize Results and Minimize Costs ............. 1: 93–97
Jones, Lesliediana
Our Quest ion—Your Answers ............. 5: 120–124
Klugh, Druet Cameron
Teachable Moments for Students... Are You Positive About "Positive Law"? ............. 10: 81–83
Mowrer, J. Reid
The Attorney's Pursuit of Justice and Wisdom: Once More, with Feeling ............. 5: 92–93
Pantalonii, Nazareth A., III and Louis J. Sirico, Jr.
Legal Research and the Summer Job ... Advice from the Law School ............. 7: 110–112
Platt, Ellen
Shear, Joan and Kelly Browne
Simoni, Christopher
Writing About Research ............. 3: 51–55
Wojcik, Mark E.
Book Review: Legal Research ............. 3: 16–17

LEGAL WRITING
(See also Teaching Methods—Writing)

Armstrong, Stephen V. and Timothy P. Terrell
Writing Tips... Fighting "Tippism" ....... 6: 71–73
Arrigo-Ward, Maureen J.
Warning the Prospective Legal Writing Instructor, or "So You Really Want to Teach?" ....... 4: 64–67
Baker, Brook K.
Incorporating Diversity and Social Justice Issues in Legal Writing Programs ............. 9: 51–57
Bench, Rebecca White
Observations from the Legal Writing Institute Conference Thinking About Writing Introductions ............. 3: 41–43
Blaustein, Albert P.
On Legal Writing ............. 2: 57–60
Bresler, Kenneth
On the Lighter Side: Pursuant to Partners' Directive, Lawyer Learns to Obfuscate ............. 3: 18
Cane, Paul
Ten Commandments of Memo Writing ... Advice for the Summer Associates ............. 4: 83–84
<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daniel, Neil</td>
<td>Managing Metadiscourse</td>
</tr>
<tr>
<td>Davis, Wendy B.</td>
<td>Consequences of Ineffective Writing</td>
</tr>
<tr>
<td>Edelman, Diane Penneys</td>
<td>How They Write: Our Students' Reflections on Writing</td>
</tr>
<tr>
<td>Gannage, Mark</td>
<td>How to ... Structure Your Legal Memorandum</td>
</tr>
<tr>
<td>LeClercq, Terri</td>
<td>U.S. News &amp; World Report &quot;Notices&quot; Legal Writing Programs</td>
</tr>
<tr>
<td>Levine, Jan M.</td>
<td>Some Concerns About Legal Writing Scholarship</td>
</tr>
<tr>
<td>Levine, Jan M. and Grace C. Tonner</td>
<td>Legal Writing Scholarship: Point/Counterpoint.</td>
</tr>
<tr>
<td>Newby, Thomas R.</td>
<td>Law School Writing Programs Shouldn't Teach Writing and Shouldn't Be Programs</td>
</tr>
<tr>
<td>See, Brenda</td>
<td>Legal Writing Through the Eyes of First-Year Law Students Their 25 Rules for Survival</td>
</tr>
<tr>
<td>Siegel, Martha</td>
<td>&quot;Seven Edits Make Perfect?&quot;</td>
</tr>
<tr>
<td>Simon, Sheila</td>
<td>Order What Are Your Words In? How Foreign Languages Can Help You Teach the Structure of Legal Writing</td>
</tr>
<tr>
<td>Sirico, Louis J., Jr.</td>
<td>Teachable Moments for Teachers ... Why Law Review Students Write Poorly</td>
</tr>
<tr>
<td>Williams, Brian S.</td>
<td>The Legal Writing Conference A Rookids Perspective</td>
</tr>
<tr>
<td>Beneke, Paul</td>
<td>Brutal Choices in Curricular Design ... Start with Enacted Law, Not Common Law</td>
</tr>
<tr>
<td>Kelley, Sally J.</td>
<td>How to ... Use the Internet to Find and Update the United States Code</td>
</tr>
<tr>
<td>Kennedy, Bruce</td>
<td>Finding Recent Legislative Developments &amp; Documents</td>
</tr>
<tr>
<td>Kelley, Sally J.</td>
<td>U.S. Congressional Materials: 1970-Present</td>
</tr>
<tr>
<td>Klugh, Druet Cameron</td>
<td>Teachable Moments for Students ... Are You Positive About &quot;Positive Law&quot;?</td>
</tr>
<tr>
<td>Wallace, Marie</td>
<td>Practice Pointer: Looseleaf Services</td>
</tr>
<tr>
<td>Shapo, Helene S.</td>
<td>The MacCrate Report Conference A Review</td>
</tr>
<tr>
<td>Jamar, Steven D.</td>
<td>Using the Multistate Performance Test in an LRW Course</td>
</tr>
<tr>
<td>Schultz, Nancy L.</td>
<td>There's a New Test in Town: Preparing Students for the MPT</td>
</tr>
<tr>
<td>Brunner, Karen B.</td>
<td>National Library Week: A Law Firm Teaching Opportunity</td>
</tr>
<tr>
<td>Callinan, Ellen M.</td>
<td>The National Legal Research Teach-In</td>
</tr>
<tr>
<td>DeGeorges, Patricia A.</td>
<td>Teach-In Programs in Corporate Law Libraries.</td>
</tr>
</tbody>
</table>

