Legal Writing Missteps: Ethics and Professionalism in the First-Year Legal Research and Writing Classroom

By Kristen E. Murray

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These days, a lot of legal writing-related mistakes and errors in judgment draw a great deal of media scrutiny and attention—attention that spreads quickly in a digital environment. For example, in 2006, an attorney made legal headlines when his auto-spellcheck program changed the phrase “sua sponte” to “sea sponge” each of the five times he used the phrase in his brief.2 News feeds and blogs are quick to react when one of these sensational stories emerges; the blog Above the Law celebrates instances of judicial chastisements with its “Benchslaps” category, pointing to “smackdowns” issued from the bench.3

Legal writing professors have long recognized these as teaching moments, usually in the form of cautionary tales shared with students. I have traditionally brought these examples into the classroom as they have occurred—I often refer to them as “current events” or “breaking news” in legal research and writing. I have saved some of the more humorous and memorable examples for my lessons on the importance of editing and proofreading, under the theory that seeing the mistakes of others in action underscores the importance of seemingly technical tasks.

More and more, as a community, the legal writing professorate has recognized the importance of integrating ethics and professionalism into the legal writing classroom; indeed in some instances, it is impossible to separate these concepts.4 Notable reports have concluded that there are certain core values that lawyers should possess, including: 1) provision of competent representation; 2) striving to promote justice, fairness, and morality; 3) striving to improve the profession; and 4) professional self-development.5 The Carnegie Report found that law schools, while very good at teaching students to think like lawyers, failed to adequately equip students with the ethical and social skills necessary to enter practice.6 Although the ABA requires law

1 Thanks to Peter Smyth for his able research assistance on this article and Andrea Agathoklis and Ellie Margolis for reviewing drafts.


4 See generally, e.g., Melissa H. Weresh, Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum, 21 Touro L. Rev. 427 (2005) [hereinafter Fostering Respect for Our Students] (advocating for the inclusion of ethics and professionalism in first-year legal writing courses and discussing why legal writing courses are particularly well suited to forming law students’ conceptions of proper lawyerly conduct); David S. Walker, Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean, 40 U. Tol. L. Rev. 421 (2009) (discussing the need for increased instruction in ethics and professionalism, and describing Drake Law School’s ethics and professionalism program for first-year students).

5 Robert MacCrate, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—an Educational Continuum, ABA Sec. Legal Educ. & Admiss. Bar (1992) [hereinafter MacCrate Report] (selected excerpts available at http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html). The Carnegie Report, published in 2007, again identified the need for an integrated curriculum that provides for “(1) [t]he teaching of legal doctrine and analysis, which provides for the basis for professional growth; (2) [t]he introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and (3) a theoretical and practical emphasis on inculcation of the identity, values and dispositions consonant with the fundamental purposes of the legal profession.” William M. Sullivan, et al., Educating Lawyers: Preparation for the Profession of Law 194 (Jossey-Bass 2007) (referred to as the “Carnegie Report” because it was undertaken by the Carnegie Foundation for the Advancement of Teaching) [hereinafter Carnegie Report].

6 Carnegie Report, supra note 5, at 187.
students to take a professional responsibility course, and many professors incorporate a discussion of ethics and professional conduct in other courses, these concepts are rarely integrated across the curriculum as key components of a law student's academic experience. Complaints about the state of professionalism in the legal community have not been directed only at law schools. Indeed, even the Supreme Court has lamented the state of legal professionalism for some time.

Professor Melissa Weresh has argued that the best time to begin teaching law students civility is not in an upper-level course, signifying to students that professionalism is a secondary pursuit that is ancillary to law practice, but rather in the first-year legal research and writing course, when law students are enthusiastic about learning what it means to be a lawyer and when students are in the best possible position to incorporate ethical and professional obligations into their “analytical and productive framework.” One commentator has observed that, in practice, a lawyer's character is judged by the things she does day to day. As such, because a lawyer's day is largely composed of the production of written work, Weresh urges that law students be introduced to legal ethics at the same time they are introduced to the fundamentals of legal writing.

