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The theme of the 1998 Conference of the Legal Writing Institute was “Advancing Professionalism.” This theme recognized that Legal Writing faculty are professionals as teachers, writers, researchers, and scholars. It was fitting that the opening plenary session focused on their most central task: teaching.

The plenary speaker exemplifies professionalism. Professor Charles Calleros of the Arizona State University College of Law is an accomplished teacher, scholar, and musician. As the author of *Legal Writing and Method (3d ed.*) and numerous law review articles on free speech, he has done much to draw attention to the discipline of Legal Writing.

At the conference, Professor Calleros drew on his diverse talents to offer a unique presentation employing his ideas on teaching music to provide insights on teaching Legal Method and Writing. Because his presentation was uniquely entertaining and interactive, it would be difficult to transform it into a traditional scholarly article. Moreover, such an effort would devitalize the product. Therefore, Professor Calleros presents his offering in an eminently accessible form as a play.
Reading, Writing, and Rhythm: A Whimsical, Musical Way of Thinking about Teaching Legal Method and Writing*

Charles R. Calleros**

A Play in One Act

Roles:

The Facilitator and the Instructor, who may be played by two or more persons or by one person who uses a vest or other prop to signify a shift from one role to another.

Los Gitanos - played by an ensemble of flamenco musicians (taped music may be substituted).

American Schemata - played by a small combo of musicians capable of playing American popular and jazz music (a single pianist or taped music may be substituted).

The Students - played by participants at a conference or teaching seminar.

Setting:

A classroom, preferably one with a variety of audio-visual equipment available.

Facilitator:

Good Morning. Welcome. I’m looking forward to learning a great deal this week, and I view this plenary session as an opportunity to set the tone for the exchange of ideas that we all hope will occur over the next few days.

Our specific topic this morning is teaching techniques, and I’d like to start by defining my goal and my methods in this presentation. First, I don’t pretend that I personify great teaching or that I have a magic checklist of teaching techniques. But I know that we have a wealth of experience, information, and brash new ideas in this group, a wealth that will be shared in various ways over the next three days. So my goal this morning

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** Professor of Law, Arizona State University. This article is a more detailed version of the author’s presentation at the Legal Writing Institute’s summer conference in June 1998, which in turn is a greatly expanded version of one prepared by the author for the Institute of Law School Teaching in Spokane, Washington in June 1997.
is simply to get us started, to get us excited about the prospect of sharing ideas about teaching. I hope you are in the mood to interact with one another and to have some fun.

My method will be simple: I will try to teach you something, something that is probably new to most of you: I want to teach you a simple rhythm used in Flamenco music and dance. I hasten to add that I will not call on individuals other than volunteers; otherwise, however, when I step into the role of teacher, I’ll use a variety of teaching techniques that are customarily used in law schools. Some of them may be effective, but others may not be so helpful, and you can reflect on how you receive those teaching techniques as students.

From time to time, we will step out of the roles of students and teacher so that we can critique the teaching techniques and share ideas with each other. So, loosen up, leave your inhibitions at the door, and let’s have some fun! You will know when I am stepping into my role as flamenco teacher, because I’ll put on this vest at those times. [If both parts are played by the same person, the Facilitator now dons a vest or uses some other prop to signify his or her transformation into the role of the Instructor.]

Instructor:

Welcome to the first day of class. Today we’ll begin by mastering the rhythm needed to accompany a flamenco guitarist who is playing a tango flamenco or a flamenco rumba. You must leave class today feeling confident about your ability to rehearse this rhythm, because you will encounter this rhythm often in practice. Moreover, our study of this rhythm will introduce you to fundamental ways in which flamenco singers, dancers, and musicians interact musically, forming the basis of a musical method that is the foundation for much of your work. As you become more comfortable with that process, you will acquire the tools necessary to become proficient in a variety of flamenco rhythms.

Your reading assignment for last night provided some historical background. Allow me summarize that material. Flamenco is the traditional folk music and dance of Los Gitanos de Andalucia, the gypsies who migrated to southern Spain through the Middle East and North Africa, from places as far away as India. As the music of a social and economic underclass, traditional flamenco passionately expresses a wide range of emotions, from grief, loss, and longing, to humor, fierce pride, and joy.
Moreover, members of this flamenco culture traditionally performed this music and dance for one another, as a means of expressing those emotions.

To some extent, those emotions are expressed in the flamenco rhythms. Many of the traditional flamenco rhythms are arranged in 12/8 time, which may be unfamiliar to Western ears. I want to show you a brief excerpt of some traditional flamenco rhythms in a musical form known as *bulerías*, because you will be performing that rhythm by the end of the year in your "moot Flamenco Festival competition," and I want you to keep that goal in mind as we work toward it throughout the year.

To help provide a link to flamenco tradition, we have a guest practitioner from the local bar with us today, who will serve as our flamenco version of Learned Hand as we briefly demonstrate the *bulerías* rhythm, toward which you will be working this year.

[Performance by Los Gitanos: Here, the Instructor can play a brief recorded excerpt of a stirring but intimidatingly complex *bulerías* rhythm in repeating patterns of 12 beats each.1 Of course, a live flamenco guitarist, accompanied by a *palmero*2 or a percussionist performing on *cajón*,3 is even better.]

Can you guess the underlying theme of that music form? *Bulerías* is often performed in a manner that exaggerates the drama and pride associated with traditional flamenco so that it communicates a bit of humor, an inside joke, a parody of our own sometimes inflated egos, even as we try to outdo one another. We perform it for each other to help keep us on our toes and help us keep our sense of perspective.

Believe it or not, by the end of this year, you'll be performing those complex rhythms. But we will begin today with some simpler rhythms associated with *tango flamenco*4 and *flamenco rumba*. Those musical forms were influenced by Moroccan and

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2 A *palmero* is a flamenco performer who accompanies a guitarist or singer by providing *palmas*, rhythmic clapping of hands.

3 A *cajón* is a wooden box played as a drum with the hands. Long popular as a musical instrument in Peruvian folk music, it has recently evolved into a popular means of accenting the driving and complex rhythms of flamenco.

4 This should not to be confused with Argentine tango music and dance, which has much less in common with *tango flamenco* than Viennese Waltz music and dance has with a Louisiana Cajun waltz.
Cuban music, resulting in a rhythm pattern that will be more familiar to us.

Facilitator:

So, allow me to remove my vest and return to my role as Facilitator. How are you receiving your flamenco instruction so far? Do you feel a little like law students in their first week of class? Any reactions so far?

[Obviously, students should not feel confident about their assignment at this point. True, the historical context should be helpful to the students, and the practical demonstration of the year-end goal was probably enlightening, inspiring, and entertaining. However, most students are probably intimidated by the apparent level of difficulty of the year-end goal, much as they might be when they try to read their first judicial opinion or contemplate the appellate brief and oral argument that await them in their second-semester moot court competition. Also, the teaching technique so far has placed the students in a passive role, a role in which they are not directly threatened but nonetheless one in which their opportunities for learning are limited.]

Some of my lecture was helpful: I provided you with a foundation for your work by introducing you to the history and nature of flamenco and by identifying its objectives and intended audience. Moreover, I'll bet you appreciated the demonstration and the exposure to the work of experienced practitioners. That demonstration exposed you to the musical method of flamenco: you could see that we are not reading charted music; we are engaging in a spontaneous art form that requires constant communication between us.

But do you still feel like a student on the first day of law school, one who is trying to wade through the first hundred-year-old opinion in a casebook, or who has heard from a second-year student that last year's moot court problem required students to research, write, and orally argue complex issues on some constitutional doctrine called the negative commerce clause? Fortunately, I've announced that your first assignment will be easier than the bulerías, but that may not be enough to set your minds at ease and make you receptive to the lesson. Let me try it again and see if I can bring the lesson closer to home. [The Facilitator once again dons the vest and assumes the role of the Instructor.]
Instructor:

You just heard some complex rhythms in 12/8 time. But, can anyone tell me: What is the most common time signature in Western music? [Answer - 4/4 time]. That’s right. In fact, it is sometimes called common time. Much of our American popular musical tradition is in 4/4 time, from Benny Goodman swing to Motown to Louisiana Zydeco boogie to Dick Dale surf music. See if you can determine why the following excerpts of popular American music would be written in 4/4 time; try to count out the four beats in each measure, and actively mark the first beat of each measure in some visible or audible way, such as by snapping your fingers, tapping your foot, or clapping your hands—softly.

[The instructor should now play brief excerpts from a variety of recognizable American popular tunes and help the students to mark the beginning of each measure of music and to identify the four beats per measure. Of course, a pianist or a combo of live musicians would be even better.]

You seemed pretty comfortable with that. Well, it turns out that tango flamenco and flamenco rumba share that familiar time signature, so the flamenco rhythm that we will learn today is likely to be more accessible to you than are the other more traditional flamenco rhythms such as bulerías. I still have not shown you the precise tango or rumba rhythm yet, because I want to lay some further foundation first, but the time signature is the same as that of the American music that we just heard.

Facilitator:

So, how are you feeling now? A little more relaxed, a little more receptive? Why? What have I added, and what is still missing in your learning experience?

We can easily identify what is missing. I still have not fully described the flamenco rumba or tango flamenco rhythm to you, and I have not yet used any visual aids to supplement the aural instruction.

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5 Suggested excerpts: The end of Harry James’s trumpet solo on Roll Em’, performed by the Benny Goodman big band in its 1937-38 Jazz Concert No.2 album; Poison Ivy, performed by the Coasters; Green Onions, performed by Booker T. and the M.G.’s, and Miserlou, performed by Dick Dale.
Nonetheless, as students, you should feel a little more confident, relaxed, and receptive now, because you have begun to take a more active role in the learning process, and you are beginning to acquire knowledge and skills that you can later apply to the flamenco rhythms. Moreover, I have brought your assignment closer to your reach by drawing analogies to things within your experience—popular American music—so that you can experience some feeling of success in your more active participation.

In learning theory, we would say that I "used your existing schema as a foundation on which to build new structures." In so doing, we can make a lesson less abstract and more concrete and accessible to students.

We inevitably and unconsciously build on our students’ existing schemata regularly in our classes, and we probably should more often do it consciously. When we introduce students to techniques of legal method and analysis, it pays to start with legal questions set in very familiar, concrete contexts. For example, as a vehicle to illustrate ambiguities in the application of precedent, I like to use a case that raised the issue of whether the Fourth Amendment permitted the warrantless search of a motor home; students can readily grasp the question of determining whether the motor home is more nearly analogous to a house or to a normal automobile, both of which were addressed in precedent. 6 Similarly, Joanne Koren 7 has created something

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6 In California v. Carney, courts were called on to decide whether police could search a motor home on probable cause but without a warrant. 471 U.S. 386 (1985), discussed in CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 60-61, 71 (3d ed. 1998). If the motor home were treated like a house, then precedent going back to 1925 would generally prohibit a warrantless search. Agnello v. United States, 269 U.S. 20 (1925), overruled in part, United States v. Havens, 446 U.S. 620 (1980). In contrast, if the motor home were treated like an ordinary automobile, separate precedent also going back to 1925 would permit a warrantless search if supported by probable cause. Carroll v. United States, 267 U.S. 132 (1925). So what is the correct analogy to the motor home—the stationary house or the mobile automobile? Neither analogy is clearly inherently better than the other, and it would be difficult to predict the rationale that would be adopted by a court to justify one analogy rather than the other. The California Supreme Court disapproved the warrantless search by emphasizing the privacy interests in the contents of the living quarters of a motor home, finding that the motor home therefore was more like a house than an automobile for purposes of evaluating the legality of a search. See People v. Carney, 668 P.2d 807, 810-14 (Cal. 1983). The United States Supreme Court reversed, approving the warrantless search on the rationale that the motor home was not only mobile like an automobile, it also generated reduced expectations of privacy because of the heavy administrative regulation of all motor vehicles. See California v. Carney, 471 U.S. 386, 390-94 (1985).

7 Director, Academic Achievement Program, University of Miami School of Law.
of a tradition at her school by using the very familiar and concrete facts of the McDonald's scalding coffee case as a means of exploring the range of relatively narrow or broad holdings that one might derive from a single case.

To take further advantage of students' pre-existing schemata, and to focus their attention even more narrowly on the concepts of legal method that we want to isolate, why not use a completely nonlegal context that illustrates legal method by close analogy? For example, to introduce students to the concepts of precedent, *stare decisis*, and interpreting the holdings of cases, I like to lead students through a problem in which parents are developing family rules of behavior for their children, incrementally, on a case-by-case basis, as each instance of conduct by a child draws a reaction from the parents. 8 By setting the problem in a familiar, nonlegal context, this exercise allows students to focus their attention entirely on the new concepts of legal method.

I soon discovered that several of our colleagues at other schools had independently developed much the same kind of illustration. Indeed, a few years ago, Thomas Patrick 9 sent me a letter describing an exercise in which he uses a family rule as a means of illustrating techniques of statutory interpretation.

But one that has inspired me most recently is the fruit-in-the-basket illustration used by Elisabeth Keller, 10 as described by Jane Kent Gionfriddo 11 in the *Second Draft*. 12 As described below, it is a wonderfully familiar and concrete means of demonstrating how the application of the holding of precedent to a new case often requires an inquiry into the rationale for the previous holding.

In Professor Keller's exercise, we first imagine that students have done a good job of identifying the narrow holdings of precedent. We can then use real or artificial fruit as props, both to illustrate the precedent and to illustrate a new issue. According to the narrow holding of one case, this red apple belongs in the basket. According to the narrow holding of further precedent,

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8 See CALLEROS, supra note 6, at 52-53, 132-33, 144-45, 160-62.
9 Lecturer in Law, West Virginia University College of Law.
10 Associate Professor, Legal Reasoning, Research & Writing, Boston College Law School.
11 Associate Professor and Director of Legal Reasoning, Research & Writing Program, Boston College Law School.
the green pear does not belong in the basket. The next case asks whether a green apple belongs in the basket. If we limit them to their unique facts, the narrow holdings of the previous cases do not answer that question, and we can imagine that the abstract rule, standard, or test applied in the previous cases is so general or ambiguous that it provides no certain answer. So students must employ skills of analogy and distinction to determine whether the green apple is more like the red apple or like the green pear. They might have some intuitive reactions, but after some discussion, they are forced to ask the question: "Is the green apple more like the red apple or the green pear in what respects?" Is it legally relevant that the new apple is green rather than red and should it be excluded from the basket on that basis, or does the legal policy give more weight to the shape, texture, and flavor that the red and green apples share to a significant extent?

Thus, students are compelled to examine the rationale of each of the previous decisions, to understand the reasoning by which the general rule produced the results in the earlier decisions. Of course, the rationale of the earlier decisions may be less than perfectly clear and thus subject to reasonable debate. Indeed, this demonstration can serve its purpose without ever identifying the general rule and rationales employed in the earlier decisions, so long as the students are convinced of the need to discover and apply the rationale for a court's previous applications of abstract standards to concrete facts. Moreover, the demonstration accomplishes that purpose simply and vividly by making effective use of objects and concepts that are familiar to every student. 13

In a variation of that demonstration, we can supply a very general rule and invite students to identify possible rationales for precedent that have some grounding in their common sense. Moreover, we can invite them to appreciate how legal rules often are malleable and indeterminate, so that the choice between legal conclusions is uncertain and dependent on discretionary choices among competing values or policies.

After all, how many times have first-year students asked us for the "correct answer" to a close legal question, and how many times have we explained that we can make arguments for either side, and that we can make a prediction about the outcome if

13 See id.
pressed to do so, but that we cannot identify a single correct
answer? Quite literally, the answer will be whichever of two or
more reasonable and permissible conclusions a judge or jury de-
cides to adopt. Even after I ask students to admit that they do
not, and cannot, know the “answer” to questions about the out-
come of football or basketball games yet to be played, they tend
to be skeptical of my professed inability to identify a single cor-
rect outcome to a hypothetical legal dispute.

Here’s a variation of the fruit-in-the-basket demonstration,
well-suited to serve as an introduction to my warrantless search
cases¹⁴ and to show students how easily different judges can
adopt different rationales to reach different conclusions on the
same issue in the same case. Suppose a grocer has decided in
previous cases to keep red apples in a display case in the win-
dow of her shop and to keep carrots in a bin inside, explaining
that she selects produce for placement in the window based on its
tendency to attract shoppers into the store. A new employee re-
ceives a crate of red tomatoes. Should he place the tomatoes in
the window alongside the apples or put them with the carrots
inside the store? The rule of the earlier decision provides some
guidance, but the rule is widely known in the store in suffi-
ciently general terms that it does not clearly identify the out-
come of the new case. Either location for the tomatoes is defen-
sible, and one answer is correct only in the sense that the
ultimate judge, the grocer, will approve of one decision and not
the other. Moreover, the application of the general rule to this
new case will call for the exercise of professional judgment,
which might vary from grocer to grocer, from judge to judge.

This exercise is fun because students have enough facts to
construct some specific arguments based on a general rule and
on the outcomes and possible implicit rationales of the prece-
dent. Can you think of some reason that might explain why the
grocer thought that her policy of attracting customers was fur-
thered by putting apples in the window and carrots inside the
store, and does that reason help the employee predict whether
the shopkeeper will want to put the tomatoes in the window or
in the interior bin?

Some students will probably argue that the red tomatoes
should join the red apples because things bright red might catch
shoppers’ eyes and attract them to the display. On the other

¹⁴ See supra note 6 and accompanying text.
hand, others may argue that the apples were justifiably placed in the window, and the carrots relegated to the interior, on a different rationale: ready-to-eat fruits like apples appeal to impulse shoppers, whereas vegetables like carrots are more likely the objective of a more deliberate shopper who has planned to enter the shop in any event to get salad fixings. On that reasoning, a tomato, regardless whether it is technically regarded as a "fruit," would probably belong with the carrots and other salad fixings. Some might even argue that—regardless of the rationale for the original decision—once the carrots were placed inside the store, the tomatoes ought to end up in the same place for the convenience of shoppers who want to find all of their salad materials in a single place.

With such an exercise, maybe students will more likely believe us when we assert that we cannot identify a single correct answer to a legal question. And they may thus be content to identify arguments based on sound reasoning. Of course, if the rationale for the previous decision is unclear or excessively general, this new case provides an opportunity to persuade the grocer to adopt a rationale that will favor one's client in this case and provide a better guide to future cases. Presumably, the case of the tomatoes will force the grocer to clarify her rationale, making the employee more confident—although not absolutely certain—about the proper location of a crate of bananas that has just arrived.15

In any event, by first addressing these principles of legal method in a simple, concrete, familiar, nonlegal context, students may be better prepared to apply them later to legal problems. However, my main point with these demonstrations is to remind you that the use of fruit to illustrate more abstract

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15 If the grocer's rationale for placing the apples in the window display case was to appeal to impulse shoppers by exposing them to ready-to-eat fruits, the bananas probably belong next to the apples in the window because they too are easily carried and eaten without special preparation. On the other hand, if the grocer placed the apples in the window simply because their bright red color tends to attract attention, then the bananas arguably should be placed in a bin inside the store, lest their yellow-green appearance detract from the bright display of the apples. Of course, that conclusion is not inevitable: the grocer might determine that the colors of the bananas complement those of the apples and make for a particularly exciting color combination. Moreover, regardless of the rationale for placing the apples in the window, if the apples are serving their purpose there, the grocer might want to place the bananas next to them in the window display simply to keep fruits close to one another for the convenience of shoppers. Thus, although clearer expressions of rationale in the tomato case may serve to refine the analysis in the banana case, ambiguities and uncertainties will remain.
concepts of legal method was someone else’s idea—from which I benefitted.

We can all do that for one another right now. Please take four or five minutes to turn to two or three of your fellow registrants, and discuss ways in which you have tried to make some lesson more concrete and less abstract to your students, or in some other way built on your students’ existing knowledge about things familiar to them. Or if you have not done that before, discuss ways in which you might consider doing it in the future.

[If time permits, the facilitator can ask registrants to share ideas with the entire group.]

Did anyone learn anything new from a neighbor? You were probably just beginning to sink your teeth into a fruitful discussion, and I'm interrupting you. But, we will not have time to satisfy our full appetite for sharing ideas now; we have accomplished our present purpose if we have whetted our appetites for further sharing later. The point is that together we have a wealth of ideas, and we constantly benefit from sharing them, through our publications, through the idea bank, through our e-mail discussions, and through our workshops at conferences like these.

And, let us not forget that we can learn from our students as well. For example, the Institute for Law School Teaching at Gonzaga interviewed a number of students about teaching techniques and recorded excerpts of the interviews in a videotape called Teach to the Whole Class: Barriers and Pathways to Teaching, produced by Gerry Hess, Paula Lustbader, and Laurie Zimet. Here is a brief excerpt that relates well to our current topic of making the study of law come to life in concrete terms. [Roll excerpt from section of videotape entitled “Learning in Context/Practical Teaching Methods].

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16 In the Summer 1998 Legal Writing Institute Conference, we did not have time to discuss our small-group conversations in the plenary session. However, I later asked participants to send summaries of their conversations to me by e-mail. A sampling of the responses is set forth in the Appendix.

17 Professor and Director of Institute for Law School Teaching, Gonzaga University School of Law.

18 Director, Academic Resource Center, Seattle University School of Law.

19 Director, Academic Support Program, University of California at Hastings College of Law. To inquire about obtaining a copy of the videotape, contact Paula Prather, Program Coordinator, Institute for Law School Teaching, Gonzaga University School of Law, Tel. (509) 323-3740, e-mail pprather@lawschool.gonzaga.edu.

20 Suggested Excerpt of Videotape: comments from students about the value of as-
We could add other examples, such as assignments to find a contract and rewrite it in plain English, or to find a warning label on a product and critique it for clarity.

But, it is time to return to our flamenco lesson. I tried to relate the flamenco rhythm to something familiar by showing you popular American music that shares the same time signature and general tempo. But something is still missing from my presentation. Even if I have good reason to focus on general process and skill-building, you still need a better idea of what is expected of you as a concrete objective, and you probably could benefit greatly if I provided a visual representation of our task. So, let us proceed in that direction.

**Instructor:**

Can anyone tell me how to represent a measure of 4/4 time visually?

In a simple representation, we might divide a measure of 4/4 time into four equal beats, with four quarter notes per measure:

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\( \frac{1}{4} \quad \frac{1}{4} \quad \frac{1}{4} \quad \frac{1}{4} \)
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Or, we could divide the measure into twice as many equal beats, called eighth notes:

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\( \frac{1}{8} \quad \frac{1}{8} \quad \frac{1}{8} \quad \frac{1}{8} \quad \frac{1}{8} \quad \frac{1}{8} \quad \frac{1}{8} \quad \frac{1}{8} \)
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The basic rhythm accompanying a *flamenco rumba* or *tango flamenco* consists of a *golpe* and 3 *palmas* for each group of four eighth notes of the measure. Let’s represent that in the following way:

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signments to interview A.F.D.C. recipients about recent changes in welfare law and to find and photograph easements.
Facilitator:

So, as students, how do you feel now? Does the visual representation and additional information help bring you closer to your goal?

Has my presentation also presented a problem for you? It probably has: I have identified your tasks in a foreign language, in flamenco terms of art, and it may not be clear to you what I mean by a *golpe* and *palmas*.

How often do you think that happens to our new students? Even when we try to avoid jargon, even when we believe that we are not playing hide-the-ball, most of our students undoubtedly have moments of confusion, during which we seem to be speaking a foreign language to them. And they have to puzzle it through, sometimes by asking us for clarification, but probably more often by brainstorming with one another.

Let us do that right now. Take a few minutes with some neighbors, share information and insights, take any of the information that I have given you today, and try to develop some theories about what I mean by *golpe* and *palmas*. Do not limit yourself to one narrow answer: experiment with different ways of executing this rhythm, of actually performing it, and see which way makes most sense to you as a way of accompanying and encouraging a flamenco guitarist and dancer. In just a few seconds, I ought to hear it get very noisy in this room.

[Participants should spend a few minutes alternately talking and performing rhythms in some manner, such as stamping feet and clapping hands.]

Did you learn from each other? We can gain much by facilitating interaction between students. Some of us do it by assigning small group projects, by inviting students to engage in peer review of their papers, or through other forms of collaboration.

To extend this collaborative learning, I asked students for the first time this year to communicate with me and with one another through e-mail and on the Internet. In some cases, elec-
Electronic communication simply allowed a student to consult with me outside of regular office hours. For example, a student might send me an e-mail on Saturday morning asking a question about a writing assignment due on Monday, and perhaps attaching a partial draft. I might check my e-mail once on Saturday afternoon from home and send a response to that student. And if the point raised is one of general application, I might send my response to the whole class. That might take me only a few minutes, it often is fun, and it will probably save me time later because it may help my students prepare better drafts for delivery on Monday.

Now, some of you have been doing sophisticated things with computers for years, including using electronic textbooks and providing feedback on computer files, but for now I want to return to the question of student collaboration. One tool that I found especially helpful in 1998 Spring semester was an Internet site that allowed students to engage in threaded discussions, discussions in which any student can either state a point on a new topic or can respond directly to any previous statement. If you and your students have access to the Internet, you can set up a threaded discussion forum in a number of ways. For convenience, I have used the Internet services provided by TWEN® from Westgroup and by the LEXIS-NEXIS Xchange Virtual Classroom®, so I can use those as examples.

I used these Internet discussion forums in a number of ways. For example, students in my Civil Rights Legislation class posted notices discussing and debating current events in civil rights, such as news reports of allegedly excessive use of force by police to disperse demonstrators. I required my Torts students to break into small groups, analyze one of two problems outside of class, and post their group analyses in our discussion forum. Any student in my class with a class password could then get on the Internet and read any of the group analyses and respond to one of them, if they wished. And they did.

I also asked my Torts students to draft and bring to class a product warning label that was stronger and clearer than one that failed to earn a summary judgment for the defendant in a case we studied in class. Some students voluntarily decided to post their warning labels on the Internet for all to see.

However, I got the most vigorous Internet discussion from my upper-division students in my advanced writing seminar. They had just finished an office memorandum on a wrongful discharge suit and were evaluating the case for purposes of making recommendations in an advice letter. The case presented some interesting legal issues, but it was not clearly worth a lot of money. Should the law firm take the case on behalf of the plaintiff? If so, what amount of potential liability should the students assert in their demand letter? If they were later to file a complaint, should the complaint certify that the amount in controversy exceeds $50,000, or is the disputed amount less than $50,000 and therefore within our state's limits for mandatory arbitration? We discussed these questions in the seminar, but a student generated further discussion after class on our Internet site. The resulting threaded discussion on the Internet was quite a bit more vigorous than the class discussion and included some strong opinions about professionalism and delivery of legal services to those with modest claims. I certainly would not use such communication as a substitute for face-to-face discussion, but the electronic communication turned out to be a good supplement.

So students certainly can learn a lot by talking to one another. In our latest question about flamenco rhythms, did you gain any insights by working with another person? Did everyone advance and test theories about the meanings of the terms golpe and palmas?

Instructor:

What are palmas? Remember the origin of this music. What would be the easiest way for a person of very modest economic means to provide rhythmic accompaniment to a singer, dancer, and guitarist? ["Palmas" is a Spanish flamenco term for clapping.]

How about golpe? That term must refer to something different than hand-clapping. Can we infer what we might do on the first beat of each group of four eighth notes? What other options besides hand-clapping do we have as we stand near the musicians and endeavor to accentuate the first beat of every measure? ["Golpe" refers to a blow, knock, or crash, from the Spanish verb, golpear, which means to beat, hit, or strike. In flamenco terminology, golpe refers to a downward stamp with the full length of the foot, although participants who were unfamiliar with the term might have reasonably guessed things like..."
finger snap, shout, or castañet beat, and any of those might have substituted adequately for a foot stamp.]

So the mystery is solved. We simply stamp one foot on the first eighth note, and we clap our hands on the remaining three beats of each group of four, and we repeat that rhythm throughout most of the song:

\[
g \quad p \quad p \quad p \quad g \quad p \quad p \quad p
\]

\[\text{(g = foot stamp; p = hand claps)}\]

Just remember to cup your hands and clap more softly when performers are singing or playing guitar so that you don’t drown them out. [Instructor demonstrates the proper rhythm and tempo.]

**Facilitator:**

So now, how is the class doing? Is the lesson over? Have we achieved our objective of mastering this rhythm so that we can perform it in practice? Of course not.

For one thing, if our ultimate objective were simply to understand this musical notation, I could have presented it in the first minute of class. But we have been equally concerned about understanding how this new rhythm relates to music that is more familiar to us; and, even more important, we have been concerned about the process of interacting and communicating with one another. After all, we will not be performing this rhythm in isolation; it must complement and help drive the music.

Second, we may think that we know this rhythm intellectually, but we will never integrate it with music simply by talking about it and visualizing it. We need to remind our ourselves of the way in which our legal method, research, and writing classes are superior to most of the other classes in law school. Those classes are especially effective because our students learn by doing—not just by reading, listening, and watching, but by doing.

So, let’s do it. And as we do it, let us take to heart the advice of two students at the end of the videotape, *Teach to the Whole Class*: [roll excerpt from the videotape in which one student encourages faculty to take risks and have fun and another
student stresses the need for faculty to listen to their students]. So, let’s take risks, have fun, and remember to listen.

Instructor:

First, let’s warm up one more time with music that is driven by a rhythm that is familiar to American ears: a Louisiana Zydeco swing by Clifton Chenier. We will practice coordinating our feet and hands by starting with this simple pattern:

\[
\begin{align*}
g & \quad \text{p} & \quad \text{p} & \quad \text{g} & \quad \text{p} & \quad \text{g} & \quad \text{p} \\
\end{align*}
\]

The first beat of every pair of eighth notes will be our golpe, or our foot stomp. That is the downbeat. The second beat of every pair of eighth notes will be palmas, or a hand-clap. That is the after-beat or off-beat. You will need to stand up for this. With a group this large, it will harder than you think to all stay in time, so start just with the golpe on the downbeat, and then add the offbeat hand clap after a few measures—and don’t forget to listen to the music.

[The instructor should lead the whole group in performing this rhythm, first without music, and then with music.]

All right, now that we have a feel for the process, let us shift to the flamenco rhythm and try it together, first just with me, and then along with some tango flamenco music.

\[
\begin{align*}
g & \quad \text{p} & \quad \text{p} & \quad \text{p} & \quad \text{g} & \quad \text{p} & \quad \text{p} & \quad \text{p} \\
\end{align*}
\]

Are we ready for court? Let's put this rhythm together with the whole package in a flamenco rhythm, accompanying flamenco artists, which might include singers, percussionists, dancers, and guitarists. We will start by accompanying a guitarist playing a very straight and simple tango flamenco rhythm in 4/4.

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22 Suggested music: First selection ("Boogie Louisiane") or seventh selection ("Boogiein' in New Orleans") from the "New Orleans" CD, recorded by the late Clifton Chenier and His Red Hot Louisiana Band, issued by GNP/Crescendo Record Co., Inc., 8400 Sunset Blvd., Los Angeles, California.
Now let’s provide *palmas* for a flamenco rumba, which is slightly more complex because the guitarist tends to play in a more syncopated fashion, and other performers are likely to embellish our straight and simple rhythm with counter-rhythms, all in 4/4 time.24

Congratulations. You all passed with Honors. Have a great conference!

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23 Suggested selection, if no guitarist is available: “De Badajoz a Madrid,” from the “flamenco puro ‘live’” album, recorded by Paco Peña and his group, and distributed for Clave Iemsa of Uruguay by Decca Record Co. in London.

24 Unless instructors have flamenco dancers, singers, and musicians at their disposal, I recommend at this point that they screen the final performance on Carlos Saura’s movie “Flamenco,” if a videotape copy is available. The final selection is a flamenco rumba, “Verde, Verde,” based on a García Lorca poem, and performed by the band Ketama.
APPENDIX

When asked to spend a few minutes sharing ideas for expressing abstract concepts in familiar, concrete ways in the classroom, the 1998 conference participants filled the room with a din of collaboration. As revealed in later e-mail correspondence, at least four of them shared stories from their personal experience or from the popular media that vividly illustrated some aspect of teaching or studying law. A fifth colleague described her experience this fall in adapting the “flamenco lesson” to an exercise within her area of artistic expertise, as a means of reminding her writing instructors of the challenges that first-semester law students must face.

Mary Beth Beazley: When my daughter Betsy was about two and a half years old, we were driving past a construction site one day. Glancing at the bulldozers and a huge pile of earth, she said, “What that?” In my best “mommy voice,” I replied, “Oh, Betsy, they’re building a restaurant there.” She considered my answer for about two beats and then said, “Out of dirt?” Now I tell my students that we’ll answer their questions, and we’ll think that we’ve REALLY answered them, but they’ll be thinking, “out of dirt?” So I encourage them to ask the follow-up.

Rebecca Cochran: In discussing close case reading, I tell my students about my older brother Mark, who is tall and skinny. When we were growing up, he just could not get enough to eat. We would both eat pork chops for dinner. I would use a fork and knife and cut the meat away from the pork chop bone. If bits of meat were left, I didn’t care or notice. Not Mark. He would pick up the pork chop and gnaw away at it until he had chewed every bit of meat away from the bone. Then, he would break the bone in half and suck the marrow out of the bone. I tell my students that I want them to read cases the way my brother Mark ate pork chops. It’s a colorful story, so they remember “the pork chop method,” and when they miss an issue or factual detail in a case, they say “oops—a piece of the pork chop went unnoticed and uneaten.”

Kate Lahey: To help my students understand why they

25 Director of Legal Writing, The Ohio State University College of Law, and President of the Legal Writing Institute at the time of the Institute’s 1998 Summer Conference.
26 Associate Professor and Director of the Legal Writing Program, University of Dayton School of Law.
27 Clinical Professor and Director of Legal Writing, University of Utah College of
need to spell out their legal reasoning, I bring in an evocative but ambiguous sculpture that our Dean of Admissions (Reyes Aguilar) has in his office. I put the sculpture at the front of the classroom, and ask each student to jot down their reactions to the sculpture or to write a few words about what idea or emotion they think the artist was trying to convey. We then compare our reactions, and naturally, we usually come up with about a dozen different reactions or interpretations. I explain that each judicial opinion is like a piece of sculpture. Each of us reacts so differently that a "naked citation" or factual recitation tells the reader no more about the meaning of a particular case than the title tells you about your reaction to the sculpture. If you want the reader to follow your analysis, therefore, you have to spell it out. This exercise would work equally well, I think, with an evocative painting or photograph, or even a Rohrsach ink blot.

Joanne Koren:28 My 10-year-old daughter, Jenny, was astonished when she looked at one of those "Milk ads" in a recent magazine. The ad shows Jimmy Smits and Dennis Franz. I explained that those were the actors on NYPD Blue—a show she knows I like to watch when I can. She was puzzled. I asked her why. She said "I thought Ennwhy Petey Blue was a girl." It just goes to show, we never really understand our "students'" context for learning!

Sue Liemer:29 When I trained my TA's in the fall, I was searching for a good way to remind them what it's like to be a beginner. I put the TA's in groups of three and told them they'd be learning something new to present to the class. Before I handed out the exercise, I hinted that it required athleticism, and I made them pick the person who would present their findings to the class. Of course the marine and the former California state wrestling champ, both muscle-bound males, were chosen to represent their groups. Drawing on my 27 years of dance study, I gave them an exercise with written directions for some very basic ballet steps, including many French terms, and a glossary for looking up the terms (the way 1L's look up all the legal jargon). One TA confessed to previous ballet training and excused herself from the exercise. The rest were good sports,
learned the material, laughed a lot while presenting to the group, and got the point. I would never have thought to do this very effective, very easy exercise, were it not for the insights into flamenco I gained in Ann Arbor.
Imagine preparing to become a bookbinder. You take a professional course in the history and theory of binding. You examine historic books, study their design, read what others have said about them, see pictures of the tools, even investigate the chemical composition of the boards. But in this course you never actually bind a book. When you finish the course, though, the instructor hands you a piece of paper that says: “Congratulations, you are now a bookbinder.” I imagine you’d ask for your money back.

To our shame, that’s how we teach in the legal academy.

This observation is scarcely original. Fifty years ago, Jerome Frank, perhaps the fiercest critic of the conventional case method, wrote: “If it were not for a tradition which blinds us, would we not consider it ridiculous that . . . law schools confine their students to what they can learn about litigation in books? What would we say of a medical school where students were taught surgery solely from the printed page? No one, if he could do otherwise, would teach the art of playing golf by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject.”

Frank wanted students to learn by doing, by working in law offices, much as medical students learn by working in hospitals. I propose something much more modest, and therefore more important, because it is at least theoretically possible to accomplish what I aim to suggest and develop, with your help: teaching how to locate, assess, and draw inferences from facts.

A few years ago I concluded that something was drastically wrong with legal education—perhaps we all come to that conclusion sooner or later—and, more, I became convinced that I knew the source of the defect: We do not teach or even talk about the
one thing on which lawyers spend most of their time, namely, ferreting out the facts. I began to talk about this problem with some of my colleagues, even to the point of hosting a lunchtime colloquium two years ago on teaching facts. I can confidently state that my enthusiasm for my discovery won me no converts.