**LEGAL WRITING INSTITUTE**

Mercer, Kathryn Lynn

"You Can Call Me Al, in Graceland": Reflections on a Speech Entitled "We Have Diamonds on the Soles of Our Shoes"

Oates, Laurel

Legal Writing Institute Publishes Journal and Holds Fifth Biennial Conference
Mccarthy, Kathleen J.
1993 Teach-In Events .......... 2: 13–17
Teach-In Activities in Law Schools .......... 1: 67

Partin, Gail A.
Teach-In Reflections Past, Present, and Future .......... 4: 20–23

O R A L A R G U M E N T
Sirico, Louis J., Jr.
Teaching Oral Argument .......... 7: 17–20

O R G A N I Z A T I O N S — R E S E A R C H
American Association of Law Schools (AALS)
Section on Legal Writing, Reasoning, and Research .......... 1: 30
Special Interest Groups Related to Legal Research and Writing .......... 1: 30

Callinan, Ellen M.
Research Instruction Caucus:

O R G A N I Z A T I O N S — W R I T I N G
American Association of Law Schools (AALS)
Section on Legal Writing, Reasoning, and Research .......... 1: 30
American Bar Association Legal Writing Committee .......... 1: 30
Conference on College Composition and Communication (CCCC) Special Interest Group—Law, Composition, and Legal Studies .......... 1: 30

Jamar, Steven D.
The ALWD Citation Manual—A Professional Citation System for the Law .......... 8: 65–67
Legal Writing Institute .......... 1: 31
Scribes—The American Society of Writers on Legal Subjects .......... 1: 31
Special Interest Groups Related to Legal Research and Writing .......... 1: 30

Shapo, Helene S.
Notes from Legal Writing Organizations .......... 2: 19

P E R S P E C T I V E S
Barkan, Steven M.
From the Editor: Introducing Perspectives .......... 1: 1
From the Editor: Perspectives on the First Volume .......... 2: 1

Hotchkiss, Mary A.
From the Editor: A Fresh Perspective .......... 9: 1–2

Houdek, Frank G.
From the Editor: A New Perspective .......... 3: 1–2
From the Editor: Coming Attractions .......... 3: 27–28

Houdek, Frank G. and Penny A. Hazelton

P L A G I A R I S M
Cherry, Anna M.
Using Electronic Research to Detect Sources of Plagiarized Materials .......... 9: 133–135
Mirow, M. C.
Confronting Inadvertent Plagiarism .......... 6: 61–64

P R O F E S S I O N A L S C H O L A R S H I P
Levine, Jan M.
Some Concerns About Legal Writing Scholarship .......... 7: 69–70

Levine, Jan M. and Grace C. Tonner
Legal Writing Scholarship:
Point/Counterpoint .......... 7: 68–70

Vinson, Kathleen Elliott and David S. Romantz
Who Will Publish My Manuscript? .......... 7: 31–33
RESEARCH GUIDES

Fine, Toni M.
Legal Research in Practice: How a FERC Lawyer Does Research ......................... 2: 46–51

Harris, Catherine K.
Pathfinder to U.S. Copyright Law .......... 2: 32–38

Holt, Barbara Cornwall and Michael Gearin
How a Bankruptcy Lawyer Does Legal Research ......................... 5: 101–105