The idea of introducing ethics in the first-year legal research and writing course has been criticized both because it would burden already overworked legal writing faculty and because some believe that formal introduction to rules of ethics is unnecessary. Following the MacCrate Report, critics argued that, while implementation of the skills and values recommended during law school would benefit students and practitioners, the cost to include additional instruction and the fear that time would be taken away from other courses were prohibitive. Weresh responded by pointing out that legal research and writing and ethics and professionalism are the only law school requirements specifically enumerated in the ABA Standards for Accreditation. She argues that this indicates a priority established by the ABA, and that few could contend that the values and skills identified by the MacCrate and Carnegie reports should not be addressed in the context of legal education wherever possible. Moreover, ethics and professionalism are already implicit in parts

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8. *Fostering Respect for Our Students*, supra note 4, at 427.
13. *Fostering Respect for Our Students*, supra note 4, at 444. Chin gives several examples of instances where lawyers have been sanctioned for discourteous writing, including uncivil language used in court documents and letters sent between opposing counsel. Chin, *supra* note 9, at 892–95. Of particular note was an affirmation by the United States Court of Appeals for the First Circuit where the court upheld a ruling by a district court that disbarred an attorney in part for attacking the court and opposing counsel in his pleadings. Chin, *supra* note 9, at 893–94. Upon hearing of the attorney’s misconduct, the appellate court affirmed the district court’s ruling and in turn disbarred the attorney from practice before the First Circuit, adding salt to the wound. *In re Cordova-Gonzalez*, 996 F.2d 1334 (1st Cir. 1993).
16. *Fostering Respect for Our Students*, supra note 4, at 434; ABA Standard 302(a).
17. *Fostering Respect for Our Students*, supra note 4, at 434.
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Thus, this spring, I introduced an exercise I called ‘Legal Writing Missteps’ to my first-year legal research and writing students.

My goals for this exercise were three-fold: (1) to give students more opportunity for general Internet research; (2) to bring a discussion of ethics and professionalism in legal writing into the first-year course; and (3) to engage the full class in discussion of these issues via an online forum, to include those students who tended to be less vocal during class.

The instructions for the exercise were fairly simple. I provided students with a single-page handout about the assignment. In it, I described the exercise as follows:

This semester, one of the themes of the course will be ethics, professionalism, and legal writing. Thus, over the course of the semester we will be having an ongoing online discussion about these topics, and then discuss them together in class later in the semester.

You are required to find and share what I have styled as a legal writing “misstep,” by which I mean a story in which someone’s legal writing brought about some sort of reaction or consequences from an audience—for example, a judge, a client, or the popular press.

The instructions further explained that the students would be required to write a post that (1) summarized the story, (2) provided a link to the source material, if possible, and (3) offered some commentary about the story. Each story had to be unique. The items were to be posted to the discussion board I set up on the class Blackboard site. Each student had to also comment on at least two of their classmates’ stories, and monitor the comments to their own posts to see if any warranted a response.

Students put their posts up over the course of the semester. As one might expect, several students got their posts up immediately following our discussion of the assignment, some trickled in over the course of the semester, and there was a surge close to the deadline, after I started reminding them of the deadline during class. There was ample time between the posting deadline and our scheduled in-class discussion for late posters to participate fully in the online discussion forum.

The online discussion was robust on a few posts and topics but skimpier on others; eventually, though, each post had a comment thread associated with it. A few of the posts touched on the same themes and ideas, and I was glad to see the students making cross-references to other items that they or their classmates had posted. I participated in a few of the threads, to ask a question or point them to relevant information when someone had posed a question. I also tracked the discussions for fodder for our discussion in class.

During one of our last class meetings of the semester, we had an in-class discussion about the posts and the ramifications of the “mistakes” that the practicing lawyers had made. I first asked the students to divide the missteps into various categories; after some negotiation, we ultimately settled on three: small typos with...