I then realized that this problem, framed dramatically as "the failure of legal education," would make a dandy chapter in a book I have been claiming to be working on for the past ten years on the problem of lawyers in America (with my authorial colleague and good friend Tom Goldstein, now dean of the Columbia Journalism School). When the opportunity for this talk arose, I decided finally to take the plunge and to begin to think systematically about this problem of our failure to talk about facts. That way I could give this talk and write a chapter and have two for the cost of one.

Almost as an afterthought, I decided I should make a brief excursion to the library. I'm old enough now to know that most of what I think I have dreamed up has already been voiced by others. So I suppose I should not have been surprised to discover a literature, albeit a small one, about this very problem. It's nearly a century old. It is even denominated by a set of initials, though I think these are perhaps only a few decades old: EPF, evidence, proof, and facts.

EPF appears to have started with John H. Wigmore early in the century. (I suppose I should say early in the 20th century, in case these remarks are actually preserved for another year or two.) Wigmore was, no doubt, reacting to the case method of teaching that by the beginning of World War I had certainly established itself in the American law schools. Wigmore proposed that something more was needed, not merely an analysis of legal rules, even if from original sources, but an analysis of the persuasive power of the facts themselves. Why do we accept a statement as fact? What constitutes sufficient evidence? What makes a datum relevant to an issue? Wigmore devised a complex symbolism, with flow charts, that permitted the student to map the relationship between facts, and testimony about facts, and the likelihood that one assertion or another was true and "proved" some ultimate fact. ²

Wigmore, because he was dean of Northwestern, could mandate that all students take a course in which he taught how to use his symbolic logic to reason with facts and draw inferences from them. When he was no longer dean the course was no longer required, and when he passed from the scene the course was not taught. Episodically during the intervening decades, other voices, some of them powerful, have suggested that Wigmore's idea, or something like it, must be revivified. About a quarter century ago, clinical courses gained a foothold in the legal academy, and they may be understood as one answer to Wigmore's call. My clinical colleagues tell me that fact issues are now taught to some degree, certainly more so than in the days when the case method was not merely the supreme method but the sole method of teaching. Clinical courses focus on pre-trial litigation, trial advocacy, "skills" courses that teach interviewing (and perhaps negotiation), and various "live-client" clinics and subject-related workshops. These courses are important. But they are expensive and they do not reach very many students. The question I'm posing is whether we can do for the curriculum what research and writing courses have achieved during the past two decades. Can we design a course that will reach every student in the school?

We need to provide this course because the "case-trained lawyer is in danger of having a distorted picture of the world in which the pathological and the exotic obscure the healthy and the routine." Mariana Hogan, the New York Law School externship director, reports that students sent out to work in law offices around New York City commonly complain that they rarely do the "real work" of lawyers. What do they do instead? Frequently, it seems, they are asked to sort through a file to uncover the facts! Real lawyers, they assume, know otherwise. Two decades ago, a well known survey of the Chicago bar reported that only two "skills" of the practicing lawyer are really essential: "fact gathering" and "the capacity to marshal facts and order them so that concepts can be applied." Commenting in the early 1990s on this survey, Abraham P. Ordover noted that what lawyers "do, day in and day out, is investigate, gather, re-

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search, assimilate, and understand the relevance of facts. This holds true for responses all across the lines of expertise in the profession. And yet this fact work is, by and large, not taught in our law schools.  

Does this inattention to teaching about facts really make a difference? A half century ago perhaps it did not: when law school admissions were relatively low most young graduates received on-the-job training in firms or had the leisure in their own shops to learn it for themselves, and there was much less law. The difficulties that arise when schools ignore fact analysis were less apparent. Today I put it to you that we are verging on a crisis: After they graduate nowadays, law students do not get the personal training that their forebears received. The firms complain about it, the law offices complain about it, and woe betide the new solo practitioner who has no idea how to uncover or make much of the facts.

We call the places in which we work Law Schools. What we really mean is that they are Rules Schools. Law school teachers suppose, probably without thinking deeply on it, that they are masters of teaching "legal analysis." But what we really teach is "rules analysis," not all of analysis. And rules analysis, in the final analysis, is only a small part of the enterprise. We do it, I think, because it's easy to do. We don't have to get our hands dirty. We don't have to go out and look very hard for anything. It's all in the library or on line. We find the rules; we find articles about the rules; we find other people's comments about how the rules work or not; and we intuit (we call it analyzing) their difficulties. We do not get grimy from researching in the real world.

This was the critique, in part, leveled by the legal realists, but most of them went off in the wrong direction, still worrying, in the end, about rules and what accounts for them and how they are interpreted. The more important question for our students is how the rules are to be used. One of the most prescient of the realists, Jerome Frank, did worry about this question. He described himself as a "fact skeptic," but very few people have taken him up on the implications of his claims. Law schools, in

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7 JEROME FRANK, LAW AND THE MODERN MIND xi (6th printing, 1963 ed.).
the realists' view, ought to be Schools of Legal Problem-Solving, not just Schools of Facts or Schools of Psychology. I agree but suggest that we need not be so much "practice oriented" as "lawyer centered." I'm not concerned whether we teach the particular narrow technique of brief filing; the mechanics of practice are not the issue. But the theory of practice, as it were, is the issue. How a person carries out a profession ought to be central to our inquiry as teachers in schools. That says nothing about what we should engage in as scholars on our own. Individual professors should, of course, feel free to follow the muse, and hats off if they choose to write about economics or sociology or literature and law, or about law simpliciter. But when we consider what we are doing pedagogically we must do more and we must do it differently.

To this point I admit that I have been abstract. What facts? What about facts? We frequently bemoan the state of our students' knowledge about what we might call "college" facts or textbook facts. In constitutional law they demonstrate that they do not know how a bill is enacted or what impeachment means. In corporations, they do not understand the nature of the corporation or the stock it issues. We want students to come to law school with grounding in American government, economics, and history. We'd like them to know some psychology and sociology. Ignorance of these fields hampers efforts to learn many branches of law. But we do not seem to bemoan a more root ignorance: the ignorance of what the facts of the particular case are, or how to find them. At least we know where students can learn history and finance: the story of "history" may be found in a textbook. But there are no textbooks that can give us the "facts" of the cases we discuss beyond the meager statements contained in the casebooks we use. Graduate instruction in history presumably teaches the budding historian how to find the "facts" that will constitute a history: should we not do the same for the budding lawyer?

Consider an analogy to astronomy. We read that the universe is expanding. This "fact" is retailed to lay audiences in newspapers and news magazines when an astronomer discovers a far distant supernova with an unusual red shift. We are not told how the "fact" gets learned. It is not a fact like the fact that my car is parked outdoors, because we cannot observe it directly.

LEGAL EDUC. 301 (1961).
Therefore it is a deduced or inferred fact, a conclusion drawn from data. The process of inference isn’t given us. It’s derived from smudges on a photographic plate, or lines of numbers in a statistical table generated by a computer. Can you imagine not teaching the astronomy student that these are the data bits from which the inference to “facts” will become known? Yet that’s not how we teach our law students. Instead, we ignore how the data bits are to be found and largely overlook how they drive juries, judges, lawyers, and clients to their conclusions.

These deficiencies deeply affect us. Let me repeat some stories I have heard over the years from a friend who was once the director of a legal clinic at a well known law school. (He forbids me from naming it.) One year he decided, as an experiment, to staff the clinic in the evening with well-known professors at this well-known law school. Here is how the professors handled their clients’ cases.

Client 1. The client wanted a divorce. The lawyer-professor grilled her extensively about her husband’s philandering, reducing her to tears. At the debriefing he suggested to my friend, the clinic director, that he had given his client sound advice about how to shape her pleading, by reciting the ample evidence of her husband’s infidelities. Unfortunately, it turned out the professor-lawyer did not know the law of the state in which his law school was located but had in mind instead a 1920s’ statute from a different state to aid him in his interrogation of a 1960s’ problem. He had the law wrong, although he was doing what a lawyer should be doing.

Client 2. The client announced that he had to be halfway across the state the next morning for a court appearance. The professor-lawyer reached into his pocket and handed the client $50 and sent him packing. At a debriefing later that evening, this second professor wanted to know whether the office would refund the $50. He made absolutely no attempt to find out what the client’s underlying legal problem was.

Client 3. The client lived in a building where electricity for her and a neighbor was billed to her on a single meter. She asked the professor-lawyer whether she could be sued if she withheld from her rent the amount of her neighbor’s electricity. The professor said “yes.” That was his whole answer. He did not ask for the landlord’s name or phone number; he had no instinct to call the landlord and say “cut it out.” He did not ask about what kind of man the landlord was and whether he would cave in to pressure.
What's going on here? We see three characteristic errors of lawyer-professors who do not attend to the real job of solving a client's problem. The first lawyer had the wrong law. Using the right law is what we actually teach in the law schools and his was, of course, an elementary error. The second lawyer did not bother to ask about the problem. He arrogantly assumed that something else was at stake. He did not listen to the client or probe at all. He heard what he wanted to hear. This is a deeper mistake, one that we rarely dwell on in law school. The third lawyer did not derive from the given facts an operational plan. He failed to infer the solution from the factual statement. Here the professor presumably drew some of the facts out properly, but he did not draw them all out, and he did not do anything with them. Instead, he answered like a law school professor. He was not concerned about being a lawyer but about understanding the theory of the case.

The approach of these three lawyer-professors is characteristic, I submit, of the three ways in which we fail to teach about facts. First, we think we teach, though we do not do it well, that the facts we seek will be determined in no small part by the rules that are implicated in the problem. If you have the wrong law, as our first professor-lawyer had, then you will look for the wrong facts. Second, we do not teach students that it will be their job to probe for facts. Except perhaps for the limited enrollment clinical course, we do not explain how students can dig for pertinent facts. Third, we do not teach students that as lawyers they must infer from the facts how to proceed.

How can we teach the art of the fact? How can we go beyond the standard answer that we already teach the art of the fact when we teach, as we claim to do in all our courses, the art of analysis? One answer was given by an experimenter at UCLA in the early 1950s. A 44-hour summer course consisted of the following topics: eyewitness testimony; detection of deception; confessions and interrogation methods; "correlation of proof" (we are told to read Commonwealth v. Wentzel, 360 Pa. 137, 61 A.2d 309 (1948), to make this clear); investigative accounting, photographic evidence; medico-legal subjects; documents; impressions and moulages; ballistics; fingerprints; spectrographic analysis; blood chemistry; alcohol effect and detection; sound and recording devices; general investigative procedures. Now there's a pot-

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pourri. That's not what I mean by a course in facts and fact analysis, though some of the items on the list would undoubtedly be considered in any course we might devise. What's wrong with this list? The problem is that it conceives of the problem of facts as a set of specific tasks and techniques rather than as a general issue that cries out for its own analysis.

The issue is the abstraction we call facts that in their concrete manifestation permeate everything that lawyers do. Mastering the art of the fact requires an underlying skill that Irvin C. Rutter, a professor at the University of Cincinnati Law School, in 1961 called the skill of "fact management." As Rutter described it, various tasks of lawyers do not amount to different skills, but to operations requiring the exercise of the same skill: "In ordering the chaos, the lawyer proceeds by discovering relationships between initially unrelated segments of the picture and then placing these relationships in their further relationship to a total reality, so far as it can be seen." 10 Law, in this sense, is not a separate reality but a part of the total mass of facts, albeit a special kind of facts. . . . It is not a denial of the reality of language as a prime tool of the lawyer to say that with this intimate identification with the facts, the lawyer goes beyond the words in which they have been presented to him, penetrates to the reality behind those words, and emerges with words as he chooses them to describe the reality as he wants others to see it. Of critical importance in guiding this process of selection and molding is that expertness in relevance to the purpose sought to be achieved, which is the crux of the "art" of being a lawyer. 11

Or, as William Twining, one of the most dedicated students of the problem, has put it: "[T]he serious study of reasoning in regard to disputed matters of fact is at least as important and can be at least as intellectually demanding as the study of reasoning in respect of disputed questions of law." 12

What, then, might such a course comprise? I tentatively suggest some possibilities, perhaps not ordered particularly usefully. I hope you will help me add to this laundry list and sug-

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11 Id. (emphasis in the original).
gest how the laundry list can be transmuted into a complete fashion statement.

First, we must show students how difficult it is to uncover facts, and how testimony about an event is a “fact” of a very different kind. We can do the hoary demonstration, the one that sends someone rushing into the classroom and that asks students to say immediately what they saw. We can also ask the same question a day or a week later. Moreover, we can tape these encounters, and students might even realize the taping is going on. We might wait to see how long it would take for some student to point out that the recollection is unnecessary because a tape has captured it all. Of course then we need to unearth the “facts” from the tape.

Second, we should devise means of permitting students to efficiently extract facts from a situation. The “live-client” clinics do this in an expensive way when each student undertakes to interview a witness. But we can easily provide all sorts of canned records, transcripts of testimony, documents, police reports, and the like, from which the student must sift the relevant and material from the useless and redundant.

Third, we must force students to analyze the nature of facts and to learn that facts are like animals. They come not only in different species but in different genuses and families. For example, I use a simple exercise in an upperclass writing course in which students are told they are assistants to the mayor of a particular town. One of the mayor’s key assistants has been involved in an automobile accident. The assistant is the head of the Mayor’s Campaign against Drunk Driving, among other things. The students are given a file that consists of transcripts of an investigator’s discussions with each of the witnesses to and victims of the accident; the file also contains several newspaper accounts of the accident. One of the accounts is headlined: “Drinking and Driving?” The Mayor’s instructions are to write a memorandum detailing only the facts. The Mayor specifically instructs that he does not want to read speculation, rumor, and innuendo. Of course, it turns out that the transcripts are full of rumor, speculation, and innuendo. Moreover, the witnesses disagree on virtually everything. The record is, though, definitively devoid of any statements or other evidence that anyone had been drinking. The students have great difficulty writing this memorandum. They usually keep it very short, and predictably write in this form: “Mr. Mayor, Witness 1 says X. Witness 2 says Y,” etc. Over the years, I have discovered that few—less than 10
percent—of the students will tell the mayor that there is no evidence of drinking. When I ask in class after the papers are turned in why the students omitted this information, I am invariably told: “That wasn’t a fact.”

Fourth, we must consider the vastly difficult problem of assessing and evaluating facts. In this same exercise, students almost never tell the mayor that the accident itself was routine, though that is the only conclusion that can be drawn. Again, students resist, saying that a conclusion is not a fact. Why isn’t it? What is a conclusion, if not a fact, although a different kind of fact from, say, the fact that the cars crashed, or the recollection that one car was traveling at 50 miles per hour? This issue is either the same as, or closely related to, the problems of inference and proof. I will not detail those problems here, but simply point to a current example: How does Microsoft’s insistence that Internet Explorer be a part of the Windows operating system “prove” that the company has violated the Sherman Act? What is the connection between individual facts that allow them to be added up to a larger truth? How are inferences drawn? When are they valid? What kind of logic or logics are at work? What is proof, anyway? Is it merely the subjective reaction of the decision maker, so that we may appeal to his emotions to get a result? Or is it something else, and what?

Fifth, we should find better, more direct, and more structured ways of teaching students how the rules they analyze are to be used to extract the facts necessary to make the case, to avoid a bad result, or to accomplish a particular objective.

Sixth, we must persuade students that the facts are not merely irreducible elements of the universe, but shards and flashes of nuance that it is the lawyer’s task to assemble into a story that will achieve the client’s end. This last problem, I hope you will agree, is what allows us, as writing teachers, to claim this territory for ourselves, and to wrestle with a pedagogy of facts.

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There have been powerful objections lodged against the suggestions that the EPF adherents and I have made. Twining discusses and answers them in his 1984 summary article, “Taking Facts Seriously.” I will not repeat his listing of the arguments and his counterarguments. Most criticisms of a proposed “fact syllabus” boil down to the claim that law schools have no time to teach “soft” skills or notions rooted in common sense that have been learned elsewhere. But these criticisms are almost
wholly beside the point: They miss the distinction between a general skill and a particular practical requirement; they underestimate the difficulty inherent in the problem; they radically assume common sense for much that has not yet been investigated; and they assume without evidence that these things have been taught elsewhere. Moreover, the tables can be turned: After all, isn't rule handling a matter, ultimately, of common sense? Yet we spend most of three years on rules handling, of detecting, understanding, distinguishing, and applying rules. Why should we do less about fact handling?

To get a flavor of the general objection, consider a short article in 1955 by Jack B. Weinstein, then an associate professor of law at Columbia. He wrote that there was no need of a separate course on facts because this subject was being (or could be) taught in its appropriate place in other courses. Weinstein pointed to three meanings of "facts skills": (1) "the ability to differentiate between facts which are and are not legally significant"; (2) "the knowledge of how courses of conduct may be planned to shape the material facts"; (3) "an awareness of how evidence of the facts may be gathered and used in litigation." 13

On the first point he said: "Teaching a law student brought up on the case method the importance of differentiating the material from the immaterial would seem to be about as unnecessary as teaching an infant the importance of milk. The infant suckles to live, the student reads the facts—and I speak now of what the writer of the opinion says are the facts—and learns their relationship to the law in order to survive at the law school and later. . . . The case method is uniquely conceived and designed to build a foundation for an understanding of the relationship of facts to law and for skillful handling of facts." 14 Weinstein's fallacy is that it is not the student but the lawyer in the case who had to sort out the immaterial. If the lawyer was at all skillful, immaterial facts would not appear in the case at all. True, the lawyers and judges may debate about the materiality of what remains, but that's not the whole of it. Weinstein comments: "For myself, if I were satisfied that our students were fully trained to know what to look for in the way of law, and, therefore, in the way of fact, it would be enough." 15 That's a

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14 Ibid. at 464-465.
15 Ibid. at 465.
pretty big "therefore." And, I believe, an illogical one.

On the second point, he said: "Are our law schools doing any good in [the area of teaching how to shape the facts]? To ask the question is almost to answer it. Lives there a student so dense that he leaves the course in contracts without understanding that an agreement must have consideration or equivalent if it is to have the legal effect that, presumably, he wants it to have?"16 "What the student learns explicitly and implicitly is that he can control the facts in many cases to minimize the chances of litigation."17 The fallacy here is that Weinstein stated an empirical proposition but, dare I say it?, offered neither evidence nor proof. He was content with a rhetorical flourish. At least in our era we might well wonder whether the student knows what the particular "thing" is that constitutes "legal consideration." Sure, the student knows the rule, and that's all that Weinstein points to. He avoids the issue of whether one party's muttering "I'll try to raise the money" amounts to a binding commitment. The issue for us isn't whether the student knows that the abstraction "consideration" is required to cause a legal effect but whether the student recognizes the abstraction in the flesh amidst a jumble of bones.

On the third point, he said: "What concerns [many teachers] is the evidence of the facts. Here, as in Plato's image of the cave, we deal not with the facts, but with the shadows and reflections of the real world. The problem is how to catch the few distorted rays of light available and focus them for the better education of courts and juries."18 We might add that such a focus is needed not just for courts and juries, but for all those affected by the decisions for action for which a client seeks the lawyer's help. Weinstein says that this teaching is already being done, in civil procedure and evidence courses (and even in torts and contracts). He provides a long list of rhetorical questions, his answers to which are evidently quite different from mine. He asks, for example, "[w]hat does Hickman v. Taylor and its progeny mean to a student if he has no inkling of investigative procedure in large corporations and small?"19 Exactly, I say. We have no way of knowing whether much of what we teach means anything at all. Furthermore, as the rules have exploded in

16 Id.
17 Ibid. at 466.
18 Id.
19 Ibid. at 468.
number we spend more and more time on that explosion and less and less, I venture to guess, on the underlying issues.

Now professors may think that they are spending time on fact analysis. But in a candid moment they would likely say that the time is mostly by implication. And they can have no assurance that the implications are being learned. After all, if implicit time is sufficient, why not spend that time implicitly on the rules, and explicitly on something else? Why not just assume knowledge of the rule and ask how a particular problem would come out? We don't because we believe that explicit discussion is imperative. No less should we be spending time explicitly discussing the nature of the facts that constitute the legal problem and its solution.

Weinstein says "to a large extent the burden of teaching the use of facts on trial is . . . on the evidence course. Much of the detail is adverted to during the course. But it is quite true that the evidence teacher does not purport to teach the art of advocacy; rather, he emphasizes the rules and some of their psychological, legal, and social geneses and implications. An alert student will, however, undoubtedly get a good deal of practical insight from such traditional discussions? Why does the student have to be alert? What about those who are not alert?

Weinstein wrote of an evidence exam he gave "which consisted of the rambling story told by a client who had been injured in an automobile accident." He "asked the class to outline its investigative steps and the impact of the rules of evidence on the way it would prepare for trial and present the evidence expected to be revealed by such investigation. The answers showed a surprising carryover into the practical world." Apparently, not even Weinstein expected the carryover. Just what is it that we are afraid of that precludes law schools from delivering instruction on these issues explicitly?

A single course may not make a difference. But a single course conjoined with a reorientation of other courses might well. My proposal is, I suggest, the exact parallel to our current experience with the teaching of writing. Writing was once, perhaps, supposed to have been taught in the regular courses, or at least absorbed in them. That didn't work, and almost every law school today has a formal first-year course in writing and research. But we are also hearing calls for "writing across the cur-

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20 Ibid. at 469 (emphasis added).
21 Id. (emphasis added).
riculum”; a single writing course is not enough. For the same reason, we need “facts across the curriculum,” as well as a facts course. Weinstein asked that those who advocate the teaching of facts “continue their earnest efforts to educate the teachers of the usual substantive and procedural courses.” We need both types of courses, and it is the writing professionals who might best be employed in the task.

I hope readers will join me in this endeavor. We need now a lively discussion about ways and means. What new course might address the art of the fact? What techniques and problems and readings can spread the inquiry across all the courses that law schools offer? How can we initiate the movement toward facts?

22 Ibid. at 471.
A Select Legal Bibliography on
Facts, Evidence, Inference, Explanation, and Proof in the
Legal Setting

Compiled by JETHRO K. LIEBERMAN


Jerome Frank, Law and the Modern Mind (Garden City: Anchor Books, 1963 (1930)).


A Select General Bibliography on Facts, Evidence, Inference, Explanation, and Proof

Compiled by JETHRO K. LIEBERMAN

Barry Barnes, T.S. Kuhn and Social Science (New York: Columbia Univ. Press, 1982).


Edwin A. Burtt, *In Search of Philosophic Understanding* (Indianapolis: Hackett, 1985 (1960)).


Across the Disciplines (Chicago: Univ. of Chicago Press, 1994).


Martin Hollis, *Models of Man: Philosophical Thoughts on Social Action* (Cambridge: Cambridge Univ. Press, 1977).


Patrick Hughes & George Brecht, *Vicious Circles and Infinity: A Panoply of Paradoxes* (Garden City: Doubleday & Co. 1975).
Roger S. Jones, *Physics as Metaphor* (Minneapolis: Univ. of Minnesota Press, 1982).
Peter Lipton, *Inference to the Best Explanation* (New York: Routledge, 1993).


Heinrich Schulz, Concise History of Logic (New York: Philosophical Library, 1961).


Raymond Smullyan, The Lady or the Tiger?: And Other Logic Puzzles (New York: Quality Paperback Book Club, 1992 (1982)).

Raymond M. Smullyan, *This Book Needs No Title: A Budget of Living Paradoxes* (New York: Simon & Schuster (Touchstone), 1986 (1980)).


Alan Sokal and Jean Bricmont, *Fashionable Nonsense: Postmodern Intellectuals' Abuse of Science* (New York: Pica-
dor, 1998).


Patrick Suppes, *Introduction to Logic* (Princeton: D. Van Nos-
trand, 1957).

Stuart Sutherland, *Irrationality: Why We Don't Think Straight!* (New Brunswick: Rutgers Univ. Press, 1994).


gumentation* (New York: Cambridge Univ. Press, 1989).


Andrew D. White, *A History of the Warfare of Science with Theology in Christendom* (New York: George Braziller, 1955 (1895)).


A History of Writing Advisors at Law Schools: Looking at Our Past, Looking at Our Future

Jessie Grearson and Anne Enquist*

I. INTRODUCTION

The tradition of having interdisciplinary scholars in law schools is well established.¹ Economics, political science, business, and ethics professors, to name but a few, have often taught or team-taught courses in law schools at the junctures where their disciplines intersect law.

It should not be surprising, then, that composition and rhetorical theory scholars, i.e., writing professors, are teaching in many law schools across the country. After all, writing is not just connected to law: it is central to the legal profession. The law itself is, for the most part, written language in the form of statutes, regulations, constitutions, and judicial opinions; and words, both spoken and written, are the lawyer's tools of the trade. Consequently, the specialized knowledge and expertise of the writing professor has direct application to much of what a law student must learn, particularly in his or her legal writing courses.

Thirty-four law schools across the country have, to date, decided that a writing professor's expertise is needed in their school and have added thirty-nine writing professors to their legal writing programs.² (See Appendix A.) These writing professors, most of whom do not have law degrees, are known sometimes as Writing Advisors and sometimes as Writing Specialists.

The authors, themselves Writing Advisors at The John Marshall Law School and Seattle University School of Law respectively, have recently surveyed both Directors of Legal Writing and Writing Advisors across the country to learn more about the

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¹ A search of the AALS Directory of Law Teachers on Westlaw shows that there are currently over 125 non lawyers teaching on law school faculties around the country.

² Since the survey was conducted, two additional Writing Advisors have been added to this list.
The Journal of the Legal Writing Institute

phenomena of Writing Advisors in law schools. This article will report the results of that survey. First, however, we will give a brief history of the events surrounding the arrival of Writing Advisors at law schools, including the rise of the writing-across-the-curriculum (WAC) movement, and then we will describe how these events set the stage for Writing Advisors at law schools. Second, we will use the data we obtained from the survey to present a snapshot of the current field of Writing Advisors in law schools. This snapshot will include information about who is filling these positions, what responsibilities they have, and how much they are paid, as well as the words of the Writing Advisors themselves as they describe the rewards and challenges of these positions. Third, using the survey data, we will discuss how current Writing Advisors may shape their roles within their law schools and how law schools that are considering adding a Writing Advisor position to their program may develop such a position. Finally, we will look at the future of Writing Advisor positions and discuss the challenges and opportunities for Writing Advisors in the next decade.

II. HISTORICAL EVENTS SETTING THE STAGE FOR WRITING ADVISORS

To best understand the history of Writing Advisors at law schools, it is helpful to consider the surrounding cultural events that were changing the nation and shaping its views on teaching writing during the time the first of these positions developed. Dating back to the 60's, a number of factors worked together to create an environment that made it natural, if not inevitable, that Writing Advisors would be part of the law school environment. This brief history focuses particularly on the 60's and 70's—the decades preceding the advent of Writing Advisors at law schools.

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3 The authors would like to thank Professors Elizabeth Fajans, Nancy Jones, and Mary Barnard Ray for the suggestions they made about the survey questionnaire; Assistant Dean John McNamara for his help formatting the survey; Jennifer O'Reilly for her assistance with data entry; Lori Lamb for her invaluable help tracking down and organizing the surveys; Professor Julie Spanbauer for her ideas regarding drafts of this article; Viren Sapat for his cheerful willingness to create charts depicting the survey data, and Professor Judith Maier for her generous help with the presentation of the survey results at the 1998 Legal Writing Institute conference in Ann Arbor, Michigan.

A. 1960's

The 1960's were, of course, a remarkable era of social and educational reform. The 1960's civil rights movement, combined with that decade's massive boom in higher education that was itself a response to the baby boom, prompted increased numbers of students from increasingly diverse backgrounds to seek access to higher education. The 60's also witnessed the rise of the newly professionalized writing professor, with an accompanying boom in membership to organizations like the National Council of Teachers of English (NCTE) and the Conference on College Composition and Communication (CCCC). This new writing professional was influenced at such national conferences by teachers like Peter Elbow, Donald Graves, James Moffat, and Kenneth Macrorie, whose pedagogies, a product of the times, are best characterized as anti-authoritarian, student-centered, focused on class as community and writing as a means of learning? Meanwhile, British scholar James Britton was developing the ideas that would form the basis of the WAC movement.

B. 1970's

In the 70's these factors combined to produce the "widest social and institutional demand for writing instruction" that the nation had seen—a demand catalyzed by a mid-70's outcry against perceived illiteracy and declining standards. "Why Johnny Can't Write," the now famous December 8, 1975, Newsweek article, captures the degree of concern and the inflammatory language of that national discussion with its opening words, "If your children are attending college, chances are that they will be unable to write ordinary, expository English." The article continues by predicting literary culture's demise and by characterizing America's youth as showing a "massive regression toward the intellectually invertebrate." The article also docu-

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5 Id. at 274. For example, in 1960 there were 2,006 institutions of higher education and in 1980 there were 3,125—a 50% increase in a 20 year period.

6 Id. In fact, it was during this decade that growth in the composition faction of CCCC began to outstrip that of its communication membership—teachers who focused on teaching speech.

7 Id. at 273.

8 The WAC movement is particularly relevant to our research because Writing Advisors can be seen as a classic example of this movement: the professional writing teacher moving into a particular disciplinary environment.

9 Id. at 275.

10 Merrill Sheils, Why Johnny Can't Write, Newsweek, Dec. 8, 1975, at 58.
ments the reaction of graduate schools of “law, business and journalism” with officials reporting “gloomily that the products of even the best colleges have failed to master the skills of effective written communication so crucial to their fields.”

Part of the solution to this perceived crisis came in the form of the WAC movement, a movement influenced greatly by the work of James Britton. The 70’s and 80’s were a golden time for the WAC movement in the U.S.; according to Russell, WAC’s success distinguished it from other cross-curricular programs since the 1900’s. WAC provoked this “unprecedented interest” in educators for several reasons: 1) the movement explored the link between language and learning; 2) it harnessed educator’s efforts to transform faculty attitudes about teaching writing and coincided with the increasing professionalization of the writing instructor; 3) it coincided with new institutional goals of retention that arose from a post-60’s ideological and cultural consciousness shift toward open admissions inclusion; 4) it coincided with a boom in higher education that created more schools for more students of increasingly diverse educational backgrounds; and 5) it coincided with a social and institutional demand and accountability for writing instruction in light of a new scrutiny on “declining standards.”

C. Effect on Law School Environment in the 80’s and 90’s

These same factors that prompted heightened national attention to the teaching of writing influenced the law school environment as well, because increased numbers of diverse students also began arriving at law schools a few years later. By the late 70’s and early 80’s, law school teachers were beginning to feel the effects of the new and diverse students yielded by 70’s undergraduate open admission policies, as well as a growing sense of institutional accountability to address the needs of this newly diverse student body in the very traditional setting of law school.

11 Id.
12 Russell, supra note 5, at 275. As Russell notes, it is no coincidence that this “crisis" occurred as diverse students with their accompanying range of diverse talents sought access to the traditional realms of higher education.
13 Id. at 283. (Noting that the first workshop was held in Pella, Iowa).
14 Id. at 275.
15 These students were racially and economically diverse as well as diverse in their levels of academic preparation.
D. The Introduction of Writing Advisors

To address these needs, many law schools first looked within and tried hiring students to help other students who were poor writers. The mixed or poor results of many of these early tutorial arrangements convinced several law school deans that they needed to look outside the law school walls for someone who had real expertise in teaching writing.

1. The First Wave—"The Law School Tutor"

Because many law schools are part of a larger university with an English department, a few law schools as far back as the 60’s and 70’s looked to these English departments for this expertise and hired an English professor to come to the law school to work with a selected handful of students. For example, at the University of Puget Sound School of Law, the dean would simply call the chair of the English department, who would then select a member of the English department who was an expert in composition and rhetoric to spend a few hours one day a week over at the law school tutoring individual law students in writing. The “law school tutor” rotated through a number of members of the composition and rhetoric faculty. Even though these individuals were undoubtedly delighted to see such a clear example of writing-across-the-curriculum at work, it was not too surprising that these individuals were far more invested in their positions in the English department than in their smaller, temporary roles in the law school. Very few, if any, had professional contact with other Writing Advisors at other law schools. The work was viewed as more of a professional courtesy between the English department and the law school.

At free-standing law schools that were not part of a university, such as Brooklyn Law School, the dean advertised for persons with credentials in English composition and rhetoric to serve as a writing tutor. Originally many of these early tutors were part-time faculty or staff whose primary or exclusive role was to do remedial work in writing with weaker law students.

At another pioneering school, the University of Wisconsin Law School, the dean advertised for a writing tutor originally because the school had made a special commitment to minority law students. This desire to provide remedial help for minority law students who needed extra work on their writing laid the groundwork for what grew into an additional writing conference resource available to all students.
2. **The Second Wave—“The Career Writing Specialist”**

The 1980’s began with three significant events that helped synthesize and crystallize the law school community’s thinking about legal writing and how and why it should be taught. In 1980, the first American Association of Law Schools’ workshop on legal writing was held. In the following year, the Plain English Movement, a kind of “consumers’ rights” approach to eradicating legalese, was “born” with the formation of a Plain English Committee. The third event was the Albany Law Review’s publication of a symposium issue on the teaching of legal writing.

As part of that symposium issue, Lynn Squires wrote an article describing her role as the Writing Specialist at the University of Washington School of Law.¹⁶ Her article drew the attention of law school deans and legal writing directors who began to realize that a Writing Advisor could play a key role in their legal writing program. Increasingly, Writing Advisors were not limited to remedial tutoring, but expected to share their insights and strategies about teaching writing with the legal writing faculty. Through their Writing Advisors, many legal writing programs learned about new approaches to teaching writing, most notably the process approach, that were being developed by English departments and could be transplanted to the law school.

A few deans began to ask for bigger commitments from their English department tutors. For example, the dean of the University of Puget Sound Law School now wanted the English department tutor three half days a week. Furthermore, he wanted the same person from year to year. He also wanted the tutor, who was now thought of as a Writing Advisor, to be available to any student who wanted to work on his or her writing. This scenario was replicated at several other law schools around the country.

By the mid 80’s Writing Advisors had been added at a number of other law schools, including Southwestern University School of Law, the University of Florida College of Law, New York Law School, the University of Bridgeport School of Law at Quinnipiac, the University of Missouri-Columbia Law School, Seton Hall School of Law, City University of New York at Queens College School of Law, the University of Dayton School of Law, the University of Texas Law School, North Carolina

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Central University Law School, Notre Dame Law School, Howard University School of Law, and Northeastern University School of Law.\textsuperscript{17}

The expanded role that many law schools wanted their Writing Advisors to play made an immediate difference. Writing Advisors began working with a wider spectrum of the law student population. Instead of meeting with only the weakest writers, the Writing Advisors were finding that more and more students from the middle and top of the class were signing up for writing conferences with them. Law students, who are naturally quite competitive, quickly learned that there was an extra resource that they could use. They sensed a possible advantage and started flocking to writing conferences with Writing Advisors. Suddenly having a Writing Advisor a few hours a week was not enough to meet student demand. As a consequence, several of the positions were increased to half-time, three-quarter time, or even full-time positions.

As Writing Advisors spent more time at law schools, they quite naturally began to develop expertise in the specific types of writing lawyers do. They were also in a unique position to critically examine legal discourse. With the confidence of another discipline's preferences in writing, they were a bit more willing to question some of the unexamined conventions of legal prose, particularly in areas that related to conciseness, precision, organization, and writing style.

A number of other changes started to take place. A few Writing Advisors now had joint positions with both a law school and an English department. Several others found that because of the added time they were spending at a law school, they were increasingly invested in the work they were doing with law students. Indeed, many enjoyed the different way their expertise was regarded at the law school. In contrast to undergraduate students who often treated writing as a curricular hoop through which they had to jump (usually in the form of Freshman Composition 101), law students saw writing as critically important to their success as lawyers.

\textsuperscript{17} In a very few schools like Southwestern University School of Law, the English professors became the primary teachers of the legal writing class. In at least one school, Notre Dame Law School, the English professor (Teresa Godwin Phelps) became the Director of Legal Writing, and at the University of Florida College of Law, the Writing Specialist (Gertrude Block) became the Coordinator of Legal Writing.
Meanwhile, in the summer of 1984, the first national legal writing conference was held at the University of Puget Sound, and the Legal Writing Institute was established shortly thereafter. At that first conference and at the second one in 1986, several of these Writing Advisors became acquainted. Prior to the conferences and the Institute, they had worked in isolation, for the most part unaware that there were other Writing Advisors in other law schools scattered around the country. Now they began to realize the potential for a professional community.

In May 1988, in the fledgling newsletter of the Institute, the Second Draft, the following notice was posted:

Elizabeth Fajans of Brooklyn Law School and Anne Enquist of the University of Puget Sound Law School are interested in organizing a network of people who are currently working in legal writing programs as Writing Advisors, writing consultants, or writing specialists. The purpose of the network would be to establish a forum for the exchange of ideas and for the discussion of issues related to these positions. If you are currently working in one of these capacities, please send you name and address either to . . . Betsy Fajans . . . or Anne Enquist . . . .