Kennedy, Bruce
Finding Recent Legislative Developments & Documents ......................... 1: 26–27

McMurrer, Nancy
Researching Health Law Issues .......... 5: 115–119

Miller, Michael S. and Dee Van Nest
Breaking Barriers—Access to Main Street: Pathfinder on the Americans with Disabilities Act ......................... 2: 73–84

Novak, Jan Ryan
Plain English Makes Sense: A Research Guide ......................... 3: 2–3

Scully, Patrice

RESEARCH INSTRUCTION CAUCUS

Research Instruction Caucus: Index of Clearinghouse Materials ......................... 1: 18–25

Callinan, Ellen M.

RESEARCH TECHNIQUES

Bennett, Edward B., III
Tools of the Trade: Using Software to Conduct Legal Research with a Disability ......................... 4: 1–4

Bintliff, Barbara
Teachable Moments...
"Shepardizing Cases" ......................... 4: 19
Teachable Moments for Students...
"How Can I Tell the Effective Date of a Federal Statute?" ......................... 8: 93–94

Cerjan, Martin

Clayton, Mary
Legal Research for Blind Law Students Speech Technologies and the World Wide Web ......................... 6: 100–102

Ford, Kristin
Teachable Moments for Students... Researching Uniform and Model Laws ......................... 10: 114–116

Gerdy, Kristin B.

Grosek, Edward
Teachable Moments... "How Can I Find a United States Treaty?" ......................... 7: 29–30

Hazelton, Penny A., Peggy Roebuck Jarrett, Nancy McMurrer, and Mary Whisner
Develop the Habit: Note-Taking in Legal Research ......................... 4: 48–52

Holt, Barbara
Our Questions—Your Answers ......................... 5: 73–78

Honigsberg, Peter Jan
Organizing the Fruits of Your Research: The Honigsberg Grid ......................... 4: 94–95

Houdek, Frank G.
Our Question—Your Answers ......................... 4: 90–91; 5: 23–25

Jarrett, Peggy Roebuck and Mary Whisner
"Here There Be Dragons": How to Do Research in an Area You Know Nothing About ......................... 7: 74–76

Kelley, Sally J.
How to... Use the Internet to Find and Update the United States Code ......................... 7: 23–26

Kunz, Christina L.
Terminating Research ......................... 2: 2–3

Platt, Ellen
How to... Research Federal Court Rule Amendments: An Explanation of the Process and a List of Sources ......................... 6: 115–118

