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Legal Writing in the Real World—Using Practitioners' Briefs to Teach Advanced Legal Writing Strategies[1]

By Megan E. Boyd

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"Many opinions used in doctrinal textbooks are dense, verbose, and replete with legalese—the type of writing we are trying to keep students from producing."

Among legal writing instructors, teaching from practitioners' briefs (or real-world briefs, as I like to call them) is sometimes a controversial topic. Critics argue that real-world briefs teach students bad habits, a fear that seems easy enough to remedy by choosing good briefs. But many believe even good briefs hinder students' development; one fear is students will simply mimic techniques used in the briefs and will not develop a thorough understanding of writing processes.[2]

When used appropriately, however, real briefs from actual cases can have substantial value, especially in advanced legal writing and litigation drafting courses. Practitioners' briefs demonstrate the limitations often present in litigation compared to teacher-developed hypotheticals with their carefully curated facts, issues, and case law. Real-world practice, however, is rarely so cut and dried. There may be little or no relevant case law. The facts may be unclear or strongly one-sided. The lawyer may need to rely heavily on dissenting opinions, opinions from foreign jurisdictions, or policy arguments to overturn prior precedent. Real-world briefs are better than hypotheticals at exposing students to situations they are most likely to face in practice.

We also know that critical reading of good writing makes writers stronger. Many opinions used in doctrinal textbooks are dense, verbose, and replete with legalese—the type of writing we are trying to keep students from producing. So allowing students to read well-written briefs helps convince them that simple, straightforward writing is effective.

And using real-world briefs as teaching tools serves another valuable purpose: it encourages student buy-in to the importance of good writing. Lawyers constantly complain that law school did not prepare them for practice.[3] Real-world briefs enable legal writing instructors to show students that they will use what they are learning in the real world.

Incorporating Briefs

I teach a course in advanced persuasive writing techniques and use real-life briefs to demonstrate those techniques, including developing a theme; telling the client's story; using rhetorical principles of logos, ethos, and pathos; addressing adverse facts and law; making policy arguments: advancing alternative arguments; targeting justices; and using an opposing party's words or actions against it.[4]

1 This article was developed from a presentation of the same name given at the 2014 Southeastern Regional Legal Writing Conference.

2 Anna P. Hemingway, *Making Effective Use of Practitioners' Briefs in the Law School Curriculum*, 22 St. Thomas L. Rev. 417, 418 (2010) (discussing objections to the use of practitioners' briefs in legal writing curriculum).

3 Stephanie M. Benson, It Is Time for Legal Education to Prepare Law Students for Law Practice, J. Kan. B.A. May 2005 at 12; Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. Sch. L. Rev. 203, 204-05 (2011/2012) (discussing the reasons law students today are more prepared for practice than previous generations, yet still unprepared for this new, technology-driven climate).

4 While I use these briefs in upper-level courses, they can be employed in first-year persuasive writing courses as well. For example, the Exxon brief, discussed infra, is an excellent illustration of storytelling and minimizing the impact of adverse facts—techniques that are discussed in introductory persuasive legal writing courses.

The briefs are only one component; students also read assigned texts, edit passages, and draft their own documents using the techniques they have learned.

In introducing advanced techniques, I assume students have little or no exposure to these persuasive strategies and therefore start with baseline concepts. After students complete the assigned readings, we discuss each technique in class. I then have students read excerpts from certain briefs I have selected. I often ask students to take a few minutes in class to read the excerpts, rather than read them as homework. I have found that students tend to read more critically in class than outside it. These excerpts could, however, become part of a homework assignment where students must come to class prepared to speak about the briefs' persuasive techniques, write a short essay on the advanced strategies, or annotate the briefs using Track Changes or a similar program.

Once students have read the assigned excerpt, the class considers the ways the writers employ the applicable techniques, why the writers might have done so, and whether and to what extent the techniques are effective.