Using the responses to this notice, Betsy Fajans and Anne Enquist organized the first Writing Advisor meeting, which occurred at the Legal Writing Institute conference in the summer of 1988. From that first meeting, the group compiled a list of fourteen Writing Advisors and named itself “the Writing Specialists Network.” The members composed and shared descriptions of their individual positions, exchanged copies of favorite handouts, and compiled an annotated bibliography, which Mary Barnard Ray published and distributed. Ray also developed a library of resources for the Writing Specialists Network housed at the University of Wisconsin Law School. In addition, three members of the Writing Specialists Network were on a panel at the 1988 Institute conference explaining the work Writing Advisors were doing in law schools.

In 1992, the Writing Specialists Network renamed itself the “Writing Specialists’ Association” and started a regular column in the Second Draft, which was no longer a fledgling newsletter and now had a mailing list of well over 1,000 members of the Legal Writing Institute. The column continues today.

Despite their relatively small numbers and lingering outsider status, Writing Advisors began to play significant roles in
the larger community of legal writing professionals. Four Writing Advisors served on the national Board of Directors of the Legal Writing Institute, with one of the four serving as the Chairman of the Board and as the editor of The Journal of Legal Writing. Another Writing Advisor served as the editor of the Second Draft and had a regular column in the Texas Bar Journal. Yet another Writing Advisor wrote regular columns for many bar journals including the Florida Bar Journal, the New York Bar Journal, and the Illinois Bar Journal. By 1992-93, six had published articles in the field, and six were authors or co-authors of books about legal writing. Several more had made presentations about legal writing at national and regional conferences.

3. The Third Wave—“Growing Pressures —> Growing Numbers”

In the last four or five years, the number of Writing Advisor positions has doubled, possibly because of the success of some of the earlier Writing Advisors but also almost certainly because of some growing pressures on law schools throughout the 90's.

Perhaps the most obvious pressure has been the national decline in applications to law schools, which started in 1992 and which virtually every law school has experienced to some degree. The decline in applications has forced all law schools to focus more and more on retaining the students they invest in attracting, and one-on-one conferences with a Writing Advisor appear to be an effective retention strategy.

While the decline in applications is undoubtedly connected to the demographic lull of the post-baby boom “baby bust,” it has also been fueled by the tightening job market for lawyers. In an effort to give their graduates a competitive edge, law schools have looked to their legal skills and legal writing programs for training that will impress prospective employers. Here again, having a Writing Advisor is further proof that a law school is committed to teaching its students how to write well.

The profession itself has been vocal in its appeal to law schools to develop their legal writing programs. In 1992, the MacCrate Report explicitly urged law schools to intensify their efforts to teach writing: “In view of the widely held perception that new lawyers today are deficient in writing skills, further concerted efforts should be made in law schools to teach writing
at a better level . . . ."\textsuperscript{18} The 1993 Garth Martin study expanded on the MacCrate Report and revealed that hiring partners at law firms most valued capable writers,\textsuperscript{19} thus confirming law schools' assumptions that emphasizing writing would help their graduates get jobs. More recently, in 1996, the ABA recodified its standards to include an explicit emphasis on analytical skills including "oral and written communication."\textsuperscript{20} The bar exam itself shows an increasing trend toward using the Multi-state Performance Test (MPT), which has a written component that requires students to demonstrate their analytical and writing abilities.\textsuperscript{21}

In 1997, the value of Writing Advisors to legal writing programs was recognized in the \textit{Sourcebook on Legal Writing Programs}, which was published by the ABA Section of Legal Education and Admission to the Bar as a "compilation of those parameters and common features" "that define successful programs"\textsuperscript{22} teaching legal writing. The \textit{Sourcebook} lists seven responsibilities that Writing Advisors, or Writing Specialists, commonly have: holding student conferences, training legal writing teachers, providing writing workshops, training law review and advanced moot court students, teaching upper-class advanced writing courses, reviewing upper-class seminar papers, and publishing scholarly articles and books.\textsuperscript{23} In addition to recognizing the Writing Advisors' value as experts in writing, the \textit{Sourcebook} stated that "they may have a greater understanding of teaching methodology than the typical law teachers who have had little or no background in teaching."\textsuperscript{24}

While the \textit{Sourcebook}'s recognition of Writing Advisors was an important milestone for this group of professionals, the most significant indicator of their perceived value by the larger legal

\textsuperscript{18} Narrowing the Gap; Legal Education and Professional Development—An Educational Continuum 163 (1992), (commonly known as "The MacCrate Report," named for Robert MacCrate, its editor and the chairperson of the ABA Task Force on Law Schools and the Profession).


\textsuperscript{20} ABA Standards for Approval of Law Schools and Interpretations, Standard 302 (a) (2), (August 1996).

\textsuperscript{21} With 14 states now using the test, approximately 35% of students sitting for the exam will be taking the MPT in 1998, Frank Morrissey, former president of National Council of Bar Examiners, in conversation.

\textsuperscript{22} RALPH L. BRILL et al., SOURCEBOOK ON LEGAL WRITING PROGRAMS 1 (The American Bar Association 1997).

\textsuperscript{23} Id. at 86-88.

\textsuperscript{24} Id. at 85.
writing community has been a small boom in the population of Writing Advisors in the last four or five years. During this time at least sixteen new Writing Advisor positions were added at various law schools around the country, which is a rate of three or four new positions added each year.

III. A Snapshot of the Field Today

To conduct the survey, the authors sent a questionnaire to all Directors of Legal Writing programs to determine whether the law school had a Writing Advisor. In cases in which the school did not employ a Writing Advisor, the Directors were asked to comment briefly on why they did not. In cases in which the schools did have one or more Writing Advisors, the authors sent survey questionnaires to the Writing Advisors identified by the Director. All thirty-seven Writing Advisors who were identified in this way responded to the survey questionnaire. The following data is compiled from their answers.

A. Personal and Educational Background

The group studied includes thirty-seven Writing Advisors in twenty-one states at thirty-two different law schools.25 As the results show, the group is predominantly female (78% female and 22% percent male).

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The group’s educational background is primarily “English.” Two-thirds of the group has an English-based background, one-sixth (17%) has a legal background, and one-sixth (17%) has both an English-based and a legal background. Further breaking down the category of “English,” the survey revealed ten people with Ph.D.’s in English literature; eleven with Masters de-
degrees (of which five were in English Literature, two were in Composition Studies, two held MAT's, one an MA in Linguistics and one an MA in Journalism). Two people had earned MFA's and one person held a degree in Elementary Education. Under the category of "both' English and legal backgrounds, five people had a Master's in English as well as a J.D., and one person had a Ph.D. and a J.D. It was also interesting to note that of the thirty Writing Advisors who listed their undergraduate major, twenty-one of them—or about 70%—were English majors. This meant that almost all of the Writing Advisors had at one time or another in their education defined themselves as having studied English.

B. Status and Contract Type

Writing Advisor positions are more often considered faculty than staff. However, the designation "faculty" (accounting for more than half of these positions) is a broad term that includes a variety of different roles at different institutions, including those of adjunct faculty, senior lecturer, dean, and a director of the Writing Across the University program. The term "staff" also includes the term "academic staff". The "Other" category includes directors of enrichment/academic support programs, as well as consultants.
The majority of Writing Advisors have annual contracts, though a significant number have long-term contracts, and a minority are on tenure track.

C. Types of Positions

Full-time Writing Advisors barely outnumber those who work in part-time positions. Of the sixteen positions created in the last four years, eight positions were full-time and eight were part-time. However, two of the new full-time positions had been converted from previously part-time positions to full-time ones, indicating that the writing programs had felt an increased need for these positions.
D. Years in Position

The following "Years in Position" chart illustrates the first, second, and third waves of position creation. The longest held position recorded in the survey is one of twenty-one years.

E. Salary Ranges

It is not surprising that faculty status is usually accompanied by a higher salary. For example, all Writing Advisors earning salaries in the D-range (below) listed themselves as faculty. After that, years in position mattered most, with those staying the longest making the best wages. The salary ranges break down into two halves: those earning salaries in the A and B range held part-time positions, and those earning salaries in the C and D range held full-time positions.
It is also not surprising that the lower salary ranges tended to correlate with a restricted range of activities for the Writing Advisors. For example, only a small percentage of the A salary Writing Advisors reported conducting research or making presentations at conferences, and those few in the A salary range who are participating in these scholarly activities all had full-time faculty jobs elsewhere.

F. Responsibilities of Writing Advisors

One section of the survey, "The Responsibilities of Writing Advisors," asked participants to estimate the percentage of time they spent each year on a variety of listed activities. Although many of the participants had some difficulty estimating how much time they spent at various tasks, their answers revealed several things about their positions. First, most Writing Advisors wear many hats in their respective schools; the average number of responsibilities that Writing Advisors have is seven.

26 Virtually all the participants in our survey had difficulty answering this question. The question itself was largely responsible because we did not anticipate many of the variables that would make such a calculation next to impossible. We also forgot to include the most significant activity—conducting one-on-one student writing conferences—in the list when we first distributed the survey.
Second, the most significant responsibility that Writing Advisors have is conducting one-on-one writing conferences with students. Every Writing Advisor who responded to the survey conducts writing conferences; and, in most cases, this responsibility consumes a great deal of their time. Third, the second most common responsibility for Writing Advisors, at least in terms of the amount of time they spent on it, was conducting workshops for students. "Teaching other courses," "working with students on exam writing," and "doing professional reading" were the next three most common responsibilities Writing Advisors had.

The one surprising piece of information that was gleaned from the responses to this question was the relatively little time the Writing Advisors ascribed to the responsibility of training legal writing faculty. This point seems to be contradicted by what the Writing Advisors wrote in their essay responses and the anecdotal information the authors have about these positions.
Comparing the responsibilities of Writing Advisors with high and low-end salaries reveals that the responsibilities may vary drastically depending on pay level. In fact, the chart below, which accounts for approximately 80% of the time spent by Writing Advisors in low and high-end salaries, shows how relatively little variety the lower paying, part-time positions may include. People in A-salary positions spend virtually all of their time in tasks of intense student contact, and almost none of their time in tasks involving contact with members of the wider law school community. In contrast, people in D-salary positions lead much more varied work lives that include involvement with faculty and staff in committee work, as well as contact with the regional and national legal writing community at conferences.

Voices of the Writing Advisors

In addition to the statistical data that the survey yielded, the survey was also a window into what it is like to be a Writing Advisor. In their responses to two of the last three questions on the survey, the Writing Advisors captured the essence of these positions.

Answering the question "what have you found to be most rewarding professionally about being a Writing Advisor," the Writing Advisors focused on the students and on their interaction with them. The answer that came up over and over again
was that witnessing the students' development as writers was the greatest reward.

A big reward comes from watching students emerge as capable, articulate writers and thinkers—knowing their growth is due in part to your diagnostic skills, suggestions, support, and enthusiasm.

Mentioned almost as frequently was the reward of working with the diversity of writing questions students brought to the writing conferences, as well as the intellectual challenge that comes from teaching highly motivated law students.

Every student who walks into my office will be different and so will every session. My position in the whole affair shifts from task to task; growing in my ability to reason to these multiple possibilities is quite a thrill indeed.

[The most rewarding thing about being a Writing Advisor is] the intellectual challenge of understanding a student's thinking habits that underlay his or her writing, and then proposing one change—a "surgical strike" that (a) will be possible for the student to implement and (b) will result in better writing. Writing is physical evidence of a person's thought process and changing it is tangible and yet multifaceted. It presents a puzzle I haven't tired of trying to solve in nineteen years. Few fields offer that.

[The most rewarding thing is] law students—their intelligence, eagerness, relative maturity, willingness to work.

Several Writing Advisors said the greatest reward was using their knowledge of writing and composition theory in a legal education environment and being able to make a difference in another field.

I enjoy being able to bring the insights of composition and rhetorical theory to a law school setting.

I love the contact with the students and the feeling that I am helping to upgrade the level of law practice in the State of ____ . . . . It means a lot to me to know that the work I do will make a difference to so many people, both the students and the clients they will represent in the future.

In answering the question "What have you found most challenging/difficult about being a Writing Advisor," almost all of
the Writing Advisors described as the top challenge the demanding nature of the positions.

... I find that few other faculty members realize the time commitment involved in working with students individually, keeping current in the field, doing my own research and writing, advising members of the writing faculty, keeping up with committee work, etc.

Balancing/juggling diverse responsibilities, meeting the needs of varying populations, negotiating the political controversies.

Others responded to this question by discussing the lack of understanding of or appreciation for their work, coupled with what a few saw as counterproductive attitudes among law faculty about writing.

Just about the thorniest challenge... is to somehow separate 'writing' from 'legal substance' in tutoring sessions. Most faculty are willing for students to get help from Writing Advisors as long as we do not address the accuracy of the student's legal analysis or their understanding of the law. Anyone who has taught writing knows that the form and the substance go hand in hand, that you cannot truly divorce them. Yet we must tread very carefully here and use the kinds of questions in tutoring sessions that focus on form or logical inconsistencies or unexpected jumps, rather than questions that would announce themselves addressing the legal analysis head-on. Needless to say, the tight-rope we must walk is a taut one, and it often feels as if there is no net beneath us.

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27 This issue of how—or whether—Writing Advisors should comment on problems they see in the content of law students' writing is indeed a difficult one. On the one hand, most Writing Advisors resist playing the role of proofreader and find it is not pedagogically sound to limit their advice to just how the student conveyed his or her ideas without addressing the logic and coherence of the ideas themselves. On the other hand, many Writing Advisors have degrees in English, not law, and consequently are wary of giving advice that seems to be a form of teaching law. Just how Writing Advisors negotiate this nebulous area where substance meets style is a frequent subject of conversation among these teachers. Some suggest the best approach for the Writing Advisor to use is reader-response methodology, where the Writing Advisor enacts the reader's reactions for the student: “As your reader, I am confused about this passage because...”
Not surprisingly, many others described status issues, politics, and the insecurity of their positions as the major challenges facing Writing Advisors.

[The most challenging part of being a Writing Advisor is] job insecurity (lack of tenure, promotion opportunities), institution's perception of this job, being left out of the decision-making about curriculum, and work load.

The most difficult aspect is not having full-time status at the law school . . . . It is frustrating to have to move offices frequently, to work only part-time, and to make a meager wage. Although the Legal Research and Writing staff value me, the university system will not pay me more nor give me more hours.

Still others described the loneliness of being the “Other,” of not being a classroom teacher, of being the one English professor in a world of law professors, and of missing the world that English professors usually live in.

As a Writing Advisor working one-on-one with students, I miss the classroom: the dynamics of student interaction, the thinking on your feet aspects of classroom teaching.

The biggest challenge is not being a lawyer; not having a J.D.—the credential that matters most around here. The second biggest challenge is not being part of an English dept. I miss having people around who talk about literature.

Finally, a few of the Writing Advisors described their surprise both at finding a hostile working environment in their law school and at learning that legal prose is often disappointing in its conventions.

Initially the greatest challenge for me was a sense of culture shock. I was shocked, for instance, at the harsh climate of law school, where students—graduate students!—were often not treated with respect. I was surprised at how I was defined as what I was NOT—a lawyer—instead of what I was—a writer and a teacher of writing. And early on I was shocked by a lot of the conventions of legal writing, which really did seem to me to be boring, repetitive, all that I thought of as bad writing. However, I think this sense of shock helps me work with students who are similarly dismayed.
It was interesting to note that the responses to questions about rewards and challenges seemed linked; the challenges people listed often were the flip-side of the rewards listed. The only exception to this was the negative aspect of stresses associated with politics, institutional red tape and status issues; these were challenges that had no advantages associated with them.

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<thead>
<tr>
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<tr>
<td>Pressure of juggling multiple roles</td>
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<td>Difficulty of drawing boundaries</td>
<td>Rewards of witnessing one’s assistance pay off</td>
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<tr>
<td>The loneliness of being the “Other”</td>
<td>Benefits of working with a community of like-minded colleagues</td>
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<tr>
<td>Missing our own conventions</td>
<td>Challenge of bringing composition insights to a new field</td>
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<tr>
<td>Stresses of politics, institutional redtape and status issue</td>
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IV. DESIGNING AND SHAPING A WRITING ADVISOR POSITION

In addition to the information from the Writing Advisors’ survey, the survey we sent to the Directors of Legal Writing programs also yielded insights into the nature of these positions. When asked “which of the following reasons describes why your law school does not have a Writing Advisor,” twelve Directors checked the answer “do not need the position,” and thirty-seven checked “do not have the financial resources to support the position.” Nine other Directors said that they were trying to meet the need in other ways, which usually meant through either a Writing Center on an undergraduate campus or student writing tutors.

Two Directors said that they are currently working to add a Writing Advisor position, and two additional Directors said that their school was currently discussing the possibility of adding such a position. In addition, during the time since the survey was conducted, a conversation has developed on the list-serve for the Association of Legal Writing Directors concerning how to develop a Writing Advisor position. The authors have also re-
received several requests for information about developing Writing Advisor positions.

A. What a Law School Should Consider in Designing a Writing Advisor Position

In designing a Writing Advisor position, a law school should undoubtedly begin by determining the needs of its legal writing program and then examining the Writing Advisor Responsibilities chart to see what kinds of things other Writing Advisors are doing. (The Sourcebook for Legal Writing Programs also has a section on the responsibilities of Writing Advisors.) The charts showing the differences in the responsibilities between a Writing Advisor at the low end of the salary range and one at the high end of the salary range also give a strong indication of what is reasonable to expect at different compensation levels. Writing Advisors on the low end of the salary range tend to spend the vast majority of their time (over 85%) working one-on-one with students in writing conferences. This type of position may be desirable, at least initially, for law schools whose primary reason for adding a Writing Advisor position is to offer more writing expertise in one-on-one conferences. The disadvantage of such a position is that the amount of student contact may exhaust the Writing Advisor over time. The lack of variety in the Writing Advisor's work life and the lack of opportunities for professional growth and rejuvenation also lead to burn-out, and these factors may make the position unattractive to highly qualified candidates.28

Designing a position in the mid or higher salary range allows a law school to make one-on-one conferences a key responsibility for the Writing Advisor (possibly consuming one-third to one-half of the Writing Advisor's time) and still draw upon the Writing Advisor's expertise in other ways. For example, other courses that current Writing Advisors are teaching or team-teaching include advanced legal writing seminars, drafting labs, law and literature courses, language and the law courses, thesis

28 One thing to consider with applicants who have a Ph.D. in English is whether the individual's doctoral studies were in literature or whether they were in composition and rhetoric. A doctorate in medieval literature, for example, has little if any application to legal writing or student writing conferences. Indeed, an applicant with a degree such as a M.F.A, M.A in composition, rhetoric, English-as-a-second-language, or a M.A.T. in teaching writing may have more directly useful expertise for a Writing Advisor position than will the typical applicant with a Ph.D. in literary studies.
writing for LL.M. participants, editing courses for law review staffs, remedial writing courses for academic support programs, and a wide variety of independent studies to meet special needs such as those of English-as-a-second-language law students.

Most Writing Advisors in the mid or higher salary ranges also have responsibility training the rest of the legal writing faculty. In these situations, the Writing Advisors share expertise in composition and rhetorical theory, learning theory, teaching methodology, curricular design, conferencing techniques, and critiquing strategies. In fact, historically this group of Writing Advisors has taken the lead in introducing critiquing strategies such as holistic assessment, reader-response commenting, and portfolio review. As people who have thought deeply about voice, narrative, and rhetorical analysis, these Writing Advisors bring an important perspective to the profession's thoughts about facts, arguments, and points of view.

In addition, mid to higher range Writing Advisors often have responsibilities outside of the legal writing program that enhance the larger institution. For example, this group of Writing Advisors advises student journals, serves on committees for institutions, assists admissions office with writing samples, works with faculty on their writing, and teaches in the school's Continuing Legal Education programs.

What most clearly distinguishes higher salary range positions from lower salary range positions, however, is the school's expectation about professional and scholarly activity. Lower salary Writing Advisors have no time (and no energy) for a high level of involvement in professional organizations—including attending or presenting at conferences—or for scholarly research and writing. Higher salary range Writing Advisors, on the other hand, have traditionally been exceptionally active in the professional organizations associated with legal writing. Several have proven to be unusually productive scholars and writers. (See Appendix B, "Bibliography of Publications by Writing Advisors.")

29 The lack of involvement in organizations like the Legal Writing Institute accompanied by a lack of opportunity and not having an opportunity to maintain a scholarly approach to one's work may also contribute to burn-out for lower salary range Writing Advisors.

30 For a bibliography of presentations by Writing Advisors, contact Jessie Grearson at The John Marshall Law School.
In programs that currently have a Writing Advisor, the Directors of Legal Writing were asked how they found the person they hired. There were almost as many answers as there are Writing Advisors. A few deans and directors posted the opening on bulletin boards and listed the position in newspapers like the Chronicle of Higher Education, but more often than not the position was filled by an internal referral or by hiring someone already known by the dean or director.

The survey also asked whether the current Writing Advisors had written job descriptions and whether they were evaluated. Surprisingly, only seven of the current Writing Advisors had written job descriptions. Only twenty had some form of evaluation, usually student evaluations or occasionally evaluation by a dean or the director, and only two of the current Writing Advisors go through a formal evaluation process with the faculty. While there may be some advantages to loose, unwritten job descriptions, it seems unwise to establish positions without outlining their responsibilities and without evaluating how these responsibilities are carried out.

B. What a Writing Advisor Should Consider in Helping Shape a Position

Whether a person is currently a Writing Advisor or considering applying for a Writing Advisor position, there are a few things he or she should consider beyond the obvious categories of salary and responsibilities: the status attached to the position, potential growth within the position given the needs of the law school, and the relationship of the Writing Advisor to the law students coming in for writing conferences.

As the earlier chart on status indicated, the current Writing Advisors are split with about 60% having some form of faculty status and about 40% having staff or other status.31 Within the faculty group, only two persons have a tenure track position, which has its obvious advantages and disadvantages. Slightly more persons have long-term contracts than have annual contracts, with the presumed benefit of more job security for those with long-term contracts. For the most part, those with long-term contracts are in the highest salary range. Only three Writ-

31 The Writing Advisors in the "other" category variously described their status as "law librarian," "independent contractor," "undefined," "casual employee," and even "I'm just me—a writer who loves to work with students. Status, whatever it is, is derived from my publishing record, not from work I perform for the Law School."
ing Advisors indicated that they have adjunct status, and all of their salaries were in the lowest range. Of the individuals with staff status, only one had a salary in the highest range, and that person was also an administrator. The obvious point to make here is that considering the salary ranges for law school faculty and staff, Writing Advisors will find it advantageous to have their positions classified as faculty rather than staff, at least for salary purposes.\(^\text{32}\)

In working with the law school to design a new position or re-shape a current position, Writing Advisors should consider what their individual legal writing program and law school needs and what they as individuals can offer and what they need to have for satisfying jobs. Through the Writing Specialists Association and the list-serve for Writing Advisors,\(^\text{33}\) they can learn more about the responsibilities other Writing Advisors have and whether those responsibilities would be appropriate in their situation.

Although the survey did not ask about the writing conference relationship between Writing Advisors and their students, an important issue for any new Writing Advisor to consider is whether his or her students will be signing up for writing conferences voluntarily or whether there will be mandatory conferences, at least for students identified as weak writers. Writing Advisors should also consider how they will handle the demand for their time, particularly during peak periods when legal writing papers are due. They should also set policies so that the pedagogical objectives of the legal writing program are met. How much and what kind of help a Writing Advisor should give any individual student are just a few of the many questions that must be addressed before the flood of students starts coming through the door.

V. THE FUTURE OF WRITING ADVISOR POSITIONS

Writing Advisors have been an interdisciplinary presence on law school campuses for nearly a quarter of a century — the very part of the century that has arguably seen the most dra-

\(^\text{32}\) The survey neglected to ask whether the Writing Advisor was paid on the law school scale or on the English department scale. This is an important consideration because law school salary scales for faculty are typically much higher than those of English department faculty.

\(^\text{33}\) To be added to either the Writing Specialists' Association or the list-serve, contact Anne Enquist at Seattle University School of Law.
matic change to the teaching of writing in all educational settings, and certainly the greatest change to the teaching of writing at law schools. Twenty years ago, Lynn Squires outlined many of the benefits such interdisciplinary teachers could provide: Writing Advisors, trained in the fields of composition studies and rhetorical analysis, could collaborate with legal writing teachers, helping improve the quality of writing instruction by bringing “expertise in teaching writing.” They could work directly with law students in classes, workshops, and individual conferences to improve student writing not only by reminding students of the “standards of normal usage . . . [in] a field of study where abnormal usage abound[s]” but also by providing students with a “preview of the audience they will have outside of law school . . . less familiar with the law than they are.” Working with legal writing teachers and law students, Writing Advisors could employ a repertoire of skills and teaching styles brought from another discipline, and in doing the above interdisciplinary work, ultimately help improve the image of lawyers who have “suffered from lay criticism of their writing” since the 13th century.

Squires’ descriptions of the benefits of Writing Advisors have continued to hold true for two decades. Now seems an appropriate time to take stock, to reconsider the role of Writing Advisors at law schools, considering both future challenges and opportunities faced by teachers in these positions.

The voices of Writing Advisors themselves speak clearly of a challenge central to the role: coping with the demanding nature of these positions. How can these individuals remain energized while doing the intense work of teaching writing and meeting individually with students under tight time constraints? Anyone teaching writing is already keenly aware of this challenge, but it is one that is undoubtedly intensified for some Writing Advisors whose roles are limited almost exclusively to working individually with students.

Comparing the activities associated with low and high-end Writing Advisor salaries, where the low-end positions are almost exclusively devoted to tasks of intense student contact and the high-end positions are much more varied in their responsibilities, prompts a blunt question: How long can people in part-

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34 Squires, supra note 17, at 412.
35 Id. at 419.
36 Id. at 412.
time, low-paying positions continue enthusiastically bringing their interdisciplinary insights to this role? Anyone who has taught writing knows the answer—not long, when facing mountains of student papers, tight deadlines, anxious, sometimes demanding law students and our own high expectations. Our experience as writing professionals has also taught us how much is lost with this revolving door scenario, where expertise accumulated in a two or three year period inevitably departs with the “burned out” teacher. Thus, these positions are not only damaging to the teacher involved but are also short-sighted in terms of the institution the teacher serves. The benefits of interdisciplinary insights should ideally enrich not only students but the wider law school environment as well. When Writing Advisors are limited to roles of exclusive student contact and, for example, do not serve on faculty committees or are restricted from attending conferences to exchange insights, it is a loss not only for the individual teacher but for these wider academic communities as well.

Also, as Squires pointed out, Writing Advisors by definition have the advantage of interdisciplinarity, bringing insights from one teaching world to another. But when a Writing Advisor lives between worlds, as neither a member of an English department nor a legal writing department but as an uncategorized “other,” that advantage may quickly become a disadvantage. The very versatility associated with being an interdisciplinary scholar may leave these Writing Advisors without departmental shelter during the “storms” of leaner times. Writing Advisors may be heralded as part of the solution to working with an increasingly diverse student population brought by 90’s application drops and downsizing, but may also be, as primarily untenured faculty or staff members, among the first sacrificed to budget cuts caused by downsizings associated with dwindling student numbers in tuition-driven schools.

In an era of slow but steady change toward professionalizing the role of legal writing faculty at law schools, it is also interesting to consider the relationship of Writing Advisors to that of an increasingly professionalized legal writing faculty. As Legal Writing professors become increasingly political and powerful members of law schools, and as expertise in the teaching of writing increases within law schools, it is interesting to consider

37 Jan M. Levine, Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs, 45 J. LEGAL EDUC. 530 (1995).
the following questions. Will the role of Writing Advisors continue to be that of collaborators and contributors to a growing field? To quote David Russell, "Will writing specialists be tenure track faculty, members of a department, or will they primarily be administrative staff consultants, temporary instructors, support personnel?"38

Despite these questions and concerns, we feel optimistic about future opportunities for the field. The 21st century seems to hold much promise, for example, of increased institutional appreciation fostered by the new demands of the information age.39 Russell notes that those who "study employment trends agree that in fifteen years most jobs will involve information processing" and may "depend on rhetorical skill, the ability of the workforce to communicate in writing . . . not only from one person to another, but from one community to another."40 His remark, made in 1990, seems prescient given the recent explosion of Internet activity and an era of "virtual connections." It also seems most relevant to law school graduates, who certainly rely on rhetorical skill and their ability to communicate in writing. Furthermore, since 1992, there has been a decline in traditional legal jobs41 resulting in more law students taking employment in non-legal fields.42 As a consequence, law school graduates have been forced to branch out into other workplaces, required, in a very real sense, to become interdisciplinary practitioners themselves, writing across business communities, to a variety of audiences to communicate a sometimes specialized legal knowledge.

Finally, Writing Advisors may already be tapping into another opportunity Russell names—researching the conventions of different disciplines and investigating the pedagogical impli-

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38 Russell, supra note 5, at 306.
39 Again, in a buyers' market, the importance of placement and thus training in job-related skills becomes clear: a recent AALS study on what prospective law students consider when applying to a particular school reveals that job placement is a critical concern among prospective applicants, ranking higher than concerns about reputation and tuition. "Who Gets The APP? Explaining Law School Application Volume, 1993-1996," AALS, 1998, at 3.
40 Russell, supra note 5, at 305.
41 For example, see Sneers, Lack of Jobs Reduce Interest in Law, THE CHARLESTON GAZETTE, Sept. 24, 1995, at 6B. "About 15% of the law school class of 1994 were still unemployed six months after graduation, compared with a jobless rate of 9% for the class of 1990."
cations of such disciplinary rhetorics. 43As appendix bibliography B vividly illustrates, Writing Advisors at law schools have been engaged in this kind of interdisciplinary research for many years.

We feel optimistic, given the contributions Writing Advisors have already made and the positions of leadership that they have assumed within law schools, that they will continue to be an important part of the solution to law schools' continuing focus on bettering the teaching of writing at law schools.

APPENDIX A: WRITING ADVISORS AT LAW SCHOOLS
as of June 1998

<table>
<thead>
<tr>
<th>Susan Adams</th>
<th>Elizabeth Fajans</th>
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43 Russell, supra note 5, at 301.
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</table>
Stephanie Vetne
Valparaiso University School of Law

Paul Von Blum
Loyola Law School Los Angeles

Nancy Wanderer
University of Maine School of Law

Shelley Rice Weinberg **
University of Chicago Law School

Kristin R. Woolever
Northeastern University School of Law

*Names added after completion of survey
APPENDIX B: BIBLIOGRAPHY OF WRITINGS PUBLISHED BY WRITING ADVISORS

Susan J. Adams
Because They're Otherwise Qualified: Teaching Learning Disabled Legal Writing Students, JOURNAL OF LEGAL EDUCATION (1996).

Robert Chaim

Susan R. Dailey

Portfolios In Law School: Creating A Community Of Writers, SITUATING PORTFOLIOS (Kathleen Blake Yancey & Irwing Weiser, eds., Utah State University Press, 1997).


Anne Enquist

LAW RELATED EDUCATION: LINKING LANGUAGE ARTS AND SOCIAL STUDIES, co-authors Margaret Armancas-Fisher and Julia Gold (UPSICEL 1993).


How Not To Conduct A Writing Conference, (Fall 1986) (video-tape distributed by The Legal Writing Institute to Legal Writing Preparation Programs).

Beyond Labeling Student Writing Problems: Why Would A Bright Person Make This Mistake? THE SECOND DRAFT (Spring 1986).

Good Writing Is Good Lawyering, WASHINGTON ENGLISH NEWSLETTER (June 1985).


Elizabeth Fajans

Writing and Analysis in the Law, co-authors, Helene Shapo & Marilyn Walter (Foundation Press 3d ed. 1995).

Writing and Analysis in the Law, co-authors, Helene Shapo & Marilyn Walter (Foundation Press 2d ed. 1991).

Writing and Analysis in the Law, co-authors, Helene Shapo & Marilyn Walter (Foundation Press 1989).


George D. Gopen


A Course In Composition For Pre-Law Students, 29 JOURNAL OF LEGAL EDUCATION 222-231 (1978).

A Question Of Cash And Credit: Writing Programs At Law Schools, 3 JOURNAL OF CONTEMPORARY LAW 191-200 (1977).

Work completed and submitted for publication: THE COMMON SENSE OF WRITING: TEACHING WRITING FROM THE READER'S PERSPECTIVE.


Jessie C. Grearson


Teach The Transition, 10 THE SECOND DRAFT, No. 1 (Spring 1997).

Perry Hodges
Writing In A Different Voice, Texas Law Review.

Nancy Jones
Extending The Classroom: The Writing Resource Center And The Teaching Of Legal Writing At The University Of Iowa, In Perspective: Teaching Legal Research And Writing (West Publishing Apr. 1993).

Trudy Krisher
Writing For A Reader (Prentice Hall 1994).

Terri LeClercq
Guide To Legal Writing Style (Little, Brown 1995).

EXPERT LEGAL WRITINGS (University of Texas Press 1995).


U.S. News & World Report 'Notices' Legal Writing Programs, Perspectives (Spring 1995).


Cast Your Vote: Doctrine Of The Last Antecedent, The Second Draft (June 1992).


The Premature Deaths Of Writing Instructors, INTEGRATED LEGAL RESEARCH (Winter 1990-91).


EDITING WORKBOOK FOR OPINION WRITERS, (University of Texas Law School 1984-1986) (Continuing Legal Education Seminars for Judges).

EDITING WORKBOOK FOR STUDENTS, co-author with Fred Asnes (University of Texas Law School 1984).

Mary Barnard Ray
The Uses And Abuses Of Procrastination, 69 WISCONSIN LAW REVIEW 49 (1996).

Avoiding Colon Trouble, 64 WISCONSIN LAW REVIEW 49 (1996).

Close Encounters Of The Word Kind: Focus And Flexibility In Student Conferences, Mary Barnard Ray and Claudia M. Carlos, THE SECOND DRAFT, BULLETIN OF THE LEGAL WRITING INSTITUTE (Nov. 1995).


Text, Sighs, And Videotape, (University of Wisconsin Law School, Madison, WI 1992) (a Training Tape for teachers handling challenging students in conferences).

Getting Dorothy Out Of Kansas: The Importance Of An Advanced Comment To Legal Writing Programs, Barbara J. Cox and Mary Barnard Ray, 40 JOURNAL OF LEGAL EDUCATION, No. 3, 351 (Sept. 1990).


Avoiding Sexist Language In Legal Writing, Mary Barnard Ray and Barbara J. Cox, WISCONSIN BAR BULLETIN, (Madison, WI Aug. 1986).

A Horse Of A Different Color: Living Happily As A Writing Instructor For Lawyers And Other Professional, a chapter in the 1983 BUSINESS COMMUNICATION: ACADEMIC AND PROFESSIONAL PERSPECTIVES, June Ferill and Stephen T. Markey, Editors, (The Aetna Institute for Corporate Education, Houston, TX 1983).

Chris Rideout


Legal Writing,: A Revised View, 69 WASHINGTON LAW REVIEW 35 (1994).


Applying The Writing-Across-The-Curriculum Model To Professional Writing, CURRENT ISSUES IN HIGHER EDUCATION, No. 3, 27-

A Contagious Peculiarity: Writing At A Law School, WASHINGTON ENGLISH JOURNAL 2-5 (Fall 1982).

Effective Writing for Lawyers (University of Puget Sound School of Law 1982-1984) (Coursebook for Continuing Legal Education).

Kristin R. Woolever
UNTANGLING THE LAW: STRATEGIES FOR LEGAL WRITERS (Wadsworth 1987).

Extending The Boundaries For Rhetoric In Legal Pedagogy, 10.2 JOURNAL OF BUSINESS & TECHNICAL COMMUNICATION 213-238 (1996).

Corporate Language And The Law, 33.2 IEEE TRANSACTIONS ON PROFESSIONAL COMMUNICATION 94-98 (1990).

Technology in the LRW Curriculum – High Tech, Low Tech, or No Tech

Maria Perez Crist

I. INTRODUCTION

The technology bandwagon is making its way into legal education. As more and more law school brochures tout the technological enhancements available at their law schools, professionals in the legal research and writing ("LRW") field are considering when, how, or even if they should integrate new technologies into the LRW curriculum. All new lawyers will require at least some technological expertise to function effectively in their law practices. Thus, among the many skills we try to...
cover in the LRW curriculum, technological skills are an appropriate and necessary component. Paradoxically, we acknowledge that practicing lawyers require some technological sophistication, but as educators, we may have serious reservations about using it ourselves. Technology can easily become the focal point in our classrooms, overshadowing "fundamental" skills like legal analysis and reasoning. While this article examines the different ways technology can and should find a place in the LRW curriculum, I also discuss the pedagogical costs and benefits associated with technology.