Jury Instructions: An Underutilized Resource ......................... 7: 90–93
<table>
<thead>
<tr>
<th>Authors</th>
<th>Title</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Potthoff, Lydia</td>
<td>Teachable Moments... “How Do You Update a West Key Number?”… Beyond the Digest</td>
<td>4: 99</td>
</tr>
<tr>
<td></td>
<td>Teachable Moments... “How Do You Update the Code of Federal Regulations?”</td>
<td>5: 28–29</td>
</tr>
<tr>
<td>Whisner, Mary</td>
<td>Managing a Research Assignment</td>
<td>9: 9–13</td>
</tr>
<tr>
<td></td>
<td>SIMULATIONS</td>
<td></td>
</tr>
<tr>
<td>Callinan, Ellen M.</td>
<td>A Teaching Model for Academic and Private Law Librarians</td>
<td>1: 6–13</td>
</tr>
<tr>
<td>Shafer, Melissa</td>
<td>Shakespeare in the Law: How the Theater Department Can Enhance Lawyering Skills Instruction</td>
<td>8: 108–113</td>
</tr>
<tr>
<td>Zimmerman, Emily</td>
<td>Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy</td>
<td>10: 109–113</td>
</tr>
<tr>
<td></td>
<td>SURVEYS</td>
<td></td>
</tr>
<tr>
<td>Browne, Kelly</td>
<td>The Top 10 Things Firm Librarians Wish Summer Associates Knew</td>
<td>8: 140–142</td>
</tr>
<tr>
<td>Hazleton, Penny A.</td>
<td>Surveys on How Attorneys Do Legal Research</td>
<td>1: 53</td>
</tr>
<tr>
<td>Mcurrer, Nancy</td>
<td>Butterflies Are Free—But Should CALR Printing Be?</td>
<td>8: 89–92</td>
</tr>
<tr>
<td>Nyberg, Cheryl Rae</td>
<td>How To Master All You Survey</td>
<td>6: 8–13</td>
</tr>
<tr>
<td>Rosenthal, Lawrence D.</td>
<td>Are We Teaching Our Students What They Need to Survive in the Real World? Results of a Survey</td>
<td>9: 103–109</td>
</tr>
<tr>
<td>Selden, David</td>
<td>Electronic Research Skills Assessment Survey as an Instructional Tool</td>
<td>9: 95–98</td>
</tr>
<tr>
<td></td>
<td>TEACHING ASSISTANTS</td>
<td></td>
</tr>
<tr>
<td>Vance, Ruth C.</td>
<td>The Use of Teaching Assistants in the Legal Writing Course</td>
<td>1: 4–5</td>
</tr>
<tr>
<td></td>
<td>TEACHING MATERIALS</td>
<td></td>
</tr>
<tr>
<td>Arrigo, Maureen J.</td>
<td>Book Review: Thinking Like a Writer</td>
<td>2: 61–62</td>
</tr>
<tr>
<td>Bintiff, Barbara</td>
<td>Teachable Moments... “Shepardizing Cases”</td>
<td>4: 19</td>
</tr>
<tr>
<td>Gannage, Mark</td>
<td>How to ... Structure Your Legal Memorandum</td>
<td>8: 30–33</td>
</tr>
<tr>
<td>Gleason, Diana</td>
<td>Technology for Teaching: “Introduction to the Internet”: A Training Script</td>
<td>8: 124–128</td>
</tr>
<tr>
<td>Miller, Michael S.</td>
<td>Recognizing and Reading Legal Citations</td>
<td>2: 70–72</td>
</tr>
<tr>
<td>Platt, Ellen</td>
<td>Teachable Moments... “How Do You Update a West Key Number?”… Beyond the Digest</td>
<td>4: 99</td>
</tr>
<tr>
<td>Wallace, Marie</td>
<td>Finishing Touches</td>
<td>1: 74–76</td>
</tr>
<tr>
<td></td>
<td>Practice Pointer: Looseleaf Services</td>
<td>1: 63–64</td>
</tr>
<tr>
<td></td>
<td>TEACHING METHODS</td>
<td></td>
</tr>
<tr>
<td>Anderson, Helen A.</td>
<td>Generation X Goes to Law School: Are We Too Nice to Our Students?</td>
<td>10: 73–75</td>
</tr>
<tr>
<td>Beneké, Paul</td>
<td>Brutal Choices in Curricular Design ... Start with Enacted Law, Not Common Law</td>
<td>10: 76–80</td>
</tr>
<tr>
<td>Blum, Joan</td>
<td>Brutal Choices in Curricular Design ... Why You Should Use a Course Web Page</td>
<td>10: 15–17</td>
</tr>
</tbody>
</table>
Broida, Mark A.
Can Legal Skills Become Legal Thrills? Knowing and Working Your Audience ........... 4: 44–47
A Tale of Two Programs. ...................... 5: 65–68

Clough, Spencer and Mary G. Persyn
How to Display Effectively in the Classroom: Critiquing the Tools .......................... 3: 78–79

Cooney, Leslie Larkin and Judith Karp
Ten Magic Tricks for an Interactive Classroom. ................................. 8: 1–3

Edelman, Diane Penneys
Opening Our Doors to the World: Introducing International Law in Legal Writing and Legal Research Courses ...................... 5: 1–4

Feeley, Kelly M. and Stephanie A. Vaughan

Friedman, Peter B.
Brutal Choices in Curricular Design ... The Class Listserv: Professor's Podium or Students Forum? ...................... 8: 75–78

Glashausser, Alex

Jamar, Steven D.
Asking Questions ................................. 6: 69–70

Kleinschmidt, Bruce
Taping: It's Not Just for Grand Juries Anymore ........................................ 7: 87

Ley, James B.
Be a Classroom Leader ...................... 10: 12–14
Legal Research and Writing Pedagogy—What Every New Teacher Needs to Know ... 8: 103–107

Lerner, Sue
Being a Beginner Again: A Teacher Training Exercise ................................. 10: 87–88

McDavid, Wanda
Microsoft PowerPoint: A Powerful Training Tool ................................. 5: 59–60

Meadows, Judy and Kay Todd
Our Question—Your Answers ...................... 10: 137–138

Shafer, Melissa
Shakespeare in the Law: How the Theater Department Can Enhance Lawyering Skills Instruction ........................................ 8: 108–113

Shapo, Helene S. and Christina L. Kunz
Brutal Choices in Curricular Design ... Making the Most of Reading Assignments ................................. 5: 61–62

Smith, Craig T.

