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 Judith Rosenbaum

Judith Rosenbaum is Clinical Professor of Law and Director of Communication Initiatives at Northwestern University School of Law in Chicago, Ill.

Introduction

In spring of 2009, when I was asked to redesign and teach Northwestern Law’s advanced legal communication course, I knew I was not writing on a clean slate. First, here at Northwestern, in 1998, Helene Shapo proposed, secured approval of, and created the school’s first advanced course in legal writing. The course name was later changed to advanced legal communication to reflect its emphasis on different modes of oral communication, in addition to written communication. It was offered every year for 10 years until Professor Shapo started teaching family law.

A second reason I was not writing on a clean slate was that advanced legal writing had been a topic on legal research and writing listserv discussions for at least 10 years and in 2003, Jo Anne Durako, then at Rutgers School of Law–Camden, had begun compiling a Syllabus Bank for Advanced Legal Writing courses on the Legal Writing Institute (LWI) website.¹

The final reason I was not writing on a clean slate was that at the time I was asked to teach the advanced legal communication course, Northwestern Law had recently completed an evaluation of its curriculum to update our 1998 Strategic Plan and had published Plan 2008, the report growing out of that review.²

As part of the implementation of Plan 2008 during the 2008–09 school year, I had been part of a Communication Skills Task Force, consisting of a cross section of communication and legal reasoning (CLR) and casebook faculty and administrators, such as the acting associate dean of student affairs and a representative of the Admissions Office. The task force had been charged with the responsibility to:

Study and propose revisions to … curriculum (including the existing Communication and Legal Reasoning Program) … in order to … [e]nsure that our graduates leave the Law School with the following four communicative abilities: Basic Exposition … ; Legal Analysis … ; Contract and other drafting … ; and Business Exposition … [and to] [i]dentify and develop diagnostic and other tools to measure and demonstrate our students’ competency and improvement in this area including at admission, at enrollment, and at completion.

Within this framework, I saw two different challenges in creating my version of this course. First, I thought I should draw on the collective wisdom of those who

From my review, I concluded that advanced courses, as they were being taught in the first decade of the 21st century, fell into five general categories.

Curricular Focus
As I went about designing the curriculum for my course, I started with what I knew. First, I knew that Plan 2008 aimed to foster deeper and richer training for our students in communication skills; teamwork; experiential learning, such as simulations and role plays; and multiple and varied feedback mechanisms. Second, I knew that the substance and pedagogy of the first-year communication and legal reasoning course had been incorporating these ideas into the curriculum for more than a decade. Third, I knew that the advanced legal communication course as designed by Professor Shapo had been a comprehensive course, popular among students, and that it often ran a waiting list.

I was less familiar, however, with how advanced courses were being taught at other schools, and again, to avoid re-creating the wheel or starting in a void, I looked at every advanced course syllabus posted on the LWI website, and in addition, I posted a request on both the ALWD and LWI listservs asking for advice or samples of syllabi or both. On the website, out of 48 links relating to advanced writing courses, 35 links were still live. And from my request to the listservs, 30 different people responded: 10 of those responses were specific responses to a narrower question about advice on requiring students to attend a court proceeding and report on what they observed. One of the 10 had responded to both requests so I had a total of 34 separate responses from 33 different people. Since the website had not been updated since 2003, there was relatively little overlap between the syllabi I received from my listserv requests and the syllabi posted on the website. Thus, I had about 50 syllabi to review.

From my review, I concluded that advanced courses, as they were being taught in the first decade of the 21st century, fell into five general categories. One type was a survey course in which students were introduced to a range of documents, such as legislation, wills, jury instructions, predictive and persuasive memos, various litigation documents, and contracts. The specific documents varied from one course to the next, but one constant seemed to be that the documents were not unified around a case or a client. Rather, by and large, the documents grew out of fact patterns developed specifically to produce the desired document. Faculty teaching these courses probably had many different reasons for designing the courses to cover breadth rather than depth, but certainly one key reason for that design is that the two main texts for advanced courses are organized so that each chapter covers a different type of document.

The four other types of courses followed a more integrated approach but gave students a smaller range of writing experiences. Some courses were designed to teach litigation drafting (often limited to a specific practice area, such as bankruptcy or employment law). Others focused exclusively...
As I designed my curriculum ... I tried to balance the work I would assign students across four pairs of corresponding skill sets. ...