Over the past few years, I have experimented with different ways of integrating technology in the first-year LRW curriculum. I have created and distributed class materials in various electronic formats and have used technology within the class-

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5 These reservations may stem from our own lack of computer skills, the unavailability of technological resources, or a concern that technology may interfere with our pedagogical goals. These are all legitimate concerns in evaluating how, or even if, to integrate technology in the LRW curriculum. See, e.g., Suzanne Ehrenberg, Legal Writing Unplugged: Evaluating the Role of Computer Technology in Legal Writing Pedagogy, 4 LEGAL WRITING 1, 2 (1998) (arguing that computers do little to enhance legal writing pedagogy and, in fact, create an additional burden for LRW teachers).

6 The American Bar Association recognizes that legal analysis and reasoning are fundamental lawyering skills in the American Bar Association Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (Chicago, 1992). See also, Bryant G. Garth & Joanne Martin, Law Schools and the Construction of Competence, 43 J. LEGAL EDUC. 469, 479-486 (1993) (describing survey results in which Chicago area lawyers defined necessary lawyering skills and their assessment of a law school's ability to teach those skills).

7 I have taught LRW at the University of Dayton School of Law for nine years. In August 1997, we moved into a new law school building, Keller Hall. The new home of the University of Dayton Law School and Law Library is a technologically sophisticated environment. I was involved in planning meetings on how technology would be used in the new building. In preparation for the move, I experimented with different forms of instructional technology in classrooms with limited technological capability. Thus, while I now work in an environment that is very conducive to the integration of instructional technology, I understand the challenges involved in working in a less technologically sophisticated one.

8 In 1996, I developed a course supplement using FolioVIEWS, an electronic publishing program that is widely used to re-create textbooks in a digital form. The project won first place in the 1996 LEXIS-NEXIS Legal Research and Writing competition, which recognizes and rewards innovation in educational technology. I also developed my own course web page, have used TWEN (The West Education Network) a ready-made web resource for law faculty, and make extensive use of e-mail to communicate with students.
room to teach legal writing, analysis and research. In using these various forms of electronic media, I have realized that technology is no different than any other teaching tool. There must be a sound pedagogical basis for using technology in the LRW curriculum, along with the recognition that sometimes "high tech" can be counter-productive.

In this article, I explore the tension between preparing students for a technologically enhanced law practice by integrating these skills into the curriculum and the constraints this technology can place on learning. First, this article examines the rationale for integrating technology in the LRW curriculum. Next, I discuss specific classroom technologies with practical suggestions for getting started and assessing their effectiveness as teaching tools. Finally, this article examines the institutional constraints that may hinder the effective use of technology. Although an LRW teacher may determine that technology could enhance her teaching, economic and structural constraints may create obstacles to its use, or at least limit what options are available. Knowing why you want to use technology and what you want to do with it, you will be in a better position to get the technological "tools" you need to enhance the LRW curriculum.

II. DEVELOPING A RATIONALE – WHY BOTHER WITH TECHNOLOGY?

Integrating technology into the educational process may prove difficult. The technology may not be familiar to you. You may have gone to law school in an era when computers were hardly used. You may have practiced law at a time when a secretary and a law library made computer skills unnecessary. Moreover, your law school's facilities may preclude much experimentation with technology. You may not have classrooms equipped with the latest technologies. In your office, you may not have a very modern computer or access to e-mail. Even if you have a computer, your students may have better-equipped models with updated software that precludes the exchange of files between you and your students. With all these potential obstacles, you may legitimately ask: "Why bother?"

There are three good reasons why. First, technology is re-defining the skills needed by lawyers to achieve professional com-

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9 My use of technology includes: *PowerPoint* presentations; the display of electronic documents for in-class editing; the display of case and statutory excerpts for in-class analysis; and live demonstrations of computer-assisted legal research (LEXIS, Westlaw and the Internet).
petence. Second, your students may learn better if you are able to use modern technologies effectively in the classroom. And finally, you may find yourself growing as a professional as your technological expertise creates new career opportunities in law firm consulting or continuing legal education programs. Any of these is reason enough for you as an educator to seriously consider integrating technology into the curriculum.

A. Re-defining Competence – the Technical Skills Needed in Modern Law Practice

Important changes are taking place in the practice of law, fueled in large part by the growing use of technology. In modern law practice, the computer is used not just as a means to enhance productivity, but increasingly as a key practice resource. Recent surveys suggest that technology is allowing attorneys to complete more work at their desks, with less reliance on support staff and the library. More attorneys are drafting documents on the computer instead of a yellow pad. They locate legal authority on their computers instead of going to the library.

Moreover, client expectations are re-shaping what it means to be a competent attorney. As clients are able to locate information on the Internet and use their computers to communicate with others, they expect their attorneys to have these skills as well. The pervasiveness of information technology has “raised the bar” on the level of technological competence clients expect from their attorneys. This shift in how lawyers work and are expected to work has re-defined professional competence.

At the recent ABA Techshow, Richard Granat, a noted legal systems consultant, described the new technology skills essential to law practice as follows: 11

- Electronic Information Retrieval skills—the ability to design, create, and retrieve information from databases for clients.

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10 See ABA Legal Technology Center, Large Law Firm Technology Survey—1997 Executive Summary 3, 5 [hereinafter Large Firm Survey] (finding that 90% of the lawyers responding had a computer on their desk and 80% reporting that they created their own work product with less reliance on support staff). See also ABA Legal Technology Center, Small Law Firm Technology Survey—1997 Executive Summary [hereinafter Small Firm Survey]; The Internet Lawyer Microsoft Corporation Survey (visited August 8, 1997) <http://www.internetlawyer.com> [hereinafter Microsoft Survey] (reporting an increasing reliance on technology within the law practice setting).

**Electronic Communication Skills**—knowing when and how to use e-mail to communicate with clients and colleagues.

**Electronic Publishing Skills**—having the capacity to produce multimedia legal documents and file or deliver them electronically.

Since legal professionals are no longer the only ones with access to legal information, their expertise will be measured in how efficiently they can locate and use such information.

While it may be argued that many of these skills can be developed in practice, law schools should at least provide exposure to electronic retrieval, communication, and publishing skills. Thus, one rationale for integrating technology in the LRW curriculum is that it allows law schools to better prepare students for modern law practice.

### B. Technology's Impact on Learning

In developing a rationale for using technology in the LRW curriculum, its pedagogical effectiveness should be considered. Begin by assessing your pedagogical goals—what do you want to accomplish in your class? The pedagogy of the LRW class may be narrowly defined as "skills training" or have a broader focus that encompasses the development of sophisticated problem-solving skills, legal analysis, and the ability to effectively engage in legal discourse. Whether one approaches the LRW class as an opportunity to teach practical skills or to develop legal cognitive skills, or both, the influence of technology on those peda-
The impact of technology on learning in law school is only beginning to be studied. While there have been positive reports on how technology affects learning, negative reports have emerged as well. Among the advantages of instructional technology is that it allows more active class participation. It can also create more opportunities for collaborative learning. For example, the teacher can use a projection device to focus on the language of a statute or case to demonstrate critical reading skills. Projecting the text on a screen helps focus student attention and generates discussion on the proper reading and interpretation of the text. A student’s writing, such as a “Question Presented” or a thesis paragraph, can be displayed and edited collaboratively through class discussion. The LRW teacher can conduct an Internet search during class while students suggest the research strategy and search terms. Any of these techniques to a hypothetical client’s case. The ability to make these factual distinctions is a needed skill as students must devise efficient ways to evaluate the growing amount of available case law. Since technology has made it possible for more case law to be digitally preserved, it becomes even more important for students to make distinctions between cases and develop the ability to hone in on the critical aspects of a legal problem. See Susan W. Brenner, Precedent Inflation (1991) (describing the increased availability of unpublished opinions in computer databases such as LEXIS and Westlaw).  


17 See, e.g., Lucia Ann Silecchia, Of Painters, Sculptors, Quill Pens, and Microchips: Teaching Legal Writing in the Electronic Age, 75 Neb. L. Rev. 802 (1996) (suggesting that online drafting may exacerbate writing problems); Ehrenberg, supra note 5, at 21 (concluding that computers are unable to enhance “the most essential functions involved in teaching legal writing, research and analysis.”).
engage the students in active learning, which is often better than passive learning. Electronic instruction, such as PowerPoint and electronic discussion lists, can also accommodate a wide range of learning and teaching preferences. Contacts between student and teacher can also increase with the use of online office hours.

Unfortunately, technology can also have a negative influence in the classroom. It can become a “side show” with students relegated to the role of passive observers. Over-reliance on electronic versions of legal materials can lead to poor reading habits and shallow, if not inaccurate, legal analysis because people read differently online than in print. Thus, decisions about whether and how to integrate technology into the classroom should take into account its effectiveness as a pedagogical device in the LRW curriculum.

The effect of instructional technology on LRW pedagogy is underscored by the fact that technology is already widely used by students. Student use of technology is pervasive throughout legal education, and especially within the first year of law school. In some manner, a computer plays a role in their legal education. The use of notebook computers to take class notes is increasing; more students are communicating with their professors and each other via e-mail. Students face technology issues as they fulfill requirements for their LRW class. They use computers to draft their assignments, and to a growing extent, use computers to do legal research. Knowing that students are using

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19 See Diamond, supra note 18.

20 Although this generation of law students may be more comfortable with computers in general, it is unlikely that they have used a computer to deal with materials containing the level of abstraction and complexity as legal materials commonly have. As a result, they may be lulled into thinking they understand what they read on their computer screens, when in fact, their analysis is incomplete. See Marilyn R. Walter, *Retaking Control over Teaching Research*, 43 J. LEGAL EDUC. 569, 579 (1993); see also Ehrenberg, supra note 5, at 7-8. The potential problems associated with reading online are discussed later. See infra pp. 14-15 and note 40.
technology to complete work for class means that we, as legal educators, have an obligation to demonstrate the advantages, as well as the disadvantages, inherent in such technology. No matter what our pedagogical goals are, unless we want to restrict our students to pencil, paper, and books, technology will play a role in how our students learn, and consequently, how we teach.

C. Using Technology to Create Opportunities for Professional Development

Finally, becoming involved in emerging technologies in legal education, and the profession generally, afford LRW faculty an opportunity to develop expertise and thereby enhance their careers. Among the law school faculty, tenure track faculty may have little time or inclination to learn and develop this expertise. Their energies are more often directed towards more traditional types of scholarship or governance issues at the law school. The LRW faculty can fill the void and increase their value to the law school. Outside the law school community, expertise in emerging technologies can lead to consulting opportunities as law firms grapple with technology issues or invitations to participate in continuing legal education programs. As we become more familiar with the technological possibilities, we have more to offer to our students, our colleagues, and the profession.

Thus, there are strong reasons for finding a place for technology in the LRW curriculum. Admittedly, the LRW curriculum may already have ambitious goals and the idea of adding to that curriculum may cause some to hesitate. Nonetheless, the technology options for the LRW curriculum are varied and plentiful. To whatever extent is feasible, technology belongs in the LRW curriculum.

21 For a discussion of the professional risks associated with involvement in technology projects, see Michael A. Geist, Where Can You Go Today? The Computerization of Legal Education From Workbooks to the Web, 11 HARV. J.L. & TECH. 141, 154-156 (1997). Another commentator states that there is a disincentive for faculty to become too involved in instructional technology:

We've found on our campus, for example, that the faculty who are generally the most receptive toward technology are the associate professors, because they don't have to worry about getting tenure . . . [and at another school] 'junior faculty work on instructional innovation at their peril.'

Albright, supra note 3.

22 The differences between doctrinal faculty and skills faculty are beyond the scope of this article. In my personal experience, however, my interest and use of educational technology has supplied a bridge to the doctrinal faculty that has led to an increase in collegiality among faculty.
III. REVIEWING TECHNOLOGY OPTIONS FOR THE LRW CURRICULUM

Once you have a rationale for using technology and understand how it can complement your pedagogical goals, the LRW teacher is ready to develop a strategy for integrating technology into the curriculum. Computer technology can be used in two general ways. First, technology can be used outside of regularly scheduled classes to enhance learning. Examples include the use of e-mail and course web sites. Second, technology can be used in the classroom to complement traditional teaching methods such as lecture and in-class exercises. Technology's use in the classroom may be limited depending on what technological resources are available. For that reason, out-of-class options are the surest way to begin integrating technology since almost all LRW teachers have access to an office computer and the Internet. However, as law schools continue to develop their computing infrastructures, in-class options will become increasingly possible.

A. Technology Options that Extend the Classroom

There are three general computer technologies that can enhance learning outside the law school classroom: 1) e-mail; 2) electronic assignments; and 3) web course pages. Each of these options can be offered at different degrees of sophistication and can be tailored to each LRW teacher's level of technical expertise.

1. Use of e-mail in the LRW curriculum

E-mail should be a part of every LRW curriculum. In a recent ABA survey of large law firms, 90% of the attorneys reported using e-mail within their legal practice. As e-mail becomes more common in law practice, it is developing its own conventions and rules as another form of written communication. The ability to communicate effectively in writing is an essential skill that students learn in law school in their LRW course. As part of that training, students should also be taught

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23 Large Firm Survey, supra note 10, at 3. While e-mail is used less frequently in small firms, its use throughout practice is expected to become as commonplace as the telephone and fax machine are today.

24 See Garth & Martin, supra note 6, at 478 (finding that ninety-one percent of the respondents to the survey think that written communication skills can be taught effec-
to communicate effectively through e-mail. Just as LRW teachers assign memos, client letters, and briefs, they can also require their students to learn to use e-mail in a professional manner.

E-mail communication between students and their LRW teacher can be handled individually or through a class distribution list. Once an e-mail communication channel is established, there are several ways to use it: as an extension of class discussion; as a bulletin board for announcements; and as a way to distribute and collect assignments. Make it clear to students at the beginning of the semester what kinds of information will be available through e-mail so they know what to expect. Establish ground rules so students will know how often you will check your e-mail and how quickly they can expect a response. Early in the semester use e-mail for a simple assignment to be sure that all students have properly functioning e-mail. A straightforward e-mail exercise could include asking a student to prepare and then transmit a case brief or client letter. The use of e-mail in this context provides students with immediate online experience. After receiving the students' e-mailed exercise, provide an e-mail reply to increase student exposure to the technology.

25 In an e-mail distribution list, the LRW teacher can send an e-mail message to everyone in the class simultaneously. Check the help menu on the e-mail program your law school uses for directions on how to set up a distribution list. Technical issues involving set-up and policies for e-mail use within the law school setting are fully detailed in Professor Warner's recent article. See Warner et al., supra note 15, at 143-53 (excellent and complete review of e-mail).

26 For example, I use e-mail for private communications with students and for collecting and distributing small, ungraded assignments. I use the threaded discussion list available on my TWEN web page for more public class discussions, and announcements. For an explanation of threaded discussion lists, see infra note 31.

27 Additional "ground rules" for e-mail use can include rules concerning civility, anonymous posting, and whether e-mail messages will be posted in hard copy. Problems with civility are best handled individually with the offending student. Although I have not yet had this problem, another teacher in our program did have a problem with a student, which was handled this way. I also allow students the option of posting their messages anonymously on the threaded class discussion list. Anonymity encourages students to ask that seemingly "dumb" question. Finally, I do not provide paper copies of e-mail messages to students. I tell my students at the beginning of the semester that any class notices will only be distributed through the class e-mail list and then posted on the TWEN page. They are responsible for checking their e-mail on a daily basis.

28 For your first e-mail exercise, avoid any assignment that requires students to attach documents. This is by far one of the most difficult e-mail tasks for students to accomplish; thus, it is better to avoid altogether the frustration that will undoubtedly ensue from this.

29 E-mail programs allow you the option of repeating the message that you are re-
In using e-mail to communicate with students, "... make your own messages to students models of good online writing—timely, succinct, to the point, and respectful."\(^{30}\)

When using e-mail to extend class discussion, encourage online discussion with a few focused introductory remarks such as repeating a question asked at the end of the last class. If using a threaded discussion list\(^{31}\) avoid jumping in too soon—excessive intervention may inhibit the opportunity for students to develop confidence in their own problem-solving abilities. Use e-mail distribution lists or threaded discussion lists as a way to answer commonly asked questions about assignments. This practice insures that everyone in the class gets the same answer at the same time.

For all these reasons, e-mail can be an excellent resource for communicating with your students. Contrary to popular belief, I did not find that it reduced the face-to-face contact with my students. Moreover, it enhanced communication by injecting an element of fairness, since student-teacher communication is more open when messages are shared through a distribution list. The use of e-mail also helped reduce the anxiety generated by the LRW assignment rumor mill. For example, I sent an e-mail to all my students when a question on the page limit had surfaced. With very little effort, e-mail provides students with another outlet to develop electronic communication skills, while adding to the smooth administration of the LRW class.

2. **Using electronic assignments in the LRW curriculum**

Distributing assignments electronically provides another opportunity to expose students to modern technology. It has the added benefit of making students recognize the shortcomings of electronic communication and that it is sometimes necessary to review information in hard copy.\(^{32}\) Since virtually all LRW as-

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\(^{30}\) See Diamond, supra note 18.

\(^{31}\) Unlike regular e-mail messages that appear within the list of incoming messages on your e-mail program, "threaded" discussion lists are accessed on the Internet at a pre-determined site. When students go to that site on the Internet, they see a chronological listing of subject lines from e-mail questions. Each question represents a "thread" of online discussion and is preserved on the site. The TWEN web sites offered by the West Group for law faculty include a threaded discussion list. For a description of TWEN, see infra note 46.

\(^{32}\) I noticed a very interesting phenomenon when I began distributing assignments...
Assignments are created in electronic form, it is not difficult to distribute assignments that way.\textsuperscript{33} The assignment can be created in \textit{Word} or \textit{WordPerfect}, in \textit{FolioVIEWS},\textsuperscript{34} as a CALI exercise,\textsuperscript{35} or in a web-based document. The assignment can be sent through e-mail, posted on the network or course web site, or handed out on a floppy disk.

Sending assignments out by e-mail, as mentioned earlier, is best reserved for small, ungraded projects. Some e-mail programs will not support very long messages or attachments. Moreover, if the students are to complete the assignment and return it as an e-mail message, it may not be anonymous, which may conflict with grading policies at some schools. Nonetheless, e-mail works very well for quick assignments such as case briefs or research exercises. It is possible to simulate the type of request students might get from an attorney if they were clerking at a law firm.\textsuperscript{36}

in an electronic format. The students still wanted to read a hard copy version of the assignment and therefore would quickly print out the assignments off the computer disk. This need for paper was particularly strong with respect to the cases and statutes provided as part of a "closed universe" assignment. The students' demand for paper generated an interesting discussion concerning the different reading patterns in print and online. \textit{See infra} pp. 16-18 and note 40. Thus, even before my students had access to computer-assisted legal research, they were already sensitized to the challenges of online reading and the benefits of seeing documents in print. This phenomenon has also been noted elsewhere. \textit{See} \textit{Ehrenberg, supra} note 5, at 9-10.

\textsuperscript{33} Because the print capabilities at our school are limited and students will soon be charged for printing, I distribute portions of many assignments in both electronic and print versions.

\textsuperscript{34} Although once available through LEXIS-NEXIS, \textit{FolioVIEWS} is no longer part of their software. "Due to the rapid migration of electronic publishing to web-based technology, LEXIS-NEXIS will no longer be providing \textit{FolioVIEWS} software in our routine software distribution starting with the fall of 1998." Letter from Michael R. Conway of LEXIS-NEXIS to law school educators and administrators dated April 16, 1998. (copy on file with author) \textit{FolioVIEWS} is still the leading platform for legal CD-ROMS and is still used extensively for electronic versions of law school texts. Materials created in \textit{FolioVIEWS} are saved in a "bound" (self-executing) version so that the user is not required to have the \textit{FolioVIEWS} software on her computer. Having used \textit{FolioVIEWS} extensively, both for course supplements and for distributing closed assignments, I can attest that the program had a steep learning curve for my students and they much preferred a web-based delivery of assignments. For a more detailed description of \textit{FolioVIEWS} and its capabilities, see \textit{Ehrenberg, supra} note 5, at 9.

\textsuperscript{35} The Center for Computer-Assisted Legal Instruction ("CALI") is dedicated to encouraging the use of computer-assisted legal instruction in law schools and provides a wide assortment of online legal tutorials for students at member schools. Although only a few of the tutorials offered are geared to the LRW curriculum, the exercises can offer students an optional way to reinforce concepts covered in class. \textit{See CALI: The Center for Computer-Assisted Legal Instruction home page (last visited June 16, 1998)} <http://www.cali.org>.

\textsuperscript{36} This is a new technique I will be trying this year. Throughout the school year, I
Posting the assignment on the law school network or a course web site has the advantage of always being available to the students. If they lose a copy of the assignment, they can easily get another. When the assignment is posted on a law school network, the LRW teacher can restrict access to the documents by distributing passwords so that students get only the appropriate information. This method of using passwords works well when an assignment involves confidential information for opposing sides such as moot court exercises.37 If these type of security measures are not needed, assignments posted on an Internet web course page will be accessible to all students with an Internet connection. Students access the assignment through a web browser and can view, download, or print the files from the course web site.

Another method to distribute electronic assignments is to hand them out on disk. However, this is the most cumbersome method of distribution. The time and expense involved in making a disk for each student is greater than other methods of distribution.38 Accordingly, course web sites are the easiest manner to distribute LRW assignments electronically.

In addition to the ease of distribution of electronic assignments, there are also pedagogical advantages as well. Hypothetical case files can be made more realistic by including a greater variety of documents such as correspondence, contracts or reports that might otherwise be too cumbersome to include in a hard copy version of the assignment. Eliminating paper costs makes it possible to include many more documents in the assignment.39 Moreover, distributing assignments electronically helps students to learn firsthand the advantages and disadvantages of working in an online environment, particularly with respect to online reading and information retrieval.
In our LRW program, the first major writing assignment, a closed universe memorandum, is distributed electronically on the class web site. The cases for the assignment are also distributed electronically, and students are at first quite pleased to have the legal materials available in this way. Soon, however, they are quickly printing out the materials, because they have come to recognize the inherent difficulties with reading online.

Reading online is not the same as reading a hard copy. When people read online, they tend not to read word by word, instead, they scan the page. In a recent study, 79% always scanned any new page—only 16% read word by word. Thus, when students are reading unfamiliar text with abstract concepts and perhaps new forms of reasoning, scanning the material is not in their best interests and may have a negative effect on their comprehension. In addition, there are indications that people read at a significantly slower rate online. Students quickly realize that reading materials online first may be inefficient. Instead, they learn that when they read new and difficult material, they are better off reading the material in hard copy first. They learn that the characteristics of online reading, scanning pages and slower reading rates, are less of an encumbrance later in the analytical process when they are more familiar with the material. Later in the semester, when the students have access to CALR, they are already aware of its limitations when researching the law, and as a result, may become more efficient online readers. By offering assignments in both electronic and paper form, students may very well improve their ability to

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41 See Ehrenberg, supra note 5, at 7 (noting that text on a computer screen is read 20-30% more slowly on a computer screen than when read on paper).
work effectively in both mediums and, in the process, gain a better appreciation of when and how to read online.

Offering assignments in an electronic format also develops student skill in retrieving information online. Within the paper medium, students must search through piles of paper to locate specific information, such as a quote. In contrast, the search capabilities in an electronic environment allow for more efficient information retrieval. As more information is stored digitally, information retrieval skills will become increasingly important to the practice of law. Students should be taught to use the "find" command (CTRL-F) in any Windows-based program to locate information in a document.42 This basic technique has many applications while in law school, and even more so later in practice. Thus, in receiving assignments electronically, students can develop their online reading and information retrieval skills and become more comfortable working in an online environment.

3. Using web course pages in the LRW curriculum

Web-based technology43 offers much promise for the LRW curriculum. Course web sites can be used to distribute traditional types of documents, such as syllabi, course descriptions, assignments, and model documents.44 As technological improvements make it easier to create web-based materials and navi-

42 When the "find" command is activated, a dialogue box opens up and a word(s) can be entered. By clicking "OK" the Windows program will search the document for every place where the word(s) appear and highlights those words in the text. Although not as sophisticated as the query capability in Folio VIEWS or the search options in LEXIS or Westlaw, the "find" command is nonetheless an effective retrieval technique. It can also be used when viewing a web site.

43 The World Wide Web (the "Web") is really only a portion of the Internet. The Internet encompasses all electronic information that can be shared between computers over phone lines. Specific types of information on the Internet are then sub-classified according to the technological language it is written in. Information included on the Web uses HyperText Markup Language (HTML). When documents are created in HTML, they include Hypertext "links." These links appear as underlined text or graphics on a web site that can be opened when clicked on with a mouse. One of the key advantages of HTML is that people using a web browser, like Netscape or Internet Explorer, can view the pages, no matter what kind of word processing or operating system they have on their computers. Other types of information available on the Internet use different techniques to access the information, such as "telnet" and "gopher." See Geist, supra note 21, at 158 n.99.

44 An excellent source for any law faculty contemplating a web site is JURIST: The Law Professor's Network (last visited October 2, 1998) <http://jurist.law.pitt.edu>. This web site includes links to faculty web sites, authoring tools, and other useful information about the Internet for law faculty.
gate the Internet, the possibilities for its use as a teaching tool are only limited by your imagination.45

Although originally the most daunting way to integrate technology into an LRW class, course web pages have become increasingly easier to create and maintain. Generally, the LRW teacher has two options in developing a web site: she can create her own web site or use one of the ready-made products available from West (TWEN)46 or LEXIS (Virtual Classroom).47 Although creating your own web site allows more flexibility, the ease of the ready-made web course products is hard to beat.

Creating your own course web site is a two step process:48 1) you must first create the documents in HTML49 files; and 2) then load those files on your web site on the server (sometimes referred to as the remote computer). Any documents included in the web site must be created in HTML, the programming “language” of the web. The latest versions of Word and WordPerfect allow you to save your documents in an HTML format, thus eliminating the need to learn the HTML language. However, formatting changes may occur or be lost in the transformation and may be difficult to fix without knowing HTML. There are also web publishing tools available in the Netscape browser and

45 Michael Geist has been a key innovator in the use of web-based technology in the LRW curriculum. His 1997 course web site can still be viewed at <http://www.columbia.edu/-mag76/lrw.html> (last visited November 13, 1998). His most recent article further describes the current state of web-based technology in legal education. See Geist, supra note 21.

46 The West Educational Network (TWEN) is a Web-based platform designed to help professors extend their classrooms electronically. With TWEN, law faculty can have threaded online discussions with their students, post class materials, and link to Westlaw, CALI, and other online materials on the Internet. For more information about TWEN, visit the web site at <http://www.twen.com>.

47 LEXIS-NEXIS Xchange offers the “Virtual Classroom” to law faculty. The Virtual Classroom is a web-based template that allows faculty to quickly create a class web site by filling in an online form. The LEXIS Virtual Classroom is free to law faculty and students and includes a threaded discussion list and the ability to post class materials and schedules. For more information about the Virtual Classroom, visit the web site at <http://www.lexis.com/lawschool>.

48 Explicit directions on how to create a web site are beyond the scope of this article. Instead, a brief overview is included here so that readers can decide for themselves if it is worth pursuing for their own courses. The JURIST web site has many links to web authoring tools and is an excellent resource for law faculty interested in creating their own web sites. See JURIST, supra note 44.

49 See supra note 43. There are many sources on the Internet that also explain HTML. One of the better guides is offered by the National Council for Supercomputing Applications. A Beginner's Guide to HTML (last visited on October 2, 1998) <http://www.ncsa.uiuc.edu/General/Internet/WWW/HTMLPrimer.html>.
web publishing software programs such as Hot Dog Pro.\(^{50}\)

Once documents are created in HTML, they must be transferred to the web site you plan to create. This process involves the use of FTP (file transfer protocol).\(^{51}\) There are fairly easy programs that will complete the process for you or, if you have a law school "webmaster," she can load the disk containing your documents onto the web site for you.

Maintaining your own course web site has both advantages and disadvantages. A web site offers twenty-four hour accessibility for students. As a result, students have no excuse for losing an assignment or handout. A web site, however, also requires constant maintenance by the LRW faculty. You must be prepared to keep it up-to-date; you cannot just create a web site and forget about it. Good web design\(^ {52}\) also takes time and thought and not everyone has the knack for it. For those people who do not, the ready-made web sites are a better option.

Both LEXIS and West now offer ready-made web course packages.\(^ {53}\) An LRW professor can create a web site with these products by filling out some online forms that ask the professor's name, the name of the course, when it meets, and how many students are enrolled in the class. Once the web site is established, course materials can easily be transferred to the site from a disk or your computer's hard drive. Be aware, however, that some formatting changes may occur when the documents are viewed through a web browser.

Both products appear to be quite similar, although the one from LEXIS is free. Another difference is that West's TWEN in-

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\(^{50}\) To find out more about Hot Dog Pro, see the web site at <http://www.sausage.com>. If you would rather use a Microsoft product, its web publishing program is called FrontPage'98. Information about this software can be found at <http://www.microsoft.com/frontpage>.

\(^{51}\) FTP (file transfer protocol) is the process of moving or transmitting a file from one computer to another over the Internet. Typically a computer user will need FTP software to move the file from the computer's hard drive to the Internet site. This process is sometimes referred to as "uploading." See MICROSOFT PRESS COMPUTER DICTIONARY 357 (1991).

\(^{52}\) One example of a well-designed LRW web site is that of Professor Gregory Berry at Howard University Law School. His web site can be viewed at <http://www.law.howard.edu/~gberry/lrww>. Professor Berry's web site offers more than just a syllabus; it includes helpful writing tips ("Berry Advice") and information regarding returned assignments such as the grading criteria, a sample answer, and grade distribution. Professor Berry conceived and created the web site himself using Netscape Composer and HotDog Pro. He also loads the pages himself using basic FTP software (CuteFTP).

\(^{53}\) See supra notes 46, 47.
cludes a link to Westlaw on the TWEN web site while the Lexis Virtual Classroom does not, at this writing, include a link to its own research database, LEXIS. Either product can be easily integrated into the LRW curriculum. Since these ready-made web sites are hosted by West and LEXIS respectively (the web sites reside on their servers), it is therefore unnecessary to coordinate these web sites with your law school network.

The main advantage of a ready-made web site is the ease of setup and maintenance. Very little technical or Internet expertise is necessary to maintain them. The chief drawback, however, to the ready-made web sites is their lack of flexibility. For example, the TWEN site does not allow a faculty to personalize a web site by tailoring the graphics or fonts to your individual tastes and needs. Because of that, all TWEN web sites look virtually the same. Nonetheless, for busy LRW professionals, either TWEN or the Virtual Classroom is a welcome option. Moreover, my students' experience with the TWEN page has been positive. Students can view, download, or print materials available on the TWEN page. Although initially some of my students had problems getting registered for TWEN, once they did, they reported that the materials were easy to use. They especially liked the threaded discussion list.

Any of these out-of-class options, e-mail communications, electronic exercises, or course web sites are fairly easy to implement. They all provide students with an opportunity to work in an electronic environment. In the process, students develop online communication skills as well as the ability to retrieve information electronically while they fulfill the requirements of their LRW class.

B. Using Technology in the LRW Classroom

Implementing technology in the classroom is admittedly more difficult than using it outside the classroom. Besides the cost, there may be logistical problems that make it impractical. The entire faculty must usually compete for limited technologi-

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54 The registration process confused some students because different passwords were needed and they tended to use the wrong ones. For example, students must use their West password to first register with TWEN. During the registration process, students are then asked to create a new password to use whenever they access TWEN. In addition, each course that uses a TWEN page (our LRW and Property classes both use TWEN) must employ a third password that is only used once, when you first register with the web site for that class.
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ical resources within a law school. In many ways, however, the LRW curriculum with its typically small class size and focus on skills, offers an ideal setting for the use of instructional technology. In this section, I suggest ways to use technology in the LRW classroom. My suggestions are based on my experiences in Keller Hall, the new state-of-the-art building which is now home to the University of Dayton School of Law. However, many of the methods described here can be implemented on a smaller scale or serve as inspiration to improve the technological resources available at other law schools.

All classrooms in Keller Hall are wired for access to the law school network and the Internet. There are data ports at all seats in the classrooms, the library, and lounges where students can plug in their computers. Each of the classrooms, other than the seminar rooms, contains a lectern equipped with a networked computer and VCR, a ceiling mounted LCD projector, a document camera, video-taping capabilities, and enhanced audio for hearing disabled students. The seminar rooms have network connections in the floor, rather than wired in the desktops, to accommodate different seating configurations. A portable LCD projector and computer are also available in those rooms.

Generally, I prefer to use classrooms in which the technological resources are permanent fixtures because the equipment proved more reliable. My preference for classrooms with built-in technology underscores its main drawback; unless the technology works flawlessly, which it often does not, you have to have a backup plan. When the technology worked, I was quite pleased with how engaged the students became in the class. But when the technology did not work, it was a humbling experience, and not everyone may want, or have the time, to risk this type of disruption.

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55 A "data port" is a connection plug-in that resembles the plug-in used for a telephone line.

56 Each LRW professor meets with her students in small sections of 15-20 students twice a week and once a week in a larger section of 45-50 students. The seminar rooms are used for the smaller sections.

57 With "portable technology" (such as a computer and projector on a rolling cart) I would often find that the "tech cart" had not been returned by the last user (creating last minute searches) or had been returned with a problem that had not been fixed. This year, I have my small sections assigned to a seminar room that is equipped with a "SmartBoard," an interactive electronic whiteboard described infra text accompanying note 62.

58 Even when things did not work, I used it as an opportunity to hone problem-solving skills. My students often had great suggestions to make things work or, better
During class, I experienced the most success with the document camera, the large screen projection, and the computer lab. The document camera allowed the flexibility to display documents and texts without having to create a transparency beforehand. With the large screen projection, my students did several editing exercises and participated in designing and implementing an online legal research strategy. In the computer lab, my students honed their drafting skills. To the extent any of these resources are available to your LRW program, there are many ways they can advance your pedagogical goals.

1. The Document Camera

The document camera (ELMO) looks like an overhead projector. Unlike a typical overhead projector, however, ELMO displays an image of whatever is placed on it. Whether you place a transparency, a piece of paper, or even your hand on the ELMO, the image is captured and then displayed on a screen via an LCD projector. Although its set-up is somewhat high tech, its classroom use is easy. Merely turn it on. The image can be zoomed in or out to make it more legible. The document camera earned high marks for reliability because it worked every time.

There were many ways to use this device in class. I displayed handouts or student work without having to first create a transparency or put the document in an electronic form. The document could be written on, or pointed to, just like a transparency on an overhead projector. The document camera made it easy to conduct in-class editing or citation exercises. The document camera could also be successfully used to teach manual research. For example, I often used it for live demonstrations showing how to use legal research sources such as Shepard’s and the West Digest System. For our research classes, I brought in the library books students were learning to use, such as Shepard’s. For the class hour, I asked students to Shepardize a case using the document camera so that everyone in class could follow the process. By displaying the actual book, rather than

yet, found other ways to accomplish the day's goals.

59 The document cameras in Keller Hall are ELMO's, model EV700AF. For more information about ELMO's, visit their web site at <http://www.m-media.com/elmo_prod.html>.

60 Unlike the overhead projector that only requires an electrical outlet, the ELMO requires a cable connection between it and a device that transmits the image to the LCD projector.
pages copied from Shepard's, students got a better sense of how information in Shepard's is organized. With the zoom-in capabilities of the document camera, everyone could see the small notations and different abbreviations students encounter while Shepardizing.

In another research exercise, I brought in the general index volumes for *American Jurisprudence* 2d and asked a student to locate information relevant to the topic we were researching in class. As the student looked up search terms in the index, the books were placed on the document camera so that everyone in the class could follow the student's research trail. As the student looked up search words in the general index, the entire process—including the "blind alleys" and mistakes—was visible to everyone in the class. It was much more effective than an abstract lecture on legal research. Later, the students went to the library to complete their research exercises. They remarked that seeing how the different books were used in class with the ELMO provided a helpful introduction to the materials. The only disadvantage I have found with the document camera is that it may be hard to read when the print on the document is very small or blurred.

2. **LCD projection**

The LCD projector allows you to project on a large screen images from a laptop computer. Most LCD projectors are portable (resembling the vintage home movie projectors) or mounted in the ceiling of the classroom. The mounted LCD projectors are usually located in larger classrooms (those that seat 50-100 students) and project onto a screen. A portable projector is better suited for smaller seminar rooms that seat less than fifty. While it is preferable to have a screen to display the images, a blank wall is acceptable, too.

Another projection alternative for a smaller classroom is a
SmartBoard. A SmartBoard is an interactive electronic whiteboard (similar to a chalkboard, only it is white and uses colored markers) that comes in a variety of sizes. The SmartBoard we have in the seminar room at Keller Hall has a touch sensitive screen surface of approximately three feet by four feet and resembles a big screen television. By projecting computer images onto the SmartBoard, you can control all Windows and Macintosh applications by using a mouse or touching the screen. For example, to close a program on the screen you can either use the mouse to position the cursor over the top right-hand "x" and click or you can simply touch the same spot on the screen. In addition, just like a chalkboard, you can make notes or highlight text on the SmartBoard in electronic "ink" that can be erased. I appreciated the projection capabilities of the SmartBoard as an alternative to the LCD projector for a small classroom. Since it is a fixed piece of equipment, I can always count on it being in the classroom and ready to go.