I generally ask students to read only a portion of one brief in each case; that is, students do not read briefs on each side of an issue and do not read complete briefs. Using excerpts enables me to maximize the benefit of the briefs while staying away from portions that are poorly written or do not advance the course objectives. Before they read the briefs, I provide students with short summaries of the procedural backgrounds and the arguments advanced in each case so they have some context and familiarity with the substantive issues.

Using only excerpts—as opposed to complete briefs—has not hampered students' understanding; they are able to identify the persuasive value of the techniques used in the briefs even though they have not read them from the beginning. Because I have chosen easy-to-understand briefs,[5] students are able to pick up an excerpt and quickly understand what they are reading.

Additionally, students are instructed not to review the judicial opinions relating to the briefs they will read. Students may already be familiar with the outcome of a case, but I ask that they not read the opinions themselves so that the holdings do not skew their thoughts about the persuasive value of the techniques employed.

Selecting Briefs

To address one of the criticisms of using practitioners' briefs as teaching tools, I carefully select well-written briefs that contain most, if not all, of the persuasive techniques discussed during the semester. Often these briefs come from cases before the Supreme Court, but many strong briefs can be found in cases before the federal circuit courts and even district courts. I browse Twitter, bar journals, *The Green Bag*, and law-related websites and blogs for interesting cases and briefs. I also have used Ross Guberman's *Point Made* and Noah Messing's *Art of Advocacy* to point me toward strong briefs.

I try to choose briefs on topics students are already familiar with (e.g., criminal law, property, etc.) or can easily understand. I want students to read the briefs critically for tone, style, and technique, not just content. And I have found that students are better able to read critically if they already have some baseline understanding of the substantive law at issue. While students may still learn some substantive law, the purpose of the exercise is to help them to see how advanced persuasive techniques are used outside the legal writing classroom.

In the past, my perception about students' cognitive biases led me to select briefs on less controversial topics. After all, conventional wisdom tells me that the stronger a student's feelings on a particular topic, the more difficult it will be to put aside biases and focus instead on the persuasiveness of the arguments. But students have proved me wrong, especially upper-level students, who are easily able to overcome any personal feelings they may have and often are

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[5] More on this topic infra.

better able to recognize advanced persuasive tactics employed by writers whose points they disagree with.

I have used three particular briefs with great success: Christopher Simmons' brief in *Roper v. Simmons*,[6] New London's brief in *Kelo v. City of New London*,[7] and Exxon's brief in *Exxon Shipping Co. v. Baker*.[8] The substantive issues are simple to understand, the persuasive techniques are easy for students to recognize, and the briefs are interesting.

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In the *Roper* brief, Christopher Simmons, who was convicted of murder and sentenced to death, argues that the death penalty is cruel and unusual punishment for juvenile offenders. Simmons' brief relies heavily on persuasion through logos—the writers cite a bevy of nonlegal sources to support Simmons' argument that juvenile offenders are less culpable than adult offenders. The writers also employ a distinct theme at the center of every argument and do a masterful job distinguishing the most adverse precedent.

The City of New London, in the *Kelo* brief, seeks to have the Court ratify the City's exercise of eminent domain to take property for private development. New London's brief is also logos-heavy, citing numerous cases to support the "long history of deference to legislative and municipal wisdom" in exercising eminent domain.[9] New London's brief is an interesting example of persuasion for another reason too; as an appellant it has to defend what appears to be an "unfair" result.

In *Exxon Shipping Co. v. Baker*, Exxon argues that a jury impermissibly awarded punitive damages against it for the *Valdez* oil spill. Exxon faces a tough set of facts, and the brief is an excellent example of how to deal with that. Unlike the other briefs, Exxon's brief is pathos-heavy with a number of policy arguments that show why the lower courts' rulings would have broad, unintended negative consequences.

Using Briefs

One topic we discuss in my advanced legal writing course is developing a theme to advance factual and legal arguments. Students often are so busy trying to get the black-letter law on paper that they do not consider the importance of a cohesive theme. But as strong legal writers know, "[t]hemes are essential to the story" of both the facts and the law.[10] "A story without a theme is not a story. It is chatter."[11]

As an introduction to the topic of theme, I have students read a chapter from Stephen Armstrong and Timothy Terrell's *Thinking Like a Writer*. During class I ask half of the students to read the prosecution's version of facts in the fictional case of *In re G.L.* (from the Armstrong and Terrell text) and ask the remaining students to read the defense's version.[12] The students are not told they are reading different passages. I then ask them to describe their thoughts on G.L. and give the theme of the case. Of course, students are surprised to learn they are not reading the same passage and identify starkly different themes in the two versions.

I then ask students to identify the theme from the following passage of Christopher Simmons' Summary of the Argument:

> Punishment is cruel and unusual within the meaning of the Eighth Amendment either if there is a general societal consensus against its imposition, or if it affronts the basic concept of human dignity at the core of the Amendment because it is disproportionate to the moral culpability of the offender. Each of these basic Eighth Amendment principles must draw

6 Brief for Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633).

7 Brief of the Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108).

8 Brief for Petitioners, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2007) (No. 07-219).

9 Brief for Respondents, supra note 7, at 11 (internal quotations and citations omitted).

10 Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. Rev. 239, 241 (2012).

11 Id.

12 G.L. (Goldilocks) is charged with trespass and destruction of property after she entered the Barrs' home while they were away, ate their food, then fell asleep. The prosecution portrays G.L. as a delinquent, destructive teenager, while the defense paints her as a scared child who was hungry and cold when she committed the offense.

its meaning from the evolving standards of decency that mark the progress of a maturing society.

This Court first considered the constitutionality of the death penalty for 16-and 17-year-old offenders in 1989. In the 15 years since that decision, advances in the scientific understanding of adolescent development, and the consistent movement by legislatures and juries away from imposition of death on juvenile offenders, have demonstrated that capital punishment of those under 18 is inconsistent with our society's evolving standards of decency. The execution of juvenile offenders—like that of mentally retarded offenders—is both disproportionate to their personal moral culpability and contrary to national and worldwide consensus.

First, research in developmental psychology and neurology over the last 15 years has confirmed that 16- and 17-year-olds differ from adults in ways that both diminish their culpability and impair the reliability of the sentencing process. Adolescents of that age are less able than adults to weigh risks and benefits, less able to envision the future and apprehend the consequences of their actions, and less able to control their impulses. Indeed, the parts of the brain that enable impulse control and reasoned judgment are not yet fully developed in 16- and 17-year-olds. For those reasons, they are not the fully rational, choosing agents presupposed by the death penalty.

More broadly, the very nature of adolescence means that adolescents are less blameworthy than adults. By virtue of their developmental deficits and their legal minority, adolescents are inherently less able to resist the influence of peers and environment; they lack the control over themselves and over their lives that adults possess, and are therefore not as fully responsible for their own actions as adults. Moreover, the defining feature of adolescence is that the self is still unformed; in a very real sense, 16- and 17-year-olds are not yet the people they will ultimately become. Adolescents' vulnerability and unformed nature preclude a reliable determination that death is a fit response to their personal culpability and character.

The maturity of individual 16- and 17-year-olds, of course, varies. But because of their developmental deficits and their inherent changeability, the case-by-case consideration that suffices for adults cannot provide the reliable assessment of character and culpability that the Eighth Amendment demands. The rapid pace of change during adolescence means that a jury evaluating an adolescent defendant at sentencing cannot assess with any certainty that defendant's maturity and moral responsibility at the time of the crime. Nor can the death penalty reliably be a reasoned moral response to the still-unsettled character of an adolescent. For these and other reasons, permitting adolescents to be exposed to the death penalty creates a constitutionally intolerable risk of wrongful execution.[13]

This passage very clearly outlines Simmons' theme: evolving standards of decency and increased scientific evidence of minors' diminished capacity show that execution of juvenile offenders has become cruel and unusual. Once students have identified that theme, I ask them to discuss the ways the writers advance it (e.g., how the specific information provided and the writers' sentence and paragraph structures support or tie in to the theme).

After exploring the theme of the *Roper* brief, students read New London's Summary of the Argument in *Kelo*:

> In the exercise of its traditional police power, the Connecticut legislature has declared that economic development, and the acquisition of private property to further such development are public uses and purposes for which public moneys may be expended. In accordance with this statutory directive and after a painstaking deliberative process, the respondents

[13] Brief for Respondent, supra note 6, at 9-12 (internal quotations and citations omitted).

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> determined that the economic revitalization of New London, as well as its environmental, social and structural health, would best be served by enacting the [Municipal Development Plan]—and, as a necessary consequence thereof, taking the petitioners' properties through eminent domain.
>
> This Court has a long history of deference to legislative and municipal wisdom in exercising the power of eminent domain. This deference is premised on two well-settled principles: (1) that courts are unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them, and (2) that the primary purpose of the Takings Clause is not to act as a substantive restraint on government behavior, but to assure compensation for any affected property owners should the government choose to exercise its eminent domain power. In keeping with these principles, only once in its over two hundred years of existence has the Court held a *compensated* physical taking of property to be unconstitutional. Such jurisprudential caution is in keeping with this Court's longstanding policy—aside from the ill-starred era of *Lochner v. New York*—of showing great deference to economic decisions made by legislative and municipal officials.
>
> This Court should adhere to these precedents and affirm the judgment of the Connecticut Supreme Court.[14]

As they did with Simmons' brief, students pinpoint New London's theme: the Court should continue its long history of deference to legislative and municipal decisions regarding eminent domain. Students then discuss how the authors support the theme, just as they did with the *Roper* brief.

Later in the semester, students learn another persuasive tactic: addressing unhelpful facts. As students will quickly discover once they start practice, they cannot change the facts. But students can learn how best to deal with bad facts and minimize the harm they cause to a client's case.

Accordingly, students read an excerpt from *Show, Don't Tell: Legal Writing for the Real World* on dealing with unhelpful facts and review the following passage from Exxon's Factual Background:

> On March 24, 1989, the Exxon Valdez, a state-of-the-art, well-equipped tanker, ran aground on Bligh Reef in Prince William Sound. The immediate cause was the failure of Third Mate Cousins to steer the vessel away from the reef. The vessel's master, Captain Hazelwood, instructed Cousins when and where to make the turn, but then left the bridge—a violation of Exxon's explicit policy requiring two officers to be present. For reasons that remain unknown, Cousins failed to make the turn as instructed, and the ship went aground, spilling 258,000 barrels of oil.
>
> Exxon immediately dispatched an emergency response team which prevented the discharge of the remaining 80 percent of the vessel's oil. Exxon acknowledged responsibility for the spill and initiated a massive cleanup, ultimately spending $2.1 billion on that effort—almost double Exxon's annual profit at that time from all United States petroleum operations.
>
> Exxon also established a claims program that paid commercial fishermen and others asserting that the spill had disrupted their businesses. Plaintiffs were almost entirely compensated for their damages years ago. Some were paid cash without providing releases, some released claims but not all, and some released all claims. Exxon spent $300 million on voluntary settlements prior to any judgments being entered against it.
>
> Typically, claims were paid in advance, on estimates of what the fishermen *would* earn in 1989. Since fish processors pay fishermen at the end of the season, Exxon paid many fishermen before they would normally have received payment for fish. Such payments did

[14] Brief of the Respondents, supra note 7, at 11-12 (internal quotations and citations omitted); Adam Lamparello & Megan E. Boyd, *Show, Don't Tell: Legal Writing for the Real World* (forthcoming Dec. 2014).

not so much compensate for losses as *prevent* them. Alyeska Pipeline Service Company, the operator of TAPS [Trans-Alaska Pipeline System], paid another $98 million to resolve claims that its oil spill contingency plan had been inadequate. Millions in claims were also paid by the Trans-Alaska Pipeline Liability Fund, the entity created by Congress to provide compensation for a spill. The Fund sought and obtained reimbursement from Exxon.

In addition, Exxon instituted comprehensive remedial measures to reduce the risk of future spills, including: (1) new navigation policies specifying daylight-only departures and reduced speeds in icy conditions, limitations on deviations from traffic lanes, and increased use of tug escorts; (2) a technologically advanced satellite-based navigation tool; (3) a strengthened policy requiring masters to remain on the bridge; (4) enhanced safety training programs; (5) revised alcohol policies; (6) improved monitoring and reporting procedures; (7) random testing for alcohol or substance abuse; (8) an absolute prohibition against use of alcohol by vessel officers while on a tour of duty; (9) additional mates in port; (10) new mandatory rest periods; and (11) strengthened corporate environmental and safety policies, a new Safety, Environmental and Regulatory Department, and a $1 billion industry-wide program to improve spill response capability.[15]

In its brief, Exxon chooses to confront the bad facts but minimize their importance, instead focusing on its post-spill efforts. Students frequently note the use of terms like "state-of-the-art" in describing the *Valdez*, the discussion of Exxon's immediate efforts to dispatch a response team, and the list of eleven measures Exxon undertook to minimize the risk of future spills. Students are amazed that by the end of the passage, they have almost forgotten about the spill itself.

Exxon's technique of confronting bad facts contrasts with the technique used by Simmons' counsel in *Roper*. Prior to trial, Simmons' counsel hired a psychologist, Dr. Cuneo, who determined Simmons was sane and competent to stand trial. On appeal, Simmons had to address this "bad" fact in a footnote:

> Dr. Cuneo testified at the post-conviction hearing that he had conducted only limited interviews with Simmons' family. He was unaware of much of the developmental history that Dr. Smith elicited, including Simmons' dysfunctional home environment and his drug and alcohol abuse, and he believed that, had he known that history, it would have been significant to his evaluation. Based on the more limited and incomplete evaluation of Simmons he was able to conduct, Dr. Cuneo concluded that Simmons was sane at the time of the offense and competent to stand trial, but that his psychological condition was potentially mitigating. After discussing Dr. Cuneo's initial findings with him, Simmons' trial counsel chose not to have Dr. Cuneo complete his evaluation and not to have him testify.[16]

After reading both the *Exxon* and *Roper* passages, students consider which method they prefer and why and the reasons the brief-writers in each case may have chosen the techniques they did.

One of the last topics we tackle during the semester is making policy arguments. Because policy arguments are addressed in first-year legal writing courses, students are at least somewhat familiar with them. But many students' policy arguments begin with a sentence such as: "Public policy also supports Plaintiff's/Defendant's position." As we know, courts often are unpersuaded by pure policy arguments, especially when they are identified in big blinking red lights. So in my course, I use practitioners' briefs to teach students to make strong policy arguments without calling them that.

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[15] Brief for Petitioners, supra note 8, at 2-4 (internal citations and quotations omitted).

[16] Brief for Respondent, supra note 6, at 6 n.5 (internal quotations and citations omitted).

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Because students have been introduced to policy arguments prior to my class, I have them read a more advanced treatment on the topic, Ellie Margolis' *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*.[17]

After reading that excerpt and discussing what they learned, they review the following passage on punitive damages from Exxon's brief:

Borrowing from common-law principles, many state courts and legislatures impose caps on punitive damages, generally requiring that they not exceed a fixed multiple of compensatory damages.

> Rather, the same considerations of "size and recurring unpredictability" that have led state courts and legislatures to impose caps on punitive damages should lead the Court to set a limit here. Enforcing such a limit would serve the maritime policies of uniformity and predictability. It would also promote the maritime policies of settlement and judicial economy. When there is an accident, compensation should be paid promptly and fairly, as Exxon did here. But if compensation paid quickly and fairly nevertheless is treated as part of the multiplier for punitive damages, then there are strong incentives to litigate compensation. Every dollar paid in compensation can, as the Ninth Circuit held, increase punitive damages by five dollars.
>
> The prospect of punitive damages thus interferes with what would otherwise be desirable incentives to pay claims quickly and fairly. It creates windfalls for some plaintiffs, and for many plaintiffs' lawyers. But it means that injured parties will be compensated more slowly, that compensatory payments will be scrutinized because of their potential to affect punitive damages, and that punitive damages, which are supposed to serve public purposes, will end up defeating or restricting one of the most important public purposes of maritime tort law (or land-based tort law, for that matter), the prompt and fair compensation of injured parties.[18]

Students are easily able to identify Exxon's policy arguments and see that they need not scream that at the reader. Reading and discussing passages from real-life briefs, like the *Exxon* brief, teaches students how to make their own policy arguments blend seamlessly into their writing.

I use the briefs in similar ways to cover other advanced topics, including employing logos, pathos, and ethos (all); advancing alternative arguments (the *Exxon* brief); using a party's words and actions against it (the *Roper* and *Exxon* briefs): and targeting judges and justices (the *Roper* brief).[19]

Putting It All Together

As the semester progresses, students are exposed to different writing styles and see how lawyers can employ the same persuasive techniques in different ways. At or near the end of the course, students read a separate brief from cover to cover, noting examples of the techniques they have learned over the semester and considering whether those techniques, as used, are effective.

While any of the briefs outlined in this article could be used for this, I have students read Alaska's brief in *Alaska Department of Environmental Conservation v. Environmental Protection Agency*,[20] written by then-practitioner John Roberts. It has been called the best brief ever filed with the Supreme Court[21] and includes nearly all of the advanced persuasive techniques

[17] 62 Mont. L. Rev. 59 (2001).

[18] Brief for Petitioners, supra note 8, at 52-53 (internal citations and quotations omitted).

[19] Simmons's brief in Roper is particularly interesting because his attorneys were targeting Justice O'Connor whom they assumed was a lock based on her opinion in *Stanford v. Kentucky*, 492 U.S. 361 (1989). Imagine their surprise when O'Connor dissented in *Roper*, 543 U.S. at 588.

[20] Brief for Petitioner, *Alaska Dept. of Envtl. Conservation v. Envtl. Prot. Agency*, 540 U.S. 461 (2004) (No. 02-658).

[21] See Ross Guberman, Five Ways to Write Like John Roberts, available at http://www.legalwritingpro.com/articles/john-roberts.php; Bruce Carton, How to Draft Like a Brief-Writing Rockstar, Legal Blog Watch (Mar. 2, 2010, 11:21 AM), available at http://legalblogwatch.typepad.com/legal_blog_watch/2010/03/how-to-write-like-a-brief-writing-rockstar.html.

discussed during the semester, yet is readable and interesting. And, perhaps most noteworthy, the Roberts brief was the losing one which serves as an important reminder to students that even great writing cannot save a losing argument.

Students read the Roberts brief and write a short paper or prepare a presentation explaining the advanced persuasive techniques it uses. Though I have had success requiring each student to read the same brief and prepare a separate paper or presentation, this exercise could be modified so that each student is assigned a different brief. Additionally, small groups of students could work together to prepare a paper or presentation collectively.[22]

Students can read texts on persuasive writing, but they often cannot see how the techniques discussed in those texts will apply to real-world situations. Reading practitioners' briefs allows students to understand the ways persuasive writing strategies can be used in the types of cases they will handle in practice. And once students see these techniques in real life, they can begin incorporating the strategies into their own writing.

Conclusion

Law schools today are expected to produce practice-ready graduates, and one way they do this is through their legal writing courses. These courses are an important part of the curriculum because legal writing is an important part of law practice. As students themselves understand:

One cannot overstate the importance of effective legal research and writing. Perhaps the most practical of all law school courses are legal research and legal writing, since virtually all attorneys will need to utilize these skills in their professional careers.[23]

By reading real-world briefs, students begin to learn how to utilize advanced persuasive writing skills, making them much better prepared to practice in the real world.

"Reading practitioners' briefs allows students to understand the ways persuasive writing strategies can be used in the types of cases they will handle in practice."

[22] In-class presentations, of course, give students an additional opportunity to practice their public speaking skills.

[23] See Tony Ciuca & Joanna Vassallo, Research and Writing, Lessons Learned in Law School Are Lessons Learned for Life, N.J. Law. Apr. 2009 at 18.