Vinson, Kathleen Elliott
New LR&W Teachers Alert! 14 Ways to Avoid Pitfalls in Your First Year of Teaching .......... 6: 6–7

Zimmerman, Emily
Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy ................................. 10: 109–113

TEACHING METHODS—RESEARCH
Anzalone, Filippa Marullo
Advanced Legal Research: A Master Class ........................................ 5: 5–11

Bassett, Peggie G., Virginia C. Thomas, and Gail Munden
Teaching Federal Legislative History: Notes from the Field ................................. 5: 96–100

Baum, Marsha L.
Teachable Moments for Students ... Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process ...................... 10: 20–22

Berring, Robert C.
A Sort of Response: Brutal Non-Choices ................................. 4: 81–82

Bintliff, Barbara and Rachel W. Jones
Teachable Moments for Students ... Mandatory v. Persuasive Cases ................................. 9: 83–85

Callinan, Ellen M.
Recite Right: Recitation Preparation and the Law School Library ................................. 1: 42–46
Simulated Research: A Teaching Model for Academic and Private Law Librarians ................................. 1: 6–13
Take Charge of Your Training Room ................................. 3: 8–9

Coggins, Timothy L.
Bringing the "Real World" to Advanced Legal Research ................................. 6: 19–23
<table>
<thead>
<tr>
<th>Authors</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dunn, Donald J.</td>
<td>Brutal Choices in Curricular Design ...</td>
<td>8: 10–12</td>
</tr>
<tr>
<td>Durako, Jo Anne</td>
<td>Building Confidence and Competence in Legal Research Skills Step by Step</td>
<td>5: 87–91</td>
</tr>
<tr>
<td>Egler, Peter J.</td>
<td>Teachable Moments for Students ... What Gives Cities and Counties the Authority to Create Charters, Ordinances, and Codes?</td>
<td>9: 145–147</td>
</tr>
<tr>
<td>Fritchel, Barbara L.</td>
<td>How to “Make Reviewing Fun”— Legal Research Scavenger Hunts</td>
<td>4: 63–64</td>
</tr>
<tr>
<td>Glashauser, Alex</td>
<td>From the Electoral College to Law School: Research and Writing Lessons from the Recount</td>
<td>10: 1–4</td>
</tr>
<tr>
<td>Gotham, Michael R. and Cheryl Rae Nyberg</td>
<td>Joining Hands to Build Bridges</td>
<td>7: 60–64</td>
</tr>
<tr>
<td>Harris, Catherine and Kay Schlueter</td>
<td>Legal Research and Raising Revenue at the Texas State Law Library.</td>
<td>7: 88–89</td>
</tr>
<tr>
<td>Hazelton, Penny A.</td>
<td>Advanced Legal Research Courses: An Update</td>
<td>1: 52–53</td>
</tr>
<tr>
<td>Kosse, Susan H.</td>
<td>Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research</td>
<td>9: 69–72</td>
</tr>
<tr>
<td>Kunz, Christina L.</td>
<td>Terminating Research</td>
<td>2: 2–3</td>
</tr>
<tr>
<td>Meadows, Judy and Kay Todd</td>
<td>Our Question— Your Answers</td>
<td>9: 16–17</td>
</tr>
<tr>
<td>Mitchell, Paul G.</td>
<td>Teaching Research in a Corporate Setting</td>
<td>1: 70–71</td>
</tr>
<tr>
<td>Olson, Kent C.</td>
<td>Waiving a Red Flag: Teaching Counterintuitiveness in Citator Use</td>
<td>9: 58–60</td>
</tr>
<tr>
<td>Orr-Waters, Laura J.</td>
<td>Teaching English Legal Research Using the Citation Method</td>
<td>6: 108–111</td>
</tr>
<tr>
<td>Ryan, Linda M.</td>
<td>Designing a Program to Teach CALR to Law Students: A Selective and Annotated Bibliography of Resource Materials</td>
<td>4: 53–58</td>
</tr>
<tr>
<td>Sanderson, Rosalie M.</td>
<td>“Real World” Experience for Research Students</td>
<td>7: 71–72</td>
</tr>
<tr>
<td>Shapo, Helene S. and Christina L. Kunz</td>
<td>Brutal Choices in Curricular Design ... Teaching Research As Part of an Integrated LR&amp;W Course</td>
<td>4: 78–81</td>
</tr>
<tr>
<td>Shear, Joan and Kelly Browne</td>
<td>Which Legal Research Text Is Right for You?</td>
<td>10: 23–29</td>
</tr>
<tr>
<td>Silverman, Marc B.</td>
<td>Advanced Legal Research: A Question of Value</td>
<td>6: 33–36</td>
</tr>
<tr>
<td>Simoni, Christopher</td>
<td>Our Question— Your Answers</td>
<td>4: 59–61</td>
</tr>
<tr>
<td>Staheli, Kory D.</td>
<td>Evaluating Legal Research Skills: Giving Students the Motivation They Need</td>
<td>3: 74–76</td>
</tr>
<tr>
<td>Stroup, Richard</td>
<td>Internet Lunch Breaks: A Low-Tech Solution to a High-Tech Demand</td>
<td>6: 88–89</td>
</tr>
<tr>
<td>Wallace, Marie</td>
<td>Finishing Touches</td>
<td>1: 74–76</td>
</tr>
<tr>
<td>Weston, Heidi J.</td>
<td>Speaking of “Teachable Moments”... Teaching the Ah Hahs!</td>
<td>4: 93</td>
</tr>
<tr>
<td>Whisner, Mary</td>
<td>Managing a Research Assignment</td>
<td>9: 9–13</td>
</tr>
</tbody>
</table>
Shapo, Helene S.
Implications of Cognitive Theory for Teaching ........................ 1: 77–78
Shapo, Helene S. and Christina L. Kunz
Brutal Choices Should the First-Year Legal Writing Course Be Graded in the Same Way As Other First-Year Courses? ............. 2: 6–8
Brutal Choices in Curricular Design ... Teaching Citation Form and Technical Editing Who, When, and What ..................... 3: 4–5
Brutal Choices in Curricular Design ... Winning the Font Game: Limiting the Length of Students Papers ............................................. 4: 10–11
Shapo, Helene S. and Mary S. Lawrence
Brutal Choices in Curricular Design ... Designing the First Writing Assignment .... 5: 94–95
Brutal Choices in Curricular Design ... Surviving Sample Memos .................... 6: 90–91
Simon, Sheila
Order What Are Your Words In? How Foreign Languages Can Help You Teach the Structure of Legal Writing ............... 10: 124–125
Sirico, Louis J., Jr.
Advanced Legal Writing Courses: Comparing Approaches ..................... 5: 63–64
Reading Out Loud in Class ............................................................. 10: 8–9
Teachable Moments for Teachers ... Teaching Paragraphs ..................... 8: 13
Smith, Angela G.
Requiring Writing Courses Beyond the First Year: To Boldly Go Where Hardly Anyone Has Gone Before ............................................. 1: 54–55
Vance, Ruth C.
The Use of Teaching Assistants in the Legal Writing Course ........................ 1: 4–5
Whisner, Mary and Lea Vaughn
Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives .............. 4: 72–77
Wigal, Grace
Brutal Choices in Curricular Design ... Repeaters in LRW Programs .......... 9: 61–68
Williams, Brian S.
Road Maps, Tour Guides, and Parking Lots The Use of Context in Teaching Overview and Thesis Paragraphs .................. 7: 27–28
Williams, Joseph M. and Gregory G. Colomb
Writing Tips ... Telling Clear Stories
A Principle of Revision That Demands a Good Character ..................... 5: 14–16
Zimmerman, Clifford S.
Creative Ideas and Techniques for Teaching Rule Synthesis .................... 8: 68–72

TECHNOLOGY
Blum, Joan
Brutal Choices in Curricular Design ... Why You Should Use a Course Web Page .... 10: 15–17
Caputo, Angela
Technology for Teaching ... Four Pointers to Effective Use of PowerPoint in Teaching ................................................................. 10: 132–136
Duggan, James E.
Technology for Teaching ... Using CALI Lessons to Review (or Teach) Legal Research and Writing Concepts .................. 9: 86–89
Friedman, Peter B.
Brutal Choices in Curricular Design ... The Class Listserv: Professor’s Podium or Students’ Forum? ..................... 8: 75–78
Henle, Alea
Training Users on Internet Publications Evolved From (And Still In) Print .......... 10: 89–91
Houdek, Frank G.
Our Question—Your Answers ............................................. 6: 81–83
Miller, Steven R.
Technology for Teaching ... Teaching Advanced Electronic Legal Research for the Modern Practice of Law .................. 9: 120–123
Rosenbaum, Judith.
Technology for Teaching ... CALR Training in a Networked Classroom ........ 8: 79–84
Smith, Craig T.
Teaching Synthesis in High-Tech Classrooms
Straus, Karen
Tips for Using a Computer for Legal Research and Writing .................. 6: 86–87
Will, Linda
WRITING TECHNIQUES
Armstrong, Stephen V. and Timothy P. Terrell
Writing Tips... Conjugosis and Declensia ... 4: 8–9

Faulk, Martha
Writing Tips... Much Ado About That...
Or Is It Which? ... 6: 112–114

Arrigo-Ward, Maureen J.
Caring for Your Apostrophes ... 4: 14–15

Writing Tips... The Best Sentence ... 9: 3–4

Bach, Tracy
Teachable Moments for Teachers... Teaching the Poetry of the Question Presented ... 9: 142–144

Writing Tips... The Dangers of Defaults ... 10: 126–131

Berch, Rebecca White
Thinking About Writing Introductions ... 3: 41–43

Writing Tips... The Writer's Golden Rule ... 7: 78–81

Boris, Edna Zwick
Writing Tips... Sentence Sense: "It" Problems ... 4: 96–98
Writing Tips... Sentence Sense: "We," "Our," "Us" Problems... 5: 125–127
Writing Tips... Sentence Structure and Sentence Sense: "And" Problems ... 3: 85–86

Faulk, Martha
Writing Tips... Never Use a Preposition to End a Sentence With ... 8: 24–25

Slotkin, Jacquelyn H.
Comma Abuse: A Comma Can Cause Trouble by Its Absence, Its Presence, Its Incorrect Placement ... 4: 16–18

Colomb, Gregory G.
Writing Tips... Framing Pleadings to Advance Your Case ... 10: 92–97

Writing Tips... Shaping Stories: Managing the Appearance of Responsibility ... 6: 16–18
Writing Tips... So What? Why Should I Care?
And Other Questions Writers Must Answer ... 9: 136–141
Writing Tips... Telling Clear Stories
A Principle of Revision That Demands a Good Character ... 5: 14–16
Writing Tips... The Writer's Golden Rule ... 7: 78–81
Writing Tips... Well Begun Is Half Done: The First Principle of Coherent Prose ... 8: 129–133

Colomb, Gregory G. and Joseph M. Williams
Writing Tips... Shaping Stories: Managing the Appearance of Responsibility ... 6: 16–18
Writing Tips... So What? Why Should I Care?
And Other Questions Writers Must Answer ... 9: 136–141
Writing Tips... Telling Clear Stories
A Principle of Revision That Demands a Good Character ... 5: 14–16
Writing Tips... The Writer's Golden Rule ... 7: 78–81
Writing Tips... Well Begun Is Half Done: The First Principle of Coherent Prose ... 8: 129–133

Daniel, Neil
Writing Tips... 1: 50–51; 1: 87–90;
.......................... 2: 23–24; 2: 63–65

Novak, Jan Ryan
Plain English Makes Sense: A Research Guide ... 3: 2–3

Houdek, Frank G.
Our Question—Your Answers ... 5: 23–25

Lynch, Michael J.
"Mistakes Were Made": A Brief Excursion into the Passive Voice ... 7: 82–83
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