I have used the SmartBoard and LCD projection for PowerPoint presentations, for critical reading and editing exercises, to show videotapes of client interviews and oral arguments, and to teach computer-assisted legal research. As for its reliability, the LCD projector was sometimes the most troublesome. If you are planning to use an LCD projector, particularly a portable one, be aware that it may be incompatible with the computer you are using. This is usually because the LCD projector will not work until the display settings on the computer are changed. Once that problem is resolved, the projector is very reliable.

When introducing discrete skills, like Bluebook citation or designing a research strategy, a PowerPoint presentation can be an effective way to present the material. Presentation software offers an organized way to present new topics or an overview of material to be covered in class. For example, I have used pres-
entation software to explain the citation rules for case cites, with an explanation provided for each major part of the case cite (the case name, which reporter to cite, the jurisdiction and year). The main drawback of this technology, however, is that students tend to be passive observers, rather than engage in a learning experience. There is also a tendency for the teacher to put too much text in the presentation resulting in the unsatisfactory phenomenon of students following along as the teacher reads the materials out loud. The more interactive a presentation can become, the easier it is to avoid this problem.

The newer versions of PowerPoint allow you to make presentations more interactive. For example, I began an exercise on citation form by displaying a series of screens that explained the rules concerning proper Bluebook form for case names. Next, I displayed a screen showing the word “example.” When I clicked on the word “example,” a Word document appeared on the screen with an unedited case name. A student was then called to the computer and asked to enter the correct case name. The class then had an opportunity to discuss the student’s answer. When that skill had been sufficiently introduced, it was easy to return to the PowerPoint presentation for the next point, such as parallel cites. The more presentation software can be used in an interactive manner, the more effective it becomes in the LRW curriculum.

LCD projection can also be used effectively for drafting and editing exercises. Text can be displayed providing an opportunity for an in-class writing exercise. I often have my students work in groups during class, drafting a “Question Presented,” a thesis paragraph, or a particular legal document, such as a complaint. Students without laptop computers in class, write out their drafts on paper. When they are done, they type in their

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65 See Nancy Page Fernandez, Technology & Learning (last modified August 1997) <http://www.georgetown.edu/crossroads/guide/fernan.html> (noting that presentation design can lull students into passive observers).

66 Id.

67 I strongly recommend that if you use technology in the classroom, you use it to engage the students. Otherwise, you may find yourself with a passive group of onlookers. The focus shifts to your technical expertise, or lack of it, instead of the material. I found that when I involved students in class presentations, they learned better.

68 I also use presentation software in an interactive way when I teach a class on Internet research strategies. For example, the presentation covers techniques for using general search engines. Then, within the presentation there are hypertext links to general search engines such as Infoseek and Alta Vista. Therefore, first the technique is described, and then it can be demonstrated in a seamless presentation.
draft on the classroom computer. Students with laptops save their drafts on a disk and then transfer the file to the classroom computer. Students can view and compare each draft as they are displayed by the LCD projector through the classroom computer. By participating in this exercise, students see the importance of revising a document to produce a high quality product. They also see the variety of ways their classmates chose to effectively communicate the same idea.

I have also used LCD projection to develop critical reading skills. I display a short case or statute and call on a student to read the passage aloud. I also ask the student to explain what she is thinking as she reads.69 Because the entire class is focused on the language of the case or statute, students can test their own understanding of the same passage. This exercise also allows me to quickly focus student attention on specific language without wasting class time trying to explain where in the document the language is found.

Besides assisting in reading comprehension, LCD projection can also help develop analytical skills since "[d]isplaying appropriate passages at crucial points help students do what they often have difficulty doing on their own: focusing on the relevant language in the materials they read."70 Using the SmartBoard,71 I ask a student to highlight the text as he reads it, just as he would highlight the text if he were reading the case in paper. When the student is finished, I ask him why he highlighted the passages he chose. This technique helps students recognize that in their search for the "Black-letter law," they often miss other crucial parts of a case, like the facts, or the court's reasoning.

Finally, I often use LCD projection to teach computer-assisted legal research. Although we still invite the vendors to train students on their respective products, I also include clas-

69 This exercise is based on an article by Elizabeth Fajans and Mary Falk describing a reading protocol, a strategy for reading legal text. See Elizabeth Fajans & Mary Falk, Against the Tyranny of Paraphrase: Talking Back to Texts, 78 Cornell L. Rev. 163, 191-198 (1993). See also Peter Dewitz, Reading Law: Three Suggestions for Legal Education, 27 U. Tol. L. Rev. 657 (1996). Using the strategy described in the Dewitz article, I first model what I expect the students to do. As I read a displayed text, I indicate how I search for context and explain what I am reading. Then, I display a different text for a student to read. As the student reads the text aloud, she provides commentary on what she is reading. For example, the student may say, "I'm skipping to the end to see how the court ruled and then coming back to the beginning of the opinion." When she is finished, students discuss the effectiveness of the reading techniques they observed.

70 See Warner et al., supra note 15, at 113.

71 Described supra in text accompanying note 62.
ses on computer research within my own curriculum.\textsuperscript{72} With a network connection, classes can include LEXIS, Westlaw, and Internet research. The main drawback is that it is often difficult to read the text in some of the projected computer images. The text can be enlarged somewhat,\textsuperscript{73} but since you have no control over how information on the screen is formatted (for example, the size of the font in the document you are viewing), there are nevertheless limitations. If students have network connections at their seats, this problem can be overcome by having them follow along with you on their own laptops.

In general, when using LCD projection in the classroom, readability concerns are the main technical issue.\textsuperscript{74} Whenever possible, use a sufficiently large font: 18 to 24 point type can be read at the back of a typical 100 seat classroom.\textsuperscript{75} Choose colors that are easy on the eyes. When lighting is less than optimal, white text on blue background works well. However, red on white is hard to read.\textsuperscript{76} The type of font you use also makes a difference. Use a \textit{sans serif} typeface (Arial works well), instead of more commonly used fonts like Times Roman or Courier. Using LCD projection can be simple or elaborate depending on your pedagogical needs or goals. And it is important to keep these goals in mind when you plan your use of the LCD projector.

3. \textit{Computer labs}

Although not technically a classroom tool (since computer labs are rarely designated as a "classroom" in the law school), I reserve our computer lab during class time for "hands-on" collaborative drafting and research exercises. When I was in a building with a smaller computer lab, students worked together at each station, which was also quite successful. The class met

\textsuperscript{72} Professor Marilyn Walter advocates the importance of involving the LRW professor in teaching computer research because trainers provided by the commercial vendors may be less motivated to teach a comprehensive approach to research strategy that includes the use of hard copy sources when appropriate. \textit{See} Walter, \textit{supra} note 20, at 582-86.

\textsuperscript{73} On the menu bar in the web browser (either Netscape or Internet Explorer), choose "View" and select an option to "zoom" or "enlarge text." Unfortunately, the text enlargement feature has limits and may not enlarge enough so that everyone in the class can read the screen.

\textsuperscript{74} A complete review of the technical issues associated with LCD projection is found in Warner \textit{et al.}, \textit{supra} note 15, at 113-124.

\textsuperscript{75} \textit{Id.} at 114.

\textsuperscript{76} \textit{Id.} at 124.
in the computer lab to draft client letters or demand letters to opposing counsel. As the students worked on their letters, they were encouraged to collaborate. During the hands-on research classes, collaboration was much more common as students compared research strategies and results. The final product (whether a client letter or list of research authorities) was printed out at the end of class, or e-mailed to the LRW professor for review. The only drawback is that it is sometimes difficult to reserve the computer lab because of heavy use by others within the law school community. You should especially avoid reserving the lab during peak demand times, like right before a major writing assignment is due. To the extent the computer lab is available, however, it can be a relatively easy way to include technology in the LRW curriculum.

Like the computer lab, the ability to use technology in the LRW curriculum depends on its availability. However, the more we understand how technology furthers our pedagogical goals, and how to effectively use technology in the LRW curriculum, the better prepared we are to assess the technological capabilities within our facilities. We can know how to use the resources we have and how to make cogent arguments to get the technological resources we need.

IV. INSTITUTIONAL & OTHER CONSTRAINTS ON THE USE OF TECHNOLOGY IN THE LRW CURRICULUM

While the use of technology may benefit our students and offer creative ways to enhance the LRW curriculum, inadequate law school facilities may pose a significant obstacle. The use of technology depends upon our law school's infrastructure, including the computing facilities, the law school network, and student computing capabilities. Deficiencies in any of these areas may limit your ability to integrate technology into the classroom. As one commentator noted: "To keep our sanity and that of our students, we have to balance what we would like to do with what is practical." 77

A. Law School Computing Facilities

If the tenor of messages posted on law school computing discussion lists is any indication, 78 many law schools are at some

77 See Diamond, supra note 18.
78 Discussion lists especially dedicated to law school computing issues include "E-
stage of upgrading or evaluating their computing facilities. Not only can LRW faculty make more effective use of the law school's existing facilities, but we can also become involved in planning future improvements in the computing facilities. In examining what technological resources you have and what you need, focus your efforts on the faculty office, the classroom, and the computer lab.

Within the faculty office, LRW faculty members need computers able to do the basic tasks they expect from their students. Their office computer must have access to LEXIS, Westlaw, and the Internet. The computer must have at least one Windows-based word processing program (Word or WordPerfect) and presentation software (such as PowerPoint). Preferably, the office computer should have the most current word processing programs available so that student assignments can be turned in on disk and graded on computer. It may also be worth checking whether the law school could supply you with a notebook computer in lieu of a desktop model. With a

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79 Both LEXIS and Westlaw are now available via the Internet. While this reduces the need to have proprietary software on your computer, it does require you to have a computer with enough "muscle" to handle the multimedia capabilities of the Internet. Recommendations regarding the computer capabilities you will need are available in computing magazines, such as PC WORLD, or by checking the reviews and recommendations on CNET: The Computer Network (<http://www.cnet.com>), a comprehensive site on issues related to computing and the Internet.

80 If the experiences of my faculty are any indication of what others may experience, it may be very difficult for some to abandon the WordPerfect "blue screen" found in earlier DOS-based versions. Nonetheless, there are compelling reasons for making the jump to a Windows-based program. An increasing number of key programs, such as e-mail, are now Windows-based. Besides being better able to communicate with your students, it will be much easier for you to create documents that can transfer easily to the World Wide Web.

81 See supra note 63.

82 I provide my students with the option of turning in their assignments on disk. I require all my students to hand in two copies of their assignment. If one copy is on disk, the other must be a paper copy. Out of my 45-50 students, only about five to ten use the disk option. As I grade the memos, I read through the hard copy and type the comments on the disk. I use this technique for two reasons. First, I believe I read differently online than on paper, and I want to be consistent in my grading. For a discussion of online reading see supra text accompanying note 40. Second, large-scale structure and other aspects of the memo are more apparent in print than online. I find that typing the comments on the students' disks takes no more time than hand-written comments. My comments are much more legible this way, and students that use this option say that they find this form of feedback much more helpful.
notebook, LRW faculty have increased portability for creating and grading assignments. Your work is not tied to your desk, and there is no need to shift files between a home and office computer. Notebook computers offer an additional advantage when LCD projectors are available because they can also be used in the classroom to display documents, exercises, or other presentations. While obtaining a more powerful computer may mean learning new word processing software or developing facility with the Internet, it is time well-spent.

Although an adequate office computer can increase the technological options for LRW teachers, a well-equipped classroom can even further the possibilities. Unfortunately, technological upgrades in the classroom may be more difficult to overcome than deficiencies in office computing facilities. Technological improvements in the classroom often face financial constraints as educational budgets get tighter. In addition, physical constraints often exist in older facilities.\(^93\) As you review your own law school's technological infrastructure, you may find that some institutional limitations are insurmountable. Even then, there are still ways that technology can find its way into the LRW curriculum.

Even under the most difficult of circumstances, a classroom can have at a minimum an overhead projector.\(^84\) More sophisticated projection capabilities are possible in the classroom if you have access to a computer and LCD projection. The computer can either be a notebook or a fixed computer. Along with the computer, the classroom needs an LCD projector that can display the computer screen.\(^85\) As discussed earlier, you can display whatever you can create on your computer, whether it is a sin-

\(^83\) See Richard Perna & Lindy Carll, Interim Report of the University of Dayton School of Law Mead Data Central Joint Committee to Study Computer Technology in Legal Education (last modified 1993) <http://www.law.cornell.edu/mdc_udsl/sect3e.html> (noting the economic constraints law schools face as they try to upgrade technology). See also Marcia Carlson et al., Beyond the ABCs, AM. SCH. & U., January 1, 1997, at 14 (school administrators examine how educational facilities are changing and the challenges involved in facing those changes). In light of these potential obstacles, it becomes even more important that technology expenditures have a pedagogical justification.

\(^84\) At the Ann Arbor LWI conference, see supra note 1, my co-panelist, Professor Nancy Soonpaa, described many innovative ways an overhead projector can be used in the LRW classroom. For many professors, the overhead projector is a low-tech, but readily available piece of equipment in the classroom. Instead of traditional overhead projectors, most of our classrooms at the University of Dayton School of Law are equipped with document cameras, which can display traditional transparencies as well as regular print documents. See supra section B1.

\(^85\) See supra section B2.
Most law schools are in the process of developing a local area network (LAN) if they do not already have one. Through a LAN, network users have access to the Internet, e-mail, and whatever programs or files are available on their server. In planning to integrate technology options such as e-mail or discussion lists, the network capabilities must be able to support these options.

The accessibility of your law school’s network may affect to what extent you can use technology. A LAN network can only be accessed through data ports. At a minimum, law schools should provide data ports in every faculty member’s office. For pedagogical reasons, other access points should exist throughout the building, including the classrooms, library, and computer lab. Classrooms may have one data port, which only permits the instructor to access the network. Or, the entire room may be wired so that every student has access to a data port. The availability of data ports impacts how the network can be incorporated into your curriculum. Generally, fewer data ports in the classroom limit your ability to conduct “hands on” exercises using the network. In addition, dial-in access should be available so that students and faculty can access the network from home. Home access may be limited to just e-mail or it can include full access to the Internet and server files.

Networked computers available for student use are usually located in the law school library. In some instances there may be a computer lab with several networked computers. If a lab is available, check out how many computers are in the lab, what software is available on those computers and the hours the lab is open. As described earlier, the lab can be reserved for

86 The “server” is the main computer that controls access to the network and its resources. See MICROSOFT PRESS COMPUTER DICTIONARY 314 (1991). All computers connected to the network have access to whatever is stored on the server. See Id. In some cases, faculty and students may have the ability to save files on the server. If the classroom has a network connection, this can allow you to access files from your directory and project them in the classroom.

87 See supra note 55.

88 If the law school is affiliated with an undergraduate institution there may be computer centers available for student use at the other facilities. However, these computer centers may not always have access to the law school network.

89 For example, look for Internet access and what word processing is available. Find out whether CALI exercises can be accessed on the lab computers and whether the com-
hands-on workshops on computer-assisted legal research or legal writing.\textsuperscript{90}

B. Student Computing Capabilities

Finally, in addition to the availability of computing facilities at the law school, it is also helpful to know what type of computing abilities the students possess. What programs are they familiar with? What is their level of expertise? The answers to these questions provide not only insight into your students' comfort level with technology, but also alerts you to their expectations for its use in the classroom. I distribute a short survey\textsuperscript{91} during orientation and then again at the end of the first year that asks how many of the students own their own computers, how many of them are notebooks and how long they have had them.\textsuperscript{92} The survey helps plan any computer training that may be necessary as well as determining whether assignments requiring the use of a computer are feasible. Several years ago, I avoided assignments that required computers because the results of my survey indicated that the computer lab could not accommodate all the students who did not have computers. The most recent survey results indicate a significant increase in computer ownership. At present, approximately 85\% of University of Dayton School of Law students arriving at law school now own a computer.

Even though law students appear to be more computer literate with each new year, be careful not to over-estimate their proficiency. Although our surveys indicated that students felt confident in their computing expertise, the number of students who have trouble, for example, correctly saving a document still surprises us. For that reason, students should be encouraged to attend any available computer training offered by the law school.\textsuperscript{93} By assessing the students' level of computer sophistication, computers have the capability to do CD-ROM research. Know what is available for your students.

\textsuperscript{90} See supra section B3.

\textsuperscript{91} If you would like a copy of the survey, e-mail me at crist@udayton.edu.

\textsuperscript{92} Many law schools are beginning to require computers of entering students. See James E. Duggan, Mandating Computer Ownership at Law Schools: A Survey, (last modified Feb. 13, 1998) <http://www.siu.edu/offices/lawlib/survey.htm>. This requirement is currently under consideration at the University of Dayton School of Law.

\textsuperscript{93} Our LRW curriculum has no time to include basic computer training. Instead, it is offered by the computing support personnel who are separate from the LRW program. Although training sessions are normally conducted by the computing support staff mem-
tion, you can avoid making unrealistic demands, such as expecting them to use a sophisticated program to complete your assignments.94

IV. CONCLUSION

While there are certainly compelling reasons to integrate technology into the LRW curriculum, there are equally significant cautions. In the article *Teaching Law with Computers*, the authors offer a useful checklist for law faculty considering the implementation of technology in their classes:95

- Have you developed a clear pedagogical rationale for using the technology?
- Have you made that rationale clear to yourself and your students?
- Have you integrated the technology into an overall pedagogical plan in a way that keeps the focus on your teaching goals and avoids "information overload"?
- Can you use and rely on the technology to the point where it does not become a distraction?
- Is the technology sufficiently reliable so that it promises to be relatively trouble-free in the classroom? If it does fail, do you have a backup plan?
- Do you have an adequate computing environment, including a well-equipped computer, a reliable computer network, and computing support staff willing and able to work with you?

After considering the answers to these questions, you will be in a better position to evaluate how to effectively integrate technology in your LRW curriculum.

Information technology in its many forms will be an increasingly integral part of legal education and the practice of law. The more we can expose our students to the capabilities, as well as the limits of technology, the better prepared they will be to effectively integrate technology in their professional careers.

94 I learned this the hard way when I expected my students to use FolioVIEWS to read and use my class supplementary materials. See supra note 8. The program had a steep learning curve and caused unnecessary frustration among my students.

95 See Warner et al., supra note 15, at 171. I have adapted the checklist for the needs of LRW faculty.
How Individual Differences Affect Organization and How Teachers Can Respond to These Differences

Mary Barnard Ray

Like the sand that accumulates grain by grain in the bottom of an hourglass, information accumulates in the writer's mind. And, just as that pile of sand must periodically reorganize itself as it grows, a writer must periodically reorganize his or her understanding as knowledge grows. The writing teacher attempts to facilitate this process of organizing and reorganizing, even though the teacher cannot predict exactly when or how this organization will occur. This lack of precise prediction means, among other things, that the teacher cannot prescribe one approach to outlining that will work for all students. While this lack of precise predictability may be frustrating, it is inevitable; writing, like the flow of each grain of sand through an hourglass, depends on differences too detailed for uniform prediction or precise control.

This paper describes the variations a teacher may see and presents a general approach a teacher can employ to cope with this lack of uniformity in organization. This approach involves both understanding the individual differences that affect specific parts of the organization process and incorporating teaching methods that enable the teacher to work with those individual differences as they appear. Some of the techniques can be used

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1 Observation and understanding of the student's learning process is the first step in successful teaching, for the student's own mental processing will affect the outcome. "The brain is not a passive consumer of information. Instead it actively constructs its own interpretations of information and draws inferences from it." M.C. Wittrock, Cognitive Processes of the Brain, in EDUCATION AND THE BRAIN: THE SEVENTY-SEVENTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION, PART II 61, 101 (Jeanne S. Chall & Allan F. Mirsky eds., 1978).

2 Sources of influence for this analogy are the theories of chaos and complexity. For an accessible account of the science of complexity, see M. Mitchell Waldrop, COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS, 1992.

3 Although this article talks about various classifications of skills and inclinations, its goal is to help individuals, not to remove individuality by placing people in theoretical boxes. Its goal is to help teachers help the student, not to forward a theory. As Jung said of psychologists, "Personal and theoretical prejudices are the most serious obstacles
in a larger class of students; some require individual work. In summary, the paper explores the reasons organization cannot be taught successfully with any one method and the ways organization can be taught to diverse students.

The principle behind this view of teaching organization is that only a few individual differences are relevant to any one point in the organization process\(^4\), even though many individual differences may affect organization.\(^5\) Applying this principle allows the teacher choose teaching approaches quickly\(^6\) while avoiding the twin perils of putting the student into an oversimplified category or getting bogged down in a cumbersome system.\(^7\)

This paper first illustrates this idea by showing how, when diagnosing a student's organizational problems, a teacher would benefit from considering three variables related to the individual student: previous academic experience, current writing process, and hobbies. It then discusses why considering individual differences is also important when teaching organization. To il-

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\(^4\) The efficacy of elegant solutions is echoed in explanations of widely divergent and complex systems. For example, biologists Francois Jacob and Jacques Monod discovered that only a few of the genes in a DNA molecule function as switches. When one switch is tripped by a hormone or another trigger, it may cause others to trip, starting a cascade that eventually leads to a new pattern. These new patterns, in turn, enable cells to differentiate into the cells of heart, muscle, brain, liver, and skin. These switches set in motion the changes that allow a human to be created from a single cell (a process called exogenesis). "Such self-organizing structures are ubiquitous in nature." Examples discussed include a laser, a hurricane, and a living cell. "[I]t's conceivable that the economy is a self-organizing system . . . ." M. Mitchell Waldrop, COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS 31, 33-34 (1992). Thus it is logical to hypothesize that writing is also a self-organizing system.

\(^5\) Myers Briggs Personality Types include some observations about ways people organize information. For example, see S. Hirsch, USING THE MYERS BRIGGS TYPE INDICATOR IN ORGANIZATIONS (1985). For a summary of other categorization systems, see PSYCHOLOGICAL ASPECTS OF LEARNING (Kevin Sheldall & Richard Riding eds., 1983).

\(^6\) The teacher faces a barrage of information and must make many choices, just as the writer must: "negotiations among multiple voices and conflicting goals and constraints appear to be a critical but common part of both writing and learning to write." Linda Flower, Collaborative Planning and Community Literacy: A Window on the Logic of Learners, in INNOVATIONS IN LEARNING: NEW ENVIRONMENTS FOR EDUCATION 25, 45 (Leona Schauble & Robert Glaser eds., 1996).

\(^7\) Myers Briggs, for example, uses sixteen different personality categories, which would require the teacher to consider sixteen variables when presenting information.
Illustrate the feasibility of considering these individual differences when teaching, it then discusses two specific aspects of organization where these differences influence learning: outlining and reasoning.

I. Diagnosis of Organization Problems

When a student's work exhibits poor organization, a teacher needs to do more than diagnose the problem itself. The teacher also needs to understand the way the student now organizes information. Then the teacher can suggest a few strategic changes that the student can improve, rather than suggesting a drastic overhaul, which the student is less likely to achieve and which may, even if achieved, be unsuccessful for that student.

Understanding each student's complete organizational system, however, would overwhelm most teachers. But a teacher can use just a little information about three individual characteristics to predict what approaches to organization are most likely to be successful for a student. Those individual characteristics are (1) the student's previous academic major or work experience, (2) the student's current writing process, and (3) the student's hobbies. These characteristics work as predictors because they reflect the individual's ways of thinking.

8 Working as much as possible with the student's current way of organizing, rather than overhauling the student's whole method, is congruent with much research in education and related biological fields. "One paradigm for educational research that emerges from these studies [in the text cited] in neurology, psychology, and education emphasizes the importance of the mental processes and intellectual backgrounds of learners in determining the learning that occurs during instruction and teaching. Within this paradigm, research in teaching and learning focuses upon understanding the individual student's previous learning and cognitive strategies and upon instruction and teaching that builds upon that learning and those strategies." M.C. Wittrock, Cognitive Processes of the Brain, in EDUCATION AND THE BRAIN: THE SEVENTY-SEVENTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION, PART II 61, 96 (Jeanne S. Chall & Allan F. Mirsky eds., 1978).

9 The process a writer uses reflects individual learning styles. For examples, see PSYCHOLOGICAL ASPECTS OF LEARNING (Kevin Sheldall & Richard Riding eds., 1983). The business world has already recognized the relevance of individual differences in the workplace. Many businesses even use Myers Briggs typing to determine good matches between individual personality differences and career. See S. Hirsch, USING THE MYERS BRIGGS TYPE INDICATOR IN ORGANIZATIONS (1985). Many problems exist with using individual differences this way, and this article does not support such a use of individual differences. Adapting teaching in response to these individual differences, however, is a different matter.

10 Asking the student for this information also reassures the student that the teacher is listening, helps the teacher avoid jumping to conclusions, and provides a baseline from which the student's progress can be measured.
A. Previous Academic Major or Work Experience

Knowing about a student's previous academic or work experience helps the teacher identify the problems an individual student is more likely to face in legal writing. An individual student's previous experiences will have inculcated the student with certain beliefs and habits, and these beliefs and habits affect writing. Additionally, the student's choice of the field of study may be affected by individual differences, which also will affect writing. For example, nurses are trained to record all data

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11 We know our students come to us with varying knowledge and cultures, but sometimes we fail to realize that they also bring differing beliefs about their academic work. "Students in school learn not only explicit curricula but also implicit ones. It may also teach each person his place in the world of people, of ideas, and of activities. While the student may learn this curriculum more slowly than the other, it is likely that he will not be able to forget it as easily as he can forget the details of . . . the explicit curriculum." Benjamin S. Bloom, Affective Consequences of School Achievement, in 2 ADVANCES IN EDUCATIONAL PSYCHOLOGY, 14, 16.

12 Studies have shown, for example, that past job experiences affect "the ways in which newcomers [to an organization] create and organize cognitive maps of their communication environments (e.g. Jabin, 1982a). . . . It is possible that individuals with previous work experience use latent cognitive scripts (Abelson, 1976) to interpret their new organizational environments . . . . (Hughes, 1958)." Frederic M Jabin & Kathleen J. Krone, Organizational Assimilation, in HANDBOOK OF COMMUNICATION SCIENCE 716 (Charles R. Berger & Steven H. Chaffee eds., 1987). Also see John H. Holland, Keith J. Holyoak, Richard E. Nisbett & Paul R. Thagard, INDUCTION: PROCESSES OF INFERENCE, LEARNING, AND DISCOVERY 205, 229 (1986). Finally, the modeling theory of learning offers examples of the powerful potential that previous modeling has on individuals. See A. Bandura, Modeling Theory, in PSYCHOLOGY OF LEARNING: SYSTEMS, MODELS, AND THEORIES 350, 351-367 (William S. Sahakian ed., 1970).

13 Anything that affects these basic aspects of an individual's thinking will affect reasoning and writing. For example, "the knowledge a person possesses has a potent influence on what he or she will learn and remember . . . ." F.J.B.C. Dochy, The Prior Knowledge State of Students and its Facilitating Effect on Learning: Theories and Research, 3, report no. ISBN 90-358-0587-9, OTIC-BB-1-2, from Open University Secretariat, the Netherlands, 1988. For related discussion, see Allen Newell & Herbert A. Simon, Simulation: Information Processing Theory of Learning, in PSYCHOLOGY OF LEARNING: SYSTEMS, MODELS, AND THEORIES 295, 302-305 (William S. Sahakian ed., 1970). Furthermore, adult learners need to inhibit old habits before they can exhibit new ones. This echoes earlier phases of human learning. For example, a human infant may understand that an object exists even when it is hidden behind a screen, but nevertheless may be unable to retrieve the object until over six months old because he or she cannot inhibit inborn reflexes as needed to retrieve the objects until that age. Adele Diamond, Neuropsychological Insights into the Meaning of Object Concept Development, in THE EPIGENESIS OF MIND: ESSAYS ON BIOLOGY AND COGNITION 67 (Susan Carey & Rochel Gelman, eds., 1991).

rather than to screen out unimportant information. Thus, a former nurse will probably have difficulty screening the facts of a case and selecting only the relevant ones. Asking the nurse to do this is asking that person to violate a principle he or she has held inviolate for many years. If the teacher realizes this and can explain the situation to the nurse, then both can understand the situation and work through the adjustment more smoothly.

Political science and English majors face other issues. Political science majors have been taught to move from a specific situation to broader philosophical applications, while law usually requires the reverse process; the legal writer must apply broader rules and principles to the specific facts at hand. English majors have been taught to create elegant and interesting writing that evokes many images and uses a wide vocabulary. But law requires control of meaning, not the evocation of many possibilities. Law also requires a control of vocabulary and the use of one phrase for one idea, avoiding elegant variation. Again, the student must adjust basic principles to perform successfully in legal writing.

Other issues challenge engineers, journalists, foreign language majors, and philosophy students. Engineers have been taught to find a solution that works and implement it; law requires them to consider all possible solutions. Journalists know the importance of "a good lead" and being readable, but legal writing requires them to focus on thoroughness and an orderly reasoning process. Foreign language majors have often learned to focus on little details, like grammar rules, more than to focus on the larger implications of the overall meaning. Philosophy majors, in contrast, have learned to focus on the big picture rather than details. Law requires these writers to attend to both the detail and the overall meaning.

If this need to adapt is presented in class and if examples are given to the students, then the students may be able to self identify and begin the process of adjustment on the first day of class. One way to do this is to have the students divide into groups by their previous academic majors and have them list "what they did to get an A." Then, as each group reads its list to

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15 This echoes a common value in science exemplified by the following quote. "In any scientific experiment, the observer's purpose is to be as accurate as possible and to make his observations independently of his own opinions . . . ." William K. Estes, MODELS OF LEARNING, MEMORY, AND CHOICE: SELECTED PAPERS 273 (1982).
the class, the teacher can explain which items on the list will apply to legal writing and which items will not. Even if the teacher cannot completely discuss all the lists (and this is likely), the teacher can cover enough to give the students a general understanding of the different approaches and enable them to realize that some adaptation is inevitably needed.

When working with an individual student, a teacher can begin by learning about the student's academic background and assumptions about writing. The teacher can then explain where legal writing differs, and both teacher and student will thus understand where problems in legal writing are most likely to occur.

B. Current Writing Process

Learning about a student’s current writing process helps the teacher determine the points at which the student’s writing behaviors need to be changed, once the teacher has identified the problems present in a student’s writing. It is difficult to change ingrained habits, and even more difficult to change internal habits of thought. Yet this is what we, as legal writing

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16 This theory is generally based on the idea that a person's method of processing information affects that person's response to a stimulus. For a description of this idea, see Douglas L. Medin, An Information Processing View of Discrimination Learning, Theories of Discrimination Learning and Learning Set, in 3 HANDBOOK OF LEARNING AND COGNITIVE PROCESSES 31, 131-132 (W.K. Estes ed., 1976).

17 Students in law school, as in any graduate program, fall into the category of “experienced learners.” That is, our students have all learned how to learn. This has both advantages and disadvantages. Although experienced learners do improve efficiency by “learning how to learn” (see reference to Harlow’s research in Douglas L. Medin, Theories of Discrimination Learning and Learning Set, 3 HANDBOOK OF LEARNING AND COGNITIVE PROCESSES, 131, 142-143 (W.K. Estes ed., 1976),) extinction of a previous behavior adds complexity when the stimulus for the new behavior is similar in some ways to the stimulus for the old behavior. Thomas O. Nelson, Reinforcement and Human Memory, in 3 HANDBOOK OF LEARNING AND COGNITIVE PROCESSES, 207, 233-244 (W.K. Estes ed., 1976) and Douglas Medin, Theories of Discrimination Learning and Learning Set, in 3 HANDBOOK OF LEARNING AND COGNITIVE PROCESSES, 131, 131-151 (W.K. Estes ed., 1976).

18 Mental habits are particularly hard to change because new learners prefer to tie new learning into old patterns. They have good reason for their preference; learning to relate new knowledge to old is the most efficient way to learn. New learning must make sense to the learner and must also relate to his or her existing structure of knowledge. If the learner cannot relate the new knowledge to this existing structure, then the learning will be rote and the new material will be stored as an isolated package in the memory. The new knowledge is thus difficult to retrieve because it is poorly organized in memory. See Richard J. Riding, Adapting Instruction for the Learner, in PSYCHOLOGICAL ASPECTS OF LEARNING AND TEACHING 91, 97 (Kevin Wheldall & Richard Riding eds., 1983).
teachers, ask our adult students to do when we ask them to change the way they organize their writing. Because it is such hard work, we should require no more changes in habits than are necessary.

Determining exactly what writing habits a student must change entails understanding the student’s current habits. Then, by understanding how those habits fit into the student’s writing process, the teacher can better determine where that process diverges from a path that would produce the desired result.

Research into the physiology of the brain suggests physical evidence of this aspect of memory: when situations trigger memories of earlier learning, the brain evidences congruent wave patterns in many different locations, even when the previously learned action is not repeated. See E. Roy John, Physiological Theory of Memory, in Psychology of Learning: Systems, Models, and Theories 451, 452-457 (William S. Sahakian ed., 1970).

This approach allows the teacher and student to build on the student’s strengths rather than focusing on an ideal organization process that may be unworkable for this student. This approach is related to a Jungian approach to psychology, which also tries to build on individual strengths:

“Just as the lion strikes down his enemy or his prey with his fore-paw, in which his specific strength resides, and not with his tail like the crocodile, so our habitual mode of reaction is normally characterized by the use of our most reliable and efficient function, which is an expression of our particular strength.” Angelo Spoto, Jung’s Typology in Perspective, 42-43 (Revised ed., 1995) (quoting 6 Collected Works of C.G. Jung, paragraph 947).

Understanding the student’s current writing habits and beliefs about writing helps us determine both the new habits needed and the approach needed to explain those new habits in relation to the student’s current writing. “[R]esearch clearly emphasizes that for learning to occur, new information must be integrated with what the learner already knows.” William L. Christen and Thomas J. Murphy, Increasing Comprehension by Activating Prior Knowledge, in Eric Digest, EDO-CS-91-03, 2 (1991), citing Donald E. Rumelhart Schemata: The Building Blocks of Cognition in Theoretical Issues in Reading Comprehension (Rand J. Spiro et. al, eds., 1980). This idea is related to the basic principle of establishing a baseline for comparison, as is done with control groups in scientific research. More specifically, it is based on the idea that it is all too easy to make assumptions about students (or subjects) that are incorrect; incorrect assumptions can lead to misunderstandings of the causal relationship between teaching information and learning responses. For a thorough discussion of the problems inherent in researching learning and cognition, see Leo Postman, Methodology of Human Learning, in 3 Handbook of Learning and Cognitive Processes 11 (W.K. Estes ed., 1976) and William D. Rohwer, Jr., An Introduction to Research on Individual and Developmental Differences in Learning, in 3 Handbook of Learning and Cognitive Processes 71 (W.K. Estes ed., 1976).

This approach is congruent with the idea of using generalizations about different personalities so you can work with them more effectively. The most popular version of this approach currently is probably the Myers Briggs Type Indicator. See S. Hirsch, Using the Myers Briggs Type Indicator in Organizations (1985).
Some students, for example, like to read through all their materials, mull over the information for a few days, write a draft, and then revise to smooth the wording and correct technical errors. This process, which involves doing all the organization in the writer's mind, may work well for writing an essay; the student is already somewhat familiar with the content, needs to coordinate information from only a few sources, and uses sources that are themselves already organized for a similar purpose. But this intuitive process of organization is less likely to work in a legal memorandum, where the information is unfamiliar, where the writer must use more sources, and where the sources are organized for a different audience and purpose.

Other students, after completing their research, prefer to begin by outlining, often using the classic system with roman numerals. When facing the task of organizing information that is complex and non-formulaic, however, students who outline too soon often produce mechanical documents that seem to go through the motions of logic without exhibiting true understanding. For example, when the student cannot correctly determine what content logically should be placed after the “I.”, the student either stops or guesses. This problem is more likely to occur when the content is very complicated and when the organization must arise from the logical progression of the content itself, rather than from a standard formula dictated by a genre. Legal writing assignments often present exactly this situation. In summary, while outlining immediately after completing the research works for some students, it is ineffective for many students in legal writing.

When working with a large group of students, the easiest way a teacher can learn how individual students organize is to have them record the steps they take in writing a previous class assignment, such as the first draft of a simple memo. The students can then refer to these steps during class and may be more likely to ask more focused and relevant “how to” questions during a class on the writing process.

A more effective way, however, is to meet with each student individually to discuss his or her writing process and to identify together places where the process needs to change. Although the teacher may not be certain what change would be best, he or she can at least suggest some approach that is likely to solve the major problems in the student's writing. For example, if a student has not seen and considered all the issues, a teacher
can suggest adding a step where the student consciously asks, "What other alternatives exist?"