I in a sense the term “draft” could refer to early versions of written documents that are revised over time. However when referring to legal documents, we have to distinguish “analytical” from “drafted.” To me, an analytical document is one that applies law to fact whether it is predictive or persuasive. Analytical can also refer to nonlegal written documents that evaluate a condition, product, or term, such as a document analyzing whether a product should be released. In a sense, all analytical documents are “drafted,” because they are written and probably revised over time. But in the law, a drafted as opposed to an analytical document is one that does not analyze or evaluate. It contains provisions written in the language and the order that authors deem necessary to accomplish their purpose. A drafted document could be for litigation such as a pleading or an affidavit, or it could be for a transaction such as the wide range of contracts. The line is admittedly blurry and some documents, such as a client letter or a demand letter, could contain both analytical and drafted aspects.

Since my review of other courses was admittedly limited, there may be faculty at other schools who have also devised creative methods to teach advanced legal writing. If so, perhaps a future iteration of this column can be devoted to other “choices” in designing advanced course curricula.


See the chart at the end of this article.

The law firm consisted of all the students in the class. Some of the students had given the firm the name of two 3Ls in the class during the interview and that name “stuck” as the name of the firm for the rest of the semester.
5. Phone the client to bring her up-to-date on what had been done thus far;¹²
6. Draft a complaint;
7. Draft interrogatories;
8. Draft an internal persuasive office memo responding to a motion for summary judgment—this assignment was actually divided into two separate assignments, one to draft a persuasive statement of facts and the other to draft a persuasive argument; and
9. Report to me as supervising attorney, assessing the strength of the case and suggesting ideas for dealing with aspects of the case where the facts and law were not particularly strong for the client.

I did give the students one additional assignment that I thought put the “cart before the horse,” because, despite its pedagogical value, it was not specifically part of their work for the client. The “cart” was that I wanted the students to do a formal oral presentation, as they might do to a group of senior attorneys, a client’s board of directors, or a potential client by whom the firm wanted to be hired. I could not think of a way to set up this assignment within the context of their work for the client, so I asked the students to observe a trial court proceeding and an appellate court proceeding, to evaluate the quality of the lawyering, and to offer an opinion on whether justice was done during whatever part of the case they had observed. The main objective was to have the students present their conclusions in a formal oral presentation, but in addition, I asked them to write about what they had chosen to do, why they had made that choice, and what they had concluded. The writing offered an opportunity for the students to prepare an informal written report that was neither legal drafting nor legal analysis.

Ultimately, while the balance was not perfect, and some competencies could not be strictly categorized (particularly the formal/informal and the litigation practice/transactional practice), at a minimum the course exposed students to a variety of tasks that lawyers perform in practice.

**Pedagogical Approaches**

In addition to designing the course to put the students in the role of junior associates working for a single client, I incorporated three well-regarded pedagogical tools into the course—rewrites, peer reviews, and grading criteria—but revised them to work better for upper-level students. For the rewrites, I wanted to assess the students on more of a mastery scale than on a strict curve or by strict percentages. I thus permitted the students to rewrite just about all of the written assignments and required them to rewrite at least two.¹³

I opted for that balance between permitted and required rewrites for two reasons. First, I know from teaching the first-year course that rewrites force students to process the comments on an original draft and that a great deal of learning takes place as they attempt to understand the comments and either answer the questions or incorporate the suggestions into the next draft.¹⁴ I wanted to ensure that students went through that intellectual process at least twice during the semester. On the other hand, I also believe that adult students need to be given some control over course content and over the allocation of their time. They all have pressure points in the semester when they are busy with other things than assignments in my course, be those due

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¹² This phone call was timed to take place while the firm was waiting for a reply to the demand letter and before the firm had taken any steps to draft a complaint and file a lawsuit. When I first taught the course in the fall of 2009, I discovered that when I asked the students to call me, I often was left waiting at the telephone for between five and 15 minutes, which turned out to be dead time. Thus, in the fall of 2010, in my second iteration of teaching the course, I switched the task so that I, acting as client, called the student attorneys. The switch put the burden on the students as attorneys to be near their phone, though we did arrange a convenient time in advance.

¹³ This idea was not my own. I borrowed it from Mary Barnard Ray who uses it in her advanced legal writing course at the University of Wisconsin Law School.

To encourage students to do additional rewrites voluntarily, I told them that instead of averaging the grades between the first draft and the rewrite, I would give them the higher of the two scores. That practice encouraged rewrites through a carrot instead of a stick because it made rewriting essentially “risk-free.” If the paper improved, they would receive a higher score and if it did not improve, they would not lose the original (better) score.

My second pedagogical focus was to help the students become more effective critical readers. As we all know, once students enter practice and become associates, their work will not only be critiqued by more senior attorneys, but they will also be asked to critique the work of others. Thus, I not only built into the syllabus an in-class peer review for each assignment, but I also structured the peer review so that each student would critique two papers written by others and thus would also receive two critiques from others.

In the first-year course, I have used peer reviews largely to help students identify organizational or analytical ambiguities in other students’ papers, with the hope that once students could recognize things that were hard to understand in someone else’s paper, that understanding would enable them to do a better job of recognizing similar clarity problems in their own work. To achieve that end, each student worked with only one other student, and the peer review was structured through a series of fairly focused “prompts,” such as whether the question presented included both the legal issue and key facts and whether it was readable.

In the advanced course, I had similar goals of using the peer review to help the students “discover” areas for improvement in their own writing, but my goals for the advanced course went beyond my goals for the first-year course. For example, the timing of the peer reviews was a bit different than the timing I use in the first-year course. In first-year CLR, I generally use peer reviews in a class session close to but before an assignment’s due date. Thus, there is still time for students to incorporate any suggestions by their peers into their drafts and to modify their own drafts based on what they learned from reading someone else’s paper. In the advanced course, by contrast, I used the peer review in the first class after the students had submitted their papers. At that point they had already faced and devised solutions to some of the writing challenges presented by the particular documents and could share that insight with their classmates. By the same token, since the peer review took place quite a bit before the rewrite was due, if they learned anything new from reading someone else’s paper, they could choose to rewrite that assignment and incorporate their insight into the rewrite. Finally, since the peer review took place before I read and commented on the papers, the students’ comments and observations would be based on their own creative thinking and not restricted or limited by the types of comments they received from me.

Although I monitor the peer review groups in the first-year course, with occasional comments to the entire class based on my observations or on questions from a student, generally the peer review work is between two students, and despite the 90 minutes allocated to the course, there is rarely enough time for the students to read the papers, respond to my prompts, and discuss their assessments with each other. However, in advanced legal communication, the students are more comfortable with peer

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15 In a class that consists largely of 3Ls, as mine did, one likely pressure point is the Multistate Professional Responsibility Exam (MPRE), which is generally given the first weekend in November.

16 Both the mastery approach of allowing the student to take the higher of the two grades and the philosophy of using a carrot rather than a stick to motivate the students to rewrite more papers also came from Mary Barnard Ray.

17 The students did not have enough class time for both reading and discussing their critiques of the longer assignments due later in the semester, particularly the persuasive facts and persuasive argument. For the peer reviews of those assignments, I asked them to exchange and read the papers outside of class so that class time could be devoted to discussing their evaluations in their small groups and with the whole class.
review and are more comfortable evaluating each others’ work and being evaluated by other students. Thus, there was enough time for the students to read the papers of two other classmates with roughly a half hour left for a group debriefing and discussion of what the students had learned. During the last 20 or 30 minutes of class I engaged the whole class in a roundtable discussion in which I asked them to identify at least one thing they had learned from reading someone else’s paper that made a document effective and at least one thing that detracted from its effectiveness. These roundtable discussions were incredibly rich, and generated lots of follow-up comments from other students about how a paper they had read led them to a similar conclusion. Consequently, the peer review classes were some of the most productive and enlightening classes of the semester.18

My last attempt to try some new approaches in the course grew out of the fact that, apart from the persuasive facts and persuasive argument, I was giving the students assignments that I had never taught before. Coming up with grading standards and applying them in grading the variety of assignments I had chosen to use was a new experience for me. I believe that the students are entitled to know, before they prepare each assignment, the criteria by which they will be evaluated. Since most of the assignments gave the students tasks that they had not been asked to do in any other courses (though some of them had been exposed to some of these tasks in summer jobs), I created grading criteria to guide the students in writing their own drafts and critiquing the drafts of others. The criteria were equally for me, so that I could be consistent in my assessment of the students’ work. To make sure that I was not doctrinaire in creating the grading criteria and that I took advantage of the practical experience that some students might have had, I put the criteria and their general weights on the Blackboard course wiki and invited the students to comment on or edit the criteria. Although no one actually took advantage of that opportunity, giving them that option was consistent with my general idea that to make the course a “win-win” for both me and the students (me in accomplishing my pedagogical goals and them in getting out of the course what they had hoped to get), they needed to have plenty of opportunity to collaborate with me about how and what they were being taught.

Classroom Assessment
In recent years the concept of classroom assessment has gained a bit of traction among law faculty. The concept of classroom assessment is not about assessment of student work through exams, papers, etc., nor is it about “outcomes” assessment, discussed by the Carnegie report and currently in vogue with the American Bar Association.19 Classroom assessment is a term that comes from undergraduate teaching and is about teachers “collect[ing] frequent feedback from their students about how the students learn and how they respond to particular teaching techniques … [which] [t]eachers can use … to modify their instruction to help students learn more effectively.”20 Generally, the techniques used for classroom assessment include simple, ungraded, in-class activities such as “free writes,” “minute papers,” “chain notes,” or other devices that allow the students to give feedback on the teaching methods that are working for them and those that are not.

18 One of our most lively discussions was about how many facts to put into a complaint, particularly in light of two recent Supreme Court cases. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009) (“[T]he tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements.”); and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . .”) (citation omitted).


Since both the concept and the content of the course were new, I wanted to be particularly attentive to whether the course was meeting the students’ objectives. Consequently, I used several different classroom assessment techniques throughout the semester. Although often the techniques used for classroom assessment are written and anonymous, the students tended not to fill out the questionnaires I gave them. Rather, the method that seemed to resonate the most with the students was devoting several blocks of class time during the semester to evaluating the course.

As a result of those conversations, I made one procedural change, revised one assignment, and eliminated a piece of another assignment. The procedural change was an adjustment to the requirement that all assignments be done in teams. The initial class size established for the course was 24 students. Fortunately, perhaps because the course was new, I ended up with nine students. However, initially, anticipating an enrollment of 24 students, I had written the syllabus to require that every assignment except the final persuasive memo be done collaboratively with at least one other student. Given all the literature about the need for intensive writing courses to be limited to about 12 students, I didn’t see how I could cover the range of assignments that I had planned and simultaneously give effective feedback if I had to read and comment on 24 separate papers for the written assignments or give 24 different evaluations for each separate oral assignment. Thus, I thought initially and still believe that the only way I could manage a class of 24 students without severely truncating the range and number of assignments was to require mainly collaborative work.

In our first discussion of the syllabus, however, before any written assignments were due, the students, even as 3Ls, who had already done a fair amount of collaborative work, were roundly against all the teamwork. Fortunately, with only nine students, the class was small enough that it was possible to turn the majority of assignments into individual assignments for the students who wanted to work individually. Still, there were two assignments—the complaint and the interrogatories—where I thought that brainstorming would be beneficial. Thus, we agreed that the students would do those two assignments with one or more team members. As to all the rest of the assignments except the persuasive memo, which was always designed as an individual assignment, I made collaboration optional.

The revision was made to the “emergency weekend assignment.”21 This assignment was intended to mirror the unpleasant aspect of practice when a junior attorney is asked at the last minute to handle an emergency over the weekend. My plan was to assign it to the class during one of the weekends I had to be out of town. For the assignment itself, I intended to draft some of the facts and one count of a complaint based on our fact pattern.22 I would then require the students to finish the facts and add a count for the second issue. I thought this approach would not be too burdensome, because I could draft the jurisdictional facts that they might not know about and they could model the remaining factual allegations and the second count on what I had already drafted (in addition to the guidance provided by the course book and by their own thinking about what was similar and what was different between the sections already drafted and the remaining sections). The students’ response was that they would be bitter and resentful if given a last-minute emergency. While such last-minute emergencies “went with the territory” at work, they were not part of the law school culture and so, unlike a work emergency, they told me the bitterness and resentment would fester. Rather than argue with them, I took their concern at face value and gave

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21 The idea to ask the students to do an emergency weekend assignment was also not my own. At a conference earlier in the year, several professors from the Duquesne legal writing faculty, Erin Karasman, Julia Glencer, and Tara Wilke, had told me they were incorporating this exercise into a new advanced course that they were planning for spring of 2010. Perhaps I should never have mentioned in the syllabus that there would be a last-minute emergency assignment over one weekend, but I thought the students were entitled to at least some notice that this assignment would form part of their evaluation in the course.

22 The students knew the fact pattern from the client interview conducted earlier in the semester and their work on both engagement and demand letters.
I have often thought that creating and teaching a course is like giving birth to a growing, breathing organism. The course, like the organism, needs nurturing. The course, like the organism, cannot remain static; it must grow and change over time. The course and the organism are likely to experience setbacks over time, but with effort and attention those setbacks can be overcome. The course, or at least the students in it, needs a measure of autonomy to thrive. Finally, although both the course and the organism may reach maturity, they will both fare better if they never cease efforts to improve. This year’s iteration of my advanced legal communication course has gone through changes and has adapted to them. However, I expect that as long as I am teaching the course, I will be looking for ways to change and improve it.

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