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Using Formulas to Help Students Master the "R" and "A" of IRAC

By Hollee S. Temple

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In the recently published *How Lawyers Lose Their Way: A Profession Fails Its Creative Minds*, two University of Pittsburgh law professors propose that the "formalistic" nature of legal education is one reason why so many lawyers are so unhappy.[1] They suggest that by valuing "rigid rules" above all else, the traditional law professor has slowly destroyed the spirit of law students who once prized innovative thought, and that these students carry this discontent into their law practices.[2]

As I read the book, I empathized with the large law firm associates who were interviewed, many of whom found their practices to be unsatisfying because of monotonous work, lack of human interaction, and intense competition.[3] Many of the same complaints propelled me out of my law firm and into the classroom, where I felt some of my natural "creative" talents were better utilized. However, as a newer legal writing professor, I worried about the book's core assumption. Was I now a party to this formalistic law teaching that was draining my students' creativity?

After giving this some thought, I've concluded that while the formalistic nature of doctrinal teaching may indeed be too rule-focused, legal writing and skills professors operate in a different, distinct universe. Our students, most fresh from undergraduate writing experiences that prized both length and obfuscation, need a template to help them transition into the legal setting, where supervisors and judges expect practitioners to adhere to the IRAC (Issue, Rule, Application, Conclusion) format.[4]

While we all, of course, use IRAC (or some derivation of it) to outline the general approach to legal reasoning and writing, I have found that the more "formulas" I develop to help my students with IRAC's individual elements, the more they thank me.[5] For this generation of law

[1] Jean Stefancic & Richard Delgado, *How Lawyers Lose Their Way: A Profession Fails Its Creative Minds* (2005).

[2] *Id.* at 48–49.

[3] *See generally id.* at 62–71.

[4] Anne Enquist, *Talking to Students About the Differences Between Undergraduate Writing and Legal Writing*, 13 Perspectives: Teaching Legal Res. & Writing 104 (2005).

[5] At the risk of sounding a bit overconfident, I've included a comment from a student's evaluation of my fall 2004 semester course: "I love Professor Temple's approach to teaching skills. Her technique is simple and straightforward, which is much appreciated by this confused 1L."

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In This Issue

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students—a group accustomed to Googling for instant answers—simple templates that can be quickly grasped and applied seem to work best.[6] These students, most having come through an American educational system that valued content over form, need the most help with structure, and the more bite-sized templates I offer, the more easily my students seem to digest the IRAC format.[7]

Over the past two years, I have developed and adapted internal formulas for both the R and A sections of an IRAC analysis.[8] Of course, students must develop the judgment to determine whether a particular formula is warranted for the specific R or A at issue, but the formulas provide a great launching pad. Time and again, I have found that my formulas flip the mental light switch for students who are struggling with the transition to legal writing.[9]

The R Section: Formulas for Writing About Rules[10]

- Big Formula #1:
  R= 1) Rule Overview + 2) Case Illustrations
- Mini-Formula #1: Rule Overview

I preface the R formulas by explaining that when a reader is prepared for what follows, comprehension improves. In other words, if the writer will "set the stage" for a rule before diving into its details, the reader is more easily able to grasp a difficult concept.[11]

Therefore, I tell my students that they should begin their R sections with a "Rule Overview." As I explain below, the length and complexity of the overview will vary depending upon the rule. But, the gist is that a rule should be broadly defined before the legal writer uses cases to illustrate its operation.[12] After offering a general explanation of the rule in the overview, the writer should then go on to explain how the rule operates, and how judges will apply it. Case illustrations accomplish that task.

For a simple rule, the rule overview should be simple. It is often a single-sentence statement that

> "[T]he more bite-sized templates I offer, the more easily my students seem to digest the IRAC format."

[6] For more on the tendencies and preferences of today's students, *see* Tracy McGaugh, *Generation X in Law School*, 9 Legal Writing 119, 143 (2005). Professor McGaugh notes that the next generation of law students will be accustomed to "constant visual and auditory stimulation." While I can't suggest that my formulas are as fun as computer games, they seem to speak to students who need stimulation (just as "guided note-taking" has worked for McGaugh's students).

[7] For a great explanation of why so many of our students struggle with form, *see* Stanley Fish, *Devoid of Content*, N.Y. Times, May 31, 2005, at A17.

[8] Many legal writing professors have devised their own formulas for tackling IRAC, and some have published these ideas. In 1995, the Legal Writing Institute devoted an entire edition of its biannual newsletter to debating the pros and cons of IRAC, with many professors offering their own twists on the paradigm. 10 No. 1 The Second Draft (Nov. 1995). More recently, Professor Craig Smith has written about a visual "charting" technique that helps his students with a difficult task in the R section—rule synthesis. Craig T. Smith, *Teaching Synthesis in High-Tech Classrooms: Using Sophisticated Visual Tools Alongside Socratic Dialogue to Help Guide Students Through the Labyrinth*, 9 Perspectives: Teaching Legal Res. & Writing 110 (2001).

[9] In addition, my experience has mirrored that of Professor Karen Koch, who has written an extensive piece about the parallels between scientific writing and legal writing, noting that students with scientific backgrounds who struggled to master IRAC were able to overcome that mental hurdle when she showed comparisons between the IRAC structure and the rules-driven structure of computer programming/scientific writing. Karen L. Koch, *A Multidisciplinary Comparison of Rules-Driven Writing: Similarities in Legal Writing, Biology Research Articles, and Computer Programming*, 55 J. Legal Educ. 234 (2005).

[10] After I encountered success with my first formula, I figured I was on to something, so I developed "formulas within formulas" to give further guidance on building strong R and A sections. For clarity, I label the overarching formulas for the R and A sections as "Big Formulas," and the formulas within formulas "Mini-Formulas" with "Steps." This works for my students because we use the term "mini-IRAC" for what others call nested IRACs. For example, my students would call the discussion of what constitutes a "dwelling" under an arson statute the "*mini-IRAC* on the dwelling element of burglary." They know that means they will need to go through an I-R-A-C outline for that element.

[11] I offer an example from the quintessential torts case, Palsgraf v. Long Island Railroad Company, 248 N.Y. 339, 162 N.E. 99 (1928). I tell the students to imagine that they are telling a non-law student friend about what they've learned in torts, and then I ask them to choose from two techniques: 1) they can dive right into a description of Helen Palsgraf and the details of the falling scale and exploding fireworks, or 2) they can explain that they are learning about negligence and how much someone has to contribute to an accident to be held responsible before giving any facts. Most of my students immediately agree that the reader/listener "gets" the difficult concept of proximate cause more quickly if a brief introduction to the rule precedes the factual background.

[12] Professor Sarah Ricks offers a similar approach in *A Case Is Just an Example: Using Common Experience to Introduce Case Synthesis*, The Second Draft, Dec. 2003, at 22.

clearly describes the rule. For a more complex rule overview, such as a rule requiring synthesis of a statute and case law, the students write more complex, and often longer, overviews.

"In a simple case, a verbatim copy of the relevant statute might suffice for the rule overview."

Simple Rule Overview

In a simple case, a verbatim copy of the relevant statute might suffice for the rule overview. For example, imagine that a partner asks an associate to find West Virginia's indecent exposure statute and advises that the associate is not to deeply analyze any factual issues.[13] The associate would not be aware of the partner's real question—whether a breastfeeding mother could be convicted of indecent exposure under West Virginia law. (This was the topic of my fall 2004 research problem; most of the following examples are drawn from student memoranda.)

Example: Section 61-8-9(a) of the *West Virginia Code* provides:

(a) A person is guilty of indecent exposure when such person intentionally exposes his or her sex organs or anus or the sex organs or anus of another person, or intentionally causes such exposure by another or engages in any overt act of sexual gratification, and does so under circumstances in which the person knows that the conduct is likely to cause affront or alarm. W. Va. Code § 61-8-9 (2002).

Complex Rule Overview

On the other hand, if the partner asked for a deeper analysis of West Virginia's indecent exposure statute, the rule overview might include a synthesis of the relevant statute and case law.[14] I describe the process of creating a synthesized rule as one of my first students did: grabbing ingredients from different shelves (case law, statutes, policy) to create the final recipe.[15]

Many of my students were able to draft solid rule overview paragraphs that included synthesis after I'd offered the "recipe" analogy, but some still struggled. They weren't sure how to bring the ingredients together into a cohesive rule overview. So, I looked for a more specific, formulaic way of describing a strong rule synthesis, and came up with the following "steps" for students to consider (in this suggested order) when drafting a synthesis: 1) what is the law/rule; 2) what isn't the law/rule (exceptions, exclusions); and, 3) what factors will the court consider/how does the rule work? These steps worked better for some students, and produced almost identical results.

Example: Under West Virginia law, a person is guilty of indecent exposure when he or she (1) intentionally exposes his or her sex organs or anus, (2) does so under circumstances in which he or she knows that the conduct will likely cause affront or alarm, and (3) does so without the consent of the victim (string citation to statute and cases omitted). In analyzing the defendant's intent, the court will carefully consider the circumstances surrounding the exposure (case cite omitted).

Mini-Formula #2: Case Illustrations

My students immediately understood that their "case illustrations" should somehow imitate the case descriptions that they read in appellate opinions, but they wanted more specifics on what to include. Again, a step-by-step approach did the trick.

Step 1: The Three-Part Approach

First, I explain that a thorough case illustration[16] should include at least three parts: 1) factual

[13] Former law firm associates will remember well (but perhaps not fondly) the "just find me the law" assignment. Our students face this task often, and are often not given enough factual background to perform any detailed analysis. In such cases (particularly if the associate is discouraged from asking follow-up questions regarding the facts of the case), the simple rule is all that can be offered.

[14] An example from a student's memorandum shows how West Virginia's highest court interpreted and applied the statute: Under the West Virginia indecent exposure law, a person is guilty of indecent exposure when he or she (1) intentionally exposes his or her sex organs or anus, (2) does so under circumstances in which he or she knows that the conduct will likely cause affront or alarm, and (3) does so without the consent of the victim. W. Va. Code § 61-8-9 (2002); State v. Knight, 285 S.E.2d 401, 405 (W. Va. 1981) (citing W.Va. Code § 61-8B-10 (superseded 1992)).

[15] For an excellent, but slightly different, approach to teaching rule synthesis, *see* Sarah Ricks, *supra* note 12.

[16] I use the term *case illustration* when I want students to provide a detailed case background. If the students determine that they need only a proposition or rule derived from the case, I advise them to consider whether a full case illustration is warranted.

background, 2) reasoning, and 3) holding. I define factual background as the determinative facts that the court relies on in reaching its holding. Reasoning means the specific reasons that the court articulates (or implies) for reaching its holding. The holding, of course, is the decision in the case. I suggest that these are the key elements that a practicing lawyer or judge needs to later evaluate the validity of the legal writer's analogies and distinctions.

Example[17]: In *Capetta*, a topless dancer exposed her breasts to patrons and allowed them to touch her breasts for a dollar. The patrons of the establishment were willing participants, solicited her conduct with their dollars, and did not leave in shock (*factual background*). Because a reasonable person would interpret the patrons' conduct to signal approval (*reasoning*), the court held that, based on these circumstances, the defendant had no reason to know that her exposed breasts would cause affront or alarm (*holding*).[18]

Step 2: Adding the Key Proposition

Once the students have mastered the three-part formula, I add one final step. Because case illustrations are so important to a reader's understanding of how a rule operates, I suggest that an introductory "key proposition" sentence should precede the three-part case illustration. The introductory key proposition sentence is somewhat self-explanatory.[19] First, it should kick off the case illustration, preceding the details of the case's factual background, reasoning, and holding. Second, it must contain the key proposition from the case, which I often explain as "the reason why the reader should bother to read the case illustration," or "what you want the reader to get from reading your case illustration." As experienced legal writers know, the key proposition often speaks to the court's reasoning (and that tip often gets students on the right track).

Case Illustration Plus Key Proposition Example: In analyzing the defendant's knowledge, the court likely will consider the circumstances surrounding the defendant's conduct objectively (*key proposition*). For example, in *Capetta*, the defendant, a topless dancer, exposed her breasts to patrons and allowed them to touch her breasts for a dollar. The patrons of the establishment were willing participants, solicited her conduct with their dollars, and did not leave in shock (*factual background*). Because a reasonable person would interpret the patrons' conduct to signal approval (*reasoning*), the court held that, based on these circumstances, the defendant had no reason to know that her exposed breasts would cause affront or alarm (*holding*).

The A Section: Formulas to Help Students Analyze Facts in Light of Rules

- Big Formula #2:
  A= 1) Best Fact + 2) Compare to Precedent + 3) Connect to Expected Result

After my students mastered the formulas and steps for the R section, they wanted formulas for the rest of IRAC.[20] My students have struggled with the A section for a variety of reasons. Some are overwhelmed by the structure we require in legal writing. By the time they get to the A section, they are either too exhausted or frustrated to "stick with the program," and some go off on incoherent tangents in their efforts to apply the rules to the facts of their fictional clients' cases. Others suffer

"After my students mastered the formulas and steps for the R section, they wanted formulas for the rest of IRAC."

[17] To save space, I've omitted citations.

[18] I suggest the "Because X, then Y" formula as a logical way of addressing both reasoning and holding in a single sentence.

[19] My "key proposition" sentence is similar to the "thesis sentence" that Professor Linda Edwards describes in her textbook. Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 94–5 (3d ed. 2002). However, my students seem to have an undergraduate, broad view of the term thesis sentence. Using the word "key proposition" gets them to accomplish the specific task that Edwards suggests: to "articulate the paragraph's point." *Id.* at 95.

[20] I will admit that when badgered by a well-meaning student during a conference, I even dictated a fill-in-the-blank formula for the A/C statement: Because _____ (insert key fact here), the party will/won't establish _____ (insert rule here). Example: Because the prosecution cannot establish that the defendant knowingly exposed her breast, the prosecution cannot satisfy the second element of indecent exposure. But for fear that students will believe that "all I want" is adherence to a rote formula, I don't share this in class.

from weak analogical reasoning skills; they simply cannot see how their facts are like or unlike the precedent. Finally, some of my students just don't want to do the difficult work required of legal writers tackling the A section. These students leave the reader with what I call the difficult job of "connecting the dots." They may throw out a few facts for the reader to consider, but they leave it to the reader to draw the explicit comparisons or distinctions.

"Because legal analysis turns on rules, and because rules vary so widely from case to case, I couldn't devise a simple formula to cover all types of analysis."

Because legal analysis turns on rules, and because rules vary so widely from case to case, I couldn't devise a simple formula to cover all types of analysis. Nevertheless, because I wanted to offer some sort of model for the A section, I developed a three-step system that has worked for analyzing many types of rules.[21] The steps are: 1) give the best fact first; 2) compare to the precedent; and, 3) connect to the likely result.

Step 1: Give Your Best Fact First

My students struggle to begin their A sections. We offer numerous examples from textbooks, but they're all slightly different and I honestly don't love any of them, mostly because I believe they ask too much of the reader.[22] With my students, I emphasize that a busy partner does not want to have to do any "heavy lifting" when reading their memoranda, and therefore they must strive for absolute clarity and simplicity. "Don't leave the reader to connect the dots," I say. Instead, begin by explicitly stating which fact or facts the court will rely upon in analyzing the rules and reaching its conclusion. In other words, start with the determinative facts and immediately tell the reader why those facts influence the analysis.

Example: Because Ms. Boyle exposed herself at a public pool, at 11 a.m., and in the presence of children, ages 8 and 9, the court probably will find that Ms. Boyle's conduct under the circumstances was likely to cause affront or alarm.

Step 2: Explicitly Compare Your Facts to the Precedent

For this step, I've drawn heavily from Professor Anne Enquist's excellent template.[23] Using a simple charting system, Professor Enquist helps students draw explicit factual analogies and distinctions, and then she offers a format for writing about those comparisons. The basic idea is that the writer must lay out the determinative facts in the client's case and in the precedent, and then explain why the clients' circumstances will produce a similar or different result. Professor Enquist suggests that the reader will "readily see the comparison" between the cases if the writer maintains the sentence structure shown in her example.[24]

Example: Like the defendant in *Randall*, who exposed himself to an 11-year-old boy during the afternoon, the defendant here also exposed herself during the day and in the presence of children.

Step 3: Connect to the Expected Result

After the writer has offered up the key facts and explained how those facts should be analyzed in light of the precedent, I suggest that the writer should

[21] I got the idea for this formula by adapting the excellent suggestions made by Professors Anne Enquist and Sarah Ricks in previous *Perspectives* articles. Anne Enquist, *Teaching Students to Make Explicit Factual Comparisons*, 12 Perspectives: Teaching Legal Res. & Writing 147 (2004); Sarah E. Ricks, *You Are in the Business of Selling Analogies and Distinctions*, 11 Perspectives: Teaching Legal Res. & Writing 116 (2003).

[22] For example, I offer Appendix C of Richard Neumann's textbook for an office memorandum example. Richard K. Neumann Jr., *Legal Reasoning and Legal Writing* (5th ed. 2005). However, I think the beginning of the A section in that memo requires too much of the reader: "The courts are likely to consider Goslin's circumstances to be at least comparable to those of the farmer in Sharp and the brother in Sinclair." *Id.* at 444. Instead, I advise my students to lead with the *fact* that will hold sway with the court. Here, I think the memo would be more readable if the A section began with a sentence about the key fact: an unstated understanding that mortgage payments were made to reciprocate college tuition payments.

[23] Anne Enquist, *Teaching Students to Make Explicit Factual Comparisons*, 12 Perspectives: Teaching Legal Res. & Writing 147 (2004).

[24] My students have successfully implemented Professor Enquist's technique. The example from her article is: "Like the defendant in *Smith*, who allowed his daughter's boyfriend to use the family car to drive to a dance, the defendants' in the clients' case allowed their family friend to use the family car to drive to work." *Id.* at 148. While Professor Enquist suggests that students need not "rigidly and mindlessly" repeat the exact sentence structure from the example, many of my students did—to great effect.

conclude the analysis by predicting how the court will rule. This seems simple, but too many legal writers "leave the reader hanging," or assume that the reader can reach the conclusion without this explicit connection. Therefore, I include the "predicted result" as one of the three steps required for a complete analysis.

Example: Therefore, just as the *Randall* court held that exposure of genitals during the day and in the presence of children caused affront and alarm, the court here will probably hold that the client's breast exposure also caused affront and alarm.

"[T]oo many legal writers 'leave the reader hanging,' or assume that the reader can reach the conclusion without this explicit connection."

Another **Perspective**

"Books spend a lot of time on bookshelves, hanging around near the curb, as it were, waiting for someone to come along with an idea for something to do. Books are the wallflowers at the dance, standing up but leaning on one another and depending on one another for their collective status. Books are the Martyrs of Saturday nights, ending up at the same place at the same time week after week. Books in dust jackets are the queue at the bus stop, the line of commuters with their faces hidden in their newspapers. Books are the things in the lineup, all fitting a profile but with only one of them expecting to be picked out. Books are the objects of searches."

—Henry Petroski, *The Book on the Bookshelf* 14 (1999).

Communicating Explanatory Synthesis

> "Explanatory synthesis … improves the substance of legal writing by combining precedents and revealing the factors and policies that determine the outcome of these precedents."

By Michael D. Murray

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The TREAT paradigm[1] and the doctrine of explanatory synthesis[2] are both organizational methodologies and substantive theories designed to improve the substance of legal writing. The TREAT paradigm doctrine holds that the presentation of legal discourse in a carefully constructed order not only promotes clarity and satisfies audience expectations but also maximizes the communicative potential and persuasiveness of the substance of the material. Explanatory synthesis (the "E" of TREAT) improves the substance of legal writing by combining precedents and revealing the factors and policies that determine the outcome of these precedents. Explanatory synthesis follows the path of inductive reasoning through exploration of the species of situations where a given legal rule has been applied to produce a concrete outcome (i.e., the cases), and derives the genera of principles of interpretation and application of the rule that can be presented in legal writing.

Explanatory synthesis is the most difficult concept I have to communicate to first-year, first-semester law students. This is how I do it:

Step One: The Reading

The assigned textbook[3] provides the background and explains the theory and process of explanatory synthesis. Many examples of synthesized and unsynthesized material are provided.

Step Two: The Theory

In class, I go over the following chart to explain the theory behind explanatory synthesis.

Goals of the Explanation Section

The goal is to explain how the rule is to be interpreted and applied based on how the authorities have applied it in actual concrete factual settings, and on how commentators have interpreted the rule.	• You are going beyond what the courts have already said about the rule in interpretive rules found in cases. • You are presenting principles of interpretation that are supported by a careful reading of the cases. • You are doing the work of analyzing and synthesizing the cases so the reader doesn't have to.
Case-by-case presentations make the reader do most of the work and they are wasteful of space and time (the reader's attention span).	• Avoid them even though they are easy to write, and sometimes fun to write. • Avoid them even though courts use them. • The only time to resort to a case-by-case presentation is when you have one or two cases that are so close to the facts that you want to cover them in great detail; or if you want to distinguish one or two troublesome cases in enough detail to make your point.

[1] *See* Michael D. Murray and Christy H. DeSanctis, *Legal Research and Writing*, chapters 6 and 7 (2005). "The [TREAT] format is derived from the rule-based reasoning syllogism and it instructs you to introduce your **T**hesis on the issue in the form of a heading, provide the **R**ule or rules that address the issue, **E**xplain each rule and instruct the reader about how the rules are to be interpreted and applied, **A**pply the rules to your client's situation, and restate your **T**hesis as a conclusion." p. 95.

[2] *See id.*, chapter 6.

[3] *Id.*

Step Three: The Process

In explanatory synthesis, students are taking the relevant cases and discerning the factors, policies, or facts that make a difference in the outcome of the cases. Students are using inductive reasoning to find the genera (as many as are relevant to the analysis) of which individual cases are the species. From there, each genus is described and supported by citations to the cases that include parentheticals to explain why and how each species case supports the genus. The communication of the results of this process of inductive reasoning is much more helpful to the reader than a simple walking tour of the individual facts and circumstances of two or three cases. In most instances, students are going beyond the "interpretive rules" that are written in the cases themselves.[4]

In class, I next go over the following chart that summarizes the process of explanatory synthesis:

The Process of Explanatory Synthesis

Read cases and look for common facts and common outcomes.	• Group cases by facts. • Divide groups of cases by outcome.
Review the groups to find the factors or public policies that make the difference in the outcome.	• Reconcile cases that have different outcomes; what policy or theme or factor determined the outcome in these cases. • Reconcile cases that have the same outcome on different facts; what common policy or theme or factors brought about the same outcome on different facts.
Write principles of interpretation that explain your findings.	• Phrase your principles of interpretation in language that mimics interpretive rules. • Often you can use interpretive rules as principles that tie together multiple authorities; there is no requirement that you always have to come up with brand new principles.
Cite the cases that support your principles of interpretation with parentheticals that provide facts or other information about each case.	• Parentheticals should contain enough information to illustrate how the individual case supports the general principle you have laid out. • Use shorthands and abbreviated phrases to save space.
When you draft the Application section, apply the principles of interpretation to your own facts; as a general rule, do not apply individual cases to your facts.	• Applying principles to facts will make your analysis more convincing; you have spelled out the connections to be made between the authorities and then followed through and showed how the principles learned from a study of the authorities determines the outcome of the case at hand. • The exception to this rule is when you have one or two fabulous cases that are worthy of individual attention in the Explanation section; these should be discussed individually in the Application section, whether as support or to distinguish them.

Step Four: The In-Class Illustration

In class, I use the following illustration:

> **Unsynthesized Case-by-Case Approach**
> *Humpty Dumpty* ignored the conditions at hand and undertook an ill-advised course of conduct when he sat on a wall. His size and shape were not conducive to stable placement on a wall. Soon after, he had a great fall.

[4] Interpretive rules are principles of law regarding the proper interpretation or application of a legal rule that are found in primary and secondary legal authorities. *See id.*, chapters 5 and 6. In contrast to the specific principles of interpretation and application that students are to derive through inductive reasoning from the cases (the records of specific situations where the legal rule was applied to produce a concrete outcome), interpretive rules simply are found and noted in the text of the legal authorities. The TREAT format contemplates that interpretive rules will be communicated in the rule section, not the explanation section. *Id.*, chapter 6.

"In explanatory synthesis, students are taking the relevant cases and discerning the factors, policies, or facts that make a difference in the outcome. …"

"I would estimate that it takes 60–70 minutes to get through the theory, the process, and the in-class illustration."

Nothing could be done to remedy the situation.

In similar fashion, the *Foolish Milkmaid* did not concentrate on her task at hand when carrying a pitcher of milk on her head. She let her mind wander to all the things she would do with the money she would obtain when she sold the milk. One idea was to buy a ball gown and go dancing. When she twirled around in her reverie, she spilled the milk all over the ground. Nothing could be done to remedy the situation.

The *Foolish Dog* who had a splendid meaty bone was also prone to distraction from the task at hand. When he saw his reflection in the river, he mistook it for another dog with another fine bone, and he jumped at the reflection. In the process, he lost the splendid meaty bone he had and wound up with nothing.

The *Three Little Pigs* demonstrate the effects, pro and con, of ignoring the facts and circumstances of the task at hand. The first two pigs ignored the facts and circumstances and built dwelling structures that were not able to withstand common wolf invasion. The third pig, having properly assessed the situation and the task at hand, built a solid wolf-proof structure, and he was able to save his own skin and that of his brothers.

Lastly, the *Tortoise and the Hare* show how important it is to assess and follow through on a task, rather than to get distracted and to lose focus. The hare had tremendous advantages of speed, and by all accounts could have lapped the tortoise in any footrace, but the hare allowed his mind to wander and he stopped in the middle of the race for a nap. This allowed the tortoise, who stayed focused on the task at hand, to finish first in the race.

Synthesized Approach

Staying focused on the task at hand is critical to success. *Compare Humpty Dumpty* (failure to focus on requirements of task caused injury), *and Foolish Milkmaid* (same), *and Foolish Dog* (same), *with Three Little Pigs* (party who focused on the requirements of the task at hand succeeded, while parties who did not focus failed), *and Tortoise and Hare* (same). Irreparable harm can come to a person who does not focus on a task. *See Humpty Dumpty* (government officials were powerless to repair damage); *Foolish Milkmaid* (spilt milk could not be recovered); *Foolish Dog* (bone dropped in river could not be recovered). Simply staying focused can change the odds greatly in favor of the party who applies the focus. *See Three Little Pigs* (one little pig's focused effort thwarted wolf who had routed two other little pigs); *Tortoise and Hare* (incredibly slow reptile was able to win footrace against vastly quicker mammal).

Step Five: Problems and Exercises

Steps one to four above generally take more than one class meeting to communicate. I would estimate that it takes 60–70 minutes to get through the theory, the process, and the in-class illustration. For the remainder of the time period of the second session on TREAT and explanatory synthesis I go over short exercises from the assigned problems and exercises book.[5]

[5] Michael D. Murray & Christy H. DeSanctis, *Legal Research and Writing Problems and Exercises*, chapter 6 (2005).

Topic Sentences—Potentially Brilliant Moments of Synthesis

Writers' Toolbox ... *is a regular feature of* Perspectives. *In each issue, Professor Anne Enquist offers suggestions on how to teach specific writing skills, either in writing conferences or in class. Her articles share tools and techniques used by writing specialists working with diverse audiences, such as J.D. students, ESL students, and practitioners. Readers are invited to contact Professor Enquist at* **ame@seattleu.edu**.

By Anne Enquist

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With every year that I teach legal writing, I find myself talking more and more about topic sentences. Yes, topic sentences. At first my law students seem to be surprised. After all, they learned about topic sentences way back in high school or even junior high. They probably haven't thought much about topic sentences since they wrote essays for their undergraduate freshman writing course. Nevertheless, I find that topic sentences are often a bellwether of a law student's legal analysis, or more precisely, of a law student's legal synthesis.

In talking with law students about topic sentences, I start by making the point that the garden variety topic sentence they wrote in high school or as undergrads ("There are three reasons why capital punishment is not an effective deterrent of crime") is a useful beginning for thinking about topic sentences in legal writing but that it is only a beginning: in law school they will need to move beyond the basics and be more sophisticated about every aspect of their writing (and thinking). That basic topic sentence did little more than set up a rudimentary organization for the points that follow. It suggests that the writer has taken the time to group his or her thoughts about the topic and now they will be presented to the reader in a 1, 2, and 3 order.

The law student version of these undergraduate topic sentences tends to be a "placeholder" topic sentence that looks something like this:

> Another case that discusses substituted service of process is *Shurman v. Atlantic Mortg. & Inv. Corp.*, 795 So. 2d 952 (Fla. 2001).

Placeholder topic sentences are useful in the drafting stage because they allow a writer to put something where the real topic sentence should go and keep on writing without breaking stride. Without stopping to think through exactly why the writer believes the reader should hear about *Shurman* at this point, the writer gets to the case and starts constructing a paragraph about *Shurman*'s facts, holding, and reasoning. The hope here is that in the act of writing about *Shurman* the writer will discover or firm up in his or her mind what *Shurman* adds to the discussion. And, as we all know, that had better be something more than the simple fact that it is one more case that discusses substituted service of process.

Many law students advance beyond this most basic placeholder topic sentence even in their early drafts. They start drafting their paragraph about *Shurman* knowing that they are using the case for one of the elements, usual place of abode, and that *Shurman* is an example of a situation in which that element was not met. Their more advanced placeholder topic sentence might look something like this:

"I find that topic sentences are often a bellwether of a law student's legal analysis, or more precisely, of a law student's legal synthesis."

> "The simple suggestion of moving a version of what was the concluding sentence up to the topic sentence works for many students. …"

> In *Shurman v. Atlantic Mortg. & Inv. Corp*., 795 So. 2d 952 (Fla. 2001), the usual place of abode element was not met.

As the paragraph develops, they include the key facts, holding, and court's rationale and then somewhere toward the end of the paragraph it appears—the real reason why they are telling the reader about *Shurman*. Although the summons was left with the defendant's relative, the defendant proved he was not living with the relative, which was where the summons was served. So *Shurman* stands for something. It is not just one more case about substituted service, and it's not just a case in which a particular element was not met. *Shurman* adds a key point to the developing analysis—giving a summons to a relative is not enough; the defendant has to be living with that relative.

Okay, so now that we know why we are using *Shurman*, let's not keep the reader in suspense; this is not a murder mystery where the writer saves whodunit for the end. The simple solution is to move what was probably the concluding sentence in the draft *Shurman* paragraph to the front of the paragraph thereby replacing the placeholder topic sentence with a more sophisticated, hardworking topic sentence that is doing more than just getting the discussion of *Shurman* started.[1]

> In a case in which a summons was left with a defendant's relative but the defendant did not live with that relative, the court held that the usual place of abode element was not met. *Shurman v. Atlantic Mortg. & Inv. Corp.*, 795 So. 2d 952 (Fla. 2001).
>
> or
>
> In a case in which the court held that the usual place of abode element was not met, the summons had been left with the defendant's relative, but the defendant was able to prove that he was not living with the relative when service was made. *Shurman v. Atlantic Mortg. & Inv. Corp.*, 795 So. 2d 952 (Fla. 2001).

The simple suggestion of moving a version of what was the concluding sentence up to the topic sentence works for many students, and in fact they are pleased to discover that they had already written the synthesis sentence. Now all they need to do is move it up to the opening of the paragraph.

Other students respond well to a somewhat different approach. For this second group of students, I simply ask either the question "Why are you using this case?" or the expanded version, "What point does this case contribute to your overall analysis?"[2]

The question method has the added benefit that it leads quite naturally to the next question one would ask when the student needs to synthesize two or more cases: "Taken together, what do these cases say?" This, of course, is the more advanced synthesis moment—the point in which the students must discern a pattern, trend, or principle for which that group of cases stands.

Initially this point may throw some students who may have assumed that they should treat each case in isolation. However, once they think about the courts establishing trends or agreeing on some principles, then they are more comfortable doing the synthesis we want. In fact it is in the synthesis of case law where the lessons on topic sentences pay the biggest dividends. Talking about topic sentences becomes one more way to make the point that legal analysis is not just walking the reader through case after case after case. One of the "values added" by the writer is the way he or she sorts through and organizes the cases, extracting from them patterns and common themes. And where is the pattern or common theme articulated? In the topic sentence, of course.

[1] Several of the example topic sentences in this column come from Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook* 59, 153–54 (4th ed. 2006).

[2] One shortcoming of the question approach is that initially some students may think the question is more about their case selection than it is about their ability to synthesize their thoughts about a case into a topic sentence. To head off that potential misunderstanding, simply start with a preamble something like "let's assume (or agree) that *Shurman* is a case you should include in your memo (or brief)."

Writing topic sentences that synthesize several cases is not a skill that all students can master immediately. It does hasten the learning process if, once the students have done their initial research and are familiar with the cases for their next assignment, you show them a few examples of topic sentences that synthesize two or more of those cases, such as the ones below.

> In most of the cases in which the courts have held that the summons was not left at the defendant's usual place of abode, the defendant had not lived at the house where service was made for a substantial period of time. *See, e.g., Shurman v. Atlantic Mortg. & Inv. Corp.*, 795 So. 2d 952 (Fla. 2001); *Alvarez v. State Farm Mut. Auto Ins. Co.*, 635 So. 2d 131, 132 (Fla. Dist. Ct. App. 1994).

> In the cases in which the courts have found that there was not sufficient evidence to support a finding of constructive possession, the defendant was only a temporary visitor and had another residence. *See, e.g., State v. Callahan*, 459 P.2d 400 (Wash. 1969); *State v. Davis*, 558 P.2d 263 (Wash. Ct. App. 1977).

A final, and for some folks favorite, way of dramatizing how topic sentences need to be workhorse sentences that provide a framework for the analysis is to show students a well-written memo or brief with the topic sentences highlighted. Ask the students to read just the highlighted topic sentences and see if those sentences create an outline of the writer's analysis. Another variation is to give the students only the topic sentences from a memo or brief. This technique can also be used to dramatize how woefully inadequate placeholder topic sentences are when they end up in a final draft.

Sophisticated topic sentences, then, are one more hallmark of excellent legal writing. They are the result of the intersection of a high level of critical thinking and skillful writing. In short, they are potentially brilliant moments of synthesis.

"Sophisticated topic sentences, then, are one more hallmark of excellent legal writing. They are the result of the intersection of a high level of critical thinking and skillful writing."

The Importance of Culture and Cognition—

A Review of *The Geography of Thought: How Asians and Westerners Think Differently … and Why*

By Richard Nisbett
Free Press, 2003

Reviewed by Cliff Zimmerman

Cliff Zimmerman is Associate Dean of Students and Clinical Associate Professor of Law at Northwestern University School of Law in Chicago.

When we teach our students to write, we consistently stress the paramount importance of knowing your audience. Knowing who the readers are, and their background, experience, and understanding is vital to crafting not only the substance but also the style of any legal presentation. But do we take the same into consideration with our students (our audience) as we teach? What about their background, understanding, and cultural circumstances? Are there other ways to gain better understanding from them or are we discounting what they bring, culturally, to the classroom? Likewise, many of us try to avoid geocentricity, whether it is local, regional, or national, but do we consider how another culture would think about or approach the subject? This is not about being politically correct or being chic, nor is this about teaching some alternative to the core of legal analysis; rather this is about whether there are true, underlying, cultural differences in comprehension, presentation, and argumentation. And, if so, how do we use that information to be better teachers to and of our students?

Richard Nisbett, in *The Geography of Thought: How Asians and Westerners Think Differently … and Why*, passionately argues that there are critical differences and similarities that, left unspoken and unstudied, leave us ill-equipped to understand, function, and thrive in a globalized society. Further, his findings raise important questions for us to consider about how to teach legal argumentation and how our students construct their arguments. This book review is less than orthodox in its approach. I hope to whet your appetite to read the text (in part by not reviewing all of it!), but also to set aflame your desire to complete the research that must follow Nisbett's work.

> "Nisbett juxtaposes East and West, or more specifically China and Greece, as two starting points for different ways of thinking."

Nisbett juxtaposes East and West, or more specifically China and Greece, as two starting points for different ways of thinking. The Greek tradition of individuality and logic, where knowledge and debate were leisurely pursuits, led to a very linear view of the world and logic. The Chinese approach was broader, based in community and harmony, and led to a universality or universal connectedness approach to the world and its contents. Thus, while the Greeks debated to advance, the Chinese strived for community advancement. "[T]he Chinese advances reflected a genius for practicality, not a penchant for scientific theory and investigation." (p. 8) This also translated into a competitive streak in Western thought (and argument) and a practical solution aim in Eastern thought (and argument). Nisbett culls through background cultural, religious, and political development in both East and West, to define, through meta-analysis, personal contacts, and some anecdotal support, and pinpoint this difference.

The core of Nisbett's argument starts with identifying common, Western assumptions about people worldwide (pp. 47–48):

- Each individual has a set of characteristic, distinctive attributes. Moreover, people *want* to be distinctive—different from other individuals in important ways.
- People are largely in control of their own behavior; they feel better when they are in situations in which choice and personal preference determine outcomes.

- People are oriented toward personal goals of success and achievement; they find that relationships and group memberships sometimes get in the way of attaining these goals.
- People strive to feel good about themselves; personal successes and assurances that they have positive qualities are important to their sense of well-being.
- People prefer equality in personal relations or, when relationships are hierarchical, they prefer a superior position.
- People believe the same rules should apply to everyone—individuals should not be singled out for special treatment because of their personal attributes or connections to important people. Justice should be blind.

Then, in a variety of contexts, including the self, relationships, conflict and negotiation, and viewpoints, he carefully parses Western and Eastern differences that matter. In the end, these assumptions are just Western assumptions and do not capture the Eastern view.

On relationships, Nisbett focuses on a difference of independence (Western) v. interdependence (Eastern). Whether parental, business, or otherwise, in the East relationships are seen as critical, strong, and long lasting, as opposed to the Western view that such relations are short and, at times, weak. He reviews various studies that confirm that this is how workers view their job commitment: is it for life (as in the East) or just until the next, better opportunity comes along (as in the West)?

On conflict and negotiation, Nisbett finds evidence that the East does not share the tradition of Western debate. Thus, when Easterners come to the West to study law or science, they do not come with the training in analytical method (start with basic relevant theories, develop hypothesis, state and justify methods, present evidence, and argue findings) that has been ingrained in Western students from day one of their education. Thus, "[i]t is not uncommon for American science [or law] professors to be impressed by their hard-working, highly selected Asian students and then to be disappointed by their first major paper—not because of their incomplete command of English, but because of their lack of mastery of the rhetoric common in the professor's field." (pp. 74–75) Many of us have experienced this; our Eastern world students know the material, but present it in a very simplistic form. Do they not know how to present it?

This East-West division is revealing about notions of justice and fairness as well. In the East, "disputants take their case to a middleman whose goal is not fairness but animosity reduction—by seeking a Middle Way through the claims of the opponents." (p. 75) Not only does this affect our teaching, particularly in argumentation and brief writing, but on a larger scale this can make us wonder about whether Western ideals can be exported on a political level. Negotiation binds together with relationships as well. "A Japanese negotiator may yield more in negotiations for a first deal than a similarly placed Westerner might, expecting that this will lay the groundwork for future trust and cooperation." (p. 76)

To Nisbett, this is not just a difference in values, but rather a difference in how the world is constructed. Citing one study, he draws from it that "Westerners and Asians literally see different worlds. Like ancient Greek philosophers, modern Westerners see a world of objects—discrete and unconnected *things*. Like ancient Chinese philosophers, modern Asians are inclined to see a world of substances—continuous masses of *matter*." (p. 82) Thus, the two are characterized as atomistic v. holistic, where "Westerners are the protagonists of their autobiographical novels; Asians are merely cast members in movies touching on their existences." (p. 87) A study asking young children to describe events in their lives found American children's self-references occurred at a rate three times higher than self-references by Chinese children. This egocentricity not only presents a clear difference, but also reveals, perhaps, why we might be slower to see the ways of others in the world. Further studies that Nisbett conducted confirmed this. Easterners (Japanese in particular) pay more attention to

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background details, context, and environment, while Westerners (Americans) pay attention to foreground matters or focal objects. Such a conclusion has deep ramifications for a divide between what a teacher intends to impart and what is identified as the important part to retain.

Nisbett next looked at control and how the importance of control varied from culture to culture. Not surprisingly, given previous findings, he found that Asians were more comfortable working in groups and less comfortable working alone, whereas Americans were exactly the opposite. "[T]o the Asian, the world is a complex place, composed of continuous substances, understandable in terms of the whole rather than in terms of the parts, and subject more to collective than to personal control. To the Westerner, the world is a relatively simple place, composed of discrete objects that can be understood without undue attention to context, and highly subject to personal control. Very different worlds indeed." (p. 100)

Then, Nisbett carries forth into argument and rhetoric (the last two chapters of substance). While his conclusions on these do not stray far from his conclusions in general, like a good mystery, I leave you to read these chapters lest my presentation be too revealing of his findings. Suffice it to say, that here is where our work begins.

When in Rome?

I have often heard from law teachers who have just read the papers of foreign-born students an utter dismay for the lack of depth of analysis in the presentation. They think or mutter under their breath: Why can't these students merely do as we have taught and leave their approach behind? When in Rome, they should write and analyze like the Romans!

With or without Nisbett, some of us have already adjusted our teaching to recognize that we need to present legal analysis in a different way to students of other cultures, particularly those of East Asia (as opposed to South Asia, which had a greater British influence). While this has most likely occurred in the teaching of foreign LL.M.s, what about the increasing number of foreign born or first generation American J.D.s who are strongly imbued with another cultural set of precepts? And, if you think you have mastered this, then move forward and teach these students the precepts of an honor code and citation form! Any way you cut this, further study is needed. We need to discern the line between the cultural understanding we need to teach here and the cultural change that needs to be taught. This is a ripe area for good philosophical and empirical work.

What about the students who know, understand, and present with the rhetorical and analytical strength that we seek, but now want to use a culturally distinct rhetorical tool to elevate their skills? Perhaps they are doing so to reach or teach their audience. Perhaps it complements the substance presented. Or, perhaps, they just want to diversify their presentation. When should we be teaching these skills to add to our students' tool belts? Is this strictly a matter for an upper-level writing course or advanced rhetoric, or, in the face of globalization, just good sense? Will judges blanch at such arguments or be intrigued? Will teaching these tools validate some of our students' backgrounds and improve their ability to thrive in law school and beyond? The answers lie buried in our schools and in our students, and are ripe for empirical and theoretical study. We are not only deeply affected by the outcomes, but plainly in a great position to develop the research, evaluate the findings, and implement the results. Nisbett has opened the door for many disciplines to pursue the rush of fresh air entering the academy. Legal writing professionals should breathe in gulps and let it inspire our creativity.

"Nisbett has opened the door for many disciplines to pursue the rush of fresh air entering the academy."

Teaching U.S. Legal Research to International Graduate Students:

A Librarian's Perspective

By Shannon L. Malcolm

Shannon L. Malcolm is a reference librarian at the University of Illinois College of Law in Champaign.

Like most law school graduate programs, mine offers a course designed to introduce the basic precepts of the United States legal system to students from other countries pursuing graduate degrees. Teaching the legal research portions of such a course presents special challenges: there is even more pressure than usual to cover a lot of material in very limited time, students often struggle with the English language itself as much as with its legal terminology, and, although we are all frustrated sometimes by how little traditional 1Ls seem to remember from their basic civics classes, their knowledge is nevertheless extensive compared to folks unfamiliar with common law systems or federalism. On the other hand, teaching graduate students is uniquely rewarding: the motivation and talent of these students are exceptional, and they already possess legal expertise that can be applied to the new system they are learning. In addition, the opportunity to learn from these students—always one of the most delightful aspects of teaching—is even greater because of their knowledge of legal systems with which most of us have limited experience. What follows are my own observations about how to best teach international graduate students in light of these weaknesses and strengths.

Remember What Assuming Does to You and Me

Although they are likely to all be together in a research class, we must remember that international graduate students will have an astounding diversity of experiences. They have worked for governments and firms; they are scholars, lawyers, and judges; and their practice specialties vary widely. The group I recently taught included a Russian literary agent, a general practitioner from a small town in China, and a partner from the Japanese office of a U.S. law firm. Some spoke English impeccably; others struggled to communicate relatively basic questions to me.[1]

Because of the variety of experiences and backgrounds you will encounter, effective instruction will require a degree of personal, one-on-one interaction more like working with students in an advanced seminar than lecturing to a section of 1Ls. It is always a good idea to learn a bit about your students' backgrounds, goals, and needs at the outset via a brief questionnaire; it is especially useful to do this with international graduate students. They may surprise you with what they do and do not know. Recently, after I lectured about U.S. statutes, a student approached me about finding legislative history materials and I was surprised to find he was already familiar with resources[2] unfamiliar to many J.D. students.

Of course, it is just as bad to assume too much knowledge as too little. I often check myself and

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[1] The most glaring differences among students will be between those with civil versus those with common law backgrounds, and those very fluent in English versus those who are not; often, of course, the groups overlap to compound students' strengths or weaknesses (i.e., those with common law backgrounds more likely know English best, while those with civil law backgrounds are often less fluent in English). Distinct courses of instruction for the two groups may be desirable. *See* Julia E. Hanigsberg, *Swimming Lessons: An Orientation Course for Foreign Graduate Students*, 44 J. Legal Educ. 588 (1994).

[2] Library of Congress, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates 1774–1875, <memory.loc.gov/ammem/amlaw/lawhome.html> (last visited November 15, 2005); LexisNexis Congressional, <web.lexis-nexis.com/congcomp>.

"[R]emember to ask 'Do you know this term?' when dealing with international students, especially when slang and informal usage or terms of art are involved."

remember to ask "Do you know this term?" when dealing with international students, especially when slang and informal usage or terms of art are involved. Because in these cases students may think they know what is meant by a term even when in fact they do not, it is a good idea to verify their understanding. Calling on them to tell you what things mean may seem a good way to do so interactively, but may embarrass the students, many of whom will not be used to speaking in class.[3] You might consider asking students to indicate how comfortable they are being called on in class in a preliminary questionnaire.

Even seemingly simple terms can cause confusion. One student came to me at the reference desk while working on an exercise I had assigned and said he couldn't find the term "tobacco" in the index to the Illinois code. Of course, I knew it was there, because, like any instructor worth his or her salt I had already run through the exercises myself. When we went to use the code together it turned out he had thought the terms printed on the spines of the volumes were the index. I had failed him because even though I had gone on and on about how indexes were almost always at the end of a resource and that they were usually the best place to begin, I had not taken the time to explain what an index was, because I was so used to being able to depend upon students' already being familiar with this common English term. As all students become increasingly dependent on online searching interfaces, it may (lamentably?) not be a bad idea to define terms like "index" and "contents" to native English speakers as well. Tools with controlled vocabularies like indexes, digests, and finding aids like *Words and Phrases*® are often better for locating relevant material than online resources. These tools also provide cross-references and synonyms that benefit researchers for whom English is not their native language.

Hands-On Instruction Is Crucial

This assertion is nothing revolutionary; hands-on instruction is important for teaching traditional students legal research too, but it is especially effective with international students. Evidence indicates that international students are often better at reading and writing English than at listening to and speaking it,[4] so handouts and other means of conveying information in written form are especially helpful. Because many will lack the fluency in English we take for granted with traditional students, they may be even more receptive to kinesthetic learning than traditional methods employing oral and written lessons. Language barriers may make it difficult to understand what you are talking about, but if you give students photocopies of the resource being discussed, and walk them through how it works while they can follow along, they can learn what they need to even if they don't catch on to the proper terminology. After all, it's more important for students to know how to use a digest than to be able to define the terms "key number" and "headnote." Frankly, I do not care if my students ever learn such terms at all, as long as they know how to use their referents. For similar reasons, it is probably not a good idea to be too particular about international students' use of citation format; the focus should remain whether they know how to find things and communicate where they found them, not whether they have mastered the more arcane font commands of Microsoft Word. Visual representations like graphical views of case histories on Westlaw® are also great, and visual presenters (such as those made by ELMO) or slides are useful for demonstrating research procedures. These can be augmented by making available exemplars of the resource in question for students to peruse before, after, or during class.

Technology Is Your Friend

Technology can also provide hands-on experiences outside of class. Consider calling your students' attention to CALI exercises, and the tutorials available from LexisNexis®, Westlaw, and other

[3] Hanigsberg, *supra* note 1, at 598–99.

[4] *See* Guofang Wan, The Learning Experience of Chinese Students in American Universities: A Cross-Cultural Perspective 9 (1996), <www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/10/ca/ec.pdf>.

online resources (the Hein-On-Line Feature Tour and AccessUN's Help feature are both good examples). I especially like the LexisNexis tutorials because they include interactive quizzes and provide feedback. Such tools enable students to learn about materials of their own choosing at their own pace, which is great, since graduate students will have widely ranging research interests and varying fluency with English and the U.S. legal system. They also allow you, as the instructor, to focus on the fundamentals in your limited class time and not overwhelm students with scads of specialized resources, while keeping those resources available and usable if and as students are ready to consult them.

"But with an already hyper-compressed schedule," the cagey reader may ask, "where is the time to point out tangential matters like this?" Remember that calling folks' attention to these things requires negligible amounts of class time. It is enough to be sure your students know to look for these kinds of instructional tools when they are exploring a new topic or resource. The motivation and experience of graduate students will seek out further details as needed, especially if you have established a good rapport with them. As for the resources themselves, I myself simply give students a handout with location information and brief descriptions of those things I think they ought to be aware of but which there is not time to discuss in class. If you have the time and the inclination, you could even personalize such handouts based upon individual students' research interests; they will adore you for it if you do.

Do not succumb to the temptation to ignore online resources and focus only on traditional tools due to limited time. International graduate students are as savvy as the next person. Indeed, they are more so; because they are already experienced practitioners in their fields, they are likely to have an attitude more like what we have come to expect from lawyers and professors than law students: they want the data they need as quickly and easily as possible, and they are not very interested in (nor will they necessarily benefit from) the details that might have some legitimate pedagogical value for 1Ls untrained in legal analysis. These folks already know how to think like lawyers (though not necessarily like U.S. lawyers). The upside is they may actually be more receptive to certain details, like how to maximize the financial efficiency of their legal research. They are going to try to find everything via computer-assisted legal research (CALR) if possible. We cannot do much about that fact. We can, however, teach them how to efficiently use CALR, and what its limitations are.

Technology can also be helpful in the form of in-house online resources customized for your international graduate students. Creating a resource clearinghouse, a frequently asked questions section, or an online forum specifically addressing their needs may be particularly effective for international students given their specialized agendas and diverse backgrounds. Forums are a great way for students to share their knowledge with their peers, and they help eliminate the need to answer the same questions many times at the reference desk. Even if you lack technical expertise, you can take advantage of services like LexisNexis Web Courses and Westlaw TWEN® pages to implement such tools relatively painlessly.

Empower Students to Learn Outside of Class

Technology is only one avenue for learning outside the classroom. Because of their extraordinary enthusiasm and motivation, international graduate students may be more likely to take advantage of opportunities to speak to you outside of class. It is important to encourage and support their needs because of the challenges they face in navigating unfamiliar resources while armed with an abbreviated training in U.S. legal research. Try to be available for questions after class. The mores of other cultures are not always the same as ours, and students may be more comfortable asking you a question one-on-one than interrupting you or speaking out in a crowded classroom,[5] so being around after class gives them a chance to pose

[5] Leon E. Trakman, *The Need for Legal Training in International, Comparative and Foreign Law: Foreign Lawyers at American Law Schools*, 27 J. Legal Educ. 509, 539 (1975).

"Technology can also be helpful in the form of in-house online resources customized for your international graduate students."

questions about the material you covered while it is fresh in their minds.

Employ the phrase "please see me outside class" freely to avoid getting bogged down in detailed sidebars during class time. Students' individual interests may lead to questions about the differences between congressional prints and reports, the *Code of Federal Regulations*' goofy color schemes, and "the ultimate answer to life, the universe, and everything."[6] Of course, all students ask these kinds of questions (i.e., those best addressed outside of class), but it is understandably probable that international law students will ask them more frequently, because of their unfamiliarity with the material and more esoteric interests. And answering them in class will be especially ill-advised because of your abbreviated time with them. Individual consultations or follow-up messages via e-mail are better ways to handle this phenomenon.

> "Employ the phrase 'please see me outside class' freely to avoid getting bogged down in detailed sidebars during class time."

You can also take advantage of these students' initiative and skill by referring them to secondary materials. I found a few times that recommending one or two good books to my inquisitive graduate students gave them more than enough information to teach themselves about a topic. What's more, they often later thanked me for the helpful recommendation. Lamentably, these kinds of recommendations often leave traditional students vexed and feeling they are being denied good service, but, having come from the working world, graduate students already know everything cannot be found via Google and that librarians do not have the time to spoon-feed them everything.

I've never had to tell a graduate student to check the online catalogue more than once.

To facilitate their independence, ensure that the students have a chance to participate in a tour of the library with you. Even if they already did so as part of their orientation, it will refresh their memories about key points and allow you to highlight the locations of specific resources discussed in class. Also let the students know when your reference shifts are. Even though it is important to make sure they are comfortable approaching the reference desk regardless of who is working, and to ensure that your colleagues are informed of what has and has not been covered in your sessions with them, international students, even more so than others, may nevertheless feel more inclined to bring their questions to a familiar face. Many of the graduate students I have taught have confided that they make a point of coming to the desk when I am working because they feel more comfortable with me and are certain I understand what they do and do not know about researching in a U.S. law library.[7]

Coordinate with the Primary Instructor

Good relationships between writing instructors and librarians are crucial to any program's success, whether or not librarians formally teach the research components of a class. Because formal legal research instruction for graduate students is frequently limited to a few sessions of a course covering fundamentals of U.S. law, it is important to coordinate your efforts closely with the course's primary instructor. Good communication will enable you to arrange your time in class to maximize efficiency. Are you expected to discuss the U.S. court systems? Do the students understand federalism? How much do they know about citation practices? Are they learning *ALWD Citation Manual* or *Bluebook* citation formats? If the latter, practitioners' or scholars' format? Will there be any exercises assigned covering the material you cover? If so, which of you will create the assignment? Grade it? Who should students contact with questions about it? Being clear about these kinds of things beforehand establishes clear expectations so that things go smoothly not only for both the primary instructor and yourself but, more importantly, for the students![8]

[6] Douglas Adams, *The Hitchhiker's Guide to the Galaxy* 170 (1980).

[7] *See* Paula D. Ladd & Ralph Ruby Jr., *Learning Style and Adjustment Issues of International Students*, 74 J. Educ. Bus. 363 (1999).

[8] I would like to thank Professor Emily Grant of the University of Illinois College of Law for her wonderful work coordinating my sessions with our international graduate students.

Parting Words

Teaching international graduate students about U.S. legal research involves additional challenges, but those challenges come with additional rewards. As long as we are careful to address the unique needs these students have, recognizing not just those areas in which they may need extra help but also taking advantage of their strengths, we ourselves can learn from their expertise and embrace the opportunities to form meaningful relationships with brilliant scholars from around the world.

"Teaching international graduate students about U.S. legal research involves additional challenges, but those challenges come with additional rewards."

Another **Perspective**

"Preparing for a hearing, I once asked IRS tax experts to tell me how many pages the tax code really has. Weeks later, they came back somewhat sheepishly and advised me against citing any particular number of pages. They said the experts could not agree how many pages the code actually had and that any number I cited could be attacked by other experts as incorrect. (I'm not making this up.)"

—Charles O. Rossotti, *Many Unhappy Returns: One Man's Quest to Turn Around the Most Unpopular Organization in America* 272 (2005).

Finding and Using Statistics in Legal Research and Writing

> "Most legal writing can be strengthened with the judicious use of numerical data."

Teachable Moments for Students *... is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a "teachable moment," a brief window of opportunity when—because he or she has a specific need to know right now—the student or lawyer asking the question may actually remember the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. It is a companion to the* **Teachable Moments for Teachers** *column that gives teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. Readers are invited to submit their own "teachable moments for students" to the editor of the column:* Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, phone: (303) 492-1233, fax: (303) 492-2707.

By Billie Jo Kaufman

Billie Jo Kaufman is Associate Dean for Library and Information Resources at the Washington College of Law, American University, in Washington, D.C.[1]

Did you make a conscious career choice to avoid mathematics, science, and data by going to law school? I know some of us did, including me. Unfortunately, my career in the law hasn't worked out that way. Almost from the outset, I began to face issues that needed statistics and data to support my arguments and positions. I learned that, beyond just giving cases or citations to amazing research, the judges and senior partners, deans, and faculty members wanted and needed the numbers and the stories the numbers represent to accept the position or argument being presented. My arguments were better when they included the dreaded numbers. I guess I don't like to admit that when I add statistics, tables, and graphs to my carefully worded and crafted arguments, the numbers actually are quite useful.

It's probably easiest to see this if you ponder this example below:

> *"Many summer clerks and first-year associates are considered deficient in research skills."*
>
> Compared to:
>
> *"Eighty percent of the respondents found summer clerks less than satisfactory in their ability to attack a legal research problem efficiently. First-year associates were found to be less than satisfactory in this area by sixty-five percent of the respondents."*[2]

It's clear that the second quotation makes a stronger case. The inclusion of two basic statistics to support the proposition gives the reader a better understanding of the scope of the problem. Most legal writing can be strengthened with the judicious use of numerical data. Fortunately, there are many sources that provide statistical data. Even those of us with "number phobia" can include supporting numerical information if we're familiar with some basic statistical resources.

For an introduction to the topic of finding and using statistics, here are a variety of useful sources:

Statistics for Lawyers[3]: This source is especially useful because it is aimed at those who use statistics in legal writing.

[1] With gratitude for the excellent editorial assistance of Barbara Bintliff.

[2] Joan S. Howland & Nancy Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. Legal Euc. 381, 383 (1990).

[3] Michael O. Finkelstein & Bruce A. Levin, *Statistics for Lawyers*, (2d ed. 2001).

Using Government Information Sources: Electronic and Print[4]: This source is useful because it focuses strictly on government resources and it includes both those in print and those available in electronic format.

OWL, the Online Writing Lab at Purdue University, created a workshop handout on "Using Statistics" that defines and illustrates various terms such as average, median, mode, and mean. See <owl.english.purdue.edu/handouts/research/r_stats.html>. You likely remember some of this from a statistics course in your past. Of course, one of the major problems with statistics in writing is depicting them so that the numbers actually say what you mean to say and so that your readers really read what you've said. This site will help.

Another interesting site is Writing With Numbers at <www.americanpressinstitute.org/pages/toolbox/writing_with_numbers>. This site was designed to be helpful to writers who work with statistics, and includes cost-of-living calculators and charts from various countries, which compare them in a variety of categories.

The Center for Public Integrity at <www.publicintegrity.org> is committed to monitoring journalists as a profession to ensure real numbers are being used to support stories and campaign ads. The site includes various research projects of interest such as "Global Integrity" and "Hired Guns." The site includes information on how to make sure that statistics you (or your opposing counsel) are using are reliable and accurate.

Joel Best, a prominent sociologist, focuses on the use of statistics and numbers in public policy in two recent works, *Damned Lies and Statistics: Untangling Numbers from the Media, Politicians, and Activists* (2001) and *More Damned Lies and Statistics: How Numbers Confuse Public Issues* (2004). Professor Best warns the researcher and writer to use data and research in a responsible and factual manner.

Typically, you use statistics to obtain a specific fact or number. For example, you may need to know the percentage of bankruptcies filed in Tuscaloosa, Alabama, in 2004 out of all federal cases filed, or the number of times a certain Bank of America branch in Sacramento, California, has been robbed, or the estimated likelihood of contracting cancer among people living within five miles of a nuclear power plant. If that's the case, then a quick search of relevant statistical sources should provide the information needed. Similarly, if you locate tables, graphs, and charts in your research, this information can be easily incorporated into your finished work (with appropriate acknowledgements in all cases).

Sometimes, however, you will find raw research data in your quest for information. While initially daunting to the true number phobic, you shouldn't despair. If the information is in electronic form, chances are that the computer sites allow the researcher to export the data to spreadsheet software or to save the data and download it into software such as Excel or SPSS. Excel and SPSS are software packages that permit the researcher to manipulate data, view data in a number of different ways, and test data against different analytical processes. Many legal academics use these features when studying legal education practices, as they compare and contrast individual classes or create evidence to propose normative grading policies. These software applications also allow the user to depict the data visually through graphs or tables that will ultimately assist the reader in understanding and visually seeing what the data "says." If your law school or law firm does not have an administrative assistant skilled in the use of these types of software applications, there are numerous classes available through continuing education, community schools, and other sources to get you up to speed on their use. It usually takes only an hour or two before you can be manipulating data like the experts.

"Professor Best warns the researcher and writer to use data and research in a responsible and factual manner."

[4] Jean L. Sears & Marilyn K. Moody, *Using Government Information Sources: Electronic and Print*, (3d ed. 2001).

"Make sure you use a reputable source for identifying statistics, and use them appropriately and accurately."

Legal researchers are very good at locating specific information and data. We understand the powerful capabilities of keyword and Boolean search strategies and techniques. The skills that serve us so well with word-based documents can also help us find numerical information. The ability to find and locate data and statistics easily through Web sites and electronic databases provides the researcher and writer with details about almost every topic.

The best news is that usually you don't have to reinvent the wheel and develop statistics yourself. Take advantage of some of the Web sites that have already established a collection of statistical links when you're searching for numerical data. For example:

Oklahoma State University Library's Statistics at <www.library.okstate.edu/govdocs/browsetopics/statisti.html>

University of Michigan Library's Statistical Resources on the Web at <www.lib.umich.edu/govdocs/stats.html>

American University Library's Quick Stats at <www.library.american.edu/subject/statistics.html>

University of Florida's The World Wide Web Virtual Library: Statistics at <www.stat.ufl.edu/vlib/statistics.html>

One great Web site that has pulled together many excellent links is The Virtual Chase at <www.virtualchase.com>. Click Legal Research on the left side of the page and then click Statistics. This site is particularly helpful because it was compiled especially for attorneys.

Many association and organization Web sites include statistics or research data and information as well. It is always a good idea to check out an association Web site that parallels the topic you are researching to see if the data has already been tabulated. A couple of excellent examples of this are the Web site of MADD (Mothers Against Drunk Driving) at <www.madd.org>, which includes state-by-state research on drunk driving, and that of the AARP at <www.aarp.org>, which has a wealth of data on retirement and age-related information.

Many government Web sites include data on justice or crime statistics, as well as education, environmental, or health-related issues. One Web site of particular interest is <quickfacts.census.gov/qfd>. This site is compiled by the U.S. Census Bureau, and offers quick, reliable access to people, business, and geographical numbers state by state.

For those of you who prefer print resources, you may wish to consult *The World Economy: Historical Statistics*,[5] a great source for information on a significant number of developed and third world countries over many years. There are companion tables and graphs that can be helpful as you explain a problem or issue where comparisons are useful.

And other print resources? What about almanacs? Encyclopedias? Other reference works in your local library? Statistical information abounds—look around! Many of the print resources are now also complemented by online or Internet sites that are designed to keep the information more current than can be done in print. It is vitally important to make sure you have current, up-to-date information when you use statistics. If your print resource is not updated with print or online supplements, you may wish to verify the information you've found with another source.

The use of statistics can be valuable and meaningful to the position you are researching and writing about, but remember the saying long attributed to Benjamin Disraeli: "There are three kinds of lies—lies, damned lies, and statistics." Make sure you use a reputable source for identifying statistics, and use them appropriately and accurately. Anything less will harm your reputation and may hurt your grade or, worse yet, your client's case.

[5] Angus Maddison, *The World Economy: Historical Statistics* (2003).

Teaching Taxonomies

By Thomas Keefe

Thomas Keefe is the Computer Services Reference Librarian at The John Marshall Law School in Chicago, Ill.

Introduction

In the Winter 2005 *Perspectives* "Our Question—Your Answers" column, Judy Meadows and Kay Todd presented the results of a survey they conducted among librarians and library administers regarding their collection of and patron use of West's print digests.[1] According to the article, those surveyed agreed that digests are still a "valuable and highly popular resource" for legal research and should continue to be taught as part of research training. This article supports that conclusion and adds some insight into how we might teach the digest system in an era when "the absence of print digests may not even be noticed."[2]

Background: What Are Digests and Why Do We Need Them?

Allow me to begin with some definitions. When I use the expression "digest system" I really mean West's digest system. This *system* is really nothing more than an indexing and abstracting service for legal cases. When I use the term *index* I mean a pre-coordinate index, i.e., an index in which the organization of the concepts precedes the search. Pre-coordinated indexing offers two important features for researchers: concept organization and controlled vocabulary. These features make the digest system a "highly effective case finding mechanism."[3] The real value of the digest system is that:

When a researcher locates a case in which a relevant point of law is discussed, the West headnotes can be scanned to identify the topic and key numbers assigned to that point of law. These topics and key numbers can then be used as locaters in the West digests to find other decisions from all West reporters on the same issue.[4]

Needless to say, teaching digest research has been a mainstay in introductory legal research classes.

Indeed, almost every partner has a war story about using the digest system to locate a case that can not be obtained through other means. My favorite story is that told by Scott Stolley in his excellent article, "The Corruption of Legal Research."[5] There, Stolley recounts how he had asked a young associate to locate a case supporting his contention that plaintiff's counsel could not rely on late-filed evidence on appeal when plaintiff had moved during summary judgment proceedings to strike defendant's late-filed evidence. Sadly, but not surprisingly, Stolley's "computer-dependent" associate came back empty-handed. Stolley shocked the associate by "going to the books" and returning with a case that stated the broader concept that a "party cannot complain on appeal of action which he induced or allowed."[6]

A recent study conducted by The Bureau of National Affairs, Inc. (BNA) provides further support for the value of indexes. The BNA study compared users' success rates and completion times using both indexes and full-text searching.[7] The

"Indeed, almost every partner has a war story about using the digest system to locate a case that can not be obtained through other means."

[1] Judy Meadows and Kay Todd, *Our Question: Is the Use of Digests Changing?*, 13 Perspectives: Teaching Legal Res. & Writing 113 (2005).

[2] *Id.* at 115.

[3] Morris L. Cohen, Robert C. Berring & Kent C. Olson, *How to Find the Law* 90 (9th ed. 1989).

[4] *Id.* at 90.

[5] Scott P. Stolley, *Shortcomings of Technology: The Corruption of Legal Research*, 46 For the Defense 39 (April 2004).

[6] *Id.* at 40, citing Dallas County v. Sweitzer, 881 S.W.2d 757 (Tex. App. 1994).

[7] Mary Elizabeth Williams, *Dr Searchlove: Or How I Learned to Stop Googling and Love Pre-Coordinate Indexing*, 10 AALL Spectrum 20 (September/October 2005).

study measured users' success for both single answer and more complex research tasks. Overall, index users had a success rate of 86 percent while text searchers had a 23 percent success rate.[8]

In fact one can understand the history and development of online legal research tools as a grand attempt to create context in an otherwise unstructured world. SearchAdvisor, ResultsPlus®, and KeySearch® are all attempts to marry technology and tradition. LexisNexis® has very nearly completed its own indexing and abstracting service to rival West's digest system.[9] Ironically legal research has now come full circle. Twenty years ago we had two fully integrated print case-finding systems: the West system and Lawyers Cooperative Publishing's Total Client Service Library. Today we have two fully integrated online case-finding systems, LexisNexis and Westlaw®.

> "All things being equal it is fair to say that about 50 percent of the students will choose to print cases via LexisNexis, thus avoiding the digest system altogether."

So What's the Big Deal?

That which is a benefit for legal researchers has become an obstacle for research instructors. The popularity of the Lexis and Westlaw electronic course management systems among professors makes it increasingly difficult to deny students immediate access to the research systems, at least in limited form. Students now have all the incentive they need to avoid print entirely. All things being equal it is fair to say that about 50 percent of the students will choose to print cases via LexisNexis, thus avoiding the digest system altogether.[10]

So here's the rub. On the one hand, the wholesale cancellation of print reporters has undermined the value of instructing students on the intricacies of using the digest *system* in print. At the same time, now that LexisNexis has its own case-finding system there is every likelihood that a student will attempt to find cases using the LexisNexis system online and not the West system online or in print.

I learned that lesson last semester when one of my more persistent students found an interesting case using a legal encyclopedia. She brought it to me and asked the obvious question, "What do I with this?" (we had yet to cover citators). My automatic research response was "follow the headnotes." My heart sank when I saw that she had printed the case from LexisNexis and she had in front of her a set of headnotes that did not correspond to what was available in print digests. I suggested that she go back and print the case from Westlaw (or maybe even copy it) and then follow the headnotes using the print digests. I recognized from the look in her eye that I had instantly lost credibility. Was it really ridiculous to ask a student to jump through these hoops to complete an assignment? She thought so and to a large extent that is all that mattered.

My experience with teaching the digest system (in print) is that my students have little or no experience with print resources and consequently no experience with basic concepts of information science like indexing and abstracting or taxonomies. Not only do they not understand the concept of a taxonomy, they do not have the skills, training, or patience to work with a keyword index. When they do not find what they are looking for on the first try, they quit. I try to teach them that digests are good but their frustration with the organization features of the print digests leaves them with a negative impression. This unintended lesson leaves them perfectly prepared for the wonderful world of Lexis and Westlaw.

Students perception of and lack of experience with "traditional" research tools, is a serious obstacle to teaching legal research. In a recent study, Lee Peoples of the Oklahoma City University School of Law determined, among other things, that the students tested had a higher rate in answering fact-based questions with print digests than with online sources.[11] Their perception, however, was much

[8] *Id.* at 20.

[9] *See LexisNexis Case Summaries and Headnotes–A Progress Report*, LexisNexis InfoPro (February 2004), <www.lexisnexis.com/infopro/profdev/column/2004/200402.asp>.

[10] I take it as a given that students will print cases from Lexis and Westlaw whenever possible because 1) it's faster than copying; 2) it's cheaper than copying; 3) it is what they are used to; and 4) in my experience, it's what students actually do. I welcome rebuttals.

[11] Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?*, 97 Law Libr. J. 661 (2005).

different. The study concluded that students perceived terms and connectors searching to be superior even when, objectively speaking, it was not.[12] Furthermore, students rated their overall effectiveness at answering questions with print digests as very low. Even after students were shown how successful they were with print digests, they responded that they still preferred electronic resources over the print digest. The reason, as Peoples suggests and I completely agree with, is that today's students cut their teeth on personal computers, so they are used to and prefer to do things electronically.[13]

It occurred to me recently that I have been doing my students a disservice. I have been introducing them to the notion of traditional legal research sources without really clarifying what traditional meant to me. It seems to me that to my students the traditional/electronic distinction translates as print is bad and online is good—no matter what I say. The upshot of this is that they spend more time and effort trying to get around using print than they do actually using it. But I do not mean for the term to be understood one-dimensionally. To me the term traditional has two dimensions—format (print) and structure (pre-coordinated).

Teaching Tradition Versus Teaching Structure

So I began to ponder how we teach digests—their importance and how to use them. The problem as I realized it is that students no longer need print digests to learn the more important lesson that the concepts in law tend to be hierarchically related and using hierarchically organized research resources in combination with free text searching simply makes good sense. So in essence, I decided to de-emphasize teaching sources as a primary means of relating the secondary lesson that structure is important because of the threat that students understood my gesture as one of foisting print upon them.

This semester I decided to take a step back from teaching traditional sources like print digests and focus somewhat more on basic concepts in information science like what is a taxonomy and why hierarchically arranged research resources are so important in law. My mantra was "think hierarchically."[14] Having provided at least a very basic grounding in information science, I tried to show them that the need for hierarchal thinking is demonstrated by the fact that taxonomies exist all around them in their daily lives. The most obvious and popular example of hierarchy is a cell phone. Yes, today's most essential electronic convenience is (or at least mine is) completely menu-driven.

Likewise the personal computer, a student's other best friend, offers many excellent examples of the value of menu-driven searching. For example, the easiest way to access "disk cleanup" on one's hard drive is to choose start>programs>accessories> system tools>scan disk. Voila! Internet subject directories offer another lesson in the value of structured searching. Finally, as one navigates through almost any well-designed Web site these days one sees "breadcrumbs"; these act to mark one's path through the taxonomy that is the Web site's hierarchical organization.

Of course, lessons about the need for structure abound in law as well. Within a few weeks of this lesson I had to introduce my class to the wonderful world of statutes. I was able to offer them a preview of what was coming by demonstrating that our laws ultimately get categorized into a hierarchical arrangement to improve accessibility for research purposes. In fact, rules themselves, especially statutes, have a structure; part of the success in analyzing statutes is recognizing the structure. There can be no more important lesson than understanding the hierarchical relationship of factual concepts in law (employer>private employer>with more than 100 employees>

"The most obvious and popular example of hierarchy is a cell phone. Yes, today's most essential electronic convenience is … completely menu-driven."

[12] *Id.* at 674–675.

[13] *Id.*

[14] As one legal writing text teaches, the capacity to think structurally is one of the critical skills in the lawyerly use of rules. *See* Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 25 (5th ed. 2005).

carrying goods only>intrastate>carrying toxic materials). To whom does a certain regulation apply?[15]

Conclusion

Today we stand at a crossroads as legal research instructors. We now find ourselves attempting to teach traditional sources and techniques to students who have been raised entirely on computers. We must recognize this reality and adjust our teaching to account for it. Teaching print digests as part of a legal research system no longer represents an efficient use of limited time and resources. Teaching digests as an example of a hierarchically organized research resource will be fruitful if we give students an introduction to what taxonomies are, why they are important, and how they can be found throughout the wonderful world of legal research.

"Teaching digests as an example of a hierarchically organized research resource will be fruitful if we give students an introduction to what taxonomies are. …"

Another **Perspective**

"[T]eachers possess the power to create conditions that can help students learn a great deal—or keep them from learning much at all. Teaching is the intentional act of creating those conditions, and good teaching requires that we understand the inner sources of both the intent and the act."

—Parker J. Palmer, *The Courage to Teach: Exploring the Inner Landscape of a Teacher's Life* 6 (1998).

[15] Adopted from Thomas R. Haggard, *Legal Drafting: Practical Exercises and Problem Materials* 19–20 (1999).

Using Alternative Dispute Resolution in Legal Writing Courses

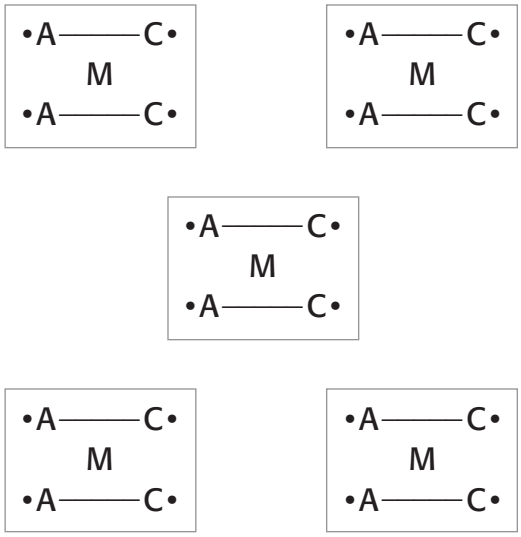
By Kathleen Portuan Miller

Kathleen Portuan Miller is a Mediator and Assistant Professor of Professional Practice at the Paul M. Herbert Law Center, Louisiana State University, in Baton Rouge.

Alternative Dispute Resolution (ADR)—specifically mediating and writing a mediated agreement—can be incorporated into a legal writing assignment.[1] When a legal research and writing class is a three-credit course, or if an interesting assignment is needed in a two-credit course, ADR is great. In some law schools, particularly in Texas, where the majority of cases are settled, ADR is part of the six-credit legal writing curriculum. In a growing number of law schools, mediation has become very important in the curriculum since many state courts have now required mediation. Florida, for example, has mandatory mediation in all divorce cases. Louisiana, where I teach, has just passed a new mediation law. Specifically, I expect the students to learn how to mediate a problem, and how to write a mediated contract—which they end up doing very well.

How to Set Up the Exercise

First, I set aside one class—10 minutes for the lecture, and 45 minutes for the mediation. The classroom should be arranged in the format at right.



Key

(Classroom of 25 Students)

M = Mediator A = Attorney C = Client

All parties in the mediation should be at the same physical level. Students should mediate in the same room, or in a hall nearby the room, so the professor can be an observer. If there is the luxury of more time, a video on a mediation can be shown before the actual mediation.

The Lecture

I always begin this exercise with a short lecture. On one occasion, I had a master mediator come and share his experiences, after he gave a short lecture. A sample lecture includes the following points:

- Mediation is a process in which persons involved in a dispute attempt to settle their differences by reaching a voluntary agreement with the assistance of a neutral third party—the mediator. He or she does not have to be an attorney. Mediation can be binding if a contract is signed.
- The mediator's role is that of a facilitator. A mediator's task is to assist the participants in voluntarily reaching their own mutually acceptable resolution of the issues in dispute. The mediator facilitates communication

> "In a growing number of law schools, mediation has become very important in the curriculum since many state courts have now required mediation."

[1] Information in this article was taken from the training I received from the South Plains Association of Governments–Dispute Resolution Center, Basic Mediation Training.

between the parties by helping them identify and explore attitudes and feelings that have kept them from understanding and talking to each other. The mediator controls the structure of the hearing, but not the content.

- The mediator gathers information by asking questions, by listening, by demonstrating empathy, and by persuading the parties to settle. A mediator is committed to his/her objectives: that each party has the opportunity to be heard, to help the parties to separate and articulate their feelings, to help the parties to evaluate and formulate options, and to help the parties design an agreement.
- Benefits of mediation include affordability, convenience, timeliness, privacy, settlement, effectiveness, and satisfaction.

"The students mediate in a class session; then each one drafts a mediated agreement to be submitted as a graded assignment."

The Assignment

In the assignment, a student (attorney) and student-partner (client) team mediates with another student-partner team, using the help of a student mediator. When the team reaches an agreement with the help of the mediator, each student participant individually drafts a mediated agreement that reflects the decision of the parties. The students mediate in a class session; then each one drafts a mediated agreement to be submitted as a graded assignment. (The agreement can also be written by a team of two students.) Each student has been given several samples or outlines of mediated agreements. The students are encouraged to do research and find an appropriate form.

One source I recommend is *Mediation: Principles and Practice*, by Kimberlee K. Kovach (2d ed. 2000). This text has a mediation problem called the "Slippery Grape," which can be used for the mediation. In the Slippery Grape assignment, a customer slipped on a grape peel at the Big Bag-N-Save Supermarket, and suffered severe pain in the left knee and lower back, and pain in the right shoulder. The customer was seeking $100,000 compensation for the injuries, medical bills, lost wages, and mental anguish. (All the students are given this fact pattern.)

Students mediating for the customer are also given another fact pattern with confidential information: the customer was self-employed and did not have health insurance. She still owed $5,500 for out-of-pocket expenses. The customer had been unable to continue work for the past six months as a yoga instructor since the fall. However, she had been doing some consulting work and thought that she would be able to continue soon with her job as a yoga instructor.

Students representing Big Bag-N-Save Supermarket are also given an additional fact pattern with confidential information: the store was insured up to $500,000. Because of severe financial problems, the store needed to resolve this case for as little out-of-pocket cost as possible. However, retaining customers was of utmost importance to the store and its future. Store maintenance was one of the areas where the manager cut back. The store knew that the customer had continued to meet with yoga students.

The Mediation

When I used this problem in the past, each group worked enthusiastically to reach an agreement. Even the quietest students participated. I was surprised just how serious and enthusiastic the students were. The groups were very lively. Each group *had* to come to some agreement. If the students came to an impasse, they could mediate outside of class for one more class period.

I was surprised that the five groups came to five different agreements. But everyone seemed satisfied with the final agreement, and everyone told me they really enjoyed the experience. The students told me that the mediation was one of their favorite assignments because they really felt as if they came to a fair solution to a problem.

The Written Mediated Agreements

Students also told me that they enjoyed working on the written agreements. Students were instructed to include the date of the mediation, the names of the parties in the mediation, the agreement of the parties, the signatures of the parties, and the date

that the mediation was signed. Each written agreement was carefully typed, or filled in, and signed by the parties. For example, one group came to the agreement that the store would settle for $45,000 if the customer would agree to no more suits. Another group settled for a lump sum of $36,000 and $100 in groceries. A third group settled for $22,000 to offset consulting income, plus $300 in store coupons. Group four settled for $30,000 and donation of 50 dinners by the store to the customer's church. Group five was still working on the agreement at the end of the class, and finished after 10 more minutes outside of the class.

The Result

Each mediation ended with a sense of achievement and a sense of renewed energy. A mediation exercise inserts active learning into a writing class, allows students to develop critical problem-solving skills, and reinforces the importance of both oral and written communication.

Advice

I found out from experience that divorce mediation problems can be painful for some students. I would probably steer away from divorce situations since they can trigger hidden emotions. Over time, I have used a variety of problems, including a problem involving a mediation about water allocation in a real-life Middle East situation. The mediation showed just how relevant and timely mediation really is. I was surprised how many creative solutions the students had. The key to a successful mediation exercise is to prepare the students in advance. The class before the mediation, I give the students a packet with information and a copy of the mediation problem. And finally, be advised that the additional time you invest in running a mediation exercise will be rewarded in terms of student engagement.

Selected sources for mediation exercises:

- Leonard L. Riskin and James E. Westbrook, *Dispute Resolution and Lawyers* (2d ed. 1998). The Instructor's Manual has many interesting mediation assignments.
- Kimberlee K. Kovach, *Mediation: Principles and Practice* (2d ed. 2000).
- Jack W. Cooley, *Creative Problem Solver's Handbook for Negotiators and Mediators* (2005).

"A mediation exercise inserts active learning into a writing class, allows students to develop critical problem-solving skills, and reinforces the importance of both oral and written communication."

Beyond Offering Examples of Good Writing:
Let the Students Grade the Models

"One method of teaching legal writing is to provide the student with a good example and a bad example of a document or a component of a document. …"

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**.

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Using Models

One method of teaching legal writing is to provide the student with a good example and a bad example of a document or a component of a document, for example, a Question Presented or Summary of Argument. For the beginning student, this method helps the student see a clear difference between the examples and offers a model to imitate. Here is an example using bad and good versions of a Question Presented in an appellate brief:

> Bad: Did the trial court err in admitting the evidence the officers obtained through the search?
>
> Better: Did the trial court err in admitting evidence voluntarily given to the police by the minor child, when the minor child obtained it as a result of his independent search of the property and without police direction?[1]

With this method, one danger, of course, is that the student will slavishly follow the good model and not consider equally acceptable alternatives. Perhaps all legal writing professors have offered students an excellent brief or memo as a model and then found themselves reading a stack of student papers that verged on being clones of the model.

One possible solution to the problem is to offer several model documents and hope that the student does not focus exclusively on the one that seems most similar to the document that he or she must produce. For example, here are two acceptable versions of an Issue in a memo:

> Issue: Whether under Pennsylvania law, a niece who witnesses the aftermath of an automobile accident involving her uncle from a block away can recover for negligent infliction of emotional distress when she arrives at the scene and observes his severe injuries.
>
> Issue: Under Pennsylvania law, can a niece recover for negligent infliction of emotional distress if she is one block away when an automobile accident involving her uncle occurs and immediately after the accident, arrives at the scene and observes her uncle's severe injuries?[2]

Another problem with using models is that the student may fail to recognize nuanced differences between different work products. For example, a Summary of Argument may be perfectly adequate, but could be improved considerably with a little tweaking. One helpful method is to offer an inadequate example, then offer a slightly improved

[1] Nancy L. Schultz & Louis J. Sirico Jr., *Legal Writing and Other Lawyering Skills* 311 (4th ed. 2004).

[2] *Id.* at 156–57.

version, and finally offer a greatly improved version. With this "inadequate–better–best" sequence, the student may become more aware of how to make qualitative assessments. Here is a challenging example focusing on reducing nominalizations, using the active voice, and placing information in a sequence that is easy for the reader to follow:

> Inadequate: The capability of the existing transportation network to deliver high-level waste to the proposed repository will also be assessed.
>
> Better: We will assess the capability of the existing transportation network to deliver high-level waste to the proposed repository.
>
> Best: We will determine whether the existing transportation network can deliver high-level waste to the proposed repository.

Using Holistic Scoring

A few years ago, I came upon an effective method of teaching students to consider alternative models and to make evaluations of written work. While engaged in private consulting for a leading testing organization, I received training in holistic scoring.[3]

With this scoring process, the graders study rubrics (grading guides)[4] to apply to the papers to be scored, then score a common set of papers, discuss the scoring until they reach a consensus on how they would score given papers, and then begin scoring on a numerical scale, usually one to six. When graders diverge significantly on how they would score a particular paper, a scoring leader assigns the score.

Although I had previously viewed holistic grading with considerable skepticism, once I saw it in practice, I understood that it could work very well and serve as a counterweight to the sort of technical grading that focuses too much on such items as small errors in spelling, format, and citation form. Just as importantly, perhaps, I realized that I could adapt one element of holistic grading to help teach students to make qualitative assessments. I could let the students score a number of examples of the same passage or document and, in the process, help them gain a richer appreciation of what makes for high quality writing.

I first tried my new method on a Saturday morning before a packed house in a voluntary session on writing law school exams. First, I had the students complete an essay exam on a property topic that I had earlier asked them study for this purpose. Afterward, I handed out an outline of my answer, explained it, and let the students self-score their answers. Next, I tried out my new technique. I gave the students six versions of the first part of the answer and asked them to score each version on a scale of one to five, with five being the highest score.

All the versions varied in quality, and none offered a perfect answer. One version stated correct legal conclusions, but offered no analysis. Another offered a policy justification, but no legal analysis. Still another offered an answer that seemed to be based on a common sense argument without any reference to the law. It also discussed an issue that the question did not raise. Another got the law wrong and completely missed the issue. Another offered an analysis that was partly correct and partly incorrect, and the final version was completely correct as far as it went, but omitted one issue.

After scoring each answer, the students disclosed their evaluations with a show of hands. We then discussed why they voted as they did, and I disclosed my score and reasons. The students generally turned out to be harsher graders than I. They learned how difficult grading could be. Still, we usually reached a loose consensus. More importantly, they encountered a variety of answers that were qualitatively different and had to make comparisons. Many students have told me that they found the exercise to be extremely helpful and worth sacrificing a lazy Saturday morning.

"I gave the students six versions of the first part of the answer and asked them to score each version on a scale of one to five. …"

[3] For a discussion of holistic scoring and the procedure for using it, *see* Willa Wolcott, *Holistic Scoring*, 13 Perspectives: Teaching Legal Res. & Writing 5 (2004).

[4] For a discussion on using rubrics in grading, *see* Karen J. Sneddon, *Armed with More Than a Red Pen: A Novice Grader's Journey to Success with Rubrics*, 14 Perspectives: Teaching Legal Res. & Writing 28 (2005); Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics–Explicit Grading Criteria*, 2004 Mich. St. L. Rev. 1.

"We then discussed the scoring, and although we did not entirely agree on the scoring, we usually had a general basis of agreement."

I also used this technique in running a workshop for trial judges. Because I have found that most opinions begin with unsatisfactory introductions, I wanted to encourage the judges to begin their opinions with introductions that describe the case, identify the issues, and state the disposition.

In the workshop, I gave the judges a simple fact pattern for the cases as well as the disposition and analysis and asked them to write an introduction. We then discussed their efforts. I then took the next step and handed out five possible introductions for the opinion and asked the judges to score them on a scale of one to five. Here are the two high scorers in my order of preference:

> Introduction: In this landlord-tenant dispute, Angel Realty, the landlord, sought to exercise its rights under the lease to reconfigure the floor space of the tenant's restaurant, taking away some space, but adding other space. The tenant refused to comply and now faces eviction.
>
> The tenant, Two Brothers Corp., raises two defenses: First, the notice of default was insufficiently particular in describing how the tenant had defaulted. Second, the lease did not permit the landlord to mitigate the effect of taking some space by adding other space.
>
> We reject these defenses and award the landlord a judgment of possession and a warrant of eviction.

> Introduction: The plaintiff, Angel Realty, has brought an action seeking a judgment of possession and a warrant of eviction against Two Brothers Corp. We find for the plaintiff and reject Two Brothers' defenses. Two Brothers argues that the notice of default lacked sufficient particularity. Two Brothers also argues that the contested lease provision does not permit Angel to reconfigure the leasehold's floor space in the manner that Angel proposes.[5]

We then discussed the scoring, and although we did not entirely agree on the scoring, we usually had a general basis of agreement.

I have also used this technique in my advanced legal writing course with an exercise using a question from an old Multistate Performance Test (MPT). After the students answer the question at home under exam conditions, they score their respective answers in class. Then I hand out several possible answers to part of the question and ask the students to score them on a scale of one to five. This teaching technique seems to work best with the MPT exercise. The students are holistically scoring a longer document than in the previous settings I have discussed. Thus they must make a general assessment that focuses less on specific qualities and defects and become more sensitive to nuances in the writing and analysis. The students have been very complimentary about this exercise, I think in part because the commercial bar prep courses have yet to perfect a method for teaching how to deal with skills questions. On the other hand, although I am happy to help students prepare for the bar, I also view the exercise as an effective way to teach about analytic writing.

Conclusion

These scoring exercises have proven extremely effective and popular. By inviting the students to become the evaluators, they offer an interactive, noncompetitive, and interesting way to learn and the revelation that there is more to legal writing than imitating the teacher's model answer.

[5] The hypothetical case is loosely based on White Angel Realty v. Asian Bros. Corp., 706 N.Y.S.2d 583 (N.Y. Dist. Ct. 2000).

Laptops in the Classroom:
Pondering the Possibilities

By Tracy L. McGaugh

Tracy L. McGaugh is Assistant Professor of Law at South Texas College of Law in Houston.

In my capacity as Generations Nerd, I am frequently asked what I think about laptops in the classroom. Like any good nerd, I think this is a really complex question, which is why the forum in which it is usually asked, i.e., on the fly at some conference or other, is not the best forum for a good answer. A good answer would first break the global question ("what do you think about laptops in the classroom?") into the subsidiary questions that professors are really asking. Then, of course, it would answer them in a way that gives everyone something to consider, regardless of where they ultimately come down on the issue. This column attempts to provide a good answer; at a minimum, I hope it informs the discussion.

Here are the questions about laptops in the classroom that I believe professors really want answers to:

1. Why do students use laptops inappropriately in the classroom?
2. How can I persuade them not to do that?
3. Can I police inappropriate laptop use effectively?
4. Can I sidestep the whole thing by (a) not caring or (b) banning laptops?

Why Do Students Use Laptops Inappropriately in the Classroom?

I am starting with the premise that professors are most concerned about inappropriate use. If students always used laptops appropriately, where would the dilemma be?

The students currently in our classrooms come predominantly from two generations: Generation X and Millennials.[1] One characteristic that both generations have in common is being accustomed to "edutainment." Edutainment is education presented as entertainment; think *Sesame Street, Zoom, Blue's Clues*, and *Dora the Explorer*.[2] These two generations also have in common being phenomenal information managers.[3] When they were old enough to begin taking an interest in news, for example, they already had the 24-hour news cycle courtesy of CNN and every major newspaper in the country online at their fingertips. Even mail, once something that came to your door at a single predictable time every day, is now on a 24-hour cycle. When this much information flies at you all day, every day, you learn to sift through it quickly, and you learn to sift while you are doing other things, so no moment is wasted.[4] This creates a habit of constant movement and constant processing.[5] The insides of their brains surely look something like the trading floor at the stock exchange.

Into this frenetic "All swim!" of information comes the law school classroom: an environment that requires their undivided attention and, yet, is slow moving by student standards. The few minutes that it takes a professor to load a PowerPoint presentation or circulate handouts is just enough time to get started on a game of solitaire, check e-mail, or check news headlines. If the class is moving slowly (i.e., not focused directly on them), they find ways to engage themselves with things

"When this much information flies at you all day, every day, you learn to sift through it quickly … while you are doing other things, so no moment is wasted."

[1] Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?* 9 Legal Writing 119, 120 (2003).

[2] *Id.* at 124.

[3] *Id.* at 125.

[4] *Id.*

[5] *Id.*

"Just because inappropriate laptop use is understandable does not mean that it is inevitable."

that seem more interesting, knowing that the likelihood of being detected is low. After all, the click of laptop keys sounds the same whether the clicks go into class notes, e-mails, or instant messages (IM). And speaking of instant messages, what better way to help out a classmate across the room than to IM her the answer she's fumbling so badly?

When I consider all of this, I am less amazed that students use laptops inappropriately and more amazed that the inappropriate use is not more rampant.

How Can I Persuade Them Not to Do That?

Just because inappropriate laptop use is understandable does not mean that it is inevitable. After all, the first step to recovery is admitting you have a problem. The next step to recovery is having a plan. Here are some features of a generation-savvy laptop plan:

- Acknowledge to students the many things they could be doing with their laptops during class.
- Acknowledge the benefit of using a computer to take notes (faster and neater than handwriting) and the detriment of using a computer to take notes (encourages taking dictation rather than synthesis and organization of material, creating the habits of a court reporter rather than the habits of an active participant to the proceedings).
- Point out the distraction laptops cause for other fee-paying students.
- Explain how you intend to minimize "downtime" so they have little time in class for inappropriate laptop use (how to minimize downtime in class is beyond the scope of this short piece; however, creating an active learning environment is key).
- Give notice of the penalty, if any, you will impose for inappropriate laptop use. Penalties might include a ban on laptop use for the remainder of that particular class session, a ban on laptop use for the remainder of the semester, or even consideration as inadequate class participation. Whether you have a penalty and, if you do, its severity will vary depending on your personal style. While some professors may be content to cover the preceding points and let students do what they will, other professors may want something with some "teeth" in it.

Your plan could be more formal, incorporated into written course policies, or more informal, incorporated into a general first-day-of-class discussion about the course or a specific discussion as the need arises.

Can I Police Inappropriate Laptop Use Effectively?

If you choose to impose some kind of penalty for inappropriate laptop use, you will need a way to monitor laptop use. My personal feeling (keep in mind that I am an Xer) is that, once you have explained the pros and cons to a group of adults who are paying money to be educated, they can make their own decisions about how to handle themselves. If the voluntary nature of a legal education, the privilege of having been selected to receive it, and the financial burden associated with it is not sufficient to motivate them to participate fully in an active learning environment, then the specter of playing "cat and mouse" with me is not likely to push them over the edge. However, knowing that others feel differently and may want an enforcement mechanism, I offer these suggestions (none of which is original to me; my apologies for having long-ago forgotten who specifically offered these in conversation):

- Be present throughout the classroom and be aware of whether students seem particularly engaged by another student's screen. This is also part of providing an active learning environment in which professors give up their role as "the sage on the stage" and move throughout the classroom during class. This is my favorite because the primary purpose of being present throughout the classroom is to create a positive learning environment, so it doesn't require a special effort to monitor laptop use.
- Have someone else monitor laptop use periodically. If you have a classroom with a window or door behind the students, this person

could just stop by periodically to peer in without even intruding into the classroom. Otherwise, you can ask a colleague or TA to periodically sit in the back of your classroom to see what's on the screens. I recommend telling students that this monitoring will happen during the semester to avoid the negative feelings they may have about being secretly spied on.

- Restrict student ability to access the Internet. Many schools have the ability to "turn off" the wireless capability in certain classrooms or areas of the school. Where students have to connect to the Internet with an actual cable, you can prohibit that.

No policing effort will result in 100 percent compliance. If a student is determined to avoid his or her education, it will be difficult for you to force him or her to get one.

Can I Sidestep the Whole Thing by (A) Not Caring or (B) Banning Laptops?

The short answer to both is "yes." You can simply decide not to address it with your students and let them do what they will. I know of one wise professor who co-opts the laptop use by periodically saying something like, "Could someone with the Internet up run a Google search on X?" or "Could someone please pull up X case or statute on Westlaw to help us answer this question?" This technique acknowledges that students are on the Internet and at least keeps Internet use on the class topic.

You can also ban laptops altogether. Of course, you can expect some grumbling or resistance, but *it is your classroom and you have the right to run it as you see fit.* I have already described the pros to laptop use in the classroom; if you are willing to forego those on behalf of your students, ban away! Do keep in mind, however, that some students may require a laptop to accommodate a disability. Their use of a laptop in the face of a ban does single those students out as different, and you should consider seriously whether you want to do that just to exert your control over the classroom.

Parting Thoughts

As with any distraction (eating in class, listening to a baseball game on an earpiece, doing taxes or crossword puzzles), you should weigh the pros and cons of allowing it against the pros and cons of curtailing or banning it. Ultimately, the best antidote to bored students looking for an outlet is an interesting and engaging classroom experience. So as you consider whether and how much energy to pour into creating and enforcing a laptop policy, consider whether you might get more bang for your buck by pouring that energy into livening up the classroom experience.

As for me, the next time I'm asked my thoughts on laptops in the classroom, I can say, "Do you receive *Perspectives*? There's an awesome column that tells you everything you need to know."

"Ultimately, the best antidote to bored students looking for an outlet is an interesting and engaging classroom experience."

The Perils of E-Mail

"Here's the advice we give new lawyers joining a firm: Assume any e-mail you write may end up in the wrong hands."

By Stephen V. Armstrong and Timothy P. Terrell

Tim Terrell is Professor of Law at Emory University School of Law in Atlanta, Ga. Steve Armstrong is Director of Career Development for the law firm of Wilmer Cutler Pickering Hale and Dorr LLP. They are the authors of Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing *(2003), and have taught writing programs for lawyers and judges for the past 20 years.*

Over the past decade or more, e-mail has replaced memos and letters as the means by which lawyers most often communicate with each other and their clients, even about substantive and complicated topics. For new lawyers, this fact of life creates risks. They've grown up using e-mail for informal, spontaneous messages that don't require much thought. In the world they are about to enter, however, the line between e-mail and formal documents such as letters and research memos has long since blurred. As a result, new lawyers have to learn to think more than they're accustomed to before they hit the "Send" button.

Here are the risks they should learn to watch for:

E-Mail Is a Hybrid Genre

Is it more like a voice mail or a letter? That depends on the context. Arranging lunch with a buddy is one thing; discussing an issue with a client or colleague is another. It's possible to go wrong in either direction.

Too much formality: A crisp, businesslike e-mail may seem straightforward and efficient to its writer, but brusque and unfriendly to its reader. One tip we often give new lawyers: Think a little harder than may feel entirely rational about whether to begin with a salutation and end with a sign-off. If you and Jack exchange five e-mails a day, or Jack is an old buddy, then, of course, it would be odd to begin each e-mail with "Jack" and end it with "Best, Jill." In many situations, though, the e-mail's tone will change for the better if you begin and end with a personal touch—even if the other person does not.

Too much informality: In most law firms and departments, the more senior you are, the more you can get away not only with informality in e-mails, but with misspellings and outright sloppiness. That casualness can mislead junior lawyers into assuming they may respond in kind. The consequences are all the more dangerous because they often never realize the impression they're making. Even in apparently casual communications, and even on BlackBerry devices, they should proofread and copyedit before hitting "Send." For some new lawyers—overworked and accustomed to firing off e-mails quickly to friends—this discipline is difficult.

E-Mail Is Neither Private nor Short-Lived

Here's the advice we give new lawyers joining a firm: Assume any e-mail you write may end up in the wrong hands. In particular, if you make a habit of criticizing other people in e-mails, at some point one of those e-mails will be read by the person you attacked or a friend of hers. That may happen in several ways. You may make a mistake when you send it—and we promise that, eventually, you will. Or it may end up at the bottom of a long chain, forwarded on by someone who didn't notice that your original e-mail criticized the person to whom it's being forwarded. Finally, it may live on in some computer archive, available for discovery five years later in the course of a lawsuit or employment dispute or regulatory investigation. That's a risk even if the e-mail is sent from a personal e-mail account, as long as you're using a computer your firm owns, and even if you're using instant message. If the e-mail is privileged, you're still not safe: Remember that the privilege belongs to the client and can be waived—and, in regulatory investigations, often is. Consequently, if you need to suggest that the action a client proposes is legally dubious or just plain dumb, pick up the phone—do not send an e-mail.

E-Mail Questions May Be Badly Formed, but the Answers Should Never Be

The ease of using e-mail causes all kinds of problems, especially now that the BlackBerry has become the distraction of choice for lawyers sitting in airports. One problem: Senior lawyers tend to send their subordinates quick questions without taking the trouble to think them through or explain what's really required. A casual question invites an equally casual response. The invitation should be refused: The junior lawyer should take time to think through the implications of a simple question or comment from a senior lawyer or client. Even if the question is about an apparently trivial, non-substantive issue, it's worth thinking about how to make the answer as useful as possible—perhaps in ways the sender hadn't contemplated.

Let's bring these warnings to bear on an example.

Assume Jane, a partner, uses her mobile handheld e-mail unit, newly reprogrammed to work anywhere in the world, to send this typo-riddled message to Ruth, a new associate:

> **To:** Ruth Jones
>
> **From:** Jane Smith
>
> **Subject:** Proj. Alpha
>
> Ruht: Can you get the revised trem sheet to me tonight? I'm at the Hilton in Bali.

Jane receives the e-mail at 8 p.m. her time, and immediately fires off a reply:

> **To:** Jane Smith
>
> **From:** Ruth Jones
>
> **Subject:** Re: Proj. Alpha
>
> Just about finished but currency of payment still being chewed over. Jack is being difficult about it. Will get revision to you as soon as I can—probably noon tomorrow. Hope you're having fun.

Especially if Ruth is still making a first impression on Jane, this response goes wrong in several ways:

- Although her tone is no more informal than Jane's, she is not Jane. Jane may take the informality of her reply to be flip, implying that she is not really taking things seriously. If they have been working together for a long time, of course, then the informal protocols of this exchange will be different.
- Because Jane's question looked simple, Ruth assumed the reply could be equally simple. If she had given it more thought, she would have realized that:
  - She didn't know why Jane wanted the revision "tonight." Is she going to be out of touch?
  - She doesn't know what "tonight" means. Tonight in whose time zone?
  - In addition to meeting or failing to meet Jane's deadline, there's a third option: Send the revision without the one missing piece.
  - Depending upon past negotiations, Jane may find it worrying that an issue is still being argued over, even though the issue seems minor.
- If things drag on through several more e-mails, Jane might forward the whole e-mail chain to Jack or people with whom he works, having forgotten Ruth's comment about Jack down at the bottom of the chain.

With a couple of minutes' reflection, Ruth might have sent this reply instead:

> **To:** Jane Smith
>
> **From:** Ruth Jones
>
> **Subject:** Re: Proj. Alpha
>
> Jane—Everything is complete except a decision about the currency of payment. That should be easily resolved as soon as Tom is in his office in London tomorrow morning his time (Wednesday). I'll e-mail the revision without that piece in an hour. If you'd prefer fax, let me know. I'll then e-mail you the currency provision by 9 a.m. NY time Wednesday.
>
> Is e-mail the best way to communicate for the rest of the week?
>
> Hope you've had time to relax and enjoy Bali.

"The junior lawyer should take time to think through the implications of a simple question or comment from a senior lawyer or client."

"For your own professional reputation, you should try to reply to e-mail as quickly as you answer telephone calls."

Here's a final risk:

Most Senior Lawyers and Clients Don't Have Enough Time to Read All Their E-Mail

It's not uncommon for them to receive a hundred or more substantive e-mails in a day, many of them asking for a response. In that kind of world, e-mail should be designed for practical efficiency, not just substantive quality. We give new lawyers these suggestions:

E-mail should be as concise and efficient as possible. Some busy executives have their secretaries print out their e-mails for them to read. But most people read e-mail by squinting at a computer screen. Even worse, an increasing number read them on the tiny screens of mobile e-mail devices. And almost everyone has developed survival techniques for coping with the flood of e-mails. Among the most brutal of these techniques:

- Skipping e-mails unless something—the content of the "Subject" line, the sender's name—overcomes that instinct.
- Reading only the first few lines that show up on the "preview" pane, unless something in those lines persuades the reader to keep going.
- Answering an e-mail only when it's sent the second time.

In this environment, survival dictates that you develop the following habits:

Make the "Subject" line as informative as possible.

Not this:

Subject: Project Alpha

But this:

Subject: Project Alpha Wed. deadline: final open issue

Not this:

Subject: Project Alpha travel

But this:

Subject: Need approval for Alpha travel plans

Put the bottom line in the first sentence or two, especially if the e-mail asks the recipient to do something. If the situation does not lend itself to that approach, say so explicitly at the start. For example: "Apologies for this lengthy e-mail, but the issue needs to be resolved by tomorrow noon on the basis of all the following considerations."

Keep the paragraphs and sentences short; do anything you can to make the text easy to read. If contemporary readers generally want their information in small bites, that tendency is exacerbated by the format of e-mail: small type, blurry screens, the irritating need to scroll down a page. Make your text as visually appealing as possible. (It often helps to choose a type size larger than the default size.) And be aware that fancy formatting may be lost in transmission, especially if the e-mail is read on a handheld device.

Do not send attachments thoughtlessly. Is the recipient sitting in her office, with a computer that makes it easy to open and print an attachment? Or is she likely to be using a handheld device or sitting in a primitive hotel room without a high-speed Internet connection? If the attachment is not too long, will her life be easier if you paste the text into the e-mail?

Do not take speed for granted. We tend to assume that an e-mail will be answered quickly. For your own professional reputation, you should try to reply to e-mail as quickly as you answer telephone calls. If you will be without access to your e-mail for a while, create one of those "out of office" automatic responses. But, for your own survival, don't assume that everyone else will be as prompt and organized. If you really need a quick response, make sure the recipient is around to read the e-mail. Even if he is around, until you know his work habits do not assume that he actually reads all his e-mails. Even if you are clever enough to have asked for an automatic "receipt" when the e-mail is opened, and the receipt arrives, still do not assume the e-mail has been read. For all you know, his secretary could be printing out his e-mails and adding them to the foot-high stack in his in-box.

Think before you hit the "Reply All" button. Enough said.

My Freshman Year:
What a Professor Learned by Becoming a Student

By Rebekah Nathan
Cornell University Press, 2005

Reviewed by Sharon Pocock

Sharon Pocock is Professor of Legal Writing and Director of the Research, Writing & Advocacy Program at Michigan State University College of Law in East Lansing.

The title of this book alone is sufficiently compelling to attract a large audience among university teachers. After a number of years as a teacher and after a variety of experiences with students, any teacher—and certainly any legal writing teacher—wants to know whether college students of today really are different from students of decades ago and what causes such differences. *My Freshman Year: What a Professor Learned by Becoming a Student* provides some of the insights that we all are seeking.

Rebekah Nathan is the pseudonym of a cultural anthropology professor at a large state university. In her beginning years in her field, she investigated an isolated culture in a far-off spot of the world—a typical activity of an anthropologist. As she approached a sabbatical year after a number of years of teaching, Professor Nathan decided to explore today's college student culture. Her experiences as a professor drove her, in part, to undertake this study. Why didn't students meet professors' expectations? Why were they so frequently unprepared for classes? Why didn't they come to office hours?

Applying to her own university based only on her high school transcript, Professor Nathan matriculated as a freshman in fall 2002 and spent one year living in a student dormitory, taking classes, and participating in student activities, as any freshman student would. In addition, she observed the student environment and student activities and behavior, making copious notes, as any anthropologist would.

The book includes chapters on student residential life, the issues of community and diversity on campus, and the views of international students at an American university. The most interesting chapters, however, are those Professor Nathan devotes to her findings about student academic behavior and to an explanation of how her year as a student has now influenced her behavior as a professor.

Time management was an issue that dictated much of student behavior that she observed. Students chose classes and professors based on schedules and workload. In those classes, most students limited their work to what was necessary, skipping classes, not preparing readings, and turning in work that, they admitted, was not their best. During her first semester, Professor Nathan took five courses with five different teachers; two of these involved discussion or lab sessions with other teachers, and another class had an out-of-class tutor. "This meant that in a single semester there were eight different people who made rules or created structures that I had to respond to as a student."[1] While Professor Nathan did readings when assigned during her first semester, in her second semester she too adopted the practices of many students seeking to make time in their lives for work, studies, extracurricular activities, and leisure. To meet the numerous and diverse demands on her time as a student, she employed "a kind of spartan efficiency": she selected which readings to do and, on written

"As she approached a sabbatical year after a number of years of teaching, Professor Nathan decided to explore today's college student culture."

[1] Nathan at 111–12.

[2] *Id.* at 121–122.

assignments, reduced her number of revisions to just one. "Even so, by peer standards I was practically a drudge."[2]

Professor Nathan relates how her insights into student prioritization have changed her teaching. Before her year as a student, she had tried to solve the problem of unpreparedness by reminding students what they needed to read for the next class and making the materials available online instead of on library reserve. These attempted solutions to the perceived problem (lack of awareness of the assignment, inconvenience in finding the material) were, however, largely ineffective. Her research as a student led Professor Nathan to see that her solutions were not addressing the actual problem. Her research revealed that students prepare assigned readings when they will be tested on the material, will need it to complete an assignment, or will have to publicly perform in class in relation to the reading. Realizing that student unpreparedness is a "proactive form of course management" rather than a consequence of inattention, she now hones her reading assignments to those she will actually use in class.[3] She also creates new ways in the classroom to use the readings that she seriously wants students to prepare.

"Her research revealed that students prepare assigned readings when they will be tested on the material, will need it to complete an assignment, or will have to publicly perform in class. … "

Professor Nathan's observations about classroom discussion at the college level can also enlighten the law professor who finds new students unprepared for the demands of Socratic dialogue. Student-teacher interactions in college classes seemed to focus more on getting all students to speak and less on what students actually said. The result was that classroom discussion was essentially "a sequential expression of opinion" by students, with little in-depth consideration of the points raised.[4] Armed with this knowledge about the prior discussion experience of students, a law professor teaching a first-year course can better prepare initial classes to help students realize the demands of law school dialogue.

The issue of time management affects student life outside the classroom as well as inside. Using a variety of studies of student life as well as her own data, Professor Nathan notes that today's students tend to be both studying and socializing less than students of 20 years ago. What today's students are doing more is working at wage-paying jobs, on and off campus. More than one-half of the students in Professor Nathan's study worked anywhere from six to 25 hours per week, averaging 15 hours weekly. This aspect of student life certainly further explains the academic prioritization that students perform.

Aspects of Professor Nathan's study offer insights to university administrators, as well as to teachers. Demands on student time, in conjunction with the value accorded to individualism and choice, gave rise to difficulties she observed in creating a sense of community. While orientation activities seemed designed to create a sense of community among students living in the same dorms and the same houses of those dorms, that sense of community proved difficult to sustain and develop. Professor Nathan noted that students tended to form their social groups based on interests rather than on where they lived. As a result, the numerous efforts of dorm advisors to get residents together for various social activities often ended in low participation.

Professor Nathan recounts that on Super Bowl Sunday, the large lobby in her dorm was set up with two big-screen TVs, free pizza, and other items meant to draw in the residents. By game time, only she and five other people were in the room (and one of them had turned one of the TVs to a different program). Yet she discovered that many students were in their rooms with others, eating, talking, and watching the game on their own TV sets. "[T]he university for an undergraduate was more accurately a world of self-selected people and events. The university community was experienced by most students as a relatively small, personal network of people who did things together."[5]

[3] *Id.* at 136, 138.

[4] *Id.* at 95.

[5] *Id.* at 54.

As part of her study, Professor Nathan conducted formal interviews with a number of international students to obtain a view of American student life as seen by outsiders. These students quickly recognized "that being a student, being a dorm mate, being a classmate—none of it automatically qualifies you as a 'member of the community,' that is, someone whom others will seek out for activities," as it would in their own countries.[6] The friendly openness of college and American life is accompanied by "a closed attachment to a small set of relationships."[7] International students found that it was much easier to make friends on the basis of common elective interests and hobbies. In addition to the different dynamics of making friends, international students also were surprised by both student ignorance about other cultures and the lack of interest on the part of students in learning about these cultures. These observations can certainly help university administrators and faculty to plan better programs for international students—and a curriculum for American students that may make them more aware of the "global village."

While *My Freshman Year* is a relatively short book, this work offers many thought-provoking observations that can be useful to law school as well as undergraduate faculty. These observations should help guide both faculty and administrators as they create the American university of today and tomorrow.

"[T]his work offers many thought-provoking observations that can be useful to law school as well as undergraduate faculty."

Another **Perspective**

"My father used to say: 'If you steal from one book, you are condemned as a plagiarist, but if you steal from ten books, you are considered a scholar, and if you steal from thirty or forty books, a distinguished scholar.'"

—Amos Oz, *A Tale of Love and Darkness* 129 (Nicholas de Lange trans., 2005).

[6] *Id.* at 69.

[7] *Id.* at 71.

Legal Research and Writing Resources: Recent Publications

Compiled by Donald J. Dunn

Donald J. Dunn is Dean and Professor of Law at the University of La Verne College of Law in Ontario, Calif. 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.

Annotated Legal Bibliography on Gender, 11 Cardozo Women's L.J. 631 (2005).

An annual compilation that provides extensive annotations of articles on gender arranged by topic.

Randy Diamond, *Advancing Public Interest Practitioner Research Skills in Legal Education*, 7 N.C. J.L. & Tech. 67 (2005).

"[E]ncourages clinical and law librarian collaborations to further prepare law students to conduct effective legal research in law practice." *Id.* at 69–70. "[R]ecommends that clinicians and librarians work together to develop customized research instruction modules in the classroom portion of the clinic [because] the clinical professor knows common and complex questions students will need to research in a clinical setting; librarians know how to shape those questions into a research instruction plan." *Id.* at 132.

A Global Administrative Law Bibliography, 68 Law & Contemp. Probs. 357 (2005).

Covers general works on global administrative law, types of international regimes, historical aspects, public international aspects, legal theory, political science and political theory dimensions, developing countries, economic analysis, domestic aspects, and region and country-specific aspects. Comprehensive, but unannotated.

William A. Hilyerd, *Using the Law Library: A Guide for Educators Part VI: Working with Judicial Opinions and Other Primary Sources*, 35 J.L. & Educ. 67 (2006).

Identifies and explains the different pieces of individual judicial opinions. Discusses the types of opinions that may be issued by a given court and the legal effect of each type. Concludes by discussing how researchers can ensure that they have located judicial opinions, statutes, and regulations that are still recognized as current law by the courts and other branches of government. The last of six articles by this author in this publication.

Joseph Kimble, Lifting the Fog of Legalese: Essays on Plain Language, 2005 [Durham, NC: Carolina Academic Press, 216 p.]

A collection of enjoyable and valuable essays written by the author over 15 years and published in six publications. Part one shows why lawyers need to improve their legal writing. Part two provides concise guidelines, explanations, and numerous examples to show how these improvements can be made.

Karen L. Koch, *A Multidisciplinary Comparison of Rules-Driven Writing: Similarities in Legal Writing, Biology Research Articles, and Computer Programming*, 55 J. Legal Educ. 234 (2005).

Points out that legal writing, biology research articles, and computer programming are each rules-driven and that once a writing instructor recognizes the similarities in logic and structure, attention can focus on smoothing the student's transition to reading, thinking, and writing like a lawyer.

J. Paul Lomio, *Bibliography of J. Myron Jacobstein, 1952–99*, 97 Law Libr. J. 653 (2005).

A listing of publications that spans more than four decades of dedicated scholarship by one of the true giants of law librarianship. Lists books, book chapters, articles, and book reviews.

Susan Lyons, *Persistent Identification of Electronic Documents and the Future of Footnotes*, 97 Law Libr. J. 681 (2005).

Explores the problem of "link rot," the phenomenon where the Uniform Resource Locator (URL) becomes a dead link, making the footnote citation worthless. Provides extensive documentation of link rot that has already occurred.

Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 Santa Clara L. Rev. 93 (2005).

> "[A]ddress[es] the common challenges that surface in structuring a LRW program and discuss[es] how to maximize student learning … reviews the recent history and progress of LRW as a discipline … review[s] the Temple University School of Law LRW program … highlight[s] those aspects of [the Temple] program that are different from many other LRW programs and suggest[s] why [its] methods resolve certain pedagogical dilemmas and are consistent with current theories on teaching writing and helping students enter the discourse community of lawyers." *Id.* at 94.

Roy M. Mersky & Jeanne Price, *The Dictionary and the Man*, 9 Green Bag 2d 83 (2005).

> A review of the eighth edition of *Black's Law Dictionary* [St. Paul, MN: Thompson West, 2004] together with a discussion of the contributions that the new editor, Bryan A. Garner, makes to the success of the publication and to legal scholarship in general.

David W. Miller, Michael Vitiello & Michael R. Fontham, Practicing Persuasive Written and Oral Advocacy: Case File III, 2005 [New York, NY: Aspen Publishers, 208 p.]

> A case simulation problem that provides a complete set of court documents to supplement a persuasive legal writing, pretrial practice, appellate advocacy, or moot court class. Based on a tort action in federal court against an Alabama church for financial exploitation by a pastoral counselor.

J. P. Ogilvy with Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography* (third edition), Clinical L. Rev. Special Issue No. 2, Fall 2005.

> A comprehensive, topically arranged listing of articles, essays, books, and book chapters relating to clinical legal education published since Special Issue No. 1 in 2001.

Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do*?, 97 Law Libr. J. 661 (2005).

> "[R]eports the results of a study finding that the opinions and performance of modern legal researchers do not support the traditional notion that print digests are the tool of choice for researching legal rules while electronic databases are best suited for finding cases discussing unique factual situations." Abstract at 661.

Lee F. Peoples, *International Trade in Agricultural Products: A Research Guide*, 29 Okla. City U. L. Rev. 683 (2004).

> Provides an extensive, annotated introduction to the sources and methods involved in researching international trade in agricultural products.

H. P. Southerland, *English As a Second Language—Or Why Lawyers Can't Write*, 18 St. Thomas L. Rev. 53 (2005).

> Points out that writing is hard work requiring practice and that "the purpose of writing [is] the ordered translation of thoughts into words … [and] good writing in legal matters does not require much in the way of literary flair. Its hallmark … is accuracy, clarity, and brevity, its aim to inform and to persuade." *Id.* at 76.

Kathryn M. Stanchi, *Moving Beyond Instinct: Persuasion in the Era of Professional Legal Writing*, 9 Lewis & Clark L. Rev. 935 (2005).

> A lengthy and favorable book review of *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* by Michael R. Smith [New York, NY: Aspen Publishers, 2002].

Monika Szakasits, *A Selected Bibliography of Judge Richard Sheppard Arnold's Writings and Tributes to His Career and Life*, 58 Ark. L. Rev. 663 (2005).

> An annotated bibliography compiled in posthumous tribute to one of the country's best legal writers that lists his scholarly publications and selected noteworthy district and circuit court opinions that he authored. Also includes a listing of tributes to Judge Arnold in other publications.

Lance Phillip Timbreza, Comment, *The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation*, 24 QLR 63 (2005).

An excellent article that demonstrates unequivocally that punctuation matters when one is engaged in statutory interpretation.

Elizabeth M. Youngdale, *Reviewing the Law Reviews*, 73 Def. Couns. J. 97 (2006).

A selective bibliography, arranged by topic, of current law review literature of possible interest to civil defense counsel.

Perspectives

Teaching Legal Research and Writing

This newsletter contains articles on ways to develop and improve legal research and writing skills, and provides critical information on electronic legal research and solutions to legal research problems. Beginning with volume 1, all issues of *Perspectives* are available in the Perspectives database (PERSPEC) on Westlaw® and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. *Perspectives* is also available in PDF at **west.thomson.com/newsletters/perspectives**.

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