C. Hobbies

This aspect of a student's individuality does not reveal likely problem areas, but rather reveals the student's strengths. Hobbies reflect how an individual enjoys using his or her mind. Because the person usually enjoys doing things at which he or she is skilled, a hobby reveals a person's natural strengths.22 Thus knowing a student's hobby helps determine how the student thinks best.

The teacher can build on the student's mental strengths by making the process of writing approach the process involved in the writer's hobby. For example, if a student enjoys reading novels or watching movies, he or she probably likes to follow a sequence of events, likes observing as much as creating, and enjoys having a rich array of data to absorb. For this student, a teacher may be able to explain an organizational technique more successfully by providing a sequence of techniques or by creating a concrete metaphor that illustrates the techniques.

In contrast, if a student likes to cook but never follows a recipe, then that student probably understands the importance of sequence but is unwilling to follow a formula. Furthermore, that student probably learns by doing rather than by observation. The teacher may want to offer the student several possible ways to change the organization of a document, rather than providing only one suggestion. Multiple options allow the student to experiment, later choosing and adapting the suggestions to develop his or her own unique way to reach the goal. This approach will be more compatible with the student's individual approach to learning and changing behavior.

In summary, the teacher can help the student work needed changes into his or her existing process. This approach to teaching increases performance by building on the writer's existing skills. By using an approach that is understandable and appealing to the student, the teacher can also increase the student's

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22 Hobbies are things we choose to do, and thus they are examples of how each of us likes to work. "Interest in a subject or a category of learning tasks may be defined behaviorally in terms of whether or not the individual would voluntarily engage in additional learning tasks of this type." Benjamin S. Bloom, Affective Consequences of School Achievement, in 2 ADVANCES IN EDUCATIONAL PSYCHOLOGY, 17, 17-18.
motivation to change by giving the student ownership of his or her organization process.

II. INDIVIDUAL DIFFERENCES RELEVANT TO VARIOUS ORGANIZATIONAL TASKS

It is likely that no one best method of teaching organization exists, or in fact can exist.23 This conclusion is the logical result if several assumptions hold true. First, adult writers already have habits for organizing information in place.24 Those habits have been ingrained by years of writing for teachers or supervisors, and other readers.25 Second, all writers do not use the same organization process, which is exemplified in part by the different writing problems experienced by students from different academic disciplines. Third, all writers need to adjust their organization somewhat to succeed in legal writing, because no

23 Scientists studying the biology of learning state that one general approach to learning is unlikely, as the final three of six basic themes of an overview of the topic reveal:

4. It is unlikely that there is only one learning mechanism, even if one prefers to work with general as opposed to domain-specific mechanisms.

5. The problems of induction with respect to concept acquisition are even harder than we thought.

It is not enough to postulate structural guidelines that help novices attend to relevant inputs; we need better and detailed accounts of acquisition mechanisms . . . .

6. Structural constraints on cognitive development and learning come in many shapes and forms and involve appeal to more than one level of analysis.


Physicists and others studying complexity (the state between stasis and chaos) explain that, in "complex adaptive systems," "there's no point in imagining that the agents in the system can ever 'optimize' their fitness, or their utility or whatever. The space of possibilities is too vast; they have no practical way of finding the optimum. The most they can ever do is to change and improve themselves relative to what the other agents are doing." M. Mitchell Waldrop, paraphrasing John H. Holland, COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS 147 (1992).

24 This is supported by general research in many disciplines, whose common themes appear remarkably relevant to the adult students' mastery of legal writing. As summarized by Carey and Gelman, innate or acquired learning structures are critical.

Innate and acquired structural determinants do important work.

- They increase the likelihood that novices will attend to relevant inputs.
- They provide a way to make coherent incoming data before the domain is mastered.
- They contribute the constraints that enable competent plans of action and thereby provide a source of self-generated feedback, practice, or alternative solution paths.
- They enable induction and hence learning.


25 See notes 13 and 14.
other field has an identical audience, purpose, or values. Finally, all people do not learn in the same way, as is discussed in learning theory, education, and psychology.

If we assume that the students have these inherent and often unavoidable differences, then we must assume that teaching organization successfully to all the students in a class requires the teacher to use more than one approach to teaching organization. That assumption requires a corollary assumption: the teacher needs to be able to determine which method will work for which students, and determine that method quickly and easily.

A first response to this need for a quick determination would be to find an overall system of categorizing people, something like the Myers-Briggs typology or Gardner's multiple intelligence theory, but for writers. However, no single set of categories is adequate. A system based on only two categories of writers would be oversimplified, too simplistic to determine how to teach each individual aspect of organization skills. A choice of two is polarizing, creating a false dichotomy. But a sys-

26 The study of how birds learn to sing provides insight into individual differences: "[T]here is no single process sustaining the learning of bird song in different species; rather, just as the song of each songbird is unique, the process that supports its development is also unique. . . . Further, understanding the unique properties of each learning process is necessary for progress in explaining learning." C.R. Gallistel, Ann L. Brown, Susan Carey, Rochel Gelman & Frank C. Keil, Lessons From Animal Learning for the Study of Cognitive Development, THE EPIGENESIS OF MIND: ESSAYS ON BIOLOGY AND COGNITION 3, 23-24 (Susan Carey & Rochel Gelman eds., 1991). If even young birds require individual study, surely adult humans do.


28 See note 5.

29 See Isabella Briggs-Myers, INTRODUCTION TO TYPE (1980).

30 Howard Gardner, co-director of Project Zero at Harvard University, developed his theory of eight intelligences: verbal-linguistic, logical mathematical, visual-spatial, bodily-kinesthetic, musical-rhythmic, interpersonal, intrapersonal, and naturalist. See D. Lazear, MULTIPLE INTELLIGENCE APPROACHES TO ASSESSMENT (1994).


32 For example, Carl Jung began with two categories (introvert and extrovert), but found this too simplistic. "I had tried to explain too much in too simple a way . . . ." quoted on Angelo Spoto, JUNG'S TYPOLOGY IN PERSPECTIVE 42 (Revised ed., 1995).
tem that included enough variables to be accurate would be unworkable. For example, Myers-Briggs' typology includes sixteen possible personality types\(^{33}\); it is unworkable for a teacher to have sixteen different ways to teach each aspect of organization.

A more reliable way to determine the best method for teaching organization to a particular student is to focus on a few relevant individual differences. Just as recognizing the student's academic background and hobbies helps a teacher diagnose and remedy organizational problems more quickly, recognizing other individual differences helps the teacher determine how to teach two specific organizational tasks: outlining and reasoning.

### III. OUTLINING: PREFERRED LEVEL OF ABSTRACTION

The individual difference most relevant to outlining is the student's preferred level of abstraction.\(^{34}\) Students with differing preferred levels of abstraction will benefit from beginning outlines at different points in the writing process. The students may also need to begin outlining in different ways.

Writers begin their thinking about a writing problem at different levels of abstraction. Some prefer to start with details, others with the big picture, and still others at a middle level. This initial difference dictates what organizational steps must come next.

Even within the classroom setting, a teacher can identify individuals' preferred levels of abstraction. For example, the teacher can ask the class to list the points they would need to make in a paper several pages long. This paper could be a research memo or an article advising college students about how to prepare for law school. When students have completed their lists, the teacher can simply count how many points the students listed. The number of points listed, rather than the con-

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\(^{34}\) These habits do not say anything deep about who the writer is; they certainly should not be used to typecast any person in any larger sense. Rather, they only identify habits relevant to the task at hand.
tent of those points, is a useful indicator of the student’s preferred level of abstraction.

A. Detail

Students who list more than eight items in the exercise usually think first of the details needed. For example, their list for law school preparation is more likely to include specific examples, such as “cost of tuition,” “problem of carrying heavy text books,” or “difficult technical vocabulary.”

These students are usually good at including specific detail and will often be very thorough, but they may not convey the larger context that makes the details significant. Thus they need to start with their strength (listing points needed) but then add a step that encourages them to see connections, such as grouping the listed points in different ways to determine exactly why and how those points relate to each other and to the question asked.

For people who begin with details, the best order for the outlining process is often the following.

1. List needed content.
2. Group those points in different ways until arriving at a grouping that makes sense.
3. Subordinate minor points to major ones within each group.
4. Logically order the groups and sub-points within each group.

This sequence allows the student to move from the detail to the larger points that detail supports.

B. Big Picture

Students who list only two or three items in the exercise are usually starting with the broader points. These students tend to begin with the general steps needed to resolve the problem, rather than the supporting detail. For example, their list relating to preparing for law school might include “finances,” “academics,” and “other preparation.” They are often good at seeing interrelationships and the logical sequence of ideas, but sometimes they fail to support their points adequately. They stop organizing too soon, often because they think the details are too obvious to be mentioned.
To outline adequately for legal writing, these students need a process that begins with the big picture, which is their strength, but then leads them to develop their logic in sufficient detail to provide good support for each point. A workable process for these students may be the following.

1. List points to be made.
2. Fill in needed support, continuing until they get to the specifics of the supporting law or relevant facts.
3. Check the order of the points and supporting details and adjust it as needed.
4. Read through the document to check the logic, plugging any holes remaining in the logical sequence.

C. Topic

When the students include four to six items in their lists, the items on those lists are more general than the specific supporting details, but less broad than the big picture. These students are usually starting at a middle level of abstraction, which focuses on topics to be covered. Their lists of points regarding preparation for law school might include “supplies,” “study skills,” and “networking.”

These students need to work in two different directions to complete the outline. They need both to fill in adequate support for each point and to find the larger issues that link their points to the larger question. A useful outlining process for these students usually includes the following steps.

1. List points to include.
2. Fill in supporting detail needed for each point.
3. Group the points logically.
4. Determine how each of the larger groups fits together and label the group.
5. Put the groups and supporting sub-points in logical order.

This exercise and an explanation of the three approaches to organization requires little time, and yet provides the students with organization plans that they can implement effectively.

IV. REASONING: PROBLEM SOLVING PATTERNS

Although teaching students how to improve reasoning skills is not easy, a teacher’s chance of success can be improved if he
or she adjusts the teaching presentation to fit with the students' individual problem-solving patterns.

Students fall into four general problem solving patterns: logical, analogical, sociological, and holistic. One easy way to describe these four groups is to describe how a member of each group would work on a jigsaw puzzle. Most students start by finding and connecting the edge pieces, but at that point their approaches diverge. The logical student often sorts all the pieces by color or shape. One logical student I met put each sorted group into Ziplock bags so no pieces could get misplaced. The analogical student often notices related oddities in the shapes of individual pieces, gradually matching them together. The sociological student holds a piece next to the picture on the puzzle box to determine where it should go. The holistic student spreads all the pieces on a table in the corner of a room and stops to work on the puzzle now and then, when the student has time, scanning the pieces and working on whatever catch his or her eye.

All four methods work. All four kinds of students will eventually complete the puzzle, and no one method is necessarily faster than the other. But, because they approach problems so differently, these students need to approach their reasoning in slightly different ways.

A. Logical

Logical thinkers follow a step-by-step sequence, pursuing one option until they have finished evaluating it. Their thinking process runs something like this: "Well, if this is true, then this . . . which leads to this . . . and thus this . . . ." A noticeable characteristic of these students is that they like to proceed in an orderly fashion through the logical process. They are distressed if they cannot finish a thought before having to change to a different one. They like to do one thing at a time and tend to be thorough.

These students need to have writing skills presented step by step. They can feel nervous or get angry if the teacher shifts from one point to another, or alternates between two ap-

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35 Although the jigsaw puzzle analogy is useful for explanation, it has limited use as a diagnostic tool. Many students do not enjoy puzzles enough to have an organized approach to solving them.
proaches. They learn best with sequential explanations of a process.

B. Analogical

Analogical students approach problems by analogizing the problem to something else they have done before. They mentally scan a range of possibilities before picking one to pursue. The pattern of an analogical thinker sounds like this: “This is like X, which follows the Y pattern, so this might follow the Y pattern. But maybe it’s also like A, which follows B pattern, so let me try that. Or maybe . . . .”

These students resolve problems by comparing them to mental templates of other problems they have solved, alternating between differing options in rapid succession, without necessarily completing one line of thought. Unlike the logical thinkers, analogical thinkers are comfortable moving back and forth between several approaches. A noticeable characteristic of this group is that they like analogies. They tend to be quick at a task, but not always thorough in completing their reasoning.

These students learn best by finding an apt analogy and practicing the application of that analogy. Indeed, they can feel impatient, bored, or stifled by the focused, step-by-step presentations that work so well for logical thinkers.

C. Sociological

Sociological thinkers solve problems by using models taken from their experiences. For example, these students approach a legal writing assignment by working to get the tone, style, and format of the genre almost before they work on the content of the document. Thus, before mastering the content, this student may concentrate on sounding like opinions he or she has read, or may concentrate on the format for footnotes. A noticeable characteristic of this group is that they want models to study, saying they cannot understand the directions without it, and they may be right. They tend to be strong verbally, but sometimes can mistake superficial connections for logical ones.

They learn best by studying multiple good models rather than only one, and may be frustrated by more abstract discussions that do not include specific examples.
Holistic thinkers discuss or observe many aspects of a problem, circling it mentally as one might circle a statue, collecting all the data they can about the problem and massaging that data until an answer appears. A noticeable characteristic of this group is that they do not divide data into sub-units, but rather work with the whole. This group remembers facts and details well, but often has trouble disregarding irrelevant information and focusing on relevant factors. They do not succeed so well with step-by-step procedures or models, and analogies can be confusing because they differ too much from the problem before the student.

Holistic thinkers often learn best by talking about the problem at great length and from many angles, working through several examples of the problem. They can develop their thinking when placed in a setting that is comfortable enough to get them to talk and ask many questions. Their focus will be on understanding the truth about the problem, or the whole nature of the problem. If a teacher can ask them the same questions their legal reader would ask, the teacher can teach them to anticipate how the legal reader reasons.

V. CONCLUSION

This paper has presented several sets of categories that teachers can use to understand different students and adapt their teaching to those students. It has presented categories relevant to diagnosing students' organizational problems, outlining and reasoning. For each category, it has suggested approaches that may be most helpful.

The most important idea in this article, however, is not this particular system of categorizing individual differences. Rather it is the idea that categories can help the teacher determine how to individualize teaching without stereotyping students. Teachers can identify relevant individual differences when needed, using them like a pull-down menu in a computer program, and then set those differences aside when a specific teaching task is completed. The teacher can weave useful categories into the teaching process without having the categories dictate the whole teaching process.

When individual differences are seen as relevant to different writing tasks rather than to the whole person, the teacher can find a workable balance between oversimplifying and be-
coming lost in a sea of possibilities. The teacher can adjust to the differences that are relevant at one point, rearranging the teaching slightly like sand in the hourglass, without losing sight of the larger rhythm of learning and teaching writing.
I. INTRODUCTION

Legal writing instruction should not end upon a student's graduation from law school. Because one can never perfect the skills of legal writing and analysis but can always improve them, law school graduates should have opportunities to continue this process of improvement throughout their careers. The legal writing programs currently existing in all American law schools can give students a start toward mastering these skills, but they cannot do everything. When students graduate and find jobs, they still need feedback and instruction regarding legal writing. The people in the best position to provide this feed-

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1 This article stems from a presentation entitled "Collaborating with the Bench and Bar in Developing CLE Programs" co-presented with Maria Perez Crist of the University of Dayton. My focus is not strictly on the nuts and bolts of presenting CLE's, but rather on how we can train lawyers, in CLE's and other settings, to be writing coaches. Because the time limits of our presentation did not allow a detailed discussion of the theories involved, I offer this article to explore and document the theoretical underpinnings of my part of the presentation. I would like to thank Prof. Grace Wigal of West Virginia University for her helpful comments on previous drafts of this article.

2 All American law schools now have some type of legal writing course. See Jill J. Ramsfield, Legal Writing in the Twenty-First Century: A Sharper Image, 2 LEGAL WRITING 1, 3 (1996)(reporting data from a national survey regarding the teaching of legal writing).

3 Although a 1991 survey found that 90 percent of Chicago hiring partners expected their new associates to "bring" writing skills to their first job, as opposed to developing them on the job, Bryant G. Garth & Joanne Martin, Law Schools and the Construction of Competence, 43 J. LEGAL EDUC. 469, 490 (1993), learning to write well is a lifelong process. The American Bar Association has listed written communication skills in its formal statement of professional skills. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 172-76 (1992) [hereinafter MacCrate Report]. Further, the MacCrate Report has recognized that this statement of professional skills can be used by people organizing training for practicing attorneys through continuing legal education programs, id. at 128, and through in-house programs in law firms, id. Even legal writing texts them-
back and instruction are supervising attorneys. However, these attorneys may be unfamiliar with legal writing pedagogy, thinking of themselves as lawyers rather than teachers. Legal writing professionals can fill this instructional gap by training supervising lawyers how to teach, or, more precisely, coach, their more junior associates.

This article explores a new role for legal writing professionals: training supervising attorneys to pick up the pedagogical baton and continue the educational process begun by a law school’s legal writing program. Part One of the article documents the need of law school graduates for continued training in legal writing and legal analysis. Part Two describes and analyzes the body of theoretical and practical knowledge that supervising attorneys need to learn in order to become effective legal writing coaches for their junior associates. Part Three suggests methods that legal writing professionals may use to convey this body of knowledge to supervising attorneys and warns of some potential pitfalls involved in this task. Finally, Part Four enumerates a series of peripheral benefits that flow to legal writing professionals from their efforts to train practicing attorneys in this manner.

II. THE NEED FOR CONTINUED LEGAL WRITING INSTRUCTION ON THE JOB

The MacCrate Report has listed communications skills (including legal writing) among the skills and values that new lawyers should seek to acquire. More recently, the addition of new practice components to many state bar examinations and the National Council of Bar Examiners’ development of a Multistate Performance Test reflect the growing concerns of bar examiners that new entrants to the legal profession be able to demonstrate
competence in analyzing issues and putting their thoughts on paper.⁵ These concerns may stem from a perception among attorneys and judges that graduates emerge from law schools with poor writing skills.⁶

In a now-familiar survey, conducted in 1991, fewer than half of recent law graduates who responded believed that their law school instruction gave sufficient attention to written communication and the drafting of legal documents.⁷ A similar survey, conducted in 1998, would probably show that more graduates feel that they received sufficient instruction in these areas, given the great expansion of legal writing programs across the country in the last several years.⁸ However, even under the best of circumstances, legal writing programs cannot guarantee that every law school graduate will excel in legal writing and analysis. Indeed, because these are not cut-and-dry skills, graduates will continue to learn and practice them throughout their careers.

At the law-school level, instruction in legal writing is hindered by a number of factors. First, there is often a disparity between the skills that legal writing courses seek to teach and the more elementary skills that many new law students still need to acquire. Legal writing instruction is not remedial.⁹ It is designed

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⁵ As of March 1998, eighteen states were scheduled to use the Multistate Performance Test, which was developed in 1997. Di Mari Ricker, *High Anxiety, Student Lawyer*, March 1988, at 24. The exam may require students to draft various legal documents, including objective memoranda, persuasive memoranda, and client letters. *Id.* at 26.


Certainly, the public has been criticizing the writing skills of lawyers for quite some time. Richard Wydick notes that in 1596, an English chancellor, disgusted by the length of a 120-page brief, ordered that a hole be cut in the brief so that its author could wear the document around his neck as he was paraded around the court. *Plain English for Lawyers* 3 (4th ed. 1998). Wydick also notes more recent criticism from the 1970's: "The popular press castigated lawyers for the frustration and outrage that people feel when trying to puzzle through an insurance policy, an installment loan agreement, or an income tax instruction booklet." *Id.* at 4.

⁷ Garth and Martin, *supra* note 3, at 479.

⁸ See Ramsfield, *supra* note 2, at 3-10 (describing a "[g]radual [m]odernization" of first-year legal writing programs in the 1990's).

to introduce students to a new, legal, discourse community by providing instruction regarding the conventions governing legal communication, the structure and function of the legal system, and the principles of legal analysis. Insofar as legal writing courses teach "writing," their focus, ideally, is on how to do rather sophisticated things with writing: inform, analyze, and persuade. Unfortunately, many law students come to law school still needing to learn to do more basic things: use punctuation and proper grammar, organize a paper by topic, and construct clear, coherent sentences. These students cannot begin to learn the advanced skills of the legal writing course until they make up for lost time by mastering these more basic skills.

To the extent that legal writing programs must play catch-up, they have fewer resources to devote to their own more sophisticated agenda. The addition of writing specialists has helped in this area, but even if staffing is available, the students' time is limited. Time spent learning to use an apostrophe is time that cannot be spent on learning something uniquely "legal," like how to structure an appellate brief or how to tell whether a given case is controlling precedent. Thus, legal writing instruction in law school can take students only so far.

Another factor hindering legal writing instruction in law schools is status. Despite progress made in recent years, legal writing instruction in law school can take students only so far.

For a discussion of the gap between the writing skills of incoming law students and the expectations of legal writing programs, see Arnold, supra note 4, at 254. In Arnold's view, this gap lies at the heart of the poor state of writing in the profession: "Nobody is surprised that a person who cannot play 'chopsticks' on the piano also cannot play Mozart." Id. at 228. Indeed, because admission to law school is much less competitive today than it was seven years ago, law professors "are seeing more students with mediocre skills in writing and analysis." Katherine S. Mangan, Students' Odds of Getting Into Law School Improve, but Their Qualifications Drop, CHRON. OF HIGHER EDUC., Jan. 23, 1998, at A41. From my years of service on my school's admissions committee, I know that at least half of the essay responses to the LSAT's writing component contain awkward sentences, spelling and punctuation problems, and grammatical errors. Even those applicants who are admitted have far from perfect basic writing skills. At West Virginia University, all new law students take a diagnostic writing test, developed by Anne Enquist at the University of Puget Sound Law School (now Seattle Law School). Although the test asks fairly basic questions about grammar, punctuation, and usage, the average score among our students has hovered for years around 69 percent. Our student population is pretty representative of students at most law schools in that our Admissions Office reports that the average LSAT score among our students entering in 1998 was 154 (approximately the 62nd percentile).

In a 1998 survey, 34 law schools reported using writing specialists, who are not necessarily J.D.'s, to tutor students in writing skills. Jessie Grearson & Anne Enquist, A History of Writing Advisors at Law Schools: Looking at Our Past, Looking at Our Future, 5 Legal Writing—(1999).

See Ramsfield, supra note 2, at 16-17 (noting a rise in legal writing professionals'
writing professionals rarely enjoy the same level of rank and compensation as their colleagues who teach "doctrinal" courses. In a recent national survey, forty-five out of seventy-seven schools reported gaps of $25,000 or more between the salaries of legal writing professionals and other faculty members. In addition, most legal writing professionals carry non-tenure track status. Ironically, along with this lower rank and salary comes a teaching load that is much more burdensome than average. Unlike their colleagues who teach other courses, legal writing instructors spend the entire year grading papers and meeting with students.

While low status and low salaries certainly do little to motivate legal writing instructors to go the extra mile, the negative effect of status issues on legal writing instruction operates on an even more insidious level. Students, who are keener observers of politics than many might believe, notice that their Contracts instructor is a "Professor," while their legal writing teacher is an "Instructor." Their Contracts professor's office is also probably bigger than the office of their legal writing instructor (if the instructor is lucky enough to have her own office at all). The Contracts course meets for a full six hours over the course of a year, while Legal Writing carries only four credits. All of these fac-

salaries from 1990 to 1994, but also noting that this increase failed to match the increase in other faculty salaries over the same period).

See id. at 16-20 (discussing salaries and status of legal writing professionals). My use of the word "doctrinal" is in itself problematic. By referring to non-legal writing courses as doctrinal or substantive, one implies that there is no doctrine or substance underlying the legal writing discipline. Still, school administrators seek to find labels to help them distinguish between legal writing and "regular" courses. Perhaps it is hard to find a label because there is not that much difference, after all.


Id. at 9.

The ABA Section of Legal Education and Admissions to the Bar has noted that 45 students in a legal writing course should be an absolute maximum and considered a full course load, Sourcebook on Legal Writing Programs 62 (1997), but the most recent national survey of legal writing professionals indicates that legal writing faculty at 51 of 132 reporting schools carry 51 or more students. Ramsfield & Davis, supra note 14, at 3.

For a comparison of teaching writing and non-writing courses, see Douglas Laycock, Why the First-year Legal-Writing Course Cannot Do Much About Bad Legal Writing, 1 SCRIBES J. LEGAL WRITING 83 (1990)(describing the experiences of the author, a tenured professor, as he taught in a legal writing program).

The great majority of legal writing courses are taught by non-tenure track instructors, adjuncts, or students. Ramsfield & Davis, supra note 14, at 9.

Eighty-two of 132 schools in a 1996 survey reported awarding four or fewer credits for legal writing courses. Ramsfield & Davis, supra note 14, at 1. Nineteen schools re-
tors send a message to students: Legal writing is not as important as other courses. Thus, when time is scarce, as it always is in law school, students will spend their precious hours on courses that appear to be more important and give short shrift to those that the law school does not seem to have invested in. Therefore, even if legal writing professionals possess the utmost skill and energy, the administrative framework in which they work will often limit the motivation of their students to master the skills covered in the legal writing course.

Thus, law students find themselves graduating law school with, perhaps, a solid foundation in legal writing skills, but hardly a mastery of them. Even where schools accord appropriate rank, credit, and compensation to legal writing professionals, absolute mastery is impossible because these are skills that people continue to sharpen throughout their careers. Therefore, instruction in these skills must continue to take place after graduation. The next section of this article explores the role that legal writing professionals can play in laying the groundwork for such instruction to occur among practicing lawyers.

III. TRAINING LAWYERS TO PICK UP THE PEDAGOGICAL BATON: WHAT SUPERVISING ATTORNEYS NEED TO KNOW IN ORDER TO BE EFFECTIVE WRITING COACHES

As explained above, most law school graduates arrive at their first legal jobs with a need for continuing instruction in legal writing. The people who are in the best position to judge their writing and help them improve it are their supervising attorneys, many of whom have solid writing skills, acquired through years of education and professional experience. It is unreasonable, however, to expect a full-time attorney to take on a

ported that their legal writing courses were graded using some type of pass-fail system.  
id. at 2.

20 This phenomenon is especially likely when a legal writing course is graded on a pass-fail basis, unlike other courses. Text author Charles Calleros cautions students not to shirk the demands of legal writing, even if the "pressures of law school may stimulate you to place primary emphasis on your short-term goals of success on final examinations in graded courses and perhaps to resent an ungraded legal writing course as an inconvenient distraction." LEGAL METHOD AND WRITING xxiii (2d ed. 1994).

21 Even within the law school context, legal writing is typically taught only in the first year, so students have two years before graduating to forget anything they may have learned.

22 This need is even more acute among students who have not yet graduated but are nevertheless performing legal work on a summer or part-time basis.
second job as a full-time teacher. Nevertheless, a full-time supervising attorney can and should be a part-time writing coach. By "coach," I mean a person who sits on the sidelines, offering encouragement and feedback to another person who is in the process of developing a particular talent. A coach does not necessarily spend time devising and grading individual exercises or filling passive students with knowledge. Instead, a coach steps in at critical moments to critique his or her "player's" real-world performance. Like all learners, new lawyers have a critical need for this type of feedback if they are to continue to develop their skills.

Being an excellent legal writer is quite different from being an excellent legal writing coach. Therefore, even the most skilled supervising attorneys have something to learn from professionals who have made a career of teaching legal writing. These days, legal writing pedagogy is informed by a wealth of scholarship concerning learning styles and composition theory. While most busy attorneys do not have time to plunge into this scholarship themselves, legal writing professionals can convey the basic points of these theories and explain how the theories suggest and validate particular methods of legal writing coaching. From years of classroom experience, legal writing professionals can also share practical wisdom concerning teaching methods in the legal writing field.

A. Theoretical Underpinnings of Legal Writing Coaching

One important notion that coaches must understand concerns the differences between expert and novice legal writers.

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23 Those of us who teach writing full-time can understand the enormous amount of time such teaching requires.

24 "The basis for effective monitoring and learning of complex skills such as writing is feedback on one's behavior." Michel Couzijn and Gert Rijlaarsdam, *Learning to Write by Reader Observation and Written Feedback*, in *Effective Teaching and Learning of Writing* 224, 226 (Gert Rijlaarsdam et al. eds., 1996).

25 While some law firms can hire outside coaches, see, e.g., Dan Seligman, *The Gobbledygook Profession*, FORBES, Sept. 7, 1998, at 174 (discussing the role of writing coaches at large urban law firms); Robert L. Clare, Jr., *Teaching Clear Legal Writing — The Practitioner's Viewpoint*, 52 N.Y. STATE BAR J. 192 (April 1980)(explaining that his law firm hired a writing specialist to train new associates because the partners did not feel they could teach writing, even if they could write well themselves); C. Edward Good, *The "Writer-in-Residence": A New Solution to an Old Problem*, 74 MICH. BAR J. 568 (1995) (describing how law firms with the resources have hired writing specialists to conduct intensive training of partners and associates and predicting that more will do so in the future), this is an expensive option that not all legal employers can afford.

26 See text accompanying notes 27-37, infra.
Even though law school graduates have spent at least three years immersed in casebooks, they still have not become experts in legal writing. More experienced lawyers have an acquired knowledge base that separates them from their newer associates and makes communication between experienced "coach" and novice "player" difficult. Research has indicated that novices and experts perform the same tasks and look at the same documents in very different ways. Typically, novices focus on details that experts would find unimportant or tangential, and novices therefore fail to recognize and understand more important ideas. In contrast, experts can recognize which ideas are important because they have internalized the conventions of their fields through years of experience. This difference between novices and experts leads to communication gaps that can play themselves out between new associates and their supervising attorneys, who fail to recognize that new associates are not yet immersed in the legal culture.


For a discussion of how experts use the conventions of their fields to develop schemata through which they see the world, see Paula Lustbader, From Dreams to Reality: The Emerging Role of Law School Academic Support Programs, 31 U.S.F.L. Rev. 839, 850 (1997).

Because they share a specialized knowledge base and an agreement as to which ideas are important, experts in a particular field are said to constitute a discourse community. Patricia Bizzell, Cognition, Convention, and Certainty: What We Need to Know About Writing, 3 PRE/TEXT 213 (1982). See also Rideout & Ramsfield, supra note 9, at 57-61 (discussing law students' entrance into the legal discourse community). Unfortunately, experts gain their expertise and their memberships in discourse communities gradually, almost without realizing it. The conventions of a given field begin to look natural to them, and they may forget that other discourse communities may see the world differently, using different conventions. This failure to recognize one's own membership in a discourse community inhibits communication between experts and novices. The expert may not see the need to explain points that are specific to a given field, even though the novice, who is not yet a member of that field's discourse community, is in desperate need of explanation.

See, e.g., CHARLES S. CLAXTON and PATRICIA MURREL, LEARNING STYLES: IMPLICATIONS FOR IMPROVING EDUCATION PRACTICES (1987). See also Lustbader, supra note 28, at 853 (noting the existence of auditory, visual, and kinesthetic learners); Ruta Stropus, Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the
The supervising attorney "coaches" need to be aware that different learning styles may call for the use of slightly different coaching styles at times. In addition, another learning theory that has received scholarly attention in recent years concerns cooperative learning. This theory notes that many students learn best in a cooperative, noncompetitive environment. Cooperative learning takes the focus off of the teacher as the transmitter of knowledge to passive students. Instead, it focuses on the students themselves, validating them by recognizing that they are capable of teaching each other. As discussed below, cooperative learning theory has implications for legal writing coaching at the professional level.

Finally, and perhaps most importantly, the field of composition theory, which concerns the formal study of the writing process, has much to offer potential legal writing coaches. Theorists of writing pedagogy have developed helpful ways of analyzing how and why people write the way they do. In recent decades, the teaching of writing in higher education has moved from a product model to a process model. That is, teachers of

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A visual learner may prefer to read information from charts, texts, and tables. An auditory learner learns best when new information is presented orally. People who prefer to "think out loud" or "talk things through" are usually auditory learners. Researchers have identified other learning styles as well, but most people tend to fall into either the visual or auditory categories. In law practice, a great deal of information is conveyed in writing. Even colleagues whose offices are down a hallway from each other may communicate often by memo or e-mail rather than in person. This preference for writing presents some problems for new attorneys who are auditory learners. On the other hand, visual learners may struggle in a smaller, less formal office where most communication is oral, and instructions are rarely reduced to writing.


In the writing context, Peter Elbow's "teacherless writing classes," described in Writing Without Teachers 76 (1973), could be called cooperative learning groups. These groups emphasize active rather than passive learning. Students do not sit back and receive information; instead, they construct and critique information by performing analytical tasks together.

For a concise overview of developments in composition theory over the last thirty-five years, see Nancy Soonpaa, Using Composition Theory and Scholarship to Teach Legal Writing More Effectively, 3 Legal Writing 81, 82-88 (1997). See also Composition in the Twenty-First Century: Crisis and Change (Lynn Z. Bloom et al., eds., 1996)(discussing general issues in composition theory).

Rideout & Ramsfield, supra note 9, at 51-56 (discussing schools of "writing process" theory). For a discussion of how a legal writing program can incorporate a writing process model, see Jo Anne Durako et al., From Product to Process: Evolution of a Legal
writing tend these days to evaluate and discuss not only the final document a student produces, but also, and more importantly, the process that a student used to arrive at that final draft. A writer makes critical decisions about a document at different stages of its development, stages that scholars have generally labeled prewriting, writing, and rewriting. The process-model of writing pedagogy posits that students need to develop effective writing processes in order to produce effective final products. In addition, composition theorists — scholars who study the writing process — have explored notions of audience when analyzing student writing. These theorists have noted that the failure of a document to communicate ideas clearly often stems from the failure of the writer to understand the person or persons to whom the document is addressed. While the writer may understand the ideas expressed, the reader may have to guess what the writer is trying to say. Further, the writer may spend a great deal of unnecessary space detailing basic concepts with which the reader is already familiar. Theorists have labeled texts with these types of problems “writer-based prose.” Legal writers, like most other writers, must move


34 VEDA CHARROW, et al., CLEAR AND EFFECTIVE LEGAL WRITING 81-84 (2d ed. 1995). See also Edwards, supra note 3, at xxi (“Legal writing is a process with distinct stages and distinct goals at each stage.”). These stages are not immutable or linear. Various legal writing scholars have divided and labeled the stages differently. See, e.g., RICHARD NEUMANN, LEGAL REASONING AND LEGAL WRITING 55 (3d ed. 1998) (dividing the writing process into four stages: analyzing issues, organizing issues, generating a first draft, and rewriting); MARY BARNARD RAY & JILL RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 354 (1993)(dividing “Writing Process” into “Prewriting, Writing, Rewriting, Revising, and Polishing”); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 188-195 (2d ed. 1993) (dividing the writing process into pre-writing, writing, drafting, revising, and editing). Many have noted that the process of legal writing is recursive; a writer might move from prewriting to writing and back to prewriting. See, e.g., Pratt, supra, at 190; Edwards, supra note 3, at xxii.

35 George Gopen of Duke University, for example, has developed a “reader expectation theory” that holds that readers within a discourse community have fairly fixed expectations regarding where particular types of information should appear in particular documents. See K.K. DuVivier, Proper Words in Proper Places, 24 COLO. L. W. 27, 27 (describing “reader expectation theory”). Prof. Gopen’s theory underlies the legal writing program he developed for Duke Law School. See Duke’s New Writing/Research Course, SYLLABUS 3 (Fall 1994). See also Linda S. Flower, Writer-Based Prose: A Cognitive Basis for Problems in Writing, 41 C. ENGLISH 19 (1979)(describing problems that develop when writers fail to take readers' knowledge and expectations into account).

36 See, e.g., Flower, supra note 35. See also Couzijn & Rijlaarsdam, supra note 24, at 227 (“The writer is nothing like a normal reader. He is a very special reader, since he has all the necessary prior knowledge to interpret the text . . . . Therefore, the writer will easily pass over many unclear, vague, incorrect and otherwise inadequate passages.”).
from writer-based prose to reader-based prose in order to increase the clarity of their texts. To do so, a writer must understand and take into account the intended reader's background knowledge, sophistication level, and need for specific new information. Because, as explained above, new associates are not yet full members of the legal discourse community, they may not understand their intended readers as well as they should. Recognition of the difference between writer- and reader-based prose can help legal writing coaches diagnose the causes of problematic writing, as explained below.

B. Practical Ramifications of the Theories on Legal Writing Coaching

By conveying even the most basic points of the theoretical literature discussed above, legal writing professionals can help supervising attorneys become better writing coaches of inexperienced associates. Each theory suggests or validates particular coaching styles and techniques, and the theories are therefore most helpful to potential coaches when they are presented in the context of practical instructional situations.

