Writing Engaging, Realistic, and Balanced Appellate Advocacy Problems

By James D. Dimitri

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It’s the winter holiday break. You’ve just finished grading your final office memorandum from the fall semester and you feel relieved. It’s time for some well-earned relaxation!

Unfortunately, you don’t have much time to breathe easily because another important task awaits—the preparation of persuasive writing assignments for the spring semester. Chances are that one of these assignments is an appellate advocacy assignment, likely to be given to your students as the major assignment of the semester. Perhaps the assignment is even part of your school’s moot court competition. The assignment will require your students to prepare an appellate brief and deliver an appellate oral argument.

Any professor who has been responsible for creating an appellate advocacy problem will agree that it can be very time-consuming and maybe even daunting. A topic for the problem needs to be selected, followed by thorough research to gather relevant authority. But even more importantly, the problem must hold pedagogical value for the students. Specifically, the problem should be engaging and challenging for the students, yet it must also be manageable for them so they don’t become frustrated. Moreover, the problem should give the students a realistic portrayal of the appellate process so the students are not surprised when they enter law practice and run into aspects of the appellate process for which their appellate advocacy experience did not prepare them.

In nearly 10 years of teaching, I have written more than a dozen appellate problems for use in my school’s legal writing program and in the school’s moot court competition. I’ve seen the headaches that can result from the process of creating the problem. I’ve seen the awkward and confusing moments that my students went through when working on problems that didn’t work well. And, I’ve seen the valuable educational moments that resulted when the problem I wrote was engaging, realistic, and balanced. Therefore, to provide guidance to other faculty who are faced with the task of writing an appellate problem, I will share the methods that I have found to be the most effective in writing a good problem.¹

1. Create an Engaging Problem

During my second year of teaching, I gave an appellate advocacy assignment to my legal writing

¹ In this article, I don’t mean to discourage legal writing teachers from borrowing appellate advocacy problems from resources such as the Legal Writing Institute’s Idea Bank. These resources are certainly valuable, particularly to educators who are new to the legal writing field. The objective of this article is merely to provide guidance to professors who wish to try their own hand at drafting appellate advocacy problems.
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Students that I thought they would enjoy. The problem involved an appeal under the Visual Artists Rights Act of 1990 (VARA)\(^2\), which was a relatively new statute at the time that I assigned the problem. VARA creates a cause of action for artists whose “work[s] of visual art” have been intentionally distorted or mutilated by another.\(^3\) In the case, a group of radicals defaced a series of original lithographs. The artist who created the lithographs then sued the defacers under VARA. The artist lost in the lower court and appealed. The issue on appeal was whether the defaced lithographs were “work[s] of visual art” covered by VARA.

Sounds like it might be an interesting assignment, right? On the surface, it was. Unfortunately, however, the actual issue that I chose for the students to brief and argue ended up being dull. Whether the defaced lithographs were works of visual art under VARA hinged upon whether they were created by the artist as an independent contractor or an employee.\(^4\) To make this determination, the students had to use an unwieldy 13-factor balancing test that included drab factors such as whether the person who commissioned the artist paid employee benefits to the artist.\(^5\) During oral arguments, my students displayed little enthusiasm for the case. In addition, I and my fellow judges were bored.

This war story leads me to emphasize that your first goal as an appellate advocacy problem writer should be to choose a problem topic that the students, as well as any outside judges who may score their briefs and oral arguments, will find interesting. There are two reasons for this goal. First, interesting problems provide a much more valuable learning experience than problems that focus on obscure, dull, or overly technical legal topics. In my experience, this is so because students who are genuinely interested in the problem topic work hard and display enthusiasm for the assignment. This hard work and enthusiasm, in turn, lead to thorough research, well-written briefs, and persuasive oral arguments.

Second, the people who are scoring the students’ briefs and oral arguments—whether they are faculty, other students, or members of the local legal community—will be more engaged in the scoring process if the problem topic interests them. In other words, these judges will have more incentive to thoroughly prepare to score briefs and oral arguments if they are presented with an interesting problem topic. In my experience, this incentive results in detailed and constructive critiques of the students’ briefs by the judges. It also produces active and relevant questioning by the judges during the students’ oral arguments. And by receiving thorough, constructive criticism on their briefs and relevant, probing questions during oral argument, the students get more out of their appellate advocacy experience.

So what sorts of topics are interesting to students and judges? I have found that problems involving civil rights issues are typically the most interesting. In addition, problems that are based on issues “ripped from the headlines” also tend to be interesting.\(^6\) For example, over the last several years, the problem topics for our school’s intramural moot court competition have included (1) whether a statute banning adoption by homosexuals is constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) whether a painted mural depicting the Ten Commandments, displayed in a county courthouse, is constitutional under the Establishment Clause of the First Amendment; and (3) whether the sentence for a federal conviction that includes a “shaming

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\(^2\) 17 U.S.C.A. § 106A.

\(^3\) 17 U.S.C.A. § 106A(a).


\(^5\) Id.

\(^6\) Of course, the problem topic should not be so new that there is little legal authority on the topic. If that is the case, the students working on the problem will struggle because they’ll have few legal bases for the arguments that they make in their briefs and arguments.
The problem should not contain overly complex legal issues or a confusing procedural posture that may be difficult for the students and judges to understand. This goal is important for the students working on the assignment because the students will be relatively new to the process of persuasive writing and oral advocacy. Because of this, they will be absorbing and trying out skills that they haven’t yet mastered. This newness to these persuasion skills causes anxiety in the students. In my experience, a needlessly complex problem only heightens their anxiety, which turns what should be a positive learning experience into a largely negative one.

As illustrated above by the national competition problem, the goal of creating a manageable problem is also important for the people scoring the briefs and the oral arguments. Complex problems may discourage some judges from familiarizing themselves with the problem material. This is particularly so if members of your local legal community will score the students’ briefs and oral arguments. Many of these judges are busy practitioners who may have little time to prepare to judge. Providing a manageable problem topic makes their job easier. If the judges have an easier job of familiarizing themselves with the material, they will have more incentive to become familiar with the problem. And, when the judges are familiar with the problem, they are more able to contribute valuable feedback to the students tackling the problem.

A manageable appellate advocacy problem includes two components: (1) legal issues that a first-year law student will find challenging, but not overwhelming, and (2) an understandable procedural posture. As to the first component, you should feel reasonably comfortable with composing appellate problems that involve subjects your students have encountered in their first-year courses. For instance, problems involving tort law or criminal law issues typically work well. My school recently added constitutional law to the first-year curriculum. I was happy to see this change because I particularly enjoy assigning problems involving constitutional law issues. If constitutional law is part of your school’s first-year curriculum, you might consider drafting a problem involving a constitutional law issue. While condition” violates the Federal Sentencing Reform Act.® All of these problems were based upon issues that were a “hot topic” of discussion among the bench and the bar. The students who worked on these problems seemed to be genuinely interested in the problems. What is more, most of the students projected enthusiasm in their briefs and oral arguments. Finally, many of the briefs and oral arguments that I scored were engaging and thorough.

2. Create a Manageable Problem

A few years ago, our school’s Moot Court Society hosted a regional round of a national moot court competition. A team of students from our school also represented the school in the competition. One issue from the competition problem was whether procedures provided in the United States Tax Court Rules were constitutional under the Due Process Clause of the Fifth Amendment. The problem also involved cross-appeals, under which each party was appealing a separate ruling by the lower court. Unfortunately, the problem was confusing. Our school’s team struggled to fully grasp the substance of the due process issue, as did a number of teams competing in the regional round that our Moot Court Society hosted. In addition, the judges were confused by the procedural posture of the case. Because the case involved cross-appeals, it was difficult for the judges to tell which party was the petitioner in the case and which was the respondent. Finally, the problem did not seem to be immediately engaging to either the advocates or the judges because of its dry and technical topic. As a result, some of the oral argument judges appeared to be ill-prepared. A few of them even admitted that they had spent little time reviewing the problem before judging oral arguments because of the confusing and technical nature of the problem.

Therefore, your second goal as an appellate problem writer should be to create a problem that the students can manage on a substantive and procedural level. The problem should not contain overly complex legal issues or a confusing procedural posture that may be difficult for the students and judges to understand. This goal is important for the students working on the assignment because the students will be relatively new to the process of persuasive writing and oral advocacy. Because of this, they will be absorbing and trying out skills that they haven’t yet mastered. This newness to these persuasion skills causes anxiety in the students. In my experience, a needlessly complex problem only heightens their anxiety, which turns what should be a positive learning experience into a largely negative one.

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appellate advocacy assignments involving constitutional law have the potential to overwhelm students, I find that they work well as long as the issues presented in the assignment are narrow and well-defined. For example, the most recent problem for our school’s moot court competition involved whether a public employee’s firing was constitutional under the First Amendment’s Free Speech Clause. Though the circumstances of the firing could also have given rise to a procedural due process issue, the students were instructed in the problem not to focus on the possible due process issue. This instruction kept the students focused on only the free speech issue, which gave them a greater sense of comfort with the problem.

As to the procedural posture of the problem, it should be one that the students have likely discussed in their first-year courses. The procedural posture certainly should not involve cross-appeals. One party should clearly be the appealing party and the other the responding party. I find that problems containing appeals from the grant of a pretrial motion (such as a motion for summary judgment or a motion to dismiss) or from a verdict after a full trial work well. These procedural postures usually present a standard of appellate review, such as de novo, that students have encountered in their first year of school. Consequently, the students will have little difficulty understanding the standard of review.

3. Create a Realistic Problem

The classic appellate moot court problem consists of only the order or opinion issued by the lower court, followed by the order from the appellate court certifying the issues to be briefed and argued on appeal. The lower court’s order or opinion commonly contains a statement of the relevant facts from the case and an abbreviated analysis of the legal issues. On the basis of this abbreviated “record,” the students must prepare to brief and argue the case.

Unfortunately, this sort of truncated appellate record creates an unrealistic environment for the students who are participating in the appellate advocacy exercise. For example, these records often leave out critical facts that would likely be present in the record of proceedings used in a real appeal. Additionally, the classic moot court record omits materials that a lawyer litigating a real appeal must deal with, such as the pleadings, motions, and transcripts of evidence from the lower court proceedings. Finally, these records occasionally contain concessions that parties in a real appeal would probably not make.

As a result of the unrealistic environment created by the classic moot court problem, the students working on the problem are presented with several scenarios that real appellate lawyers normally don’t encounter. First, the oral argument judges, especially those who are appellate practitioners, don’t expect the record to omit important facts or to contain concessions that would not typically be made in a real appeal. Therefore, these judges often focus their questioning at oral argument on these omissions or concessions. Unfortunately, the students who are arguing the case are usually at a loss to explain these omissions or concessions, which often leads to the embarrassment of the students and to the judges going off on tangents in their questioning.

Second, unlike real appellate lawyers, who must sort through the record of proceedings to figure out which information is relevant to the appeal, the students are spoon-fed the relevant facts and law by the abbreviated record. Therefore, the students are prevented from practicing an essential lawyering skill—sifting through information to determine what’s important to their client’s case. Finally, the students simply don’t get to see what a real appellate record looks like. Therefore, they may be presented with an unwelcome surprise—a voluminous record of proceedings—should they later take on a real appeal in practice.

8 For instance, testimony of important witnesses may be omitted.

9 Several years ago, the problem from a national moot court competition in which our school competed contained a curious concession. The appellant conceded that he could not prove an important component of a key defense that he had raised to the appellee’s action, even when the evidence in the record of proceedings for the problem indicated the appellant could prove that component.
Therefore, to avoid these issues with your students, your third goal as an appellate problem writer should be to provide the students with a record that approximates a real appellate record of proceedings. Write a record that contains the relevant pleadings, motions, and transcripts of evidence from the lower court. Make sure that the record doesn’t omit critical facts or include odd concessions. To make your job easier, consult a record from a real appeal if you have access to such a record. This real-world record can serve as a template for the record that you will provide to your students and allow you to avoid “reinventing the wheel.”

4. Create a Well-Balanced Problem
As the faculty adviser for a number of teams who have represented my school in interscholastic moot court competitions, I am used to hearing student competitors grumble about “one-sided” problems—problems that provide one side to the case with easier arguments than the other side. Sometimes, the students’ complaints seem to be based on their misperceptions of the problem rather than the reality of the problem. But occasionally, I have seen appellate advocacy problems that are truly one-sided.

In real appellate practice, the courts dispose of many cases that could be considered one-sided. Indeed, appellate courts across the country issue unpublished orders disposing of scores of routine appeals on a daily basis. But in many real appellate cases, both sides to the appeal have equally strong arguments. This is the sort of case that we, as teachers, should seek to replicate in the educational context. This is so because, in my experience, one-sided appellate advocacy problems create two unwelcome issues for the students and the people who score their briefs and oral arguments. First, the students may feel disadvantaged and, therefore, discouraged if they are assigned to argue the weaker side of the case. Consequently, these feelings may negatively impact their performance. Second, judges may give higher scores to students assigned to argue the stronger side of the case, even when the judges are specifically instructed not to let their personal views about the merits of the case impact their scoring.

Therefore, your last goal as an appellate problem writer should be to create a problem with strong arguments on both sides of the case. This will promote the students’ confidence in the case, thus creating better performances, and will prevent judges from unfairly favoring certain advocates over others.

Unfortunately, achieving a well-balanced appellate advocacy assignment is probably the most difficult goal in problem writing. To create a balanced problem, I do two things that I have found to be extremely helpful. First, after gathering and reading the relevant authority for the problem, I create an argument “t-chart.” On one side of the t-chart, I list the potential arguments for the appealing party in the case. On the other side, I list the potential arguments for the responding party. I then read through and consider all of these potential arguments. While the process is somewhat subjective, I ponder whether one side of the t-chart outbalances the other side. If I find that there is a lack of balance, I consider ways in which I can alter the facts of the problem to achieve a better balance. I then implement those changes.

Second, I try to work with a problem-writing partner. At the very least, this partner should be available to simply review your work. At best, this person should co-author the problem with you. Either way, having another person involved in the process lends a fresh perspective to the process. Your partner, who is ideally a fellow faculty member but can even be a student who is a member of your school’s moot court board or a practicing attorney, may see problems with the balance of the assignment that you may not see. And, if your partner is co-authoring the problem, there is the added benefit of dividing the labor with your partner.

10 Several years ago, a problem from a national moot court competition considered whether a criminal defense attorney who slept during his client’s trial rendered ineffective assistance, thus violating the Sixth Amendment to the Constitution. According to the factual account in the problem, the defense attorney slept for at least half of the trial. The students representing the government had an extremely difficult time convincing the judges during the oral argument stage of the competition that the lawyer’s conduct did not violate the Sixth Amendment’s guarantee of effective counsel.
There is, however, a caveat here—there is no such thing as a perfectly balanced problem. Just as each side of any real case has strengths, it also has weaknesses. In fact, these weaknesses must be present in any appellate advocacy problem that you draft because in practice, your students will be forced to deal with the inevitable weaknesses of their clients’ cases. Therefore, the students need weaknesses in any appellate advocacy assignment so they may hone their skills of minimizing the negative impact that those weaknesses have on the client’s case. But, as emphasized above, your goal in drafting the assignment should be to ensure that the weaknesses on one side of the case are not so prevalent that students arguing that side of the case are unfairly saddled with a disadvantage.

5. Generate Ideas for Problem Topics
To achieve the foregoing goals, it’s helpful to know which resources are useful to assist you in generating ideas for appellate problem topics.
I consult a combination of print and online sources that contain regular discussions of current legal issues that are ripe for argument. As for print sources, I find that legal news periodicals are the best print sources to consult in generating ideas for problem topics. I typically consult legal news periodicals such as the National Law Journal, the ABA Journal, and the American Lawyer.

As for online sources, I visit a number of law-related Web sites that include a regular discussion of current legal topics:

- Northwestern University Medill School of Journalism On the Docket U.S. Supreme Court News <docket.medill.northwestern.edu>
- Oyez: U.S. Supreme Court Media <www.oyez.org/oyez/frontpage>

Additionally, the Web blog craze has given rise to a number of excellent law blogs that routinely contain postings on current legal issues and litigation:
- Appellate Law and Practice <appellate.typepad.com/appellate>
- Balkinization <balkin.blogspot.com>
- How Appealing <howappealing.law.com>
- SCOTUSblog: Supreme Court of the United States Blog <www.scotusblog.com/movabletype>
- Split Circuits <splitcircuits.blogspot.com>
- The Volokh Conspiracy <volokh.com>

I try to check these sources on a weekly basis. If I find an article or blog posting that contains an interesting topic, I print out the piece and jot down the URL for the piece on the printed copy so I can access it online in the future. I then put the printed copy in a folder in my office marked “Potential Assignments.” As the time comes for me to work on a new problem, I consult the printouts in my folder.

Teaching our students persuasive writing and oral advocacy skills is a critical task. As educators, our goal through this task must be to prepare our students to “hit the ground running” when they set foot in their new law offices after graduation. By presenting our students with appellate advocacy problems that are engaging, realistic, and balanced, we take an important step toward that goal.

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“[T]here is no such thing as a perfectly balanced problem. Just as each side of any real case has strengths, it also has weaknesses.”
Persuasion in a Familiar Activity: The Parallels Between Résumé Writing and Brief Writing

By Patricia Grande Montana

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To succeed in drafting a “winning” brief, you must approach it like you approach any other persuasive piece of writing in everyday life. A résumé is one such type of writing. Although many writers might not realize that composing a résumé is an exercise in persuasion, it is. The résumé’s purpose is simple: to persuade the employer to hire the applicant. Thus, a good résumé will be tailored to the needs of the employer. To achieve this goal, writers of successful résumés will carefully consider the employer throughout the planning, drafting, and revising processes. They will step into the shoes of the employer and evaluate what type of person the employer seeks. Then, they will identify the skills and experiences they have that match the needs of the employer. These are the ones that they will emphasize in their résumé. Not only will they explain them in a clear and concise way, but they will also arrange the information in a way that prioritizes the ones that exactly fit the employer’s needs. This means that every decision—from the placement of information to the selection of words—is a deliberate one, designed to convince the employer to hire them.

In contrast, poor résumés are not tailored to the needs of the employer. They typically include a detailed summary of what the applicants have accomplished over their lifetime with little consideration of its relationship to the job they seek. Students are often guilty of drafting résumés in this way.1 They devote their time largely to updating the latest version of their résumé. They add any recent educational and work experiences as well as change home and e-mail addresses, with the main purpose of fitting the “new” information onto a single page. As a result, they never fully consider how to arrange and describe their experiences to show their relevance to the employer’s needs. This approach inevitably fails to persuade the employer to hire them.2

If brief writers similarly ignore their audience—the court—when they develop their arguments and organize their text, they will likely fail to obtain a favorable ruling. Just like successful résumé writers take into account the employer’s perspective, brief writers must carefully consider what facts and arguments are most likely to persuade the court of their position. They must arrange that information in a way that showcases their position’s strengths and minimizes its weaknesses. If the brief’s statement of facts are monotonous, for example, or the argument summarizes the law on the subject without showing its application to the case, the brief will lose the reader in the same way an unfocused résumé does. To keep the court’s attention, the brief needs to narrate a compelling story and describe, using vivid examples, how the relevant law warrants the outcome the writer seeks. Just like a résumé is customized to the employer’s needs, so too must the brief’s facts and law be customized to the case’s strengths in order to persuade. Thus, brief writers can learn important lessons about persuasion by examining the qualities that make an effective résumé stand out from the pile.

There are six important steps that successful résumé writers follow. They (1) understand the reader’s

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1 Christen Civiletto Carey, Full Disclosure: The New Lawyer’s Must-Read Career Guide, 25–26 (2001) (“Students often stray from [the] objective of landing the interview and start pursuing others, like drafting a detailed life history or producing a creative piece of self-congratulatory propaganda.”)

2 Jane A. SteckBeck, Marketing Yourself Through a Winning Resume, 5 Nev. Law. 12, 13 (Nov. 1997) (asserting that the reader will “quickly lose [sic] interest in a ‘kitchen sink’ resume” that lists everything the applicant has ever done).
Similarly, good brief writers develop a very deep understanding of what the law requires to succeed on their case before crystallizing and prioritizing their arguments. ...

1. Understand the Reader’s Needs
Writers of effective résumés create a very rich and detailed image of the type of person the employer is looking to hire. This helps them see what experiences of theirs match the qualifications of the ideal candidate. To the extent there is not a perfect match, they will creatively show how a different experience produced the same type of qualification the employer desires. Assume, for example, that an employer seeks a law clerk to research Title VII issues. The ideal candidate would have actual experience researching that statute. Without that experience, however, a candidate could still effectively show that she has the requisite skills. Although she did not research Title VII issues, if she researched other statutory problems, she can use that experience to illustrate that she is competent in statutory research generally. The employer will then have confidence that she can easily tackle a Title VII problem given her background in statutory research. Further, if the applicant had no legal research experience whatsoever, a good résumé writer would draw on any nonlegal research to show that the research skills there are easily transferable to the legal context.

Similarly, good brief writers develop a very deep understanding of what the law requires to succeed on their case before crystallizing and prioritizing their arguments. Because this high standard of fault benefits your client, you will want to identify similarities between your case and the cases in which courts have found that the plaintiffs were limited purpose public figures.3 If the analysis requires evidence that the plaintiff had continuous media contact, you would highlight any facts that satisfy that standard just like résumé writers would emphasize experiences that meet the employer’s requirements. In the event you do not have such facts, you would argue that the facts you do have are equivalent to media contact, in the very same way the applicant for the law clerk position would show that her nonlegal research experience has adequately prepared her to conduct Title VII legal research. Although the comparison might not be a perfect one, by making it, you establish that your argument has merit. A good brief writer thus assesses what the court needs to hear in order to rule in its favor so that the brief can be structured to say it.

2. Develop Specific Headings
A good résumé captures the employer’s attention by also using headings that specifically describe the information they cover. Catch-all categories, such as “Experience,” “Nonlegal Employment,” and “Other Experience” are generic headings that miss the chance to guide the employer in a more helpful manner. Such headings put the burden on the employer to figure out whether the information listed is relevant to the job in any way. Because most employers are busy and receive many applications for a single position, they typically will not do this work for the applicant. Therefore, a persuasive résumé will create headings that correspond to the qualifications the employer seeks. For example, if a marketing position requires a background in public speaking, an effective heading might read: “Public Speaking Engagements.” This will have a greater impact on the employer than a list of job experiences.

3 In addition, you will want to distinguish your case from cases in which the courts have found the plaintiffs were not limited purpose public figures.
A persuasive résumé does more than simply point out that the applicant has the experience the employer seeks. It provides vivid examples of the applicant’s experiences. …

organized chronologically under a general heading “Work Experience,” where the references to public speaking are hidden in the job summaries. By separating out those experiences that meet the employer’s needs, the résumé more clearly illustrates why the applicant is right for the position.

In brief writing, persuasive argument headings are ones that provide succinct and specific summaries of the arguments that follow. Together, the main headings and subheadings tell the court the legal conclusions it should reach on each issue and the reasons for those conclusions. Just like effective résumé headings establish why the applicant should get the job, effective point headings demonstrate why the writing party should prevail. If the argument headings include general statements of law instead, they will have the same negative effect on the audience as the general headings in résumés do. Because they neglect to tell the court upfront why the writing party should win, the court is forced to identify on its own the arguments hidden in the text below. Courts, like employers, are busy and sometimes overburdened. If they rely on point headings to understand the case, the writer will lose this important opportunity to persuade.

4 To ensure that the full argument is heard, the brief must plainly state the party’s assertions and the bases for them in the headings.

Returning to the earlier defamation example, let’s assume that the main heading reads: “A Limited Purpose Public Figure Must Prove Actual Malice.” Although this is an accurate statement of the law, it is a bland heading. It does not state an argument or provide any critical facts of the case. A more assertive heading would argue, using specific facts, why the defendant should win that point in the same way an effective résumé heading would highlight the qualifications that establish why the applicant should be hired. Therefore, a revised heading might read: “Because Plaintiff Thrust Herself into the Public’s Eye by Participating in a Nationally Publicized Reality Television Show, She Is a Limited Purpose Public Figure Who Must Prove Actual Malice on Her Defamation Claim.” This revised heading previews for the court the foundation of the defendant’s main point, which will make the entire argument easier for the court to follow.

3. Use Vivid Examples

A persuasive résumé does more than simply point out that the applicant has the experience the employer seeks. It provides vivid examples of the applicant’s experiences by focusing on accomplishments. “An accomplishment is a specific and quantified contribution, not a general statement about [the applicant’s] basic scope of responsibility, as in a job description.” Let’s say that an applicant worked as a law clerk in a small law firm. If part of that job’s description stated that the applicant simply “drafted briefs,” the employer would not be very impressed. Even though the experience might fit what the employer is looking for, the explanation says nothing about the extent and quality of the applicant’s work. To convince the employer that the applicant is the most qualified, the writer must revise it to showcase an accomplishment. The description, therefore, could be revised as follows: Drafted posttrial brief on asbestos violations that won a favorable decision in the United States Court of Appeals for the Second Circuit. This specific example is more informative because it tells the reader the type of brief the applicant wrote and its subject matter. And, the accomplishment—that it was such a good brief that it resulted in a favorable outcome—demonstrates that the applicant not only has the desired experience, but also is very talented.

Just like résumé writers need to provide clear examples of how they are right for the job, brief writers need to provide vivid descriptions of how

4 This is especially true when the headings are also reproduced in a table of contents. Because the table of contents precedes the argument section in the brief, the court gets its first overview of the case by reading the headings. Therefore, headings that outline a clear picture of the case will make a good first impression on the court.

the relevant authority supports their arguments. Thus, if the writer is relying on a case to make a point, it is essential that the brief describes completely the relevant facts, holding, and rationale of that precedent. A general description of the case (like the general description “drafted briefs”) will not impact the court in the same way that a detailed narrative will. The narrative must include all of the facts that the writer plans on using to reason by analogy later in the brief. Oftentimes inexperienced writers unintentionally omit some of these facts. Because they are so intimately familiar with the precedent, they do not even notice that what they put down on paper is incomplete. Therefore, writers must be careful to revise their briefs to tell the completed message because only that message (like the revised résumé description of “drafted briefs”) will truly convince the court of their position. Further, when reasoning by analogy, the analogies must be clear. Good briefs reconcile the similarities and differences between their case and the supporting cases. They convincingly show that the facts present in the analogous cases are unequivocally present in their case, while the facts on which the courts rely in the distinguishable cases are absent. By providing these analogies and vivid descriptions of the authority, the court will see more clearly why the law should be applied in the way the brief writer argues.

4. Lead with the Strongest Selling Point
An effective résumé is also organized to give immediate visibility to the applicant’s strongest selling points. This is done, in part, because the realities are such that an employer might not read the entire résumé. Thus, in arranging the information on the page, the writer will begin with those qualifications that best fit the job’s criteria. The experiences that do not exactly match the employer’s needs but nonetheless reflect the applicant’s overall competence will follow. Suppose, for example, an intellectual property lawyer, who has not previously taught law, applies for a law school faculty position to teach intellectual property. A persuasive résumé for that position would emphasize two elements of the applicant’s background. First, the applicant has extensive legal experience in the relevant subject matter and, second, the applicant has some form of teaching experience, even if not in law. If the legal experience is more impressive than the teaching experience, the résumé would lead with a heading devoted to the applicant’s legal experience in intellectual property. The next heading would be “Teaching Experience” and would summarize any teaching experience the applicant had. By leading with the applicant’s strongest selling point, the employer will immediately see how qualified the applicant is for the job without having to read the entire résumé to be persuaded.

The same principles apply to brief writing. An effective brief is organized around legal points and leads with the point that is best supported by favorable controlling law, favorable facts, or a mixture of both. Just like a prospective employer, the court’s enthusiasm is at its highest when it first begins to read. Therefore, a brief that opens with its strongest argument will immediately capture the court’s attention and confidence in the writer’s case. This will set a positive tone for the brief which, in turn, will persuade the court to accept the remaining weaker arguments.

Determining the descending scale of points, however, is harder for the brief writer than for the résumé writer. The brief writer must also consider whether there are dispositive issues, dependent arguments, or alternative arguments. Obviously, if there is a threshold issue in the case, an effective brief will lead with its assertion on that issue, even if it is not the strongest of all of the brief’s arguments. For instance, if the plaintiff is asserting that the defendant breached a contract, the plaintiff must first establish that there was a contract. Then, the brief would set out its remaining arguments—from strongest to weakest—that there was a breach. Subordinate and alternative arguments would also

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6 See Mary Beth Beazley, The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique, 3 Legal Writing 175 (1997). When writers revise they see the words they wrote and they often remind their short-term memories of the complete message. Id. at 181. The short-term memory “tells” the brain the complete message, thereby preventing writers from seeing that the words that they actually wrote fail to communicate the entire message. Id.
follow this order. Therefore, similar to a résumé, a brief will engage its reader by leading with the most compelling reason why its position should prevail.

5. Explain Potentially Harmful Facts
It is not uncommon for applicants to have something in their background that they consider potentially harmful to their chances of landing a job. For many, it is the fact that they were unemployed for a period of time. An effective résumé, however, will not lie about or obscure such negative facts. If the reader noticed that an applicant, for example, vaguely described dates of employment to cover up an unemployment gap, the reader would likely conclude that the reason for the gap was very bad. Otherwise, why wouldn’t the writer simply explain it? Further, the fact that the applicant was not candid in one part of the résumé will cause the reader to mistrust the veracity of the résumé’s other representations, guaranteeing that the applicant will not get the job. Thus, a good résumé will be truthful about potentially harmful facts.

To be persuasive, the writer will neutralize the impact of any harmful facts by placing them among favorable ones and describing them in the most positive way. For instance, let’s assume that the applicant was unemployed because he changed careers. He would explain this reason in his résumé or, more likely, his cover letter, next to the employment descriptions that indicate his career change. Because the reason is innocuous and at the same time the employer is directed to favorable material that establishes his qualifications, the employer would likely forgive the gap.

Similarly, the writer of a good brief will not ignore seemingly negative facts or authority but rather will diffuse them by carefully positioning them in the brief. In brief writing, it is even more crucial that the writer addresses weaknesses because if the writer does not, the opponent undoubtedly will. In that situation, the writer is pushed to react to the opponent’s spin on the material. Because the writer did not explain the material in his or her own way earlier, the response usually takes a defensive tone, which is less impressive to the court. Moreover, in the case of an omission, the court, like an employer, will question the writer’s credibility and lose confidence in all of the writer’s assertions. To avoid these pitfalls, an effective brief will be honest about harmful information.

However, just like a good résumé, a persuasive brief will exploit its paragraph and sentence level structure to disarm such harmful information. Good brief writers usually set positive information at the beginning of sentences and paragraphs and potentially damaging information in the middle of both. When the reader sees the information in that context, its negative effect is often reduced. Because the brief writer discloses the information in a positive way, the court is not alarmed by it. Rather, the court views the writer as a credible advocate and, as a result, seriously considers the writer’s assertions.

6. Keep It Short and Simple
A good résumé is concise and contains only information that is relevant to the sought-after position. The “kitchen sink” approach to résumé writing does not work; that is, not every detail of the applicant’s life story should be collapsed into the résumé. For example, an applicant who tutored elementary school children on an occasional basis will not discuss this experience in his résumé if it has no bearing on the computer technician job for which he is applying. Such immaterial facts will not influence the employer’s decision and, in some instances, might even divert the employer’s attention away from experiences that are actually relevant. Because most résumés should be limited to one or two pages, every word matters. An effective résumé thus will not waste space on irrelevant material.

Furthermore, an effective résumé is an easy-to-read document that is free of pompous terminology, jargon, surplus words, and code words that carry special meaning for the writer, but make no sense to the reader. That type of language does not impress the employer; rather, it distracts the employer from concentrating on the candidate’s actual qualifications. The use of passive voice is distracting because it de-emphasizes the applicant’s role as the person responsible for the achievements listed on the résumé. Thus, to emphasize the applicant’s
An effective brief also will omit pompous language, jargon, surplus words, and code words for the same reasons an effective résumé does. Brief writers similarly face page limitations and should not misuse the space by trying to impress the court with unnecessary language. Rather, the time should be devoted to fully developing the supporting authority and reasoning by analogy to buttress the brief’s assertions.

Moreover, the kitchen sink approach to brief writing will fail to persuade a court in the same way this approach to résumé writing will fail to persuade a prospective employer. Just because there are countless cases that address a party’s argument does not mean that the brief should discuss every one (or even string cite all of them) to make a point. If it does, it will be harder for the court to focus on the cases that matter. An effective brief selects and exploits only the ones that most convincingly address the arguments. Similarly, the brief should not include ineffectual arguments simply because the party wants to cover all of its bases. The weaker arguments will diminish the effect of the stronger ones and thus should be cut loose. Therefore, a persuasive brief presents only its legitimate arguments and does so in a clear and concise way.

The techniques a writer uses to plan and write a persuasive résumé are applicable to planning and writing a persuasive brief. If writers can see the parallels between successful brief writing and persuasive writing in a familiar activity like résumé drafting, it will be easier for them to navigate the process successfully.

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Another Perspective

“What is persuasive? This question is at the heart of lawyering and legal writing. The art of persuasion requires empathy as well as a deep understanding of human psychology and the complex emotional and intellectual processes that result in perception and attitude change. Measuring persuasiveness is exceedingly difficult, yet this endeavor continues to preoccupy a number of disciplines, including philosophy, communications, psychology, and rhetoric. On some level, what tactics persuade is more than a little mysterious and cannot be precisely quantified or definitively articulated. What is persuasive to one may be neutral to another and even repellent to a third. Nevertheless, there are clues about how human beings respond to persuasive tactics, and lawyers should be taking greater advantage of the information.”

In supervising students who are writing for a client, ethical dilemmas come up immediately, deadlines matter, and the faculty member has to be product-oriented.

By Helen A. Anderson

Helen Anderson is an Assistant Professor at the University of Washington School of Law in Seattle.

I began teaching legal writing in 1994, but I’ve since had the occasional foray into practice through supervising students who represented clients in our state’s appellate courts. I directed an appellate clinic for two years, and most recently I supervised two students who briefed and argued a case in the Washington State Supreme Court. These experiences have taught me some important lessons that I have brought back to my legal writing classes. The clinical cases have not only reminded me what writing for practice really entails, and how hard it is to follow our sage writing advice, but they have given me key insights into aspects of writing that we (or at least I) don’t always address in first-year legal writing classes.

In supervising students who are writing for a client, ethical dilemmas come up immediately, deadlines matter, and the faculty member has to be product-oriented. The final product is important in a way that the final product of a legal writing assignment is not. We are forced to follow a piece of writing all the way through to the end and make sure it is right. Collaboration has to work. And in the end, when we realize the outcome of our efforts, we come face-to-face with our limitations. This last lesson, the limitations of “good” writing, is one of the most important lessons I learned from directing a clinic.

Passion and Pathos

One case that we lost in the clinic forced me to think hard about what really matters in advocacy. I’ve come to believe that the attorney’s passion for the case and the ability to convey that passion may sometimes be more important than an academically good brief.

I was used to an uphill battle, having done criminal appeals for nine years before coming to the University of Washington School of Law. I was used to trying to distract the court from the bloody corpse, and urging it to look instead at the constitution or a court rule provision. When I undertook the appellate clinic, I arranged to represent otherwise pro se civil clients referred to us by the state court of appeals. I thought that in taking on civil cases, I would finally have the benefit of less politically unpopular clients. The Connor case, I thought, should be an easy win. It was a family law case, and family law issues usually enjoy a very deferential standard of review. We represented the respondent, and respondents usually have a great advantage. And to top it off, the appellant’s brief was not well-written, with run-on sentences, no road map or thesis paragraph, very little citation to authority, and a weak equal protection argument. I think my student’s brief was much clearer, better written, and correct on the law. Other lawyers and faculty members who reviewed the briefs and helped us moot the case agreed that ours was the better brief.

But what our opponent had that we did not was a real passion for his case. That passion came through, even in the badly written brief. At least it came through enough to persuade the writing judge, who persuaded the other two judges. It was also very clear at oral argument. My student, on the other hand, never seemed sufficiently enthusiastic about her arguments. I think she was persuaded by the opponent’s brief. I sensed that at the time, but I just kept trying to buck her up with my own outrage on behalf of our client.

When we lost (actually we lost in part, won in part), I was furious at the travesty of justice. Now that several years have passed I am able to reflect more calmly. Of course, it is entirely possible that we would have lost the case no matter what we did—that something
Beyond our control in the case appealed to the court. But I believe that storytelling and faith in your story (whether that faith arises naturally or is self-induced as part of the representation) are critical to winning—more critical perhaps than academically good writing. How you view the facts is critical: our client was either a smooth customer or one of the downtrodden working poor.

I have emphasized this lesson ever since in all my writing classes. I work a lot with facts and the emotional appeal of the argument. In my persuasive writing classes, I try to be very alert to when my students do not appear convinced by their own arguments and get them to talk about that. We can usually refocus the argument so that it is something they can endorse. I’ve found this technique works very well even with so-called “objective” memo writing. When students come to my office and describe their struggles with the analysis, I ask them: Does this make sense to you? Are you convinced this is really the law? What is not being addressed? What is bothering you? Often these questions lead to important insights. As novices with little confidence in their abilities, students may at first bury their own reactions to the soundness of an argument. Yet those reactions usually suggest an analytical weakness that needs to be confronted, or a student who does not really understand the law. These buried reactions might also indicate an emotional aspect to the case that has been ignored, but needs to be addressed. To write most effectively, students must believe in the arguments they are making, whether in a persuasive brief or an objective memo.

**Strategy**

Last year, I learned another kind of lesson from representing real clients. The clerk of the state Supreme Court asked me to take a case on behalf of two life prisoners who had filed a civil suit. The prisoners claimed that a close reading of a statute entitled them to have less money deducted from their funds (for the most part money sent by friends and family) than other prisoners. The prisoners, who had done a good job representing themselves in the lower court, agreed to our offer of assistance. I selected two very capable 3Ls from applications to work on the case.

As my students and I worked over multiple drafts of the brief, we faced a significant challenge in structuring the argument. We debated the transitions between arguments and about how to make different arguments compatible. So often in legal argument, one argument has the potential to undermine another, yet the advocate wants to make both. This was a statutory construction argument, and we wanted to create a linked chain of alternative/complementary arguments. We went back and forth on many of the connections.

For example, we had a plain text argument—was that incompatible with a legislative history argument? Our opponents had a legislative history argument, too. Should we tell the court not to look at anything but the plain text, or would that be putting all our eggs in one flimsy basket? Should we make the legislative history argument as an alternative, or as an “even if” argument?

These are challenging strategic writing decisions, and in thinking it over, I realized that we often succumb to student pressure and make these decisions for legal writing students rather than letting them wrestle with the argument chain themselves. Students frequently ask, should we argue X and Y or just X? Sometimes I will make the call in order to calm them down or in the interests of “fairness” in grading, but I realized how much we were taking away from their writing experience when we made those decisions.

These strategic decisions, and the risks that go with them, are a critical part of lawyering. Should we be doing more to encourage students to make these decisions for themselves in legal writing assignments? I now try to be more aware when students press me to answer strategic questions, and to hold off answering them. They sometimes think I am “hiding” the answer when I do this, but I do my best to explain the real reason: that determining the structure of an argument is an important legal skill, no less than fleshing it out in writing.
My clinical experiences have taught me other lessons as well. I’ve been reminded how hard it can be at times to take constructive criticism without offense. I’ve seen the editorial “blindness” that sets in when one rereads one’s own work under a deadline. I’ve seen how difficult it can sometimes be to see the line between stylistic differences and mistakes that need to be corrected. Being on the receiving end of my student’s editing has reminded me of just how delicate writers’ egos can be.

I’ve spent the last few years doing mainly academic writing. I’ve learned a lot from academic writing, but working on a real case is quite different, and has provided me with some wonderful insights that I have been able to bring back to teaching my first-year students.

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Another Perspective

“As we move into the twenty-first century, teaching students lawyering skills has become an explicit goal of legal education at most schools. Some faculty still seem to view the teaching of skills as insufficiently intellectual, critical, or challenging, perhaps because skills can be defined in widely varying ways. Lawyering skills are often defined at the level of technique, which may seem ‘cookbook-ish’ and not intellectual. Commonly taught techniques include the technique of asking an open-ended question, or an unambiguous leading question. Such techniques can be valuable across a range of lawyering tasks, such as interviewing, mediating, taking a deposition, or performing a direct or cross-examination. Lawyering skills can also be conceptualized at a more general task-based level. Tasks commonly addressed in law school simulation and clinical courses include interviewing and counseling, negotiating, fact investigation, legal research, legal analysis and developing a case theory (for either a transaction or a litigated case), trial advocacy, mediation, appellate advocacy, and legal drafting. Teaching a task involves teaching techniques certainly, but not solely techniques, for in order to perform the larger task well, an individual must integrate the task into a larger framework encompassing goals, strategy, and interpersonal understandings. At the level of that larger framework, teaching lawyering skills can focus on placing the skills within a framework of case-theory or strategy. Clinical methodologies are without peer in teaching lawyering skills, from basic technique to sophisticated strategy.”

Brutal Choices in Curricular Design is a regular feature of Perspectives, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other “brutal choices” that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, e-mail: h-shapo@law.northwestern.edu, or Kathryn Mercer, Case Western Reserve University School of Law, e-mail: klm7@case.edu.

By James B. Levy

James B. Levy is an Associate Professor at Nova Southeastern University Law Center in Ft. Lauderdale, Fla.

Humorous teachers often get a bad rap. Not among students, of course, but among their colleagues—you know, the ones who vote on retention and renewal decisions. A professor who develops a reputation for being humorous in the classroom or otherwise adopting an entertaining style can be seen as someone who panders to students. Good teachers should strive to stimulate students’ intellect, not their funny bone, the critics say. They’ll tell you that humor is for stand-up comics; seeking laughs in the law school classroom is both undignified and anti-intellectual. Right? Well, not so fast Langdell-breath.

The view that professors who incorporate humor into their teaching are somehow less worthy of respect or less competent than their humorless colleagues is both unfair and inaccurate. To the contrary, humor, provided it relates to the material, is an extremely effective technique that can engage students more deeply on a cognitive level than a similar non-humorous explanation. That’s because humor is usually grounded in an incongruity that piques our thinking and challenges expectations. Apart from the cognitive benefits, humor helps teachers establish a socio-emotional classroom atmosphere that is better suited to learning. Indeed, several studies involving undergraduate students show that there are a myriad of ways in which humor has a positive impact on learning. Be aware, though, that humor also has pitfalls that can easily displace all the virtues, so remember to use caution.

As noted, the benefits of humor are manyfold. To begin with, it’s axiomatic that students are incapable of learning anything from their teacher unless they are paying attention. Capturing and holding student attention is the linchpin of effective teaching. At the very least, seasoning the day’s lesson with occasional humor that illuminates the material, as opposed to gratuitous humor used merely to entertain students, is an extremely effective way to attract and hold students’ attention.

Beyond serving an attention-getting function, humor assists learning by making the material more memorable to students because it typically engages them more deeply on a cognitive level than a non-humorous explanation of the same point. At the heart of most humor is an incongruity that requires a certain amount of “mental gymnastics” to “get” the joke or understand the punch line. Moreover, that incongruity often activates multiple schemas as well as helping students develop new ones by turning the familiar, if not on its head, at least sideways. In that sense, humor works much like metaphors, which are also very effective tools of intellectual growth, because humor requires students to make mental connections between seemingly disparate areas of knowledge and, thus, is a more immersive cognitive experience. As a result, humor, like a metaphor, “lights up” more parts of the brain in order to process the thought and thus students are more deeply engaged.

Essentially, the brain learns by recording and storing experiences along neurological pathways that we think of in conventional terms as
"All things being equal, therefore, a point made with humor makes a deeper impression on students, which means it will be easier to recall later."

“This humorous example works as a teaching tool for several reasons. First, the humor itself derives from the incongruous idea of using a blender to make lasagna. For most people, that incongruity is so memorable that it only takes seeing Professor Simon’s PowerPoint slide once to remember it forever. Second, it broadens students’ existing schemas for lasagna regarding its taste and appearance by suggesting an entirely new one concerning the layering of ingredients according to norms. More relevant to the law professor’s goal is that Professor Simon’s humorous example helps students develop a new schema for IRAC beyond the need to memorize it by showing them the appalled reaction they will get if their memos and briefs are not organized according to professional norms.

Aside from challenging expectations, humor also works because it often packs an emotional punch. That is because humor frequently derives its power by tapping into some uncomfortable or unspoken truth. The emotional “charge” that results can make for a more immersive cognitive experience because, again like metaphors, it activates not only our memory but also our emotions. Any experience that causes an emotional reaction tends to be stored more deeply and widely by the brain than an experience lacking that explicit emotional component. All things being equal, therefore, a point made with humor makes a deeper impression on students, which means it will be easier to recall later.

Beyond all of these cognitive virtues, humor also has socio-psychological benefits because it helps establish a positive classroom rapport between the teacher and students, which is vital to learning. Humor, obviously enough, puts us in a good mood, which makes us more receptive to whatever it is we’re trying to understand. Because pleasurable experiences are typically more memorable than emotionally neutral ones, knowledge imparted in an atmosphere of good humor causes the brain to perceive it as more meaningful than a non-humorous explanation of the same material.

Humor also reduces stress and anxiety among students and, for that reason as well, helps foster a classroom socio-emotional climate that’s conducive to learning. A teacher’s use of self-deprecating humor, in particular, can help reduce anxiety among students who are shy or otherwise reluctant to speak in class since nothing bridges the gap between teacher and students more quickly and effectively than a professor who pokes fun at himself or herself. A teacher who is willing to acknowledge and laugh at his or her own shortcomings can help create a safe classroom atmosphere in which students feel they too can take risks without fear of looking foolish or

memory.” The brain recalls and relies upon these experiences to tell it what to do when it confronts a new, but similar, problem in the future. The more importance the brain ascribed to the earlier experience, as well as the more widely dispersed that experience was stored within our memory, the easier it will be for the brain to later recall it and the broader range of experiences the brain has to call upon in order to problem solve. Intellectual growth is also about developing new schemas that create new neurological pathways that add to the reservoir of problem-solving tools the brain can call upon when needed. One way to help students develop new schemas is to challenge existing ones, which humor can facilitate.

To use an example that many readers are already familiar with, Professor Sheila Simon’s humorous “lasagna in a blender” analogy shows how humor can be used to engage students more deeply on a cognitive level than a non-humorous explanation of the same point. For those who don’t already know, Professor Simon’s lasagna example makes the point to students that it’s important for them to not only include the right “ingredients” in their office memorandum and briefs (i.e., issue, rule, application, and conclusion), but that those ingredients must also be “prepared,” or organized, according to the audience’s expectations. Professor Simon makes the point by showing a slide of the appalled reaction from dinner guests who are served lasagna made in a blender rather than layered and baked in a pan. The point is made very effectively that the ingredients in IRAC must also be “layered,” or organized, within memoranda and briefs according to the expectations of the lawyers whom they will work for.

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like everything else we do in the classroom, the first rule is that humor should be used only when it serves a concrete pedagogical goal. To be safe, you may want to avoid sarcasm altogether no matter how tempting it may be at times. Like all of our interactions in the classroom, a teacher's use of humor should be genuine and thus enhance the teacher's authenticity. It should not be contrived or unnatural; instead one must find a way to make use of humor in a way that is consistent with one's own personality and classroom style. Some people are more naturally adept at pulling it off than others. It's important to know yourself, know what works for you and what doesn’t, and then develop a style that incorporates humor in a manner that is consistent with your authentic self. Since few things can bring a class to a screeching halt like a botched attempt at humor, stay within your limits and be yourself. Classroom humor should evince a sense of natural playfulness and fun. In the end, the best advice is to have fun if you're going to be funny.

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feeling shame for having failed. The professor must be careful, though, to not let self-deprecating humor devalue one's personage in front of the students. There's a crucial distinction between laughing at, and denigrating, one's self and it's important to always keep that in mind.

On the downside, humor carries significant risks if it's not used appropriately or with care. Like everything else we do in the classroom, the first rule is that humor should be used only when it serves a concrete pedagogical goal such as aiding understanding of a key point or helping to create a relaxed atmosphere. Humor has no place if it's only purpose is gratuitous entertainment devoid of any substance.

An overarching consideration is that humor often relies on shared assumptions that, in a diverse classroom, might not be held by everyone. What's funny to one group with a common background may be lost on another group or, worse, may be unintentionally hurtful to them. Contrary to the old cliché about "sticks and stones," we all know that words in fact do hurt. Students are especially vulnerable when those hurtful words emanate from a trusted authority figure like a law professor. At best, a sarcastic comment from a professor can demoralize a student and, at worst, it can be an emotionally searing experience that taints the entire school year. Thus, the golden rule of classroom humor should be that it must never be used at the expense of any individual or group of students. Likewise, be aware that some humor, at least according to the armchair psychologists, is born of anger. Thus, be vigilant about not using humor that may contain an angry or hurtful subtext. To be safe, you may want to avoid sarcasm altogether no matter how tempting it may be at times.

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Another Perspective

Please note that beginning with volume 1, all issues of Perspectives are available in the Perspectives database (PERSPEC) on Westlaw and in the LEGNEWSI, TP-ALL, and LAWPRAC databases. Perspectives is also available in PDF at west.thomson.com/newsletters/perspectives.
In-Class Online Legal Research Exercises: A Valuable Educational Tool

By Tom Kimbrough

Tom Kimbrough is Foreign and International Law Librarian at Southern Methodist University School of Law, Underwood Law Library, in Dallas, Texas.

Background

In spring 2007, I was elated to learn that I would have the privilege of teaching an upper-level law school class on international and foreign legal research for the first time during the summer. But my elation quickly gave way to trepidation when I learned that, due to scheduling constraints, each class session would need to last for two hours. For weeks I struggled with a troubling concern—how could I keep my students interested and engaged for two hours at a time on subject matter as technical and (from a perspective other than that of a law librarian) potentially dry as legal research?

For the first hour of each class, I planned to give a lecture on various research methods and sources for the day’s subject matter (e.g., treaty research, research in civil law jurisdictions, research involving inter-governmental organizations, etc.). The question was how best to utilize the second hour. Among the possibilities that I considered and eventually rejected were Socratic-method interrogations on the assigned readings, open-ended class discussions on legal research theories and techniques, and providing “free time” for students to explore Web sites and electronic databases useful for legal research individually.

The idea that I settled upon was to have the students actually apply the methods and (electronic) sources that I talked about in the first half of the class to solve, in the second half of the class, specific legal research problems that I had either designed myself or adapted from exercises created by others published on the American Association of Law Libraries Foreign, Comparative, and International Law–Special Interest Section.¹

I believe that the use of in-class online research exercises was a smashing success. On the last day of class, I asked each of my 16 students to provide anonymous feedback on this aspect of the course. Here is a sample of the responses that I received:

“The in-class exercises were particularly helpful in applying these tools to practical applications.”

“Exercises were very practical and helped to put our reading and classroom lectures to immediate, meaningful use. They also helped to familiarize us with the myriad websites mentioned in class.”

“The class exercises were good because it [sic] makes you practice all the things from that class. I like the split in the class between lecture and exercise because it breaks up monotony.”

“I really liked the format of learning information in power point [sic] and then applying and practicing the knowledge in the second half.”

“Exercises were helpful and very practical! It was good to have some hands on experience right after hearing the lecture.”

“The exercises were the best part of the course. The application skills it required were essential to synthesizing the information.”

In this paper, I discuss various aspects of my recent experience using in-class online exercises that I hope

¹ <www.aallnet.org/sis/fcilsis/syllabi.html> (last visited September 14, 2007). Marci Hoffman (University of California at Berkeley), Heidi Kuehl (Northwestern University), Lee Peoples (Oklahoma City University), and Mary Rumsey (University of Minnesota) each generously permitted me to utilize and adapt their materials for my course, which proved invaluable.
will be helpful to others who may be contemplating whether to incorporate such a teaching method into their own classes.

**Points to Consider in Deciding Whether In-Class Online Exercises Are Likely to Be Useful for a Particular Type of Legal Research Course**

Although they worked well in my class this summer, in-class online exercises are not necessarily appropriate for every legal research class. Three key factors that will impact on whether they should be used in a particular class include:

1. the relative importance of electronic resources compared to print resources for the subject matter of the particular class;

2. the availability and reliability of a wireless network or other means to enable students to access the Internet and the law library’s subscription databases from the classroom; and

3. the amount of time available for each class session.

One of the distinguishing characteristics of foreign and international legal research is the relatively high importance of online (both free Internet and paid subscription) resources. Examples of the free Internet kind include the Web site of the American Society of International Law (ASIL/EISIL), World Legal Information Institute, and legal research guides available at various Web sites that often contain links to other key resources such as Globalex (Hauser Global Law School Program, New York University School of Law), LLRX, and the Law Library of Congress. Electronic databases to which many academic law libraries subscribe (e.g., Foreign Law Guide, the HeinOnline Treaties and Agreements Library, Kluwer Arbitration, etc.) also play a crucial role in this area of research. As a result, this area is one that is especially well suited to devoting substantial class time to utilizing online resources. For certain other areas of law where print sources remain paramount, requiring students to do exercises using their laptop computers may not be an optimal use of class time.

Before embarking on teaching a course with an in-class online exercise component, the instructor needs to make sure that the students are prepared to bring their laptop computers to class each day and that the wireless network or other means of electronic research access (via ethernet cable, virtual private network (VPN), etc.) are in place and reasonably reliable. This can be trickier than it might seem at first glance; for example, in my class this summer one of the students was unable to access our law library’s VPN because her own laptop computer was equipped with the newest Microsoft Vista operating system, while our VPN was not yet compatible with the Vista operating system. We worked around this by arranging for that student to use another computer equipped with a compatible operating system. Moreover, a sudden network failure or other unanticipated technical glitch can be extremely disruptive, so it is the teacher’s responsibility to coordinate with each of the students and with the law school’s information technology (IT) professionals in advance to reduce the likelihood of such a disruption.

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8 A description of the Hein Online Treaties and Agreements Library is available at <heinonline.org/home/about /Overview.html> (last visited Sept. 14, 2007).
The amount of time available in each class session is also critical. Based on my experience this summer, I believe that a minimum of 40 minutes per session is required for students to reach the “critical mass” of concentration that is necessary to engage in online legal research exercises effectively. Any less than that is problematic, because students need time to become generally familiar with navigating a Web site or database before actually doing research with that resource. I also encourage students to try a variety of possibly helpful sources to develop informed personal preferences and to, at all times, be patient, creative, and persistent when doing research. Putting excessive time pressure on students as they explore new and unfamiliar resources will not be beneficial in this regard or lead to a comfortable, supportive classroom environment.

The Merits of In-Class Online Exercises Versus “Homework”

Before my course began, I was somewhat concerned with the question whether my decision to allocate classroom time for the online exercises, rather than assign them as work to be done outside of class, was appropriate. In retrospect, I am glad that I decided to have the students do them in class. I believe that there were four major benefits in doing this:

1. encouraging discussion and cooperation among students in class regarding the relative advantages of alternative approaches to research problems;
2. supervising the students and assisting when the research process goes off track;
3. providing immediate reinforcement of the content of the lecture that preceded the exercises; and
4. freeing up time to assign the students more readings and other graded assignments (e.g., print research in the library) as homework.

I believe that the biggest benefit to having the students do online exercises during my class, rather than outside of it, was the flow of communication and sharing of ideas on how to go about seeking answers to particular research problems that resulted. Rarely is it the case in foreign and international legal research that there is only one correct way to approach a research problem. Every day I was impressed, and occasionally amazed, by the diverse ways that various individual students would think about a problem, and I found that students could sometimes learn as much from each other as they could from me.

Another benefit to assigning the exercises in class was my being available to step in and help when students would “hit a roadblock” and become frustrated. I would sometimes find that something as simple as reminding students to look for a site map link to aid in navigating a big or confusing Web site, to try a specialized subscription database rather than just the Internet or Westlaw® or LexisNexis®, or to try an online directory of Web sites rather than just a Google search, etc., would open up whole new avenues of exploration for them that they would probably never have found if they had worked alone at their computer outside of class.

Additionally, I believe that going straight from my presentation to having students actually use the resources that I talked about during my presentation forced even the more passive listeners (daydreamers?) in my class to internalize the information that I sought to impart in a way that having several hours or more between class time and “homework” would not. The feedback that I received thanking me for using the exercises to break the “monotony” in class, as well as my own experience in both law school and library school (especially back in the pre-Starbucks and Red Bull days), reinforces my strong belief in the vital importance of turning passive listeners into active participants during the class itself.

Finally, rather than looking at in-class online exercises as a waste of valuable class time spent on

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10 See, e.g., Amy E. Sloan, Creating Effective Legal Research Exercises, 7 Perspectives: Teaching Legal Res. & Writing 8, 8–9 (1998). As she put it very well in her referenced article, “Most of your assignments should be designed to illustrate to the students how to use the particular research tool. Assignments should not be designed to test students’ knowledge until they have had an opportunity to work with a research source and become familiar with it.”
something that students could do just as well outside of class (with which view I do not agree, for the reasons discussed above), I prefer to see the in-class exercises as freeing up more time for my students to complete reading assignments and research exercises involving print sources outside of class. I believe that there are sharply diminishing returns, in terms of students’ absorption of content, when a lecture goes on for more than about an hour. Moreover, in my personal opinion, legal research is not a subject that is well suited for lengthy theoretical class discussions among the teacher and students unless the class happens to be composed of prospective law librarians.

**Designing or Adapting Online Exercise Questions**

Based on my experience, I believe that there are two critical points to keep in mind whether one designs one’s own online exercises for students or one adapts exercises prepared by others:

1. include a mixture of different types of questions of varying degrees of difficulty; and
2. revisit and update any questions that you are reusing: as appropriate, check for broken links (if you ask your students to use a particular resource on a question), or determine whether the question still requires the students to use the resources that you intended in order for them to find the answer (if you do not ask your students to use a particular resource on a question).

In-class exercises should challenge students to think for themselves and be creative, while not frustrating them and diminishing their confidence as they learn how to use certain resources for the first time. For this reason, it is important to provide in a set of exercises some relatively straightforward questions that can be answered without great difficulty (but which nevertheless do require a systematic approach using law-oriented resources beyond just a simple search of the Internet using Google or another search engine), as well as others that require creative thinking. A key point to remember is that the purpose of in-class exercises is to teach students how to first select and then employ a wide variety of research tools effectively so that the students will be confident and competent when faced with actual research problems in the course of law practice.

Another key point is that, because many sources of legal information change so rapidly, the teacher must frequently revisit exercise questions to ensure that they still serve the pedagogical function for which they were originally intended. For example, the answer to a question that once could be found only in a specialized database that a teacher wanted students to explore may now pop up in a simple Google search, thus defeating the point of having the question in the exercise set. Or perhaps a particular question requires the use of a resource that is no longer sufficiently up-to-date or is as easily accessible as it once was, or maybe the premise upon which the question is based is no longer valid. Just as a legal researcher must always remember to update earlier research results, a legal research teacher must likewise always remember to update exercise questions that have been used previously.

**Grading/Evaluation of the Students’ Responses to Exercise Questions**

Once I decided to incorporate in-class online exercises into my course, I struggled with whether, and, if so, how, to grade my students’ performances in the exercises. My goal was to provide the students with incentive to take the exercises seriously while not creating a stressful, competitive class atmosphere while the students did them. I believe that I successfully struck this balance by the two means below:

1. count the exercises as one, relatively minor, component of the final grade (e.g., 10 percent), while giving full credit to the students for making a good faith effort at completing most or all of the questions in each exercise; and
2. collect the completed exercises at the end of each class and provide written feedback to each of the students individually on his or her methods and results in doing the exercises.
By making the exercises count toward the students’ final grades, I provided an indirect incentive for them to attend each class. I would only allow a student to make up a missed exercise by doing it outside of class if the student provided a reasonable excuse for having been absent on the relevant day. But, at the same time, by giving full credit to the students for attempting the exercises, I encouraged a cooperative, lively atmosphere in class where the students with a relatively better aptitude for legal research were glad to assist their classmates who encountered more difficulty.

Providing written feedback enabled me to monitor the students’ progress in mastering the necessary legal research skills. If students consistently seemed to have trouble with a particular question in an exercise, it would indicate to me that perhaps I had not explained something sufficiently in my lecture the previous hour, and I could revisit this point in the next class. Providing feedback also encouraged my students to take the exercises seriously as they knew that I would be reading and commenting upon their responses.

A Few Lessons Learned from My Personal Experience Using In-Class Online Exercises

There were a few aspects or results of using in-class online exercises that somewhat surprised me. The lessons that I learned from these aspects or results were to:

(1) limit the number of questions in an exercise to an amount that a reasonably diligent, proficient student can successfully complete within the designated time period;

(2) recognize and plan for the fact that the students’ legal research abilities are likely to vary widely; and

(3) have a backup plan ready for each class in case, for whatever reason, Internet access is suddenly not available for an exercise set.

Before teaching my class, I thought that it would be a good idea to provide more than enough questions in each exercise so that I could be sure that no students would finish early and feel bored in the remaining time.\(^{11}\) I thought that by explaining to the students that I did not expect them to finish all of the questions and that they should not feel pressured to complete them (and would receive full credit simply for doing as many of the questions as practicable), there would be no problem with this approach. But what I found is that a number of my students seemed frustrated or discouraged when they could not complete the questions. Several would rush through some questions in a compulsive attempt to finish all of them, even when I specifically told them not to be concerned with that. As a result, the next time that I teach this course I will limit the number of questions in each exercise to avoid such unintended consequences of having “too many” questions.

I found that the legal research abilities and motivation of my students varied to an almost astonishing degree. For example, one of the questions in an exercise was to find the text of the traffic laws of the state of Chihuahua, Mexico. One enterprising student had little trouble finding them from an official source in Spanish, others made no progress despite trying hard, while still others got bogged down reading news stories such as “Chihuahua saves baby from rattlesnake” or “Chihuahua wins ugliest dog contest.” An effective legal research teacher must have patience; allow for the differences in the ability, motivation, and personality of the students; and let the students enjoy the time spent doing online research (as long as it does not get so out of hand that the students forget what they are supposed to be using their laptop computers for during the exercise period).

Finally, be careful to avoid overreliance on technology that could malfunction unexpectedly at any time. Wireless networks, Internet service providers, and individual computers can all “crash.”

\(^{11}\) Because, as Amy E. Sloan described it, “It is difficult to generalize about how much time an assignment will take because some students naturally work faster than others, and some will catch on more quickly than others.” Sloan, supra note 10, at 10.
If possible, bring an extra laptop computer to class in case a student’s computer falls off of a desk (as actually happened once in my class this summer), etc., and always have the IT department’s phone number handy. But, to be even safer, it is a good idea to have a backup plan (such as saving a class discussion on a general subject like “the advantages of legal research using print versus digital media” or “how to use a law library”) for that “rainy day” that may occur when you least expect it.

Conclusion
As a result of my teaching experience this summer, I believe that for certain types of legal research classes, particularly an upper-level class on foreign and international legal research, in-class online exercises can be a valuable educational tool. This somewhat novel approach has become feasible only relatively recently due to such factors as the widespread use of notebook/laptop computers and wireless networks, as well as the prevalence of online research sources. But as electronic databases and the Internet continue to grow in importance as legal research tools, I believe that a greater number of legal research instructors will recognize the advantages of in-class online exercises and begin incorporating them into their courses.

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Another Perspective

“It is axiomatic that today’s students have basic computer skills. While students need to learn the mechanics of using a source, we should spend more time focusing on its usefulness, coverage, and limitations. In addition, if we learned anything these past few years, it is that technology changes rapidly and that our students are technological chameleons. They adapt to the needs of the computer world. Today’s popular tools can become tomorrow’s ‘remember when.’ One never knows what is on the horizon and students, as they always do, will learn to adapt to different technologies. Thus, we need not spend too much valuable class time teaching our students how to use a particular technology—they can and will figure it out. Instead, we should help them understand what to do if they do not know anything about an area of law they are researching, what to do if they know their particular problem involves a federal statute, what to do if their problem is not governed by statute or regulation, and so on.

In short, we must turn our expert ‘finders’ into ‘thinkers.’ Ultimately, we must teach them what to do with the masses of information they find. Teaching legal research necessarily involves teaching synthesis and legal analysis and goes far beyond knowing how to use a digest or the Internet. The tools will continue to change but the need for thoughtful analysis is a constant. Understanding this frees the professor of legal writing and research from the constraints of the research tools themselves. Once researchers recognize that all tools are useful yet limited, they can then turn to the task at hand: to critically assess and analyze search results (no matter how they are found).”

Teaching research is always a challenge. Throughout our years of teaching, we have experimented with a variety of methods for teaching research. None of them has satisfied us. Students often found the “old ways” abstract, boring, or just another task to be completed. They often failed to learn research strategy and rarely became engaged in the research part of the course.

History of and Weaknesses in the Old System
In the past we tried several approaches and were unhappy, at least in part, with all of them. One former method was a lengthy guided research project, keyed to the open research memorandum topic. After some initial exposure to legal research through lecture and a short exercise, we assigned this longer, memo-tracking exercise, to be completed primarily in the library. We guided students to specific sources, such as American Law Reports annotations or pertinent cases and statutes that would help them with their memo research. The questions were often quite specific, such as, “What two Montana cases are cited in the footnotes in Jon W. Bruce, James W. Ely, Jr., The Law of Easements and Licenses in Land, rev. ed., Warren, Gorham & Lamont, 1995, as discussing what constitutes adverse (i.e., not permissive) use? Note: Remember to check the pocket part.” This guided research project achieved the limited goal of exposure to a variety of sources. Students met the express goals of the assignment—to find those two Montana cases, and other precise bits of information.

In practice, however, students often failed to achieve the memo-tracking assignment’s broader pedagogical goals. The memo-tracking assignment failed to help students learn to frame research strategy and to learn other research skills. Students skimmed (at best) the background information on each type of source (such as why treatises and other secondary sources can be a good place to start) and went straight to finding those two Montana cases in The Law of Easements and Licenses in Land. Also, as a practical matter, when students saw 15 other classmates waiting to look at the treatise, they would skip ahead to digests. Thus, they abandoned the logical order of research provided by the assignment and failed to learn any research strategy. These assignments were also very time-consuming, often taking 20–30 hours for individuals to complete. In response to the size and length of the assignment, students often collaborated and divided up the assignment. Hence, students only learned part of the intended research skills.

In response to the students’ practice of collaborating and dividing up the assignment, we began assigning the work to be done in groups of three or four. We thought this would encourage collaboration and ease the burden on the students. To avoid partial learning, however, we required all group members to complete all sections of the project. We encouraged one group member to take the lead in each section (e.g., treatises), do the initial work, and teach the others. Many groups did work together and gained the benefit of collaboration. Others, however, simply took a divide-and-conquer approach (i.e., less work, finish sooner). As a result, each group member in the latter category worked only on a quarter of the sources in the assignment. In these cases, the students were far behind in research skills, which hampered their research on later assignments.

Many of us then turned to more open-ended questions on our research assignments. The goal was to force students to put more thought into developing a research strategy as well as how they used the sources. The problems with limited strategy responsibility and group work remained, however.
On the plus side, when students completed these assignments, we had some level of comfort that they were well on their way to finding the relevant sources for the memo or for the open-ended research questions. Since we thought that first-year law students were not ready for complete freedom in their research, we guided them down the path of an ideal research plan for their topic. We assumed that the students would note this path and apply it to future research problems. However, students do not learn research strategy this way, nor do they learn well with problems involving abstract questions of law. Students had no personal stake in the outcome. We have since found that first-year law students are ready for freedom in their research. They want to be the lawyer and solve legal questions relevant to them.

Birth of the Independent Research Project

Inspired by a presentation at the 2006 Legal Writing Institute (LWI) conference, we decided to revamp our long research assignment completely. Instead of using the long memo-tracking assignment, we let the students choose their own research topics. The results exceeded our expectations. Students were more engaged and learned research skills better than before.

Professor Joe Bodine gave a presentation at the 2006 LWI Conference entitled, "Finally, Something About Me! Student-Interest Based Research Instruction." Bodine developed a semester-long research curriculum, based on individual student research projects. The broad concept underlying Bodine’s approach was to allow students to approach research from a topic of their own choosing. Students could finally take areas of interest, passion, and life experiences and translate those into a research question. Though this method gives up a certain amount of professor control, it adds much more that compels students to actually learn. Most of us intuitively understand that when a student is interested in a topic, he or she will work harder and more thoroughly, and ultimately learn concepts in more depth.

We built off the Bodine model and adapted it to fit our course structure. Rather than spend all semester on research, we compacted the assignment into three weeks. The project consisted of choosing a research topic, creating a question presented based on that topic, researching the topic, creating a research log, and then orally presenting the answer to the research question with tips on research.

How It Worked in Practice

For preliminary exposure to research, we began with either a fairly traditional lecture or an interactive research class. The preliminary exposure was designed to teach research strategy and secondary sources. After this lecture, we gave students two handouts: a guide sheet providing a detailed description of what they were to do over the next three classes and “optional” research skills guide sheets.

According to the guide sheet, the students’ first task was to come up with a topic for their research project. To jump-start that task, we had them briefly write stream-of-consciousness style to elicit a motivating topic. Once the students discovered what topic they would like to research, they began to refine the topic into a legal question. Their questions were framed much like a question presented—including applicable law, jurisdiction, and facts. Refining the area of interest into a legal area that could be researched proved to be the most difficult part of the project for most students.

Students had to check their topics with the professor or teaching assistant (TA) before proceeding with research. The topic choices varied greatly. Some were narrow, like “Whether in Alabama, a dog owner has knowledge that his dog is capable of harm to other humans or murder, when the dog has daily run up to humans and barked and growled at them and has attacked other dogs?” Others were broader, or tied to current political issues, such as, “Is the suspension of habeas corpus relief for non-U.S. citizen detainees in recently passed Senate Bill § 106 likely to be found unconstitutional?” The evening after the first class, all students e-mailed us their questions.
By the second class, all students’ topics were approved, and they proceeded with research. We held class in the library’s large study rooms so we and our TAs could answer questions. We provided a great deal of guidance at this point. We gave them written step-by-step plans on how to use a variety of secondary and primary sources. At this stage of the process, some students continued to refine their questions as they researched secondary sources. Some hung out in back rooms and probably talked to each other and did nothing, while others went immediately online and began researching their topics via Westlaw® and LexisNexis®, Google, or FindLaw®. During the research, students kept a research log noting which strategies worked for them and which did not.

On the final research day students gathered in two conference rooms in the library for further guided research. A few students who had still not refined their questions began to get frustrated. One student sent a long e-mail saying that she felt she wasn’t learning research and that she was confused and didn’t know what she was doing. Since this moment of panic mimics early legal research in a work setting, we actually felt that the process was probably working. And since this process was taking place in academia, and not a work setting, we could promise the student an extra class when this project was over, for those who still felt confused. Other than that one note of frustration, we heard very little grumbling, and instead, heard lots of “ahas.” Students were finding sources that helped them, and they began to detect light at the end of the tunnel.

Before the final presentations began, students sent us their research logs and we compiled all their questions and posted them on our course Web sites so they would know each others’ topics ahead of time. Presentations involved recitation of the legal question, the answer to that question, and the single best research tip that each student found. As the students recited their tips, we wrote the tips down and compiled them into a tip sheet later handed out to the class. Presentations were supposed to last approximately two minutes only, so that we could finish in one 90-minute class.

In response to the disgruntled student’s lengthy e-mail, we added one more research class. During that session we used a more traditional research teaching method, providing three separate, prewritten problems and putting students into groups of two, three, and four to research online one problem set per group. The students researched online together, and then gave brief presentations of their research to the class. The disgruntled student told me she felt better about research after this class.

Changes for Next Time
At the very end of the research project, we had our students fill out a questionnaire about the entire experience to see whether it was successful, and what needed to be improved. In addition to overwhelmingly positive responses about the exercise, students also provided direct feedback about what could work better.

Because students had not yet received their full computer-assisted legal research training, many of them felt ill-prepared to go online to do any research. For purely logistical purposes, computer research skills must be taught before this independent research project begins.

In response to the question “Did the optional skill set handouts help you?” some students wrote, “What optional skill set handouts?” From this response, we realized that the students did not all use the skill set handouts as we had hoped. This was probably because they were called “optional skill sets” and perhaps because we did not emphasize them enough. We realized that we will have to call the handouts something other than “optional,” and make them a mandatory part of the research project. These handouts provided crucial step-by-step information about how to research a legal question from beginning to end. Some students simply failed to read or use these handouts.

To address the difficulty students had in framing their initial topic into a legal question, we have several possible solutions. One possible solution is to provide students with individually tailored research questions based on their interests. This solution would eliminate some of the learning that goes along...
with struggling to refine a legal question, however. Another possible solution is to provide a list of possible topics and questions for the students ahead of time and let them choose from the list. However, this eliminates some of the personal stake involved in choosing a personally interesting topic of their own. Possibly the best solution is to sit with each student during class for a few minutes framing the question with them, once they have identified their interests, while also providing some past topics as examples.

Finally, the last change we will make is to provide more time for the final presentations. Our students requested more time for these presentations because they had worked so hard coming up with the legal answers and research tips, and they wanted time to show off that hard work to their classmates.

**Success Overall**

Students learned more, and they loved doing it! They learned to frame a legal issue that was unrelated to a case or other assignment. Another unexpected benefit was that they learned patience in pursuing the unknown results of their topics. Unlike guided exercises, their topics may not have a pat answer. They had to focus on their research strategy rather than on finding a result. All this added up to internalizing concepts of legal research and retaining the knowledge of how to research future assignments in law school and the workplace.

Survey responses confirmed the positive effects of the independent research project:

- "I was very interested in my own topic, so I remained engaged throughout."
- "Research is hard, but at least I found out something I really wanted to learn."
- "I really liked the exercise, it was fun and informative! My research skills improved and this was good practice."

The final presentations clearly demonstrated how engaged students were with this project. Since the topics were their own, they had great enthusiasm for their work. Students followed their passion and enjoyed an exciting level of independence early in their career. With guidance from faculty, teaching assistants, and written materials, each student had a sense of "being a lawyer" and the process of problem solving. Finally, we found a method for teaching research that satisfied us and our students.

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Developing Internal Consistency in Writing Assignments by Involving Students in Problem Drafting

By Karin Mika

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Introductions should always reflect an organization of what is to follow, and what follows should reflect the order set out in the introduction.

One of the greatest challenges first-year students seem to face is understanding the concept of internal consistency within a document. That is, many students, at least initially, do not seem to comprehend the relationship among portions of a memo or any type of legal writing. All “good” writing involves an element of consistency. Introductions should always reflect an organization of what is to follow, and what follows should reflect the order set out in the introduction. The title of a paper should bear some relationship to the content of the paper, and any headings should accurately reflect what is contained in the material that follows.

The organization of any type of legal writing is similar. With respect to a memorandum of law specifically, the facts in a fact-specific issue should be reflected in a statement of facts. The “relevant” facts should be reflected in the factual application whether in the introductory paragraph to the memo or afterward. There should also be a relationship between the relevant facts and the facts from cases that are chosen to be analogized.

There are many examples of the incorrect and internally inconsistent ways that documents are initially written during the first year of law school. All legal writing professors are familiar with the student who states that the resolution to an issue involves applying a three-part test, and then goes on to introduce cases that resolved the issue set forth based on a totality of the circumstances test. Other examples include suggesting that the paper will follow a chronological order, then providing no such order, or suggesting that several cases define the law, then setting out only one.

More likely than not, the inconsistency of the introductory paragraph and the body of the document makes for such a muddle of information that the reader cannot possibly understand any later application of the law. Additionally, because the introductory paragraph is inconsistent with what follows, the writer (student) loses the ability to engage in any type of self-critique and often meanders off on a trail of related information that does not fall into any appropriate legal (or even compositional) structure.

Other examples of consistency problems specifically related to a memorandum of law include the student setting out an issue that bears no relationship to the discussion that follows. A recent example from my own experience relates to an assigned issue that posed the question whether it would be negligence per se if a hotel owner failed to install smoke detectors as mandated by state law and guests were injured during a subsequent fire.

In the memo in question, the student set out the appropriate issue (which was assigned as written) and parroted the facts pretty much in the way that I had constructed the scenario; however, the memo went on to define the law in terms of general negligence principles. Some of the cases used did involve fires at hotels, but not in relation to whether a state law mandated that smoke detectors be installed. None of the cases involved negligence per se. Essentially, the memo set out the elements of negligence, and then went through cases in which individuals were deemed negligent. Very little specific comparison of facts was made, and the end product did not address the initial issue posed.

When the student came in for a conference regarding the memo, I found it difficult explaining that he did not answer the issue posed. Given that the memo did, at points, discuss a hotel owner’s negligence in...
situations involving fire, and analogized negligence cases to a negligence situation, the student did not understand why I believed that the initial question was not answered. When reexamining the facts the student had written, it became clear that the problem in consistency had arisen because the student had subtly shifted the focus of the facts in the statement of facts from the lack of smoke detectors to the fire itself.

In many respects, this was my fault. Given that the issue posed a question about a statute and smoke detectors, I read my fact scenario as clearly focusing on negligence per se. The student read it as focusing on negligence. The slight nuances of this shift in how he related the facts changed the entire focal point of the memo and became the basis for his answering a much different question than was posed.

The situation is demonstrative of a problem that many first-year and even upper-level students have—understanding why a document is not internally consistent when the cases chosen and analyzed involve part of the same subject matter of the issue presented and have some factual relation to the facts provided.

Recently, I tried a new strategy regarding teaching internal consistency and avoiding this problem. During one of my classes, I divided the students into groups. For each group, I assigned a very fact-specific issue statement, for example, “Whether a public utility is liable for negligence when a child is injured after the child climbs up a utility pole by way of a ladder left out by a utility company worker who was planning to return to the site the following day.”

Based on issues like these, the students then drafted their own fact situations, which presumably incorporated facts that raised the relevant issues. After the fact situations were drafted, we critiqued them and then discussed what could or should have been included so that the fact situation corresponded to the issue. We then discussed what cases we would be looking for in order to ensure that the research corresponded to both the issue presented and the fact situation that was drafted.

The next step was similar, but it involved assigning the students issues that were much more general in nature such as, “Under what circumstances would a utility company be liable for an injury sustained by a child who has climbed up a utility pole?” I again asked the groups to draft fact situations related to the issue. However, this time, the students had much more discretion in writing fact situations that would reflect how the child was able to climb up the utility pole, and how the child was injured. After the students completed this portion of the exercise, the class again discussed what research was necessary for the individual fact situations, and how these cases might differ from the previous cases that had been discussed. For instance, in a fact situation involving a ladder that was left out in anticipation of work the next day (the first hypothetical), the student would presumably focus on research involving cases in which a multiday project was anticipated, and what safety mechanisms were customary in the profession in such an instance. The student would also research cases in which the employee perhaps did not adhere to his or her company’s own safety standards and would likely research cases where work equipment posed an attractive nuisance to children given the location of the equipment.

If, however, the student modified the original hypothetical to reflect that the child climbed up the pole by using a ladder that was accidentally left behind (and not part of a multiday project), the research path would change. In that instance, the student would be researching cases in which equipment was accidentally left out. The student would also need to focus on the nature of the resulting accident and injury. Additionally, despite the fact that the issue focuses on the liability of a utility company, it would be prudent for the researcher to look into cases where ladders, specifically, were left out, and read any commentary the courts may have on the dangerousness of a ladder left in the open in any venue. The research need not focus on industry standards and whether those standards were violated by the placement of the ladder.
In both situations, there would be a body of research that is overlapping, but depending on the specificity of the facts, the research universe would change slightly. By seeing how research results differ when changing the facts slightly, the student gets an idea of what must be considered when answering a broader issue. For example, “When is the utility company responsible for the injury to a child who falls after climbing up a utility pole?”

In both instances above, we have assumed the existence of a ladder left out by a utility worker. Considering the specificity of the ladder—and indeed drafting the situation themselves—leads students to understand the broader questions such as “What must be left out for there to be liability?” The student should be able to formulate the answer to the general question because, by examining the nuances in specific situations, the student should be able to identify the distinction between injury caused by a lack of appropriate protocol of the company (or breached protocol by the employee) and injury caused by an accidental act of the employee.

Following this class exercise in which we changed facts to reflect the specific nature of the issue or changed the issue to reflect the specific nature of the facts, I assigned a research project that incorporated this exercise. Each student was given a general issue and, after doing some preliminary research, the student drafted his or her own fact situation and modified the issue accordingly. The student then re-researched the modified issue prior to writing a memo. The entire process was memorialized in a log to be submitted along with the final draft.

As I had hoped, the memos I received had much more internal consistency than memos for which I had assigned the hypothetical fact situation. It seems as though the students’ integration into the process of actually drafting what they were to research enabled them to better focus on what would be the central themes of their work. Although in the “real world,” attorneys are not able to change the fact situation to reflect their research, the involvement of the writer in determining what facts are to be included in a statement of facts appears to enable a writer to better focus on what law needs to be researched. Certainly attorneys must extract fact situations from files of documents; thus they are performing the same type of task required in this exercise.

Although many first-year legal writing assignments include a limited universe in which the professor sets out the legally significant facts, this might, in fact, be adding to the problems students face in making an entire document consistent with respect to issue, facts, and law. Providing students with the opportunity to become more involved in the drafting process may, in fact, be more beneficial and enable the students to internalize a concept that is often difficult to get across.

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Getting Them While They’re Young: Two Experiences Using Traditional Legal Practice Skills to Interest High School Students in Attending Law School

By Angela M. Laughlin

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“The legal profession faces no greater challenge in the 21st century than the critical need to diversify its ranks.”

I. Introduction

Take a moment and think back to how you first got the idea to become a lawyer. Chances are, your inspiration was someone you knew personally. Now, imagine that your path had never crossed with that of the person who inspired you. This situation is real life for some young people from economically disadvantaged backgrounds: they never have considered a career in law because they rarely encounter such professionals in positive situations.

Law schools need to be creative when it comes to increasing diversity among their student population. Diversity is a compelling state interest and is important to the legitimacy of legal education and the legal community. The rate of minority enrollment in institutions of higher learning is decreasing, and as a result, so are the number of minority students entering law school. One way that may help to increase minority enrollment is to invest time and resources in the surrounding community.

In February of 2005, at Texas Tech University School of Law, where I teach, the dean of

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4 Statistics provided by the Scholastic Aptitude Test (SAT) show that African-Americans, as well as other traditional minority groups such as Hispanic students, score much lower on the SAT than Asian or white students. College Board SAT 2006 College-Bound Seniors, Total Group Profile Report, available at <nces.ed.gov/index.asp>. Institute of Education Sciences, United States Department of Education, National Center for Educational Statistics.

5 According to statistics published by the Law School Data Assembly Service (LSDAS), enrollment is down for all applicant groups. Black/African-American enrollment is down 6.6 percent from 1996, Hispanic/Latino is down 4.2 percent, and Chicano/Mexican-American is down 10.7 percent. Volume Summary Applicants by Ethnic and Gender Group available at LSACnet, <www.lsac.org/data/Volume-Summary-Ethnic-Gender-app.htm>. Further ABA data reveals that while non-whites make up 24.9 percent of the country’s minorities, they are severely under-represented in the legal profession. See also ABA statistics of minority demographics in the practice of law.

Minority Demographics

<table>
<thead>
<tr>
<th></th>
<th>General Population</th>
<th>Lawyers and Judges</th>
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<tbody>
<tr>
<td>African American</td>
<td>12.90 percent</td>
<td>4.20 percent</td>
</tr>
<tr>
<td>Asian American</td>
<td>4.20 percent</td>
<td>2.29 percent</td>
</tr>
<tr>
<td>Hispanic</td>
<td>12.50 percent</td>
<td>3.70 percent</td>
</tr>
<tr>
<td>Native American</td>
<td>1.50 percent</td>
<td>0.24 percent</td>
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Admissions asked me to help create a program for high school students in our area. One program that the school regularly participates in is the “Groundhog Day Shadow Program.” The goal of the “shadow program” is to invite students from our predominately minority high schools to the law school and introduce them to the opportunities available for higher education. We strive to prepare the students for the rigors of higher education by immersing them in the law school environment. My challenge, more or less, was to introduce these students to the world of law school while not intimidating (or boring) them. The students who ultimately participated were chosen from local high schools and magnet programs.7

I created two different experiences for these students. My first was a mock-research path that had them searching through the library for answers to legal questions. My second was creating a mock-appellate argument where the students chose roles as judges, defense attorneys, or prosecutors. The program was a success. The students overwhelmingly expressed that this was their favorite part of the day. Because we made each student participate, each individual had a different experience. Many of the students realized that they enjoyed the feeling of the judicial robe; they liked putting counsel on the “hot seat.” Others found they enjoyed oral arguments more; they had a real talent for speaking in front of groups.

II. Research Path Exercise

First, I teamed the high school students with current first-year law students and had the law students guide them through a modified research path. I picked an issue that would be current and perhaps interesting to the high school students: the military draft. While we take it for granted that women do not have to register for the draft, the question that the students needed to answer by the end of the hour and a half was as follows: Why do women not have to register? I decided to use a research path to illustrate what being a “real” lawyer was like, to show that we solve problems and provide a service to others, and to show that being in the courtroom is not all they would be required to do as lawyers.

I started by drafting a scenario, similar to one a first-year law clerk might face. My ultimate goal in this exercise was to show the students that legal research, while difficult, could be a relevant and rewarding experience. I also talked to the students about a lawyer’s role as someone who must answer questions for the client.8 After discussing the issue that the client wanted answered, I next had the students brainstorm about different topics that could arise as a result of the question. I also had specific questions I wanted the students to answer at the conclusion of their research.

This exercise gave me the opportunity to show these students how a lawyer goes about answering legal questions. I also emphasized that practicing law is not only about what you know, but more importantly, about being able to find what you do not know. I explained that our next task would be to explore some of the different sources for conducting legal research, including statutes, case law, updating sources, and legal encyclopedias.

I instructed my first-year law students to use this time as an opportunity to answer the students’ questions concerning what it means to be a law student, how much time and effort it takes, and how rewarding this experience truly is.

I prepared a grid for the law student helpers to use in assisting the high school students find the necessary information. I had each group start on a different resource, for example, either the United States Code or a legal encyclopedia. I had the law students explain how each resource worked and what kinds of questions each individual resource could answer.

I have also contemplated, but not yet incorporated, using Westlaw® or LexisNexis®, or even search engines like Google, to show the students the wealth of research resources available.


8 See Appendix A.
information available on the Internet. During the hour-long exercise, I circulated among the students in the library to answer questions and distribute refreshments (in this case, lollipops).

After completing this hands-on exercise, the high school students had a variety of reactions. Some students said they wanted to be lawyers but did not like the “boring research stuff.” Other students were excited that they learned about how much work a lawyer actually does and that lawyering is not just about courtroom theatrics. There was positive feedback about the law school and library tours, the interactions with current law students, and the opportunity to see and use the resources of the school and library. The exercise forced the students to actively look for material.

Most important, and one benefit that I had not anticipated, was the educational benefit this exercise gave the volunteering law students. It reinforced what we had discussed in class about research. Also, in teaching the method to others, my students began to appreciate the research process and make the method their own.

III. Advocacy Exercise

On the second occasion I met with high school students, I again pursued an “active” exercise, but this time I kept the students in the courtroom and focused on oral advocacy skills. In preparing for this exercise, I enlisted the help of two other colleagues and gathered a collection of black robes, highlighters, pens, and pads of paper. I adapted an exercise written by Lisa T. McElroy, associate professor of law at Drexel University.9 I have subsequently created my own scenario for future programs.10

I discovered that I needed to change the legal practice exercise in some significant ways in order to tailor it to the level of high school students. First, I wanted to make the scenario more fact-based so that it would be more understandable to the younger audience. Also, I eliminated the references to different jurisdictions and levels of the court.

During the exercise, I broke the students up into three groups: prosecutors, defense attorneys, and judges. I let the students self-select; the groups always turned out evenly disbursed. Each group was facilitated by an individual professor. During their time with each group, the professors would do a quick overview of how the courts work, how appellate arguments work, and the value of case law in decision making. Each professor explained the role of the respective party, explained the cause of action, and helped the students create a short oral argument for the court.

I prepared the students for the role of a judge by first telling them that as judges we had to decide upon the right result. I explained that we needed to review what other courts had done in the past by applying precedent to the situation at hand. Even though we have a lot of knowledge about what happened before, each case is handled individually, and the judge attempts to apply the knowledge gained from prior cases to the case before him or her.

We walked through each of the cases, and I quizzed the students on the facts and the holding of each case, having them explain in their own words what the precedent meant. Next, I asked them, if this was the only available law and based on that case, what should happen in our case? The students brought really interesting insight to the problem. When we used the Goldilocks problem most of the students were adamant Goldilocks should know better than to go into a strange house. Each of them had been taught from an early age not to talk to strangers and never to approach a strange house. Additionally, the students were intrigued by the case law and how precedent shaped the outcome of a case.

I also saw some real diamonds in the rough emerge. Some of the students were shy in the beginning but as soon as they put on a judicial robe, their “inner judge” came out. The student judges were tough on...
Introducing the students to skills used by lawyers, and getting them active and involved, helped them understand law school in a different way.

IV. Conclusion
These two exercises engaged high school students in the law school experience in different ways than simply attending classes and listening to lectures. Introducing the students to skills used by lawyers, and getting them active and involved, helped them understand law school in a different way. I have done this exercise for three years—each time with great success. We can define success for now in terms of likeability—this is consistently the students’ favorite part of the program. We do not yet know how many students may enroll from these schools or how many may pursue a career in the law. One day, I hope I have a student in my class who says, “I remember you from Groundhog Shadow Day and you inspired me to be a lawyer.”

Appendix A
Memorandum
To: Groundhog Job Shadow Day Program Participants
From: Senior Partner
Date: February 4, 2003
Re: John P. Jones Selective Service Question

I received a call this morning from our client, Nathan Jones. Mr. Jones is concerned because his son John is turning 18 next month, and John must register with selective service. Mr. Jones would like to know what the possible consequences are if his son does not register. Mr. Jones would also like to know why his daughter Belinda did not have to register when she turned 18.

Your research will help me advise Mr. Jones about this issue.

Thank you.
Move to the Federal Practice Digest. Look up the lower court opinion in Rostker v. Goldberg.

Since the USCA only gives you the Supreme Court case, look up the case name in the Table of Cases.

This is a good opportunity to talk about how you can find cases using the Federal Practice Digest. You will get a lot of information from the Table of Cases, including some indication of how the Supreme Court treated this case.

Look up the U.S. district court case at 509 F. Supp. 586.

Talk about the “anatomy” of the opinion. What are all the parts? Talk about the holding—here the statute was found unconstitutional.

You can talk about levels of government here—where a district court fits into the larger federal court scheme, or about constitutional law—how can a court tell Congress that a statute is unconstitutional?

Headnote 15 discusses the court’s reasoning for its decision.

Help them answer the questions for the client.

Guide for Research Facilitators

Group 2
Using the American Jurisprudence 2d General Index, look up Selective Service—Military Services—Conscription

Volume 53 § Military and Civil Defense 90
Registration—Military 90-93
Refusal—156–157

Section 90 will address each of the four research questions posed by the assigning attorney.


Go ahead and look up the Supreme Court case—use as an opportunity to talk about the anatomy of a case.

Help the Groundhog Shadow Day participants answer the questions for the client.

Appendix B

General Information for All Students

Facts: State of Enchantment v. Hunter

Mr. Peter Hunter was convicted of second degree murder by a jury in the district court. Hunter was charged in the death of John “Big Bad” Wolfe. The state prosecuted Mr. Hunter after John Wolfe was discovered dead in a nearby forest. Mr. Hunter swears that he was protecting a young girl, Little Red Riding Hood. According to Mr. Hunter, Mr. Wolfe had followed Ms. Hood into the forest, attacked Hood’s grandmother, and attempted to abduct Ms. Hood.

Ms. Hood testified at trial that she was walking through the woods to deliver food to her sick grandmother. A stranger, identified as Mr. Wolfe, approached her, and she naively told him where she was going. Mr. Wolfe then suggested that Ms. Hood pick the nearby flowers for her grandmother, which she did. When Ms. Hood arrived at her grandmother’s house, a wolf answered the door dressed in women’s clothes. Ms. Hood became frightened and ran deeper into the woods.

Mr. Hunter, who was chopping wood nearby, heard the screams of Ms. Hood and ran to her. Upon meeting up with Mr. Hunter, Ms. Hood explained what had happened. Suddenly, John Wolfe showed up on the scene, out of breath from running. Before Mr. Wolfe could even speak, Mr. Hunter struck him with the axe.

According to the testimony of the grandmother, it was not Mr. Wolfe who entered her house on that day. In fact, it was Mr. Wolfe’s cousin, Alfred “Pig Snatcher” Wolfe, who was the culprit. The grandmother was able to pick out Alfred from a lineup. It turns out Alfred was out on bail, as he had recently been arrested on another breaking and entering charge involving three pigs.

Mr. Hunter is appealing his conviction, and he argues that the lower court judge did not allow him to present a defense of justifiable homicide.
The law in the State of Enchantment is that justifiable homicide is divided into two situations: (a) homicide owing to an unavoidable necessity, and (b) homicide committed for the prevention of some atrocious crime which cannot otherwise be avoided. If a defendant proves the act was justified, there is no penalty, either by way of fine or imprisonment.

In justifiable homicide cases the important issue is the proportional response to the threatened evil. That is, only an action against a person that seems to put someone in imminent danger of death allows us to repel that action with death.

Here are the major cases cited in the parties’ briefs:

*State of Enchantment v. Prince Charming.* Prince Charming was charged and convicted in the slaying death of the Wicked Witch. Prince Charming argued at trial that he was defending Snow White, who was in imminent danger. The prosecution argued that Prince Charming was never in danger nor did he ever perceive he was in danger. The court of appeals overturned the guilty verdict saying that the lower court should have applied the alter ego rule. The appellate court stated, “The court must not view the actions from the point of view of the defendant, but instead, take the point of view of the person he was seeking to defend.”

*State of Enchantment v. John Pig.* John Pig was convicted of murder in the shooting death of the Big Bad Wolf. The lower court denied Pig’s request for a justifiable homicide instruction because the court found that Pig did not have an “actual and reasonable” belief that he must protect another from imminent danger of death or great bodily harm. The court held that under the alter ego rule, one who attempts to defend another person steps into the shoes of the other person, and so acts at his own peril if that person was in the wrong. The facts adduced at trial suggested that Pig’s brother Tom and Big Bad Wolf were not arguing, but instead, were practicing for a debate at school the next day.

*State of Enchantment v. Jack.* Jack went up a hill to fetch a pail of water and on the way back down met up with his cousin, Jill. As he and Jill entered the forest, a man attacked Jill. Jack was able to save Jill by beating up the attacker. The court in its opinion said that the justifiable homicide instruction had never been extended to the cousin relationship. However, while the defense typically had only been allowed with husband and wife, parent and child, or brother and sister, the court extended it to cover this situation. The court of appeals affirmed.

*State of Enchantment v. Peter “Pumpkin” Eater.* The lower court refused to instruct the jury on the defense of justifiable homicide. Here the decedent snatched a piece of pie from Mrs. Eater. Peter killed the man with a knife. The court said “… that a person may lawfully do in another’s defense what such other might lawfully do in her own defense, but no more.” Although a victim had the right to use reasonable force to recover her property, the act in question here, killing the thief, was not apparently reasonably necessary.

*State of Enchantment v. Cinderella.* The court affirmed the conviction of Cinderella for the murder of her stepsister. The lower court had properly instructed the jury with regard to the defense of justifiable homicide. While traveling to the ball, Cinderella’s carriage was taken over by her angry stepsister. The lower court found insufficient evidence that Cinderella ever perceived that she was in imminent physical danger. The court based this finding on the lack of physical strength of the stepsister and the lack of any visible weapon.

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We can learn a great deal about written rhetoric when we compare it to oral persuasion because there are some similarities.

By Benjamin R. Opipari

Dr. Benjamin Opipari is the in-house writing instructor at Howrey LLP, based in their Washington, D.C., office. He is responsible for the development and implementation of a writing curriculum for all Howrey associates. Ben teaches seminars on all aspects of the writing process and conducts coaching sessions for all of Howrey’s attorneys. He holds a Ph.D. in English Language and Literature. He can be reached at opiparib@howrey.com.

CTRL-B
CTRL-B, CTRL-I
CTRL-B, CTRL-I, CTRL-U
CTRL-B, CTRL-I, CTRL-U, CAPS LOCK

In order of increasing importance, these are often the most popular keystroke combinations for writers wishing to emphasize a word or a phrase. A writer, then, who emphasizes the word absurd says that opposing counsel’s position is ridiculous, while the writer who calls the same motion ABSURD believes that opposing counsel’s position is pure, unadulterated lunacy. But does the reader really assign the same degree of emphasis as the writer? And more importantly, does it really make the writer’s points more credible?

Before we begin, I want you to perform a short exercise. Go to your bookshelf and pick up that favorite book of yours by your favorite author. Flip through the pages and pick out the bold, the italics, the underlining, and the all caps. You probably can’t find any. That’s because good writers know how to create emphasis without resorting to visual gimmickry. I dare say that Hemingway would never have entertained the idea of boldfacing any of his text!

Our tools for creating oral emphasis are different from those in written rhetoric because we usually can’t plan our sentences to create emphasis in extemporaneous speech. When we write, however, we can craft sentences through multiple drafts and revisions until they contain our precise intended message. In speech, we do not have this luxury, and we have one shot to get it right. To put it bluntly, our words come shooting out. So our tools for creating oral emphasis are somewhat limited, ranging from inflection to volume to fist pounding. When it comes to written emphasis, novice writers create the print version of fist pounding: the keystroke combinations listed above.

There are three problems with these methods. One is that few writers look at the word ABSURD and decide that it possesses greater intensity than just plain old absurd. Readers do not assign greater emphasis based on keystrokes the way that the writers do; no judge will say, “Well, that’s really absurd, not just absurd!” The second is that it is distracting. Argumentative writing is difficult writing to absorb because it involves both the accumulation of new information and the taking of a position. Distractions confuse readers and cause them to lose their focus. On a page filled with bold and underlining, the eyes of the reader almost instinctively turn from the top of the page, where they should be, to the bold and underlined words dotting the page (much in the same fashion that our eyes are immediately drawn to the red dot in the center of a blank white canvas). Lastly, keystroke emphasis can seem like crying wolf; overuse will condition the reader to ignore the seriousness of the message if the CTRL-B combination has been used too often. Seen once, it might catch the reader’s attention. Seen several times, and it might not be taken seriously. Does anyone really believe, for instance, that opposing counsel’s position represents “the absolute zenith of hypocrisy,” that nothing else has ever been so hypocritical?

We can learn a great deal about written rhetoric when we compare it to oral persuasion because there are some similarities. If my keystroke
Readers look to sentence endings for important information. That’s why people want the last word in an argument.

Examples represent stages of heightened anxiety and importance, does anyone believe more sincerely or take more seriously the speaker who shouts and preens and finger waves? Are you more apt to listen to Clint Eastwood or Bill O’Reilly? The speaker whose emotions remain in check always appears more credible. Their points notwithstanding, all talking heads would be taken more seriously if they just quieted down. They would appear more in control, more rational, and more authoritative, all traits that help sway an audience.

Before discussing some effective ways to create written emphasis, I have some bad news for fans of that other great method of emphasis: the dash at the end of the sentence. It’s horribly overused. Like all stylistic conventions, it loses all force, all credibility, all panache when it becomes commonplace. But overuse is not the main problem with the dash. Instead, its main problem is misuse. First, a bit of history. The word dash comes from the Middle English word dasshen, in the sense of “strike forcibly against … probably symbolic of forceful movement,” according to the New Oxford American Dictionary, which defines the current use as “to strike or fling (something) somewhere with great force, especially so as to have a destructive effect.” Further, the Oxford English Dictionary defines it as “a sudden impetuous movement, a rush; a sudden vigorous attack or onset” or “a violent blow, stroke, impact, or collision, such as smashes or might smash.” Accordingly, the dash as a mark of punctuation should only be used to destroy the natural direction of the sentence, to forcefully move it in another direction so that what comes after is a sudden shift in meaning and a surprise to the reader. In other words, the dash should break the readers’ expectations of what they thought was coming. Dashes at the end of a clause should reveal something surprising, ironic, or shocking. For example, this is not worthy of a dash:

- After five years of imprisonment, he had only one request when freed—to sleep in his own king-sized bed.

But this is:

- After five years of imprisonment, he had only one request when freed—to sleep on a thin cot.

We should hardly be surprised that the prisoner would want his own grand bed once he is released. But a thin cot? That’s surprising.

The writer who uses five or six dashes on a page for any reason forfeits any expectation of surprise. Dashes are dramatic. Anything dramatic that is used too often loses its intended dramatic effect. Think about the classic slasher movies from the 1980s: how many times can the poor sorority girls look into the dark, empty closet before [pick one: Freddy Krueger, Mike Meyers, Jason¹] no longer scares us because we know he’ll be waiting inside? A reader shocked too often will soon not be shocked, so save those dashes for when you really need them. Moreover, because they signify an abrupt change in movement or meaning, dashes create a choppy effect. Use them sparingly as a diversion from your normal course of punctuation.

Now that I have hopefully debunked the two most overused methods of emphasis, let’s look at some effective ways to provide emphasis through sentence construction. Perhaps the easiest way is word placement within the sentence, or what rhetoricians call “end focus.” Rhetorical theory holds that the last words of sentences carry the strongest degree of emphasis and the most weight. During the minute pause after a period, the last word lingers. I’m not talking about a chin-stroking rumination on that last word. Instead, the period provides for the slightest of moments when that last word stays positioned in the reader’s mind. Readers look to sentence endings for important information. That’s why people want the last word in an argument. In fact, we are conditioned to look to the end of anything for important information, whether it’s the climax of a play or the chocolate mousse for dessert.

¹ Characters from A Nightmare on Elm Street, Halloween, and Friday the 13th, respectively.
Sentences should build up and move toward strength and anticipation.

To test for effectiveness, read your sentences aloud and provide obvious, almost melodramatic, emphasis at the end (the words in caps are meant to be read with intonation, not written in all caps). If it sounds foolish, rewrite. For example:

- Two days ago, while riding his bike, he COLLAPSED or
- He collapsed while riding his bike two days AGO

Or perhaps I would like to call someone a jerk. Which sounds more emphatic, more forceful?

- You are a JERK or
- I think you are a jerk, in my OPINION

The second insult hides the offending word in the center, protecting it from exposure and attention. We end on the harmless opinion, reinforcing the idea that it’s only something that I believe, and not a universal fact. Also noteworthy is the harshness of the /k/ sound in jerk in the first instance. To further emphasize a word at the end of a sentence, pick one that ends with a hard consonant like /k/ or an explosive sound like /p/ or /t/ because these sounds reverberate in the reader’s mind (say both aloud and you’ll see). These strong, even jarring, sounds come at the end of the two most common expletives in American English, and that’s no coincidence; it’s the force of these sounds that gives these words their punch. Try yelling funny or shiny in their place next time. Not quite the same.

Much of this depends on context and on what you are trying to emphasize. In my above example, you might want to end with in my opinion because it is less harsh, and it reinforces the uncertainty surrounding the reader’s jerkiness. In his book Understanding Style: Practical Ways to Improve Your Writing, Joe Glaser discusses two sentences that someone might write in an e-mail or memo regarding an upcoming project. If we are trying to rally the group to our cause, leaving them to mull on “task” will not generate much enthusiasm:

- Your efforts will be much appreciated as we undertake this crucial task.

However, a sense of gratitude might win them over:

- As we go about this crucial task, your efforts will be much appreciated.

In the first sentence, appreciated is buried in the middle. Furthermore, the first example emphasizes the drudgery with its hard consonant ending of –sk; we’ve not only ended the sentence with incorrect emphasis, but we’ve doubled the effect when the last sound ends harshly. The second example ends on a more inviting note, burying the drudgery in the middle (though a small quibble would be that the comma allows for a smaller pause after task).

The idea of end focus also holds on the paragraph level. Material at the end of a paragraph receives emphasis thanks to the even longer pause after the concluding sentence. This point also reinforces the importance of the concluding sentence in any paragraph. Moreover, the end of the paragraph receives emphasis because it is surrounded by white space, naturally drawing attention to the words. Use this white space to your advantage: when it envelopes a short paragraph or even a one-sentence paragraph, we can’t help but be drawn to it.

One-sentence paragraphs are not common to the formality of legal briefs because they represent a departure from the method of normal paragraph development in closed-form prose. Used sparingly, however, they command attention and could be effective in delivering an especially potent point in an argument. Used too often, and your writing might look like a first draft in a creative nonfiction class.

Once writers master the idea of end focus, they can become more creative in their sentence structure to emphasize important points. For instance, writers create transformations when they restructure...
sentences to subvert the expected word order of subject-verb-object (SVO). With transformations, writers create emphasis by shifting words that normally receive little attention, thus altering the reader’s expectations. Put more informally, transformations throw readers for a loop by rearranging sentence structure, demanding that readers perk their ears up and say, “Wow, that looks unusual.” Anytime you shift word order, you draw attention.

While countless texts on legal writing argue against its use, the there is construction shifts emphasis to the subject through the use of an expletive that creates a sense of anticipation. For example:

There is a large dog outside my door

There were fifteen people in the room when I left

According to C. Beth Burch in her book *A Writer’s Grammar*, expletives give the writer a chance to delay using a word, perhaps to gain greater impact by using it later in the sentence. The there front-loaded in the sentence tells the reader that something emphatic and interesting is coming later, thereby lending more importance to the subject that is wrenched from its normal place in the sentence.

Of course, the There is construction breaks the rule of end focus since it places the emphasis in the middle of the sentence. In this transformation, the emphasis is on the subject, which comes after the to be verb. So what we might have is *There is a man with grey hair breaking into cars on Stillwater Avenue* (the location receives some stress here as well). These transformations work well when the subject is a number or a rather surprising subject, like the large dog above.

What transformations also pique the reader’s interest by withholding information until the end of the sentence, as in

What the woman really wants is a free night at the hotel
or
What the man had in his hand was a .45 caliber handgun

These constructions create suspense. When we see the opening What construction, we know that something good will be waiting for us at the end of the sentence: What he saw at the end of the hallway, after walking for what seemed an inordinate amount of time, was the green light.

Similarly, the *It* transformation can also be effective. Glaser notes that “putting a sentence in the form ‘It was (something) that …’ or ‘It was (someone) who …’ automatically assigns stress to the word in the ‘something’ or ‘someone’ slot.”

It and What transformations are also called cleft sentences because the writer cuts the sentence in half and rearranges the word order to create emphasis. In *It* transformations, the emphasis is in the middle of the sentence. Like the others, the *It* transformation adds an element of anticipation to your writing. For example:

New: The man with the blue shirt entered the courtroom

Cleft: *It was the man with the blue shirt who entered the courtroom*

The advantage of the *It* construction is its ability to emphasize either the subject or the object: both can go after the *It + [to be]* construction. For example, we have:

*It was for fifty dollars that Tom sold the book*

*It was Tom who sold the book for fifty dollars*

*It was a book that Tom sold for fifty dollars*

---

4 This construction is so common that grammarians refer to it as the There-V-S construction.

5 In grammar, an expletive is a word that fills a space in a line or sentence that adds no meaning.


7 Glaser, supra note 2, at 123.
The concept of end focus plays a role in two grammar debates. One is the idea of ending a sentence with a preposition. Students have been told for years to avoid this error, yet writers and rhetoricians often ignore this rule on account of the awkward constructions it can create. And few people, including those who espouse the rule, know why it’s bad. With the principle of end focus, we have learned that it is most effective to finish a sentence with a word that carries meaning. Some parts of speech are more descriptive and meaningful than others, and this is why prepositions get such a bad rap: they carry little meaning. When classifying parts of speech according to their strength, from top (strongest) to bottom (weakest), we have:

Nouns/Verbs
Adjectives/Adverbs
Prepositions

The stronger words are typically more objective, easier to define, and more concrete. That is why, without drawing Kant into this debate, we can agree more easily on the definition of chair than on the definition of very or beauty. When you end a sentence with a preposition, you end on the weakest note possible.

To the dismay of many, end focus also gives us an excuse to use the passive. Again, “avoiding the passive” is a rule that has been around for years. Unfortunately, many students do not know how to define it and cannot recognize it (most mistake it for past tense, as in he was going to the store). Passive voice is abhorred because it is deceptive in its omission of the agent. Readers see it as an abdication of blame, an evasiveness.

Dismissing the passive becomes a little trickier if you want to end your sentences with emphasis. After all, in passive construction, the subject of the sentence comes at the end. And shifting the sentence to passive often makes it more concise. Using end focus, the passive voice puts emphasis at the end of the sentence, if the subject is what you want to emphasize:

She was left by the side of the road by a man with grey hair
Babies should not be fed peanuts

Note also that shifting the sentence to passive actually makes it more concise. Most rhetoricians accept the passive voice. Burch even goes so far as to say that “certain rhetorical occasions call for passive voice—and the passive transformation is not a structure to be avoided, but one to be used wisely.” Railing against the passive is a 20th century phenomenon; rhetoricians before then saw nothing wrong with it. In 1874, Samuel Greene said, “The passive voice may be used when we wish to conceal the agent, give prominence to the event, or reconstruct the original.” Brock Haussamen, in his book Revising the Rules: Traditional Grammar and Modern Linguistics, states it well:

The fact is that even though active sentences state action quite directly, they do not necessarily throw the spotlight on the agent. Contrary to what the handbooks say, if emphasis on the agent is really what the writer is interested in, the passive construction is often better suited, because it makes the agent the focal point of the clause … The car was driven by the woman is a very different statement than A woman drove the car.9

So if you want to emphasize the agent, use the passive.

Wayne Scheiss, in his excellent legal writing blog <www.legalwriting.net>, proclaims, “Passive voice. Avoid it” after listing several examples of passive construction from a grammar handbook that itself preaches to avoid the passive. Any such blanket declaration, however, ignores the stylistic advantages of the passive. The passive is also appropriate when the actor is unknown, obvious, or irrelevant. Consider:

A car was broken into last night on campus
Office mail is now delivered twice a day

8 Burch, supra note 6, at 67.
Writers can also create emphasis through short sentences. We can accentuate such emphasis by surrounding short sentences with long sentences.

Lunch is served at noon
Streets filled with potholes should be avoided

In the above examples, we can assume that burglars broke into the car or that we don’t know the identity of the burglars. We can probably also say (and it’s probably also irrelevant) that the mailperson delivers the mail. And does it matter who serves lunch? Lastly, of course everyone should avoid potholes. Scheiss’ own examples from the handbook prove this point:

Fractions of a dollar are written as cents or Numbers that begin a sentence are spelled out.

Avoiding the passive in these two sentences would make write and spell active verbs, and any subject accompanying them would almost certainly be obvious or irrelevant (writers? students?). These sentences would draw more attention to their construction than to their content with a writer who goes great lengths to avoid the passive.

I also find the active voice distracting in these two examples because the focus of the sentence is not on the writers but on the numbers, and removing the subject altogether makes this sentence more concise in its idea.

The other construction that sends shivers up the spines of prescriptive grammarians is the split infinitive. This construction is commonplace, though truthfully it never should have fallen out of favor. Unsplit infinitives cause trouble because they often place stress on the morphemes that contain the least meaning, usually the to and –ly parts. They can throw off the natural rhythm of spoken English with its unstressed-stressed pattern, called the iamb, that sounds like spoken English. The split infinitive with its iambic pattern places stress on the morphemes that contain the most meaning, the important parts.

The little voice in our head is unhappy with two consecutive stresses because the combination does not sound as rhythmic. As an example, say the following phrases aloud, stressing the morphemes in all caps.

to WRITE QUICKly or
to QUICKly WRITE

As you can see, we DUM elements in a sentence that we naturally want to emphasize because they carry meaning. We stress quick and write because they are meaningful. Again, try the following:

HE beGAN to BOLDly WALK inTO the BUILDing
HE beGAN boldLY to WALK inTO the BUILDing
HE beGAN to WALK boldLY inTO the BUILDing

There is logic behind why we should split the infinitive. As I mentioned at the outset of this piece, we engage most eagerly with writing that sounds good, and often writing that sounds good is writing that mimics the way we talk.

Writers can also create emphasis through short sentences. We can accentuate such emphasis by surrounding short sentences with long sentences. For instance, look at the following:

Before discussing some effective ways to emphasize, I’d like to talk about the horribly overused dash at the end of a sentence.

This sentence was in the first draft of this article. I was not happy with it because I didn’t think it emphasized my thoughts on this type of punctuation. With revision, it became in the final version

Before discussing some effective ways to emphasize, I am going to be the bearer of bad news for lovers of the dash at the end of the sentence. It’s horribly overused.

10 The split infinitive has been used for almost 700 years, and every great writer, from Donne to Wordsworth to Hemingway, uses it. The rationale often given by those opposed to split infinitives is that because the Latin infinitive is a single word, so we must consider the English infinitive to+verb as a single unit. But English is not Latin. It is far beyond the scope of this article to list the many who favor split infinitives, but suffice to say their comments are endless.

11 A morpheme is the smallest unit of language that contains meaning and that cannot be further divided.
The short second sentence is Clint Eastwood-esque in its power and brevity. There are few words, but its emphasis is clear because it stands alone, bookended by pauses and without baggage. The same principle applies here:

His wife was killed when the tire blew on her car and she hit the retaining wall.

In revising the sentence to emphasize her death, we now have:

His wife's car hit the retaining wall after her tire blew. She was killed.

This revision also illustrates why short sentences are so punchy: the less distance between subject and verb, the more emphatic the point. This is not to say that all of your sentences should be short. Instead, vary your sentence length. If your writing is full of short sentences, you’ll end up emphasizing nothing in your quest to emphasize too much. Use moderation.12

Now that we’ve extolled the virtues of short sentences, let’s give long sentences their due. Long sentences can be powerful in their ability to build to a crescendo, keeping the reader waiting to see what emerges at the end:

After walking through the building, wandering through the dark and encountering broken glass, destroyed furniture, unhinged doors, and torn up carpeting, he found the package.

The build-up is noticeable, made even more palpable by the numerous commas that make us slow down. When written like this

He found the package after walking through the building, wandering through the dark and encountering broken glass, destroyed furniture, unhinged doors, and torn up carpeting.

the sentence emphasizes destruction, but we lose the drama and anticipation. This type of sentence is also called the periodic sentence, where the main point does not come until the end. It is a variation on end focus because it’s not the word at the end that receives emphasis, but the entire main clause. There is a fine line between making your audience impatient and making them hinge on your words, but Lyndon Johnson gives us a good example:

Until justice is blind to color, until education is unaware of race, until opportunity is unconcerned with the color of men’s skins, emancipation will be a proclamation but not a fact.

While we’ve spent our time so far discussing how to emphasize good points, we can use these same principles when talking about how to bury bad facts. Bad news or bad facts are easy to hide. Put them in the middle of a long paragraph. Make sure they’re in the middle of a long sentence. Even better, put them in the middle of the page. Whatever you do, limit the amount of white space around them so that the reader’s eyes are not drawn to them. Human resource departments do this when they soften the tone of rejection letters by surrounding the rejection with pleasantries:

Dear Ben,
It was a pleasure meeting with you last week. Unfortunately, we are not able to pursue your candidacy at this time. Best of luck in your future endeavors.

or

Dear Ben,
Unfortunately, we are not able to pursue your candidacy at this time. It was a pleasure, however, meeting with you last week. Best of luck in your future endeavors.

Assuming you had to get one, which one would you rather get?

So let’s summarize. I’ve said that to emphasize your desired points, you should:
- Write short sentences
- Write long sentences
- Use the passive
- Split infinitives
- Place emphasis at the beginning
- Place emphasis in the middle
- Place emphasis at the end

12 Short sentence used deliberately.
In other words, I’ve given you conflicting advice as well as advice that goes against some conventional wisdom. But these wildly disparate pieces of advice fit neatly into one giant bit of wisdom: vary your sentence construction to keep your reader entertained. We engage with writing that sounds inviting, not writing that sounds like a monotonous template with little structural variety. As with the boring or talkative or obtuse conversant, we don’t like dull or verbose or pompous writing either. When we read a piece of writing, we meet the reader, and the personality that greets us will determine our response to the piece. We’ll engage with the reader if what we hear is lively, unique, friendly, and even somewhat unpredictable. A writer’s goal should be to achieve a unique voice, a voice that everyone can recognize without ever seeing the name at the top. The best writers have this quality; we instantly recognize their words.

Our aim in writing should also be to achieve the tonal quality of conversation that keeps the audience in rapt attention. The advice I’ve given you does not fit neatly into discrete rules, and some even flout the conventions of good writing. But the English language is messy like that, and it’s an uncommon rule that begins with the phrase, “You should always …” For instance, long sentences are bad when they run on but not when they are used stylistically to build suspense to a powerful ending. “Keep sentences to 25 words” or “keep sentences to two lines or fewer” is generally good advice, but should be met with a caveat. Sometimes rules must be broken to maintain a captive, satisfied, and interested audience.

To that end, use the techniques above with a measure of restraint, like you would any sentence construction. And let me be clear that I am not dismissing the use of bold text and dashes; both have their uses but are only effective when used sparingly. The paradox of some of these constructions is that few can please all the people all the time. For example, the passive can trim sentence length while creating end focus, but it’s, well, the passive; and cleft sentences create end focus and grab the reader’s attention, but they often increase word count. The most important technique to remember is variety. The best speakers—and the best writers—do this by surprising the reader with new constructions and by adding a sense of unpredictability to their rhetoric, rather than simply by raising their voice (CTRL-B) or slamming their fists down on the table (CTRL-B, CTRL-I, CTRL-U, CAPS LOCK).

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Another Perspective

“Every author has a ‘voice’ that he or she brings to an article. The voice may be objective, passionate, professional, strident, caring, sarcastic, haughty, energetic, cavalier, friendly, hesitant, or cynical, to name a few. It also can be a combination of two or more of these attitudes. In other words, voice is the personal stance that the author has taken toward his or her topic, thesis, and readers; it is the human being behind the words.

Editors need to consider and comment on voice as part of the substantive editing stage, but they should do so with a great deal of care and diplomacy. After all, asking an author to change his or her writing voice is tantamount to suggesting that the clothing they are wearing is not quite appropriate.”


13 “Entertained” might be a stretch, so at least keep your reader reading.
Compiled by Barbara A. Bintliff

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

Annotated Legal Bibliography on Gender, 13 Cardozo J.L. & Gender 467 (2007).
Extensively annotated bibliography of journal articles on a range of topics related to gender, including domestic violence, history and culture, international law and human rights, reproductive rights and technology, and sexual identity, among others.

Paul Axel-Lute, Selected Bibliography on Same-Sex Marriage, 59 Rutgers L. Rev. 413 (2007).
An unannotated, selective bibliography of books, articles, and other resources excerpted from a more extensive work available online at <law-library.rutgers.edu/SSM.html>. Works included are from 1997 forward, arranged alphabetically by authors within broad categories.

The article explores “the skills a [legal writing] teacher needs to effectively comment on student-drafted legal assignments.” Id. at 653. It then offers extensive discussion and guidance to allow the teacher to hone his or her own critiquing skills.

An extensive, but not comprehensive, bibliography on all facets of electronic voting and Internet voting. Includes coverage beginning in 2001 of books, reports, periodical articles, and cases. Does not include popular newspapers or magazines and some very hard-to-locate items.

Offers traditional information to first-year students on legal analysis and synthesis and legal writing, focusing on memos and briefs. Includes numerous examples and exercises to assist in learning legal writing skills and reinforcing important writing techniques. New information in this edition includes an annotated set of Supreme Court briefs and material addressing how the Internet is affecting court filing and formatting.

Legal reading is challenging to beginning law students, as legal texts are “largely incomprehensible” to novices. Id. This empirical study examines how first-year law students read a judicial opinion and whether specific reading strategies correlated with their law school grades. After presenting evidence supporting a conclusion that there is a correlation, the author offers examples of reading strategies used by the most successful law students and suggests ways to incorporate the strategies into the classroom.

Textbook focusing on first-year legal writing and analysis instruction. Begins with an introduction to law, legal method, and
the basic concepts of legal writing, then moves to coverage of writing an office memorandum and trial and appellate briefs. New material in this edition includes sections on legal rules, synthesis, and organization of a legal discussion or argument; updated examples; and an improved teacher’s manual.


“This Note is a rejection of the argument that poetry, fiction, and drama cannot and should not inform the law." Id. at 523. The author uses classical rhetoric to demonstrate the usefulness of literary themes to judging; narrative to relate the human experience to the judicial enterprise; and Lon Fuller’s theory of legal fiction to illustrate how literature can offer a shortcut to understanding the human condition. He then considers the contributions of the law and literature movement and concludes with an examination of literary citation in the larger realm of jurisprudence.


A guide to free electronic sources providing information on state government “personnel, news, legislation, laws, regulations, policy updates, and statistics.” (Introduction.) The listing is extensive, but not comprehensive.


The author presents a brief history of the Supreme Court’s stare decisis analysis, examines the continuing evolution of the doctrine, and concludes that the emerging theory of “societal reliance” as a special justification gives the Court flexibility in considering constitutional issue and provides an opportunity for better decision making than previous stare decisis analysis.


This article, completely updating one from five years ago, lists publicly available sources for state jury instructions.


This note argues that the “legal theory of contractual interpretation should be revised in three respects,” id. at 602, taking into account the linguistic treatment of legal interpretation. The author contends that courts should acknowledge that meaning can be expressed in several languages, that courts should abandon the concept of objective meanings of words, and that contractual interpretation should be accomplished recognizing the language used by parties. The outcome would see the court interpreting contracts prior to constructing them.


“This is the fifth annual collection of hidden maritime legal scholarship. It includes admiralty articles published outside of the four U.S. maritime law journals." Id. All articles were published during 2006 in U.S. scholarly or professional legal publications.


A description and evaluation of the University of Dayton’s revised curriculum “aimed at producing problem-solving graduates well prepared for practice.” Id. The new curriculum is based on Dayton’s existing tradition of experiential learning, and offers students the ability to graduate in two calendar years. Skills are integrated more comprehensively across the curriculum, and practice-related, subject-matter concentrations have been developed.

A supplemental text for legal writing classes focusing on nuances of legal writing style. Offers guidance to beginning legal writers on making their writing more precise, readable, and elegant. New to this edition is an updated, interactive CD-ROM with multiple exercises and expanded skills tests, a new chapter that tests common errors in professional writing, and new checklists reinforcing coverage of each chapter.


A review of the writings of Bob Berring, whose scholarship on legal research resources and, especially, the impacts of electronic legal research have shaped the discussion of the ways in which published legal information has shaped—and continues to shape—American lawyers’ thinking about the law. Berring’s works continue to influence a new generation of legal research scholars.


The author explores the ways in which the bibliographic structures of legal research sources influence the manner in which researchers think about the law and, ultimately, how the law itself is influenced. He examines the principle of “literary warrant,” using it to explore whether there is conservative bias in the West Key ‘Number System’ and, if so, its source.


An exploration of the changing context of legal research results, as more research moves to the electronic environment. Basic communication theory is used to explain how the change affects the shared context necessary for effective communications.


The authors explore how legal information can serve as the knowledge base for collective action, and thus be a catalyst for the development of social capital. They offer suggestions on ways in which legal information’s creation and distribution can be improved to enable it to better support the creation of social capital.


An explanation of the criticisms of technology and modern life by philosopher Martin Heidegger, and an application of the criticisms to the current legal information environment. The author contrasts current attitudes and practices with earlier Anglo-American traditions.


Updating an earlier article, the authors posit that computer-assisted legal research has not necessarily speeded law reform, and may have slowed it. Included is a review of claims that have been made in favor of computer-assisted legal research and a discussion of the ways in which electronic research retains many of the constraints of print searching, supporting
a discussion on categorical thinking and how it limits our ability to use electronic resources effectively.


Despite accepted format-neutral citation conventions and a growing number of state digital case law archives, few states have adopted format-neutral citations for their case law. The article explores why this is the state of affairs, despite the “best practice” of making authoritative information available in multiple formats.


“The authors describe a proposed system for patent application reviews that uses new technologies to access information-community peer reviews. By allowing examiners to ‘mine for data’ in the heads of experts rather than in libraries or databases, the proposal illustrates how new technology could change the boundaries of legally authoritative and relevant information and make it possible to identify legitimate authority from new sources.” Abstract.


A survey of the effects of increasingly advanced legal research techniques and sources on research in American legal history. Coverage begins with fundamental English sources before moving to coverage of American sources. Includes appendixes listing full-text databases useful for historical legal research.


A history of legal writing and legal research programs forms the backdrop against which curricular and instructional changes are discussed. The goal is to address demands by practitioners and the judiciary for improved legal research skills for new law graduates, as well as to meet the expectations of a new generation of law students.


The author asserts that legal research should be a part of the bar examination process, allowing jurisdictions to measure competency in a fundamental lawyering skill.


A brief essay and comprehensive bibliography of “the prolific and eclectic body of work of Robert C. Berring, including the books, chapters, articles, and assorted other materials he has written to date on subjects ranging from law libraries and legal information to legal research instruction and Chinese law and history.” Abstract.

Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 Wash. & Lee L. Rev. 531 (2007).

This essay “focuses primarily upon the ways in which writers utilize the lyrics of popular music artists to help advance a particular theme or argument in legal writing.” Id. at 536. “Ultimately, the [e]ssay attempts to illustrate the point that despite the sometimes unimaginative and counterproductive use of music lyrics in legal writing, there remains the potential for the lyrics of popular music to serve a useful role in the art of persuasive writing.” Id. at 537.

Third in a series of articles listing U.S. Supreme Court citations to one or more essays from *The Federalist*. Citations are complete through June 2006, and are arranged by case name (alphabetically), by subject, and by *The Federalist* essay number. Majority and dissenting opinions are included, with the authoring justice’s name noted.


Updated version of authoritative text on legal research. Offers in-depth guidance on all aspects of the research process and includes a new chapter on legal writing and extensive, additional appendix entries. Numerous illustrations clarify proper use of resources. Teacher’s manual available; author’s forum available on TWEN” (The West Education Network”).

Companion publications include:

Abridged version of *Fundamentals of Legal Research*, omitting some specialized materials. Teacher’s manual available; author’s forum available on TWEN.


A supplemental text for legal writing classes providing guidance on writing objective memos, opinion letters, and e-mails. The first five chapters present information on the U.S. legal system, including statutes and cases.


This revised work is offered as a companion text for a first-year legal writing course. It consists of the brief writing chapters of the authors’ *Legal Writing Handbook*. Assists students in identifying and applying the features of legal writing that are unique to trial and appellate briefs.


The guide, completely revised and updated from earlier versions, covers virtually all sources useful in performing competitive intelligence research. Covers identifying information about all aspects of an individual business or an industry.


Designed as a supplemental text and easy-to-use reference for either first-year or advanced law students, this text provides readers with checklists for guidance in preparing a variety of documents including trial and appellate briefs, memos, letters and e-mail messages, and scholarly articles. Includes a chapter on oral advocacy.


An extensive analysis of the use of the concept of “symmetry” in legal writing. The author notes that writers use the word as if it had a self-evident meaning, while in fact the it can be used to refer to a variety of distinct concepts. The author reviews the current usage of the term and offers suggestions “for more self-aware use of the concept of symmetry in legal thought and writing.” Id. at 1168.

The pathfinder organizes selected articles, books, reports, and Web sites by topic, with brief evaluative comments. It includes many sources not generally considered “legal,” such as social science journal articles and items from popular presses.


This article presents data collected for the Federal Judicial Center during its study of citations to unpublished appellate opinions. The information presented includes statistics relating to the number and methods of disposition of cases filed without briefs from counsel, the length of briefs and opinions filed and the corresponding judicial workload, citations to published and unpublished opinions and secondary sources, and disposition times for cases filed. Appendixes present tabular information.


The authors explain recurring brief writing errors and misconceptions in an effort to assist students in clinical settings (and attorneys) in presenting important information to judges. The content applies, as well, to all other law students and legal writers.


This revised edition continues the step-by-step approach to teaching legal reasoning and writing skills of earlier editions. Covers several types of written work products, including advisory letters, office memos, and appellate briefs, using a single case as an example throughout. New to this edition are an expanded consideration of transaction-based memos and advice letters, integrated material on demand letters, and additional information on pleadings.


Traditional theories state that precedent can be followed, distinguished, or overruled, and some courts treat precedent as if it was mistaken. The author posits yet another way courts may treat precedent, by ignoring it, and examines this treatment of otherwise controlling law.


A research guide that offers a starting point for the location of information on international, regional, and national law relating to disability. The information expands on the Syracuse University College of Law Library’s International and Comparative Disability Law Web Resources, found at <www.law.syr.edu/lawlibrary/electronic/humanrights.asp>.


Based on years of experience in teaching legal research, the author argues that legal research and writing instructors must frame the research and writing process in terms of indeterminacy. He emphasizes that the goal of law students in their legal research and writing classes should not be to find the answer, but to understand the range of possible outcomes, and then base strategies and predictions on this less concrete but more realistic information.


“The article surveys select online resources for seeking clemency as well as guides and research materials on the administration of
this important form of relief.”

(Introduction.) It is organized in five parts: federal and state sources; clemency research; death penalty; petition sites; and advocacy projects.


An unannotated, comprehensive bibliography of animal-law related articles from law reviews and journals published in 2006. Topically organized into categories of companion animals; entertainment; farmed animals; research; wildlife; and miscellaneous.


Articles of particular interest include:


The author suggests that the development of a “cognitive science of law” should allow insight into the nature of legal concepts and legal reasoning, with its potential for helping explain how law can be both stable and capable of change. Employing methods from the cognitive sciences can allow us to deal with the highest levels of abstract concepts and reasoning.


A discussion of the importance of legal metaphor in “reintegrating” human processes. Legal reasoning can separate legal imagination and constraint; metaphor can bring these two critical abilities together. “[S]uccessful legal metaphor derives its force from the very discipline of constraint that defines its conditions of possibility.” Id. at 872.


“[T]his Article attempts to reconcile some of the approaches to the topic of ‘metaphor and the law’ by identifying different ‘levels’ of metaphor operating in legal analysis and writing. A close reading of the scholarship reveals that there are actually four basic types or levels of metaphor operating in persuasive legal discourse,” doctrinal, legal method, stylistic, and inherent. Id. at 920–921. The article analyzes the use of each level in persuasive legal writing and concludes that metaphors are integral to the use of numerous rhetorical strategies.


The author analyzes the way in which metaphor affects how we see and live in the world, drawing on the work of George Lakoff and Mark Johnson. He explores the class of metaphors related to the theme of exclusion, noting his “decision to discuss this particular class of metaphors is not happenstance.” Id. at 995. He asserts that exclusionary metaphors are used in the legal academy to discuss the status of faculty who teach skills courses such as legal research and writing. He concludes that skills faculty members need “to create new metaphors that better capture our contributions to legal education, and to modern legal practice. …” Id. at 1018–1019.


The Annual Review, a bibliography with brief annotations, organizes law review articles on family law into multiple subject categories, with articles then listed alphabetically by author. The purpose of the survey is to “highlight the variety and depth of family law scholarship produced during the year and to call attention to currently debated ‘hot topics.’” Id.


Revised edition of standard work on all facets of academic legal writing. Provides
detailed instructions for every aspect of the
law school writing, research, and publication
process. Topics covered include law review
articles and student notes, seminar term
papers, how to shift from research to
writing, cite-checking others’ work,
publishing, and publicizing written works.
Supporting documents are available
at<volokh.com/writing>.

Michael Whiteman, Features–Free and Fee Based
Appellate Court Briefs Online, LLRX.com,
September 28, 2007 (available online at

Information is in two parts: sources of no-
cost appellate court briefs and fee-based
sources. All sources are for online versions
of briefs. Links to briefs are sorted by
jurisdiction or source (governmental
agencies, NGOs, or other organizations).

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In Memoriam: Donald J. Dunn, 1945–2008

Donald J. Dunn, dean and professor of law at the University of La Verne College of Law, died on January 5, 2008, at his home in Orange County, of complications related to cancer. He is survived by his wife, Cheryl, son, Kevin, daughter-in-law, and two grandchildren.

Don Dunn was nationally recognized as a law librarian and legal research expert. In 1969, he began his 38-year career in librarianship at the University of Texas at Austin’s Tarlton Law Library. In 1973, he joined the Western New England College School of Law in Springfield, Massachusetts. He spent three decades there, serving as law librarian, interim dean, associate dean, and dean of Western New England College School of Law. In 2003, Don moved to Southern California, joining the University of La Verne as dean and professor of law at the College of Law. An experienced administrator, Don led the College of Law through its successful accreditation by the American Bar Association.

Don Dunn held leadership positions in the American Association of Law Libraries, the Association of American Law Schools, and the American Bar Association. Don was a prolific writer with more than 60 books, articles, and papers to his credit. He was the co-author of Fundamentals of Legal Research and Legal Research Illustrated, 8th ed. (2002), recognized in 2006 by the American Association of Law Schools Academic Law Libraries Special Interest Section as one of the most influential texts in legal research. Don co-edited the quarterly Index to Periodical Articles Related to Law. He served on many American Bar Association site evaluation teams. He served as president of Scribes, the American Society of Writers on Legal Subjects and on the editorial board for Perspectives: Teaching Legal Research and Writing.

Readers of Perspectives benefited from Don’s annotated bibliographies of legal research and writing resources that appeared in every issue of the first 15 volumes of Perspectives. During his tenure on the editorial board, Don also contributed several stand-alone articles that focused attention on methods for teaching legal research. The Perspectives editorial board and readers are grateful for Don’s passion for law librarianship, dedication to teaching and scholarship related to legal research and writing, and his many contributions to the national legal community.
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.

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