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18 Id. at 434–36. Professor Weresh has written a supplemental text entitled *Legal Writing: Ethical and Professional Considerations* that is organized by specific type of document, e.g., predictive memoranda or appellate brief, and points out ethical and professional considerations that are related to legal writing. Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (LexisNexis 2006).

19 A copy of the handout is available upon request.

20 I noted in the instructions that this should give students an incentive to post their “missteps” sooner rather than later, so they would have more choices available.

21 Blackboard is the course management software we use at Temple Law (http://www.blackboard.com/). The assignment could be executed using any course Web page that includes a threaded discussion forum or message board.
Most of the students’ submissions (16 of my 29 students) fell into the first category: typographical errors that had legal consequences, drew admonishment from judges, or both. These included some things that received a lot of attention when they occurred, such as the $2,000,000 comma typo and a challenge positing that the Texas constitutional amendment banning gay marriage actually banned marriage. Most of our discussion centered on the consequences of these mistakes, and we had an interesting conversation (with some disagreement) as to when these types of mistakes should have consequences and when they should not. Even after I introduced some of the concepts covered in the relevant rules of professional responsibility, some students felt that absurdity and common sense should prevail while others held tightly to the notion that a lawyer should be held to an extremely high standard for the work product they put out.

Eleven students submitted missteps that fell into the category of “bad lawyering”—legal writing-related strategic mistakes or erroneous actions taken by lawyers. These included stories of a lawyer who submitted a brief that was 4,000 words over the court’s word limit—and lied about it—and a lawyer who insulted the court in his written motion. When we discussed these cases in class, students seemed less forgiving of these mistakes because they were either poorly thought out or so obvious that they could and should have been avoided.

Finally, two students found examples criticizing lawyers for plagiarizing the work of others—one case where a lawyer used substantial portions of a law review article (17 of 19 pages) in a brief submitted to a court and another where a company that failed to obtain the patent it sought filed a lawsuit against the lawyer it had hired to obtain the patent because the lawyer used language from a rival scientist’s patent application. I thought it was important to consider this category of “missteps” separately because plagiarism is an issue that vexed many of my students. As one student observed in the discussion forum, “I find it interesting that there seems to be a significant division in opinion between academia and practicing professionals regarding plagiarism.” In class, we discussed the nuances of what constitutes “plagiarism” in practice, including a discussion of using prior work product, boilerplate, or forms as part of one’s legal writing work product.

In general, our discussion of these categories was reasoned, thoughtful, and provocative, with some easy agreement and several points of contention about what conduct does and should violate professional norms. The discussion also stretched to cover topics I had not anticipated; these can be demonstrated through two other noteworthy moments in our discussion. The first involved the use of humor in lawyering, which we included in the “writing-related bad lawyering” category. In our discussion, the students were

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22 Grant Robertson, *Comma Quirk Irks Rogers*, The Globe and Mail (Aug. 06, 2006, 11:30 p.m.), http://www.theglobeandmail.com/report-on-business/article838561.ece (noting that comma placement allowed contract to be interpreted to allow for cancellation based on one year’s notice rather than a five-year contractual commitment).


28 These instances of humor included quoting from the movie *The Hangover* in an opening brief (http://www.thecocklebur.com/criminal-law/worst-opening-of-a-legal-brief-ever) and advice about when and how to use humor in lawyering (http://www.swa.ca/2009/08/19/humour-and-legal-advocacy-use-it-with-care/).
The students were able to find a variety of examples that appeared in many different sources; the ethics and professionalism discussions were fresh, interesting, and thought provoking.29 We also had an in-depth discussion of one case in particular. In this case, a death row inmate whose lawyers missed the deadline to file a notice of appeal because the original lawyers working on the case left the firm and neither the court nor the mail clerks seemed to know that other lawyers had taken over the pro bono case.30 The students were especially troubled by the grave consequences that seemed to follow what amounted to an in-house clerical mistake. Some seemed surprised that the situation could present itself in the first place; others seemed more cynical and focused on the fact that this was human nature but that fairness should ultimately prevail.

We eventually voted on which was the “worst” kind of mistake. Fourteen students thought that the “bad lawyering” mistakes were the most egregious, eleven voted for the plagiarism-like mistakes, and three voted for the typographical errors category. These results surprised me somewhat—I thought the students would be more affected by the consequences that attached to simple writing/editing errors because those issues would hit closer to home. However, some students seemed reluctant to have to pick a category and thought they were all offensive in equal measure.

All in all, I deemed the exercise a success. The students were able to find a variety of examples that appeared in many different sources; the ethics and professionalism discussions were fresh, interesting, and thought provoking; and, ultimately, every student had a voice in the discussion—even those who were less vocal in class had their opinions recorded in the discussion forum. Thus, I met all of my goals for this assignment.

Still, I might make two small changes when I use this exercise next year. First, I may ask the students to post their contributions over a shorter period of time (two to three weeks instead of over the course of most of the semester); I think the compressed time frame will make the in-class discussion ever richer, because early posters will not have to think back several months to when they did their research. Second, I will assign a basic reading on professional rules and ethics as a backdrop for our in-class discussion, rather than simply introducing these concepts in class.31

There are other ways one might integrate a similar exercise into the class. One option I considered is having a weekly (or per class) posting, with reference in each class to the new issue that had been presented. Ultimately, I concluded that with 29 students, and the potential for long, engaging discussions about each presentation, I should not spend the time to open each class with this topic; it was better saved for a single discussion at the end of the semester. This model might work, though, in smaller classes or classes that meet more frequently.32 This could also work as an exercise that is completed in class from start to finish. A professor could introduce the exercise, ask the students to

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29 Sample comments from the discussion board included “I personally would not mind humor in legal advocacy as long as it is not inappropriate. There are definitely other people in the profession who also probably would encourage the use of humor; we’ve read some case opinions where judges clearly are having fun writing his/her opinions and I think this should be encouraged.” and “It seems like an unnecessary risk to attempt to use humor in a courtroom, when you do not know how receptive the audience will be.”


31 I considered doing it this year, but decided to focus on the exercise itself before adding any other requirements.

32 My class met twice a week for 50 minutes per meeting.
do the research in class, and then share the results with the class (or in pairs or small groups to start, to ensure that the goal of full class participation is met). This version might allow for a more robust discussion of the first goal—use of search terms—which was but a small part of the discussions we had both on the discussion board and in my class.

This is, of course, one small way to bring a discussion of ethics and professionalism into a first-year legal research and writing course, focused on one small slice of what it means to be an ethical and professional lawyer. What I learned firsthand is that Professor Weresh is correct: first-year students are both interested in and ready to discuss these issues. Rather than laughing or cringing at the misfortunes of others, my students were able to look critically at these experiences and think about their implications for the lawyers and clients involved and for the profession generally. The benefits to the students far outweighed the small burden I took on in developing and executing the exercise. I encourage others to look for ways to integrate these topics into the first-year research and writing course, in ways both large and small.

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Another Perspective

“Judges can be quite clever when they scold incompetent lawyers. I think, for example, of the case when an appellate judge explained that the court of appeals would not examine issues that were not raised in the brief with the colorful metaphor of pigs sniffing for truffles. Many of us can find some amusement in a well-turned phrase (particularly if we are not on the receiving end of the barb). Reading these cases, we might experience a bit of schadenfreude—being happy at the misfortune of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we could, very easily, have made that very same mistake. And then we wonder: did the judge have to be so very clever in pointing out the lawyer’s incompetence? Was the shaming necessary?

Since finding cases where judges scold lawyers for incompetent research or writing is a recurring reference question, I thought I would explore some techniques for the quest. Along the way, I will share some quotations that will give you a good start the next time you are asked this question—or the next time you want to liven up one of your own presentations with some vivid examples.”