1. Diagnosing problematic writing

First, the notions of discourse communities, expert-novice gaps, and writer-based prose can help coaches diagnose the causes of problematic writing. These theories highlight the importance of realizing that associates do not come to law firms as fully-formed legal writers. New associates still have a lot to learn about the people for whom they will write in practice, and the conventions that prevail in that practice. Although most students have written legal memoranda to "supervising attor-

37 See, e.g., Edwards, supra note 3, at 147-48 (urging students to focus on the characteristics of the legal reader); Pratt, supra note 34, at 233-36 (discussing the characteristics of the trial judge as reader).
38 See Rideout & Ramsfield, supra note 9, at 93 (noting that "[a]cculturation to legal discourse continues well after law school").
39 Even if law school gives students a general sense of the "legal reader" and the conventions governing some legal documents, graduating students will not have been exposed to the more specific conventions that govern some particular types of documents. Indeed, the writing in trial briefs differs in significant ways from the writing in contracts. One could say that each practice area is its own, specialized, discourse community. For this reason, Steven Stark, who has conducted numerous in-house writing workshops at law firms, suggests that writing instruction for practicing lawyers "should reflect each legal specialty." Individualized Courses for Practicing Attorneys, National Law Journal, Dec. 11, 1989, at 15, 27.
neys" in law school courses, the "supervising attorneys" were merely fictional characters, portrayed by the instructors to whom the papers were submitted. While such exercises are useful, they carry an inherent artificiality. The good news for supervising attorneys is that no such artificiality is present in the writing projects that an associate performs in practice; the writer will learn more and more about his real readers each day simply by interacting with other lawyers. The bad news is that the new associate will have to learn to please these "real" readers very quickly. He or she will immediately need to internalize the tastes, needs, predilections, and pet peeves of readers who are practicing attorneys in order to communicate within the legal discourse community. Therefore, the supervising attorney's first job as coach is to consider novice-expert gaps as possible causes for an associate's ineffective legal writing and to let the associate know when such problems arise.

For example, if the supervising attorney finds passages of a document cryptic, he or she should realize that a new associate may have mistakenly assumed that all practicing lawyers are familiar with some particular information and therefore did not explain that information in the document. Simply by communicating his or her confusion to the writer, the reader at this point can teach the writer a little bit more about the extent of the knowledge base that a legal writer can presume his or her readers to have. Similarly, a coach can let a writer know that explanation of some basic points (such as whether a cited case is controlling authority, for example) may be unnecessary because the reader would already understand them. Rather than just drawing a line through the unneeded explanation, a supervisor could seize a coaching opportunity by taking an extra five seconds to jot down a comment ("judge would already know this") next to the crossed-out text. With every such comment, a new associ-

40 As Peter Elbow insightfully explains to students of writing, "When you write for a teacher you are usually swimming against the stream of natural communication . . . . You seldom feel you are writing because you want to tell someone something. More often you feel you are being examined as to whether you can say well what he [the teacher] wants you to say." Writing With Power 219 (1981). In short, "[r]eal readers are different from teachers." Id. at 220.

41 Jane Bowers, in a short article advising lawyers to be teachers of their associates, notes the importance of communicating the standards of legal writing discourse immediately to the new associate. She suggests that attorneys prepare and distribute to associates a short handout describing the goals of clarity, brevity, and coherence. How to Improve Associates' Writing, 34 Practical Lawyer 35, 36 (1988).

42 Comments that explain the rationale behind an editorial change are immensely
ate gains a better understanding of his or her audience and becomes less likely to make similar errors in future documents. Indeed, one writing consultant recommends that associates draft a short "audience analysis" memo that lists characteristics of the intended reader and features of the writing that enable it to meet that reader’s needs. Whether or not an associate puts such an analysis in writing, he or she will develop a sharper sense of the intended reader upon receiving more and more feedback from supervisors.

Sometimes expert-novice gaps may run deeper, as for instance when an associate drafts a document containing basic grammatical or punctuation errors. The novice may not only misunderstand the conventions and standards of the legal discourse community; he or she may not fully understand the conventions of the more general discourse community of educated English-speakers. Most supervising attorneys can avoid such situations by studying job candidates’ writing samples before hiring them. However, legal employers have surely hired at least some law school graduates who make these kinds of errors. To the extent that such associates exist, it makes more sense to give them some direction as to how to improve their writing than to let them continue to submit poor work and, perhaps, eventually be let go. Upon receiving such work from an associate, a coach must communicate to the associate immediately that the product is substandard, not because the legal analysis is flawed, but because the draft contains basic English errors. The coach need not spend precious time instructing his or her charge in the finer points of apostrophes and semicolons, but it


43 Bowers, supra note 41, at 38.

44 It makes no sense to lose a poor writer who may have other strengths and whose writing can, with some help, be improved. As Jane Bowers notes, every firm invests time and money in every new associate until he or she is let go, and many billable hours will be lost editing a poor writer’s work if supervisors never take steps to help the writer improve it. Bowers, supra note 41, at 37-38. However, another expert believes that some lawyers do not have the time or the ability to improve their own writing, even with proper guidance. Mark Mathewson, In-House Editors: Letting the Experts Do It, 1 SCRIBES J. LEGAL WRITING 152 (1990). According to Mathewson, the “practical answer is not for all lawyers to write well, but for lawyers to pay editors to help them prepare better documents.” Id. at 152. I disagree with the pessimism behind this suggestion. All lawyers can improve their writing, at least to some extent, but they will never improve at all if they receive only editing without coaching. Further, because style and substance are inextricably linked, the suggestion of an in-house editor sets up an inevitable conflict between the law-trained writer and the lay editor.
may be necessary to point the associate to some familiar sources of help that the associate can study on his or her own time.\textsuperscript{45}

Process-oriented theories of writing can also help coaches diagnose problematic drafts. It pays to give some thought not only to what a problem is, but also to how that problem crept into a draft. Sometimes it is obvious whether an error stems from a writer's lack of understanding of the subject, or from mere sloppiness in editing. At other times, it may be necessary to interview the writer a bit about the process that he or she followed in order to understand why a draft looks the way it does.\textsuperscript{46} An understanding of the process is necessary to uncover the root of the problem and make suggestions. Therefore, it is helpful if the supervising attorney could review the draft and then have a discussion with the writer to determine whether the writer has misunderstood the assignment, needs to do additional research or reread a particular source, or has simply failed to spend sufficient time editing. If a coach can couch suggestions in the context of the writing process, the writer will be able to improve his or her process to the point where it will allow the writer to generate better documents the first time around.

Attention to process can also help coaches diagnose problematic writing in another way. If a coach spends time editing an associate's document, the coach can deconstruct the editing process itself in order to determine the nature of the original problems. In other words, by thinking about what needed to be changed, and how it needed to be changed, the coach may find new, more articulate ways to describe the problem to the associate.\textsuperscript{47} For example, a coach may see a series of problematic sentences in a document and think simply, "These sentences are bad. They're awkward." Unfortunately, these adjectives will not


\textsuperscript{46} Indeed, a supervisor could conduct a Socratic-style conference with an associate about a draft. Such a conference could help the supervisor to diagnose the problem and also prompt the associate to think of ways to remedy it. For a discussion of how legal writing teachers can integrate such Socratic techniques into their teaching, see Mary Kate Kearney & Mary Beth Beazley, Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process, 64 TEMP. L. REV. 885 (1991).

\textsuperscript{47} For several examples of how this dynamic can operate, see Bowers, supra note 41, at 39-40.
help an associate understand the problems with the sentences or possible solutions to them. However, if the coach edits a few of the sentences and finds himself or herself constantly crossing out the words “there is” and “there are” and building new sentences with new subjects and verbs, the coach, upon reflection, has something much more helpful to tell the associate. Now the associate can be warned to watch out for the problematic construction and will be able to fix it in the future. Experienced lawyers have often internalized the editing process and perform it speedily and without self-consciousness. However, as explained above, slowing down now and then to perform some process-oriented reflection regarding editing can help a lawyer diagnose and explain problems to a writer so that even less editing will be necessary in the future. The goal is to help the new attorney begin to self-edit more effectively.

2. Providing feedback

Because supervising attorneys are attorneys first and coaches second, they often overlook the crucial importance of providing feedback to their associates, preferring to spend their time on other lawyering tasks more directly related to their clients’ cases. However, associates cannot improve their writing (and indeed their performance in all areas of law practice) unless they receive information about the strengths and weaknesses of their work product.48

Key ideas from learning theorists can help supervising attorneys give more effective feedback to those whom they coach. For example, if an associate does not seem able to improve a draft after receiving written comments on it, it may be necessary to have a five-minute conference to explain the key problems in the document, particularly if the associate is an auditory learner.49 At that point, the associate will be much more likely to make sense of the written comments. Supervising attorneys should try to develop a sense of how various associates respond to various means of communication and must realize that

48 See Couzijn & Rijlaarsdam, supra note 24, at 226.
49 In an office setting, many supervisors who like to use dictation could take advantage of this preference to provide feedback. See Audrey Berner et al., Using the Tape Recorder to Respond to Student Writers, in EFFECTIVE TEACHING AND LEARNING OF WRITING, supra note 24, at 339 (suggesting how one might use tapes to provide oral feedback). However, one writer suggests that the best learning occurs over a series of face-to-face conferences, each aimed at working on a distinct problem. See Bowers, supra note 41, at 40.
different associates will respond better to different methods. This suggestion does not mean that supervising attorneys need to spend hours adjusting their methods of communication; as explained above, five minutes can go a long way toward increasing an associate's understanding.

When providing written comments, coaches should remember that their own writing, too, must be reader-based. Comments are of little value if they are not understood by the new attorney to whom they are addressed. Research in the area of effective commenting on students' legal writing has revealed specific characteristics that make written comments more likely to be understood and thus more likely to lead to better drafts. First, students prefer comments that elaborate, give examples, or explain rationales for suggested changes. In addition, students need positive feedback. However, excessive commenting can overwhelm students and create barriers to learning. Thus, supervisors should make an attempt not just to edit but also to explain briefly why changes are necessary. While explanations require time and energy, they need not take undue amounts of a supervisor's limited resources. A few carefully phrased explanations regarding the most important strengths and weaknesses of a document will provide tremendous help to an associate when he or she revises the draft. Indeed, to the extent that the revision is better than it would have been had the associate not received the comments, the supervisor may actually save time that would have otherwise been spent laboring over an inadequate second draft.

Cooperative learning theory also suggests some additional innovative coaching techniques that may actually save a supervising attorney some time. Cooperative learning strategies take some of the burden off of the teacher or coach, recognizing that novices can — with a little structured guidance — teach each other. If a coach can communicate to a group of associates some basic criteria governing a given legal document (are the point headings clear and persuasive? does the brief clearly explain the law? does it cite the law correctly? are the sentences wordy?), then the associates can teach one another by critiquing each

50 Enquist, supra note 42, at 188.
51 Id. at 188-89.
52 Id. at 188.
53 Id. at 188.
other's documents.\textsuperscript{54} In fact, if all of the associates occupy similar positions along the expert-novice continuum, they may actually be better able to communicate regarding a document's problems because they may be able to get around the expert-novice gap that creeps into conversations with a more expert supervisor. By clearing out the problematic underbrush in a draft, one or more associates can save a supervising attorney some time that would otherwise be spent dealing with all levels of problems. In the process, the associates will probably have learned how to make their own drafts better in the future.

3. \textit{Inspiring}

One of the most important jobs of a coach is to inspire. It has already been noted that students of writing need positive feedback, but in the rush to generate documents and get them out the door, most supervising attorneys feel they must perform triage, focusing on the negative aspects of a draft in order to fix the errors and get an improved revision on its way. Pointing out strengths, however, is equally important in the long term. Sometimes a new writer will not know why his or her draft was good and will therefore not be able to replicate the good qualities in future documents. In addition, writers who receive little or no positive feedback will eventually lack the motivation to produce excellent drafts, even if they know how. Therefore, a few minutes spent on encouraging words can again save time in the long run and also develop a better coach-player relationship.

IV. \textbf{THE NUTS AND BOLTS OF TRAINING LAWYERS TO BE WRITING COACHES}

Legal writing professionals cannot teach practicing lawyers the above information unless they find an appropriate forum. Many possibilities exist, ranging from a full-scale multi-day workshop to a very abbreviated hour-long lecture at a bar meet-

\textsuperscript{54} Such a process could be informed by the idea of a "self-graded" draft, developed by Mary Beth Beazley in \textit{The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique}, 3 LEGAL WRITING 175 (1997). A supervising attorney might develop a set of general guidelines and questions for a specific category of documents and then allow associates (either the writer of the document or other associates) to critique the draft using the guidelines and questions. Once a supervisor develops a few sets of guidelines, they could be used over and over on similar types of documents. Legal writing professionals could even share their own guidelines or cover sheets with attorneys, who could modify them to suit their own specialized needs.
ing. Legal writing professionals can even organize their own continuing legal education programs focusing on coaching techniques. Whatever the forum, the most effective presentations will take into account the similarities and differences between teaching lawyers and teaching law students.

A. Similarities Between Teaching Lawyers and Teaching Law Students

First, and unfortunately, legal writing professionals are likely to run into some of the same motivational and status problems among lawyers as among law students. Many more senior attorneys may have attended law school at a time when legal writing programs did not exist, at least not in the independent, relatively well-staffed way they do today. Therefore, they may not understand what a "legal writing teacher" is and may view legal writing professionals as some lower form of faculty member. In addition, while most legal writing professionals are women, supervising attorneys are disproportionately male (and disproportionately white). The typical biases and stereotypes with which students may view female professors can also play out in a presentation to attorneys. In fact, since law students...
these days are more diverse than they were twenty years ago, the classroom may actually be a more welcoming place for a young female instructor than the state bar meeting. Therefore, it may be necessary for a legal writing professional to educate an audience of practicing attorneys as to her credentials in advance in order to gain their respect.

In addition, practicing attorneys can view legal writing instruction with some of the same scepticism that students may have. As explained above, lawyers tend to be preoccupied with the specific details of legal practice and may resist the idea of stepping back and working on a more general skill like writing. Like some students and law school administrators, lawyers may view legal writing instruction as remedial and therefore beneath them. They may not understand that good legal writing goes hand in hand with sophisticated legal thinking. Or they may presume that they already know everything there is to know about good writing.

The best answer to this resistance may involve a bit of flattery. I have specifically chosen a “learning how to coach” theme when I address audiences of experienced attorneys because it tends to be more palatable than a “learning how to write” theme. The “learning how to coach” theme communicates respect for the audience because it presumes that the audience members already know the basics of writing. If they do not, then they are likely to learn a few things for themselves as I present some specific nuts-and-bolts material, but their initial ignorance can be their own little secret. A “learning how to write” theme sends the message that the presenter believes that the audience members themselves lack basic writing skills. Some audience members will be turned off by this assumption, even if they indeed need the basic writing instruction.

See Gopen, supra note 56, at 82.

I experienced this suspicion of legal writing first-hand when I lectured on legal writing to the trial lawyers’ division of the state bar in my home state in the summer of 1997. Although a representative had invited me to speak and had assured me that many lawyers genuinely wanted help in improving their writing, the title that the group had assigned to my talk sent a different message: “Effective Legal Writing: Style Over Substance?”

Lawyers “are not high school students,” but they may feel they are being treated as high school students if a presenter is not careful to couch material in an appropriate professional context. Gopen, supra note 56, at 82. A presentation that lacks this context is not likely to get “a fair hearing.” Id.
B. Differences Between Teaching Lawyers and Teaching Law Students

One major difference between teaching experienced lawyers and law students is that the lawyers have become full-fledged members of the legal discourse community. Therefore, they already understand the conventions of legal writing and the rationales underlying these conventions. Any supervising attorney who has read wordy drafts submitted by associates understands the need for conciseness and the frustration caused when this need is not met. The legal writing professional therefore does not have to sell the importance of effective legal writing to this audience in the way that many legal writing texts must sell their message to law students.64

In addition, supervising attorneys presumably are also attending a workshop on how to train their associates because they have experienced first-hand the need for such training. They therefore already possess the motivation to listen and participate that can be lacking among students in some legal writing courses.65

One difference between lawyers and law students may make instructing lawyers a bit more challenging: lawyers, especially in the formal setting of a large CLE workshop or bar conference, may be less likely than students to share comments and participate in small-group activities. An instructor who is used to an enthusiastic response from students assigned to get into groups may encounter self-conscious resistance from attorneys who are asked to do so. In addition, a question thrown out to a group of attorneys may be met with stony silence, whereas at least a few hands would go up under the same circumstances in a classroom situation. In part, the attorneys' reticence may stem from their being products of a different educational era. Unlike today's law students, experienced attorneys were educated at a time when small group work, interactive classrooms, and active learning were not the norm. Even today, most continuing legal

64 See, e.g., JOHN C. DERNBACH, et al., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD xxii (2d ed. 1994) ("Although the practice of law requires a combination of negotiation, counseling, research, and advocacy skills, there is one skill upon which all the others depend. The good lawyer . . . must be able to write effectively"); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE 51-52 (3rd ed. 1998) (discussing "Your Writing and Your Career"); CHARROW et al., supra note 34, at 1 (discussing the importance of legal writing).

65 Lawyers, after all, are "well trained in grabbing what is available and making the most out of it." Gopen, supra note 56, at 84.
education sessions are presented as lectures where audience members can sit passively and stare at a talking head. In addition, to the extent that law students may be more responsive than attorneys to questions, their responsiveness may stem in part from the fact that the classroom, after a few weeks of school, has become a familiar setting, and ice has broken between professor and students. (Of course, the prospect of heightened grades may also inspire students to participate.) In contrast, a legal writing professional lecturing to a group of attorneys will not have had an opportunity for ice-breaking, and she certainly cannot use grades to motivate her audience to join the discussion.

One suggestion for incorporating some interactivity into a presentation to lawyers is to throw out questions and ask lawyers to think about answers silently for themselves. For example, one could ask lawyers to create a mental list of three typical problems seen in associates' writing. One could also ask the lawyers to jot down answers, but in that case, the assignment should be closed-ended and concrete. A presenter could ask at that point for a show of hands as to how many people had one answer or another. At the beginning of a presentation, this informal survey can break the ice a bit. In addition, it might help a presenter to break the ice if she emphasizes her practice experience or other common ground she shares with her audience. At any rate, presenters should not necessarily expect the type of informal give-and-take that can animate a law school classroom, but some of the above strategies might help to generate participation and active learning.

C. Suggestions for Organizing a Training Session on Coaching Skills for Lawyers

The scope of a training session for supervising attorneys who wish to become writing coaches will of course vary with the amount of time allotted, and its format will depend upon the setting and the number of lawyers attending. Nevertheless, what follows are some general suggestions for coverage.

After introducing herself and spending a few minutes on ice-breaking conversation and questions, a presenter should ex-

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66 For example, one could ask lawyers to list the three qualities that best describe excellent legal writing. By asking for a concrete number of entries on the list, the presenter can make the task easier and less "fuzzy."
plain the difference between coaching and editing, noting that coaching will save time in the long run by making every associate a more effective writer. The presenter could also briefly explain the coverage of a typical legal writing course, so that the attorneys could understand where their associates are coming from in terms of training and experience (and why it is not reasonable to expect law graduates to be perfect legal writers). The presentation could then move to a discussion of diagnosis of typical writing problems, perhaps illustrated by samples of actual problematic documents. The presenter could inform her discussion of diagnostic techniques by incorporating some ideas about reader-based prose, expert-novice problems, and writing process theory discussed above. However, because lawyers want pragmatic advice, the presentation should not dwell on theory. Instead, the presentation should mention theoretical ideas, in layman's terms, only insofar as they help to explain why a particular diagnostic technique is effective. In addition, a presenter could slip some specific writing advice into the discussion of diagnosis by discussing examples of wordy sentences, passive voice, and misplaced modifiers. By learning to look for particular problems in associates' writing, the supervising attorneys will also be learning how to avoid such problems in their own writing.

After discussing diagnosis, the presentation could then move on to effective feedback techniques. Again, examples of written comments on draft documents could provide helpful illustrations of effective and ineffective comments. If time permits, audience members could be asked to comment on a page or two of problematic writing and then compare notes. To illustrate oral feedback, the presenter could show homemade videotapes of effective and ineffective conferences. The dramatic possibilities here are intriguing if the presenter has some theatrical leanings. The presentation could wrap up with a very quick review of key points and a question and answer session. In addition, a presenter should leave audience members with handouts listing tips on diagnosis and feedback, and perhaps some favorite reference texts on writing. Attorneys will resent and ignore

67 Depending on the format of the presentation, it may be possible to contact attorneys in advance and have them submit actual samples of poor writing that have crossed their desks (without names, of course). Using these "real" examples could make the presentation appear even more relevant to the audience.
lengthy material, but a few pages with very pragmatic information will likely not be thrown away.

V. BENEFITS OF TRAINING ATTORNEYS TO BE WRITING COACHES.

Of course, the main benefit of training attorneys to be coaches is that new lawyers will be able to improve their writing with the help of newly trained coaches. However, a legal writing program itself can benefit if one of its faculty becomes involved in this type of training. First, because teachers inevitably learn from their students, legal writing professionals can benefit by learning from the supervising attorneys whom they train. Too often, law school faculty are so swamped with teaching and administrative duties that they lose touch with current trends in law practice. This phenomenon strikes teachers of legal writing especially hard, given their extraordinary teaching loads and their tendency to be called upon to perform other administrative functions. By becoming involved with attorney training, a legal writing professional can maintain familiarity with the nature of law practice. Using this familiarity, she can insure that her legal writing program is indeed providing law students with the specific skills and information that they will need in practice. To the extent that the nature of practice is changing — economic trends and new technologies are both changing what lawyers do on a daily basis — the legal writing professional who maintains regular contact with practicing attorneys can stay on top of these changes and modify her teaching accordingly.

In addition, by making presentations to area lawyers, a legal writing professional can increase the visibility and credibility of her writing program and the law school. After a few presentations, the presenter will gain a local reputation as an expert on matters of writing. In addition, training sessions give legal writing professionals an opportunity to talk a bit about their programs to practicing attorneys. If attorneys understand a program's goals, structure, and some of the obstacles that it faces, they will be more likely to appreciate the efforts of the faculty who teach writing and less likely to attribute associates' poor writing to lack of good teaching in law school.

Once lawyers realize that a school's legal writing program is staffed by knowledgeable professionals who understand their needs, they will be more likely to support the program, both financially and through donations of their own time. For example, once relations are established, a legal writing professional could
call upon a practicing attorney to give a guest lecture or judge an oral argument. In addition, practicing attorneys could make their own donations or lobby for the administration to provide more financial support to writing programs, once the attorneys appreciate the importance of the program’s mission and the paucity of resources currently available to most programs. In a state-supported school, which has a clear obligation to be of service to the state bar, the voices of influential practicing attorneys are hard to ignore.

Further, to the extent that law students see lawyers assisting legal writing professionals and consulting them for help, the students are more likely to put stock in the writing program as a source of preparation for the real world of law practice. In addition, if lawyers assist the legal writing professional by visiting classes or judging arguments, students can have opportunities to make professional contacts through the legal writing course. Students may have many reasons to give their legal writing courses short shrift, but the visible support of practicing attorneys can be a powerful counterweight to these reasons, causing students to look at the course with renewed respect.

VI. CONCLUSION

Law school graduates need coaches if they are to become effective members of the legal discourse community. Law schools cannot do everything when it comes to teaching writing, but a law school’s legal writing professionals can train lawyers to pick up the pedagogical baton and become writing coaches for new associates. By translating theoretical research into practical advice, legal writing professionals can train supervising attorneys to become effective coaches. This training can build productive relations between junior and senior attorneys and between legal writing professionals and the bar. Therefore, it can benefit not only practicing attorneys but also the legal writing professionals themselves.

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68 See text accompanying notes 18-20, supra.
Teaching First-Semester Students that Objective Analysis Persuades

Julie M. Spanbauer*

I. INTRODUCTION

Students frequently experience frustration and difficulty when they make the transition from objective to persuasive analysis and writing. Despite these recognized problems, the standard legal writing curriculum, whether organized in a two-semester or a four or five-semester sequence, invariably begins with the objective memorandum, taught as a prerequisite to advocacy and to persuasive writing.1 This structure alone can create a false dichotomy by pitting objective analysis against advocacy, as an alternative to advocacy, instead of situating it within advocacy as a form of persuasion, a subtle and thus sophisticated form of advocacy.2 This dichotomy is then internalized by first-semester students unless they are given an explanation for

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1 Legal writing texts are generally organized so that the objective memorandum (also known as the inter-office or even neutral memorandum) is listed first in the table of contents. Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style xi-xii (3d ed. 1998). In fact, Professor Neumann uses as the heading for Part V, the section following objective analysis, “The Shift to Persuasion.” Id. at xii. For a similar organization of just a few of the legal writing texts currently on the market, see Charles R. Calleros, Legal Method and Writing ix-xi (3d ed. 1998); Linda Holdeman Edwards, Legal Writing: Process, Analysis, and Organization vii-viii (1996); Laurel Currie Oates et al., The Legal Writing Handbook: Analysis, Research, and Writing ix (2d ed. 1998); Diana V. Pratt, Legal Writing: A Systematic Approach ix-x (2d ed. 1993); Helene S. Shapo et al., Writing and Analysis in the Law ix-xviii (3d ed. 1995).

2 I do not criticize this approach or structure to teaching analysis to first-year legal writing students. In fact, I believe there are sound reasons for this progression. See infra note 3. I simply point out that we as teachers need to be aware of how this structure can be interpreted by the novice legal thinker.
the course sequence and continued reinforcement throughout the first-semester of this alternative way to look at objective
writing and analysis.³

In this article, I offer two teaching techniques which can be utilized throughout the first-semester to reinforce the persuasive
nature of objective analysis and writing: (1) First-semester writing teachers can compare and contrast the Socratic method with
the organizational paradigms taught in the legal writing classroom to reveal the inherently persuasive nature of these tools,⁴
and (2) First-semester writing teachers can also introduce a concept known as “close reading” as an important tool for unearthing persua-
ing persuasion in objective writing and analysis.⁵

First, the Socratic method and the organizational paradigms taught in the legal writing classroom, as traditional first-year pedagogical tools, may actually compound the problems students experience in their first-year legal writing courses. Surveys show that the Socratic method remains the dominant teaching tool in non-skills courses throughout law school and, in particular, in the first-year curriculum.⁶ Once again, first-semester law students are frequently introduced to this teaching tool with lit-

³ The traditional course sequence requires that “students learn objective or predic-
tive writing of legal memoranda during the first semester and persuasive writing of ap-
pellate briefs during the second semester.” Jo Anne Durako et al., From Product to Pro-
“sequence of topics is logical. . . . because persuading a judge is in general rhetorically
more complex than conveying an objective or predictive doctrinal analysis to another at-
torney in the office.” Neal Feigenson, Legal Writing Texts Today, 41 J. Legal Educ. 503,
509 (1991) (review essay). My point is simply that students need to be told that the ability to objectively analyze is a necessary prerequisite to persuasive analysis. The student
must be able to see all sides of the legal issue in order to make the best arguments on
behalf of a client and to anticipate an opponent’s potential arguments. First-semester
students are not likely to understand this point unless they are specifically told.

⁴ See infra notes 31-49 and accompanying text. For a discussion of an organizational
paradigm offered in one of the legal writing texts, see Neumann, supra note 1, at 503-509.

⁵ For a definition of close reading, see infra note 13.

⁶ A recent nationwide survey of law school teachers revealed that 97% (370/383)
said they “used the Socratic method at least some of the time in first year classes.”
Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law
Inquiry into the Art of Critique, 40 Hastings L.J. 725, 739 (1989) (quoting T. Shaffer & R.
Redmount, Lawyers, Law Students and People 168 (1977)) (asserting that the lecture
method has replaced questions which are asked “only as ‘a garnish to lecture’ or as ‘a
way to make lectures more palatable.’ ”) Friedland acknowledged that “the Socratic
method has many different variants and is defined in a plethora of ways,” and thus
what those who responded to his study meant by their statements that they utilize the
Socratic method is not entirely clear. Friedland, supra note 6, at 12, 15. For a definition
and clarification of the Socratic method, see infra notes 31-46 and accompanying text.
yte or no explanation of its purpose.\textsuperscript{7} The first-semester student, who usually has very little grounding in formal logic or philosophy, may view the Socratic method in combination with the organizational paradigms taught in legal writing\textsuperscript{8} as formulas which, if mastered, magically distill the correct answer.\textsuperscript{9} Although the legal writing professor has no control over, and indeed should not control, the teaching methods employed in other first-year courses, he or she should be aware of their potential impact in the legal writing classroom.

When teaching IRAC, CRAC, or any other organizational paradigm, the legal writing professor should explain the paradigm’s use as a deductive tool which the student actively manipulates in order to persuade the reader of a particular outcome.\textsuperscript{10} A comparison of this paradigm to the Socratic method can then illustrate the Socratic method as both a deductive and an inductive tool which professors manipulate to empower students with the knowledge that law is malleable and, once again, that all legal analysis involves persuasion.\textsuperscript{11}

Second, an additional teaching technique, involving the close reading of legal documents, implemented at the initial stages in teaching objective analysis, may reduce the feelings of disconnection students experience when they make the transition to persuasive writing.\textsuperscript{12} Of course, teachers of advanced legal writing courses and seminars have advocated various methods and teaching tools to empower students to critically analyze (deconstruct)\textsuperscript{13} legal texts and thereby critically and creatively


\textsuperscript{8} See Neumann, \textit{supra} note 1, at 89-90.

\textsuperscript{9} One author even described use of the Socratic method as doing “magic.” Childress, \textit{supra} note 7, at 351. He also cautioned that “a danger is present that the [Socratic] ‘game’ played well will seem real, obscuring the approach’s manipulability and its vulnerability to objective reality.” \textit{Id.} at 339. IRAC in its most structured form, is “an oversimplified version of deductive reasoning useful in some legal writing contexts as an introduction, but not in others.” Rideout and Ramsfield, \textit{infra} note 23, at 75 n. 136.

\textsuperscript{10} \textit{Id.} See \textit{infra} notes 47-56 and accompanying text. See Parker, \textit{infra} note 28, at 583 (stating that if students are provided with only one model of a legal document, they “may seek to use it as a template from which to create all documents of that type”).

\textsuperscript{11} See Childress, \textit{supra} note 7, at 338-39 (discussing the Socratic method).

\textsuperscript{12} For a definition of close reading, see \textit{infra} note 13.

\textsuperscript{13} I do not use the term “deconstruct” in the sense of literary deconstruction which “uncovers the suppressed meanings of a text that renders the text indeterminate.” Carrie Menkel-Meadow, \textit{The Trouble with the Adversary System in a Postmodern, Multicult-
create (construct) their own persuasive documents. This enterprise, however, must be modified with the first-semester student who has no grounding in this discipline; the first-semester student has not yet developed a legal vocabulary or a familiarity with legal documents and the legal process. As Joseph M. Williams asserts, “sophisticated reading, writing, and thinking is impossible prior to a novice’s thorough ‘socialization into a community of knowledge.’” Thus, it is vital that from the very beginning, legal writing students be taught that objective analysis flows both from and to persuasive analysis or advocacy.

In Part II, I address the theoretical assumptions underlying my approach to teaching objective analysis and writing. In Parts III and IV, I analyze the potential impact teaching tools such as IRAC and the Socratic method may have upon first-semester law students. Finally, in Part V, I offer an illustration of a close reading exercise appropriate for use in a first-semester legal writing classroom.

II. THEORETICAL ASSUMPTIONS

Before discussing the teaching techniques and tools I advocate, I would like to explain the basis for my belief that objective analysis and writing are inherently persuasive activities.

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14 Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163, 163-166 (1993) (discussing the nexus between critical reading and writing and arguing that students should be taught “techniques of patient intellectual inquiry”).


17 See *infra* notes 20-30 and accompanying text.

18 See *infra* notes 31-56 and accompanying text.

19 See *infra* notes 57-106 and accompanying text.
First, I reject formalism. In terms of analysis, this means that I believe the goal is not to find the single correct answer or some sort of objective truth because there is no single correct answer to a given legal problem. Instead, my goal is to empower students to look at things in different ways, to see there are different possible answers to legal issues. If they are aware of the different possibilities, they will be able to carefully and persuasively construct the answer they choose.

In terms of writing then, the goal is not to teach that language merely conveys meaning, but rather that language creates meaning. Language is law and law is language. At the same time, however, there are potential answers to legal questions which are “better” than others (more likely to be accepted by a particular court or courts within a jurisdiction and more likely to be accepted by particular teachers).

I also believe that writing and thinking are not separable tasks; that is, reading legal texts and creating them involve a common analytical enterprise: the analytical enterprise involved is the construction of meaning. “In reading, we produce text within text; in interpreting, we produce text upon text; in criti-

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20 By “formalism,” I mean “legal formalism” as defined below:

In literature, formalism usually refers to a method of criticizing literary works that focuses on language and genre to the exclusion of other explanations for the work's meaning (such as historical context or author's intent), whereas, in law, formalism usually refers to the claim that well-crafted rules embodied in authoritative texts will constrain the choice of an impartial decisionmaker.


21 Id.


24 “[W]riting does not represent law, but makes it.” Cornwell, supra note 13, at 1095.

25 We certainly would be doing our students a disservice if we did not design problems to encompass some legal issues with more or less predictable results. See Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 406-08 (1985) (discussing easy cases in the context of constitutional adjudication). These “easy cases,” however, are not due to scientifically determined results; instead, this predictability is the result of: “an existing structure of legal argumentation” which “orients thought according to a predictable scheme”; this “orientation of thought” and the shared legal culture of judges and theorists, in turn, “limits the number and variety of perceived ways to resolve conflicts.” Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 21 (1984).

26 “[W]riting is the interplay of images that we call thinking . . . . writing is thought in its purest possible form.” Cornwell, supra note 13, at 1094-95.
cizing, we produce text against text.” In creating, we produce text out of or from text. If students are taught that every time they analyze a legal problem, read legal authority, and predict an outcome, they are constructing meaning, they will have a strong incentive to hone their close or critical reading skills.

The law also imposes certain conventions for different writing projects, e.g., inter-office memoranda versus memoranda in support of motions for summary judgment. Thus, a defined product which answers a legal question or effectively argues in support of a legal position is a very real part of legal writing. Introducing students to these products is one important goal in teaching first-year students. Emphasis on product and certainty or definite answers in resolving legal issues without discussion of the manipulation of language in the construction of these documents and the values underlying the body of law from which an answer is derived, however, is misleading and disempowering for the student.

Finally, critical analysis or interpretation is a skill which is not unique to legal writing or so-called “skills” courses, but rather crosses over from so-called traditional doctrinal or substantive courses to writing, research, and other skills courses, including trial advocacy courses, negotiation courses, judicial extern programs, and clinical programs. Thus, teaching students about the purpose and use of the Socratic method and its parallel to the organizational paradigm taught in the legal writing classroom is particularly useful. To fully empower students,

27 Elizabeth Fajans & Mary R. Falk, supra, note 14, at 163 (quoting Robert Scholes, Textual Power (1986)).

28 I do not use the term “product” to denote the product approach to teaching legal writing students. The product approach “focuses on what to write and the rules for writing, with the professor’s primary input on evaluation of the final product.” Jo Anne Durako et al., From Product to Process: Evolution of a Legal Writing Program, 58 U. Pitt. L. Rev. 719, 721 (1997). I simply mean that law students must be made familiar with the various formats for standard legal documents. See Carol McCrehan Parker, Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It, 76 Neb. L. Rev. 561, 580-81 (1997).

29 See Cornwell, supra note 13, at 1134 (stating that “[t]he traditional model of IRAC thus reinforces the stereotype that legal writing is a technical exercise in graphic representation, a mere reflection of legal truths that precede linguistic manifestation”).

30 For a discussion of the importance both academicians and professionals place upon teaching skills in law school, see ABA Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development -- An Educational Continuum (July 1992) (Report on Task Force on Law Schools and the Profession: Narrowing the Gap — the “Macerate Report”). See also ABA Section of Legal Education and Admissions to the Bar, Sourcebook on Legal Writing Programs 17 (1997) (describing legal analysis as “[o]ne of the most important skills taught in legal writing courses”).
however, it is also important to teach students to employ the tool of critical reading across the law school curriculum into all aspects of their legal education.

III. FIRST-YEAR PEDAGOGY: THE SOCRATIC METHOD

The dominant teaching tool in first-year doctrinal courses is something which is loosely labeled the “Socratic method.” Since this teaching method has many variations and since its use in the law school classroom really is anything but Socratic, an explanation of what I mean by the phrase, “Socratic method” is in order. Specifically, I am referring to the combination of teaching substantive law through the case method with a question and answer classroom technique (of course, the teacher rarely answers questions). This method was actually devised by Christopher Columbus Langdell more than 100 years ago.

Professor Langdell’s reason for adopting this approach to the study of law is crucial to and at odds with my underlying assumptions to teaching objective analysis: He believed that all law could be reduced to a set of scientific principles. In other words, he was a formalist. Over time, the Socratic method began to be utilized “less as doctrine and more as process; the goal became the development of a particular mental process rather than".

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31 See Friedland, supra note 6, at 28 (citing statistics showing that 97% of first-year teachers surveyed claimed to use the Socratic method “some of the time”). Thirty percent of teachers in this group used the Socratic method “most of the time,” and forty-one percent used it “often.” Id. Friedland’s data also indicates that “female professors use non-Socratic methods in first year courses to a slightly greater degree than Socratic methods.” Id. at 40.

32 Professor Neumann first identifies and then describes the two components of “[a] true Socratic dialogue” as follows:

the elenchus and the psychagogia. In the elenchus, the teacher’s questions guide the student to an understanding of the nature and extent of his or her ignorance. The elenchus ends when the student reaches aporia, a state of new-found perplexity. In the psychagogia (literally, the leading of a soul), the questions help the student construct the knowledge that the elenchus showed was lacking (footnote omitted). Neumann, supra note 6, at 730. Its application in the law school classroom often involves “a brutal elenchus” followed by the psychagogia as “a brief afterthought" if the latter occurs at all. Id. at 732. Stated another way, “‘the professor’s capacity to criticize within the Socratic method exceeds his synthetic or constructive capacity.’” Id. (quoting Alan A. Stone, Legal Education on the Couch, 85 Harv. L. Rev. 392, 415 (1971)).

33 Id. at 728 & n.14. See also Childress, supra note 7, at 335 & n. 5, 336. Very few teachers refuse to answer all questions. See Thomas L. Shaffer & Robert S. Redmount, Legal Education: The Classroom Experience, 52 Notre Dame Law. 190, 203 (1976).

34 Neumann, supra note 6, at 728 & n.14.

35 Childress, supra note 7, at 336.

36 Id. See supra notes 20-25 and accompanying text.
than of a doctrinal view of law.” 37 The purpose then of the Socratic approach to teaching law is for the student to acquire the method by which the student has been educated: “[W]hen a student can ‘split a hair’ or ‘distinguish a distinction,’ he not only reflects the instructional method . . . , he also shows that he has made this method his own.” 38

Thus, at its best, through this version of the Socratic method,

[t]he teacher leads the students to generalizations and inferences regarding the subject matter under study, and prompts the student. In effect, the teacher says to the student, “If you wish to know, you must exert your own intellectual effort. You must work with the data from experience yourself. Through your own inquiry will come knowledge.” 39

Instead of reflecting a belief in formalism, the Socratic method as currently employed should explore the different kinds of answers available to questions and should reveal that some answers are better than others, depending upon underlying value judgments and assumptions. 40 The Socratic method ultimately can demonstrate that there is no single answer to most legal questions, but rather “a spectrum of viewpoints.” 41 Its use in first-year courses is thus consistent with the theoretical as-

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37 Childress, supra note 7, at 336. During the 1930’s, legal realists began to challenge “excessive formalism.” Id. More recently, members of the critical legal studies movement have provided a harsh criticism not only to formalism in the law, but also to the Socratic method as utilized in law schools. See Duncan Kennedy, How the Law School Fails: A Polemic, 1 Yale Rev. L. & Social Action 71, 72-73 (1970) (discussing the “emotional harm” to students). Women have recently joined the criticism of the Socratic method as practiced in law school:

[M]any women are alienated by the way the Socratic method is used in large classroom instruction, which is the dominant pedagogy for almost all first-year instruction. Women self-report much lower rates of class participation than do men for all three years of law school. Our data suggest that many women do not “engage” pedagogically with a methodology that makes them feel strange, alienated, and “delegitimated.” These women describe a dynamic in which they feel that their voices were “stolen” from them during the first year. Some complain that they can no longer recognize their former selves, which have become submerged inside what one author has called an alienated “social male.”


38 Bolla, supra note 7, at 566 & n. 63 (quoting William C. Heffernan, Not Socrates, but Protagoras: The Sophistic Basis of Legal Education, 29 Buff. L. Rev. 399, 404 (1980)).


40 Id. at 1013.

41 Childress, supra note 7, at 339 & n. 16.
sumptions underlying my approach to teaching objective analysis.42

The problem with the Socratic method as practiced in today's classroom lies not in this purpose, but in the teacher's complete failure to explain the purpose to first-semester students combined with its formalistic roots.43 Given this combination of factors, it is no wonder that the first-semester student, as novice legal thinker, is often seduced into a search for the right answer.44 First-semester teachers also rarely take the time to summarize and evaluate classroom discussion.45 This omission compounds the potential for reinforcing poor reasoning and logical errors. In order to learn to "think like a lawyer," students need to be told "when an argument is circular" and when they have made "factual misstatements" or when they have "mis­taken cause-and-effect relationships."46 Without this kind of feedback, they will not understand the purpose of the Socratic method, and they will not be empowered to make and anticipate sound legal arguments.

IV. IRAC: THE SOCRATIC METHOD'S COMPANION

The first-semester legal writing teacher who anticipates law students' problems with the Socratic method is in a wonderful position to demonstrate the Socratic method as a flexible, persuasive tool while simultaneously demonstrating the same flexibility and persuasion inherent in another tool unique to the legal writing classroom: the particular organizational paradigm used in teaching the interoffice objective memorandum — IRAC, CRAC, or some variation.47 The student can be shown that this

42 See supra notes 20-30 and accompanying text.
43 "A] danger is present that the [Socratic] 'game' played well will seem real, obscuring the approach's manipulability and its vulnerability to objective reality. The professor can guard against this impression by a candid and self-conscious examination of the 'game' itself." Childress, supra note 7, at 339 (footnote omitted).
44 Id. at 338-40.
45 The failure to explain may be due in part to time constraints caused by "an algebraic increase in cognitive information in all areas of the law." Neumann, supra note 6, at 739-40.
46 Childress, supra note 7, at 347-48.
47 Legal writing teachers have advocated integrating the Socratic method with the writing process and thereby utilizing the Socratic dialogue in the legal writing classroom. See Mary Kate Kearney and Mary Beth Beazley, Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process, 64 Temp. L. Rev. 885 (1991). In her book, Legal Writing, Process, Analysis, and Organization, Linda Edwards describes the organizational paradigm for the objective memorandum "generally as IRAC (Issue, Rule, Application, Conclusion)." Edwards, supra note 1, at 86. While
paradigm provides direct empowerment because the student is in charge of its manipulation. In contrast, in the doctrinal classroom, the teacher is directly empowered to ask the questions, and the student gains power only indirectly by understanding and possibly anticipating the teacher's use of the questions. In this way, students can vividly learn about their power of persuasion in a first-semester legal writing course by direct comparison to their relatively disempowered existence in the doctrinal classroom.

The first semester provides numerous opportunities for unearthing persuasion within so-called objective documents. The very process of organizing this type of analysis requires a student to first predict the outcome, given the facts and the available case law, and then to work backward from that outcome in constructing the analysis. The students are deciding or predicting the result and then constructing the memorandum to support that result. If students work with a closed universe of cases, the organization of those cases becomes a key component in persuading the reader. If students are performing their own research, the choice of cases may provide an avenue for persuasion. The point is simply that students need to be reminded
throughout the semester of all of the persuasive decisions they make every time they conduct research for and compose an interoffice memorandum, particularly the more subtle persuasive decisions just mentioned.

In contrast to the other aspects of the objective memorandum, counter-arguments, particularly case-based arguments, provide direct opportunities for constant reminder and reinforcement that all objective analysis is a form of persuasion.\textsuperscript{53} Judicial opinions, particularly concurring and dissenting opinions, provide the basis for many counter-arguments.\textsuperscript{54} They thus provide vivid illustrations of judicial persuasion. Judicial opinions are also the documents which most closely resemble an objective memorandum, and students usually do not discover this comparison on their own.\textsuperscript{55} Students need reminding that the very documents they rely upon to predict outcomes are persuasive persuasive technique. For the teacher who does not like to use students' work product, examples can be created very easily. The teacher can then hand out a portion of a memorandum which the teacher has constructed in two different ways.

\textsuperscript{53} \textit{See} Fajans & Falk, supra note 14, at 195 ("[a]sking how a court reads caselaw or a constitution also implicates the ways it chooses not to read, that is, the texts it rejects").

\textsuperscript{54} \textit{Id.} at 194. The authors suggest an example: the majority and dissenting opinions in the United States Supreme Court decision, Goldberg v. Kelly, 397 U.S. 254 (1970). \textit{Id.} Writing for the majority, Justice Brennan ruled that the Due Process Clause of the Fourteenth Amendment requires that a state provide an evidentiary hearing before terminating welfare benefits. Goldberg, 397 U.S. at 264. Justice Black argued in dissent:

I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a \[C\]onstitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable. \textit{Id.} at 277. Some teachers of legal writing may be hesitant to use this example, particularly in a first-semester course, because it involves a due process issue. There are, however, many cases which can be effectively used in the first-semester. The majority and dissenting opinions in the "Baby Richard" case provide an excellent example for first-semester students. \textit{See} Cornwell, supra note 13, at 1129 n. 86. \textit{In re Petition of Doe}, 627 N.E.2d 648 (Ill. App. Ct. 1993), rev'd, 638 N.E.2d 181 (Ill. 1994), \textit{cert. denied}, 115 S. Ct. 499 (1994).

The majority opinion of the appellate court tells a story of an absent natural father who has reason to think his child might have been placed for adoption by his girlfriend, but who does not care to consult a lawyer until over two months after the child is nurtured by adoptive parents. \textit{Id.} at 649-56. The dissent tells the story essentially from the point of view of the natural father, who is portrayed as a supportive father-to-be subsequently the victim of his girlfriend's deception — a deception of which the adoptive parents and their attorney were aware. \textit{Id.} at 656-66. 
Cornwell, supra note 13 at 1129 n. 86.

\textsuperscript{55} This is probably due to the fact that they see the judicial opinion as authority. \textit{See} Fajans & Falk, supra note 14, at 165.
and are models for the very documents students are creating in their first-semester legal writing class.

I find this fact most difficult to convey to first-semester students who uniformly resist seeing the persuasion inherent in a majority opinion: The same students who can see persuasion in their own and their classmates’ written memoranda and in dissenting and concurring judicial opinions fail to see the persuasion imbedded in a majority opinion. In other words, “they fail to see how” the court “‘worked’ the text on them.”

V. APPLICATIONS FOR THE FIRST SEMESTER

I use the following in-class exercise to illustrate judicial persuasion in a majority opinion. I begin by setting out the facts from two cases: Walker v. City of Birmingham and Shuttlesworth v. City of Birmingham. Both opinions arise from the same set of operative facts—Dr. Martin Luther King’s 1963 protest against segregation in Birmingham, Alabama. What is most important for purposes of illustrating my point to students is that both majority opinions were written by Justice Stewart. I require the students to read the facts from each opinion outside of class. I then conduct an in-class exercise designed both to elicit the different persuasive technique utilized by Justice Stewart in each opinion and to highlight the importance of the fact section to the objective memorandum. Next, I assign carefully edited portions of the legal analysis from each case. We then discuss how Justice Stewart read and interpreted the law differently in each case.

Before providing the text of Justice Stewart’s opinions, I would like to provide some background information to contextu-

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56 Id. at 164. The authors offer an explanation for student hesitancy to read judicial opinions critically: “Judicial opinions are not just interpretation—they are adjudication, and adjudication is power, coercion, even violence. To read judicial opinions closely and critically is to talk back to power.” Id. at 165.
59 Id. at 148-49; 388 U.S. at 310-11. See also Sally Frank, Eve Was Right to Eat the “Apple”: The Importance of Narrative in the Art of Lawyering, 8 Yale J.L. & Feminism 79, 84 (1996) (using these two cases to illustrate “the flexibility that lawyers and judges may enjoy in constructing narratives”).
60 Shuttlesworth, 394 U.S. at 148; Walker, 388 U.S. at 308.
61 See infra notes 78-80 and accompanying text.
62 See infra notes 81-87 and accompanying text.
63 See infra notes 88-89 and accompanying text.
64 See infra notes 90-99 and accompanying text.
alize the issues. The events leading up to Reverend King's Good Friday march in 1963 were dramatic. Two other civil rights leaders (and the named defendants in the opinions) were involved with Reverend King in the organization of the civil disobedience and non-violent protests in Birmingham: Reverend Frederick Lee Shuttlesworth, a prominent civil rights activist in Birmingham, and Dr. Wyatt Tee Walker, Executive Director of the Southern Christian Leadership Conference.

In 1963, Birmingham was described as "the most segregated city in America." In his inaugural address delivered just two months prior to Dr. King's protest, Governor George Wallace vowed to retain "segregation now, segregation tomorrow, segregation forever." Birmingham ordinances prohibited restaurants from serving both blacks and whites. Buses, taxi cabs, restrooms, theaters, hospitals, "ambulances, police paddy wagons and elevators were segregated."

The day before the marches leading up to the Good Friday march were scheduled to begin, the protesters requested the necessary parade permit. The permit was denied, and the marchers went ahead with their protests. The Alabama legislature responded by statutorily raising bail "for misdemeanor arrests in Birmingham, from $300 to $2,500." On Wednesday, April 10, 1963, two days before the scheduled Good Friday march, City attorneys also petitioned the state court for and re-

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65 Of course, I do not provide this background information to my students. Instead, I let them discover some of this information as they read the two excerpted cases. I find it is a much more powerful demonstration of persuasion if, for instance, they learn that Dr. King was a defendant in the Walker case, but he is not directly mentioned anywhere in the fact section of the opinion. I add the other more emotional facts which are also omitted from the Court's opinion (such as the nature of his confinement after his arrest) as we move through the readings.


67 Id. at 646.

68 Id. at 658 (quoting Martin Luther King, Jr., *Why We Can't Wait* 50 (1964)).

69 Id. & n. 68.

70 Id. at 658.

71 Id.

72 Id. at 659. In responding to their request for a permit to march, Eugene Connor, Public Safety Commissioner, proclaimed: "You will not get a permit in Birmingham, Alabama, to picket. I will picket you over to the City Jail." Id. at 659-60 (quoting Transcript of Record at 352-55, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67 - 249)).

73 Id. at 661-62.

74 Id. at 660.
ceived an injunction against further demonstrations. King, Walker, and Shuttlesworth decided to march, knowing they would be arrested and also knowing that they could not afford to pay the bail. Dr. King wrote Letter from Birmingham Jail, his “greatest written work,” on “the edges of newspaper” while being held in solitary confinement for his arrest in Walker.

In Walker, a majority of the United States Supreme Court upheld the injunction issued by the state court prohibiting the protesters from marching. Justice Stewart described the facts as follows:

Five of the eight petitioners were served with copies of the writ early the next morning. Several hours later four of them held a press conference. There a statement was distributed, declaring their intention to disobey the injunction because it was “raw tyranny under the guise of maintaining law and order.” At this press conference one of the petitioners stated: “That they had respect for the Federal Courts, or Federal Injunctions, but in the past the State Courts had favored local law enforcement, and if the police couldn’t handle it, the mob would.” That night a meeting took place at which one of the petitioners announced that “[i]njunction or no injunction we are going to march tomorrow.” The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by, “clapping, and hollering, and [w]hooping.” Some of the crowd followed the marchers and spilled out into the street. At least three of the petitioners participated in this march.

Meetings sponsored by some of the petitioners were held that night and the following night, where calls for volunteers to “walk” and go to jail were made. On Easter Sunday, April 14, a crowd of between 1,500 and 2,000 people congregated in the midafternoon in the vicinity of Seventh Avenue and Eleventh Street North in Birmingham. One of

75 Id. at 660-61.
76 Id. at 661.
77 Id. at 662.
78 Walker, 388 U.S. at 320-21. The injunction was issued pursuant to a Birmingham parade ordinance which required a permit for “any parade or procession or other public demonstration on the streets or other public ways of the city, . . . ” Id. at 309 n. 1.
the petitioner was seen organizing members of the crowd in formation. A group of about 50, headed by three other petitioners, started down the sidewalk two abreast. At least one other petitioner was among the marchers. Some 300 or 400 people from among the onlookers followed in a crowd that occupied the entire width of the street and overflowed onto the sidewalks. Violence occurred. Members of the crowd threw rocks that injured a newspaperman and damaged a police motorcycle.\textsuperscript{79}

In \textit{Shuttlesworth}, Justice Stewart, who now ruled that the parade ordinance was unconstitutional, described the same facts much differently:

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

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Uncontradicted testimony was offered in \textit{Walker} to show that over a week before the Good Friday march petitioner Shuttlesworth sent a representative to apply for a parade permit. She went to the City Hall and asked “to see the person or persons in charge to issue permits, permits for parading, picketing, and demonstrating.” She was directed to Commissioner Connor, who denied her request in no uncertain terms. “He said, ‘No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,’ and he repeated that twice.”

\textsuperscript{79} Id. at 310-11 (footnote omitted).
Two days later petitioner Shuttlesworth himself sent a telegram to Commissioner Connor requesting, on behalf of his organization, a permit to picket "against the injustices of segregation and discrimination." His request specified the sidewalks where the picketing would take place, and stated that "the normal rules of picketing" would be obeyed. In reply, the Commissioner sent a wire stating that permits were the responsibility of the entire Commission rather than of a single Commissioner, and closing with the blunt admonition: "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama." 80

After the students have read both sets of facts outside of class, we work through the following questions in sequence for this in-class exercise: 81 (1) Do any facts appear to be omitted from one opinion? (I am asking about court silences and getting students to consider the persuasive power of silence.) (2) Are the same facts characterized differently in one opinion, and if so, how are they characterized differently? (I am asking students to read for rhetoric, style, and narrative.) (3) What type of reaction do the different characterizations evoke in you? (I am asking students to consider the effect of tone or mood.) This example helps students to see the power of language, particularly in terms of the same writer's different characterizations and omissions of facts. They are also able to see how the marchers appear in the Walker account as aggressive, disorderly, and dangerous and how in the Shuttlesworth version they appear to be an organized group with defined leadership. They have, in just two years, 82 become orderly, reasonable people, protesting violations of their civil rights.

For example, many facts which cast the marchers in a sympathetic light were omitted from the Walker opinion. First, before the march, Reverend Shuttlesworth sent a telegram to the Commissioner of Public Safety requesting (for the second time) a permit to march. 83 Also noticeably absent were the facts that the marchers were led by three ministers and the purpose

81 See Fajans & Falk, supra note 14, at 193. The authors posed similar questions in their close or critical reading exercise utilized in an advanced legal writing seminar.
82 Walker was decided in 1967, 388 U.S. at 307, and Shuttlesworth was decided in 1969, 394 U.S. at 147.
83 Shuttlesworth, 394 U.S. at 157.
of their march was to protest segregation. The Walker Court further failed to note that the marchers stayed primarily on the sidewalks, they obeyed traffic signals, and they did not interfere with either pedestrians or automobiles when it described these protesters as a "group," or "parade."

In stark contrast, in Shuttlesworth, information which was unfavorable to the marchers because it cast them as defiant law breakers was omitted: They were served with a copy of the injunction the day before their scheduled march; after they received a copy of the injunction, they held a press conference at which they proclaimed their distrust of the state court system; and that same evening, they publicly announced their intention to march. They were described by the Shuttlesworth Court as "people" who "were led" "by three . . . ministers." The students are very surprised by the power of both the omissions and the characterizations of the marchers.

I next provide the class with a carefully edited portion of the legal analysis in each case. I provide the following excerpt from Walker:

The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of the law, which alone can give abiding meaning to constitutional freedom.

In contrast, in Shuttlesworth, Justice Stewart argues:

"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or with-

84 Id. at 148-49.
85 Id. at 149. See Walker, 388 U.S. at 310.
86 Walker, 388 U.S. at 310.
87 Shuttlesworth, 394 U.S. at 148.
88 388 U.S. at 320-21 (footnote omitted).
held in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license. "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands."93

I then ask the following question: How does the court itself read the law? (I am asking about judicial interpretation and the effect of social and political context upon that interpretation).90 The Walker decision reflects a belief in the duty to obey law and a fear of chaos.91 In Walker, Justice Stewart uses very strong language, declaring that the marchers were not "free to ignore" the injunction and "carry their battle" to the public streets.92 Stewart then describes the marchers as "impatient" and chides them to show "respect for judicial process" as a "small price" in order to have "the civilizing hand of the law."93 In contrast, the opinion in Shuttlesworth acknowledges a duty to disobey unjust laws, a recognition of civil disobedience, and a fear of tyranny.94 Justice Stewart's language is very different as he declares that the marchers "may ignore" the ordinance "and engage with impunity in the exercise of the right of free expression."95

We discuss all of these differences and the important social and political events which occurred between the time Justice Stewart authored the two opinions. Dr. Martin Luther King, Jr., one of the defendants in Walker, was assassinated;96 Senator Robert Kennedy, a prominent civil rights leader, was also assassinated;97 and there were many demonstrations and violent con-

90 See Fajans & Falk, supra note 14, at 193-96 (asking similar questions).
92 Id. at 321.
93 Id.
94 394 U.S. 151.
95 Id.
97 "Robert Kennedy, former Senator from New York and then Attorney General of the United States, was assassinated on June 5, 1968. He was a key proponent of
frontations throughout this country, particularly in the South.\textsuperscript{98} The rule of law, emphasized in \textit{Walker}, was breaking down.\textsuperscript{99}

As a final step in the exercise, I sometimes assign portions of Martin Luther King Jr., \textit{Letter from Birmingham Jail}, dated April 16, 1963, which was written after his arrest in the \textit{Walker} case.\textsuperscript{100} We discover that this letter is yet another version of the "truth" embodied in the \textit{Shuttlesworth} decision.\textsuperscript{101} It is simply another way of stating (or an alternative narrative for)\textsuperscript{102} the legal analysis in \textit{Shuttlesworth}. We analyze Dr. King's persuasive technique which is not in any way "disguised" as it is in judicial opinions, and we admire his eloquent, beautiful prose. During the class discussion of this letter, I point out its parallels to a closing argument.\textsuperscript{103} I also point out that his use of law and philosophy to support his arguments is akin to use of precedent.\textsuperscript{104} I underscore his powerful use of quotations and his ability to manipulate language to create vivid images.\textsuperscript{105} Again, I make an analogy to law and the use of witness testimony in creating emotion and painting pictures.\textsuperscript{106}


\textsuperscript{98} See Keating, supra note 96 at 237.

\textsuperscript{99} In five years, this country "had endured the assassination of a president and two other national leaders (Robert Kennedy and Dr. Martin Luther King, Jr.). We had experienced Kent State, riots at the Democratic Convention, and the bombing of Cambodia." William R. Glendon, \textit{The Pentagon Papers — Victory for a Free Press}, 19 Cardozo L. Rev. 1295, 1306 (1998).

\textsuperscript{100} A copy of this letter in its entirety can be found in David Benjamin Oppenheimer, \textit{Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail}, 26 U.C. Davis L. Rev. 791, 835-51 (1993). I have set out some parts of it in an appendix.

\textsuperscript{101} See Appendix, infra.

\textsuperscript{102} See Frank, supra note 59, at 84 (discussing the two different narratives embodied in Walker and Shuttlesworth).

\textsuperscript{103} One author argues:

It is currently fashionable to analogize the rhetorical theory of closing arguments closely upon the \textit{dramatic arts} and \textit{storytelling} (the Literary Analogy). While these comparisons are very powerful and have had a salutary effect on trial theory and technique, they are dangerous and ultimately misleading, because they overlook the uniqueness of the closing (footnote omitted).

Michael Sean Quinn, \textit{Closing Arguments in Insurance Fraud Cases}, 23 Tort & Ins. L.J. 744, 749 (1988). The author further argues that "principles applicable to political orations, after-dinner addresses, sermons, ardent entreaties to one beloved, theatrical monologues, and academic papers are all inapplicable to closing arguments." \textit{Id}.

\textsuperscript{104} See Appendix, infra.

\textsuperscript{105} \textit{Id}.

\textsuperscript{106} \textit{Id}.
VI. CONCLUSION

From the beginning, these techniques can be utilized to teach first-semester students about the persuasive power of language and of law. The judicial opinion should be emphasized as a key persuasive document. After all, it is the basis for most predictive analysis during the first-semester, both in the legal writing classroom and in the doctrinal classroom. If students are reminded that the very authority they rely upon to support the conclusions they reach is persuasive, they will begin to understand that any interpretation involves manipulation of the law. They should also be reminded that the judicial opinion is the closest parallel to the document they are producing during the first-semester of legal writing — the objective or inter-office memorandum. They should then be able to understand that Socratic questioning is also a method for manipulating the law. If a parallel is drawn to the organizational paradigm utilized in first-semester legal writing, students can find their own power to manipulate the law.
In answering those who criticized the marchers for not allowing the newly elected city administration time to implement change, Dr. King stated:

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was “well timed” in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word “Wait!” It rings in the ear of every Negro with piercing familiarity. This “Wait” has almost always meant “Never.” We must come to see, with one of our distinguished jurists, that “justice too long delayed is justice denied.”

We have waited for more than 340 years for our constitutional and God-given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse-and-buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, “Wait.” But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an air-tight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can’t go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five-year-old son who is asking: “Daddy why do white people treat colored people so mean?”; when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs
reading “white” and “colored”; when your first name becomes “nigger,” your middle name becomes “boy” (however old you are) and your last name becomes “John,” and your wife and mother are never given the respected title “Mrs.”; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of “nobodiness” — then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair. I hope, sirs, you can understand our legitimate and unavoidable impatience.\textsuperscript{107}

In response to the criticism that he and the other marchers had broken laws, Dr. King argued:

You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court’s decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: “How can you advocate breaking some laws and obeying others?” The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to disobey unjust laws. I would agree with St. Augustine that “an unjust law is no law at all.”

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the term of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the

\textsuperscript{107} Oppenheimer, supra note 100, at 838-40.
terminology of the Jewish philosopher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically, and sociologically unsound, it is morally wrong and sinful. Paul Tillich has said that sin is separation. Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.

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I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

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We should never forget that everything Adolph Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. Even so, I am sure that, had I lived in Germany at the time, I would have aided and comforted my Jewish brothers. If today I lived in a Communist country where certain principles dear to the Christian faith are suppressed, I would openly advocate disobeying that country's antireligious laws.\footnote{Id. at 840, 841-42.}
Sailing and designing memo assignments have a lot in common. At first, both can seem overwhelming—so much to learn, so much to organize sequentially, and so much to get right in a short period of time. Mistakes mean instability, lost time, and possibly capsizing. Avoiding the mistakes, a good skipper can break through to clean water and good air, and teaching writing can be exhilarating. Exhilaration is contagious.

The students and teacher both benefit from and enjoy working with an ideal memo assignment. Although the ideal memo may take many forms, several assumptions underlie the authors' concept of the ideal. First, sailors start by venturing out in a small boat, on flat water, in a light breeze. Similarly, legal writing assignments need to start with a topic that requires very simple structural analysis, usually a statutory elements analysis that teaches basic skills. From there, the wind increases and the next memo assignment is more difficult. It reinforces the skills students learned by completing the first memo, and it adds new skills in research, analysis, and writing. This process of designing writing assignments that both reinforce old skills and add new skills results in a spiral curriculum. The

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1 This article focuses on the objective interoffice legal memorandum, which forms the basis of Seattle University School of Law's program for first year students. Each writing assignment relates to a specific legal memorandum, which is similar to an assignment a new associate would receive in practice. For each memorandum, the students are required to research, analyze, and write. For an approach focusing on more discrete skills, see Gail A. Kintzer et al., Rule Based Legal Writing Problems: A Pedagogical Approach, 3 LEGAL WRITING 143 (1997).

2 See Jerome S. Bruner, The Process of Education (1960) (reporting the major themes that emerged from the Woods Hole Conference of scientists, scholars, and educators). Bruner describes the spiral curriculum as teaching the basic ideas first and then revisiting them "repeatedly, building on them until the student has grasped the full for-
spiral curriculum process also charts the course for a semester or for an entire year.

The process is critical, but the destination is key. No memo assignment is effective if it results in capsizing or getting lost. Memos are effective only when they help students meet the goals set for research, analysis, and writing. The three sections of this article provide concrete ideas for reaching the destination. The first section outlines the top ten mistakes in designing memo assignments. The top ten designation refers not only to the importance of the mistake but also to the frequency with which the mistake is made. The second section discusses the ideal assignment, and the third section presents strategies for working through the process of designing a memo. The completed memo assignment that appears in Appendix 2 illustrates concepts discussed in both sections two and three. Following the ideas in these three sections should lead to exhilarating sailing through legal writing for both teachers and students.

I. TOP TEN MISTAKES IN DESIGNING ASSIGNMENTS

Novice and even experienced legal writing faculty find that designing assignments is one of the more challenging parts of their jobs. Like the skipper who is trying to think about destination, weather, obstacles, and the needs and ability of the crew, the legal writing professor designing an assignment has so many different things to consider that it is all too easy to be so focused on achieving one objective that another equally important objective gets completely overlooked. For that reason, the authors have assembled a “top ten” list of mistakes in designing assignments as a quick checklist against which legal writing faculty can test an assignment. The mistakes are listed in ascending order.3

3 Any resemblance to David Letterman’s “top ten” lists is unintentional. In determining which mistakes to include on the list, the authors considered both how frequently the mistake is made and how important the mistake is to the overall learning objectives for the legal writing course. A one-page summary of the top ten mistakes appears in Appendix 1.
Number 10: The assignment is too boring.
(sailing with no wind)

When a legal writing professor selects a topic or legal problem for students to solve, it is important to remember that both the students and the teacher will be spending a considerable amount of time living and working with this assignment. If the subject matter has some natural intrinsic interest, it will be easier for the students to get into and stay fully engaged in the assignment, and consequently, their learning will be enhanced.4

Number 9: The assignment is “all flash and no cash.”
(sailing with a hot boat and an inexperienced crew)

The companion problem to the “too boring” assignment is, of course, the assignment that is selected primarily because it is “sexy” or the hot topic of the day. Although the topics and legal problems in legal writing assignments should be interesting, they must also help the legal writing professor and students meet their pedagogical goals. Avoid the temptation to design a problem based on a headline without thinking through whether it will help students learn what they need to know about legal research, analysis, and writing.

Number 8: The assignment is too highly charged.
(avoiding rocks hidden under the surface)

Law students are not fragile, nor do they need to be coddled. Nevertheless, some topics are so highly charged that they interfere with some, even many, students’ learning. For this reason, it is best to avoid certain types of legal writing problems, for example, fact patterns with gruesome assaults on children. Selecting such a fact pattern will inevitably mean that the students will be immersed not only in the facts of the case in the assignment but also in the facts of the analogous cases.

Another fact pattern that many legal writing faculty avoid using in their assignments is one concerning rape. With so many other topics to choose from, it seems unwise to force the victim of a crime like rape to deal all over again with his or her earlier personal experience while trying to learn how to do re-

5 Our colleague Professor Ramona Writt nicknamed this mistake for us.
search and analysis.⁶

**Number 7: The assignment is created without consultation.**
*(not discussing the course with the crew)*

As a general rule, consider consulting with two people before designing and distributing any assignment in legal writing. First, consult with an experienced legal writing professor and ask whether the assignment will work. Another set of experienced eyes might head off a disaster or, at the very least, spot a minor problem that can be solved before the assignment is given to the students. Second, consult with the faculty member who is teaching the same students the doctrinal course associated with the legal writing assignment.⁷ This second consultation is important as a professional courtesy, and it can head off potential political problems.⁸ From a pedagogical standpoint, this consultation with the doctrinal professor is important so that the students do not have unnecessary confusion about the law, particularly if there are differences between how it is taught in the doctrinal course and how it will be applied in the legal writing assignment.

**Number 6: The assignment requires resources that are not available.**
*(what do you mean there aren't enough lifejackets?)*

Most law school libraries have multiple copies of the resources for their own and nearby states, but they may have limited copies of the resources for distant jurisdictions. Before plac-

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⁶ One possibility is to have an alternative assignment for an individual student whose past experiences are a serious obstacle to his or her working on a given assignment.

⁷ See OATES ET AL., supra note 2, at 288. There is always the potential danger that a doctrinal professor will see such a consultation as opening the door to having the legal writing professor cover some content from the doctrinal course. We are not recommending the consultation for this reason. In fact, we urge legal writing faculty to resist any pressure to cover material for a doctrinal course because covering topics for doctrinal courses would be at the expense of teaching the many research, analytical, and writing skills that need to be covered in legal writing. RICHARD NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE, TEACHER'S MANUAL 205 (3d ed. 1998); J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 WASH. L. REV. 81-82 (1994); Grace Tonner & Diana Pratt, Selecting and Designing Effective Legal Writing Problems, 3 LEGAL WRITING 163, 168 (1997).

⁸ Knowing in advance about an assigned legal writing problem in his or her subject area will help a doctrinal professor if questions related to the legal writing problem surface in the doctrinal class.
ing a problem in a particular jurisdiction, consider whether the library has an adequate number of copies of the necessary resources for the students to do the assignment. Also remember to consult with other legal writing faculty about which library resources their students will need. Too many students, whether they come from the same class or from different classes, competing for the same set of books creates unnecessary headaches for the students, the librarians, and the legal writing professors involved.

Many legal writing programs delay introducing computer-assisted legal research until after the students have learned to research using the books. It goes without saying that students should not be given assignments that require computer-assisted legal research until after they have had the necessary training.

**Number 5: The assignment is not adequately researched.**
*(check the charts and the weather first)*

New legal writing faculty sometimes think that giving students a legal writing assignment is like a partner giving an associate or intern a legal problem to research. Using that analogy, they may think they can simply assign a problem, turn the students loose, and then see what they find. This approach is seriously misguided. Unless the legal writing professor has researched the problem himself or herself, the professor will not know if the problem helps students learn the skills he or she wants to teach.

By thoroughly researching the problem before assigning it, the legal writing professor will have an opportunity to make any necessary revisions to the assignment before distributing it to the students. By knowing what the students will find before sending them out to do research, he or she can ensure that the teaching goals of the course are met.

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9 One alternative is to place copies of a limited resource on reserve.
10 _Oates et al., supra_ note 2, at 288.
11 Even when a legal writing professor has carefully researched a problem, the students often uncover unforeseen issues and complications. Researching a problem before assigning it just cuts down on the number of surprises the legal writing professor may have to handle.
Number 4: The assignment is ill-defined.
(any way the wind blows)

In designing an assignment, legal writing faculty need to make sure that it is focused on the issues they want the students to discuss.\textsuperscript{12} Students can still be given a realistic, multifaceted fact pattern and then told to assume that another associate will handle one or more of the issues, for example, whether there was a contract.

In addition to defining the issues in the assignment, it is wise to define the logistics of the assignment. Put everything—due dates, format requirements, length requirements—in writing.

Number 3: The assignment is too long.
(are we there yet?)

If an assignment requires too many cases or too many parts to the analysis, the students will not be able to do a good job researching and writing in the time they have. Equally important, overly long assignments add to the legal writing professor's critiquing and grading burden.\textsuperscript{13} For both reasons, then, it is crucial to consider approximately how many pages it will take to do the assignment and, if necessary, adjust the assignment so that it is not too burdensome to the students or the legal writing professor.

Number 2: The assignment fails to develop skills.
(we're sailing in circles)

From a learning standpoint, this is the most serious mistake in designing legal writing assignments. Assignments are not there simply as work for the students. They need to be carefully designed and sequenced\textsuperscript{14} so that they provide a vehicle through which students can learn the foundation skills in legal research, analysis, and writing.\textsuperscript{15} The key, of course, is for legal

\textsuperscript{12} Linda Holdeman Edwards recommends making the first assignment a single-issue assignment. LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION, TEACHER'S MANUAL 38 (1996).

\textsuperscript{13} Id.

\textsuperscript{14} See OATES ET AL., supra note 2, at 287; RALPH L. BRILL ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS 13 (1997); Helene S. Shapo & Mary S. Lawrence, Designing the First Writing Assignment, 5 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 94, 94-95 (1997); Kintzler et al., supra note 1, at 144, 145, 151.

\textsuperscript{15} See NEUMANN, supra note 7, at 200; BRILL ET AL., supra note 14, at 15; Levine,
writing faculty to plan ahead and think through exactly what it is that they want to teach. Then they can devise assignments that naturally require students to use the various research tools and resources, to do increasingly more sophisticated analysis, and to develop all the aspects of their writing.\textsuperscript{16}

\textit{Number 1: The assignment is too difficult.}
(\textit{trying to go around the world on your first sail!})

The number one and most common mistake in designing legal writing assignments is creating an assignment that is too difficult. The reasons why legal writing faculty tend to create overly difficult assignments are numerous. Sometimes it is a sign of insecurity on the part of a new teacher. A tough assignment may make a new teacher feel like he or she is sufficiently "rigorous." Often the mistake comes from the legal writing professor simply forgetting how much more he or she knows than a brand new law student knows.

Unfortunately, the mistake of creating an overly difficult assignment often happens with the very first assignment of the year. The result is that the course begins on the wrong foot, with the students unnecessarily frustrated and the professor spending most of the class time trying to remedy the problem. If the legal content is completely unfamiliar, the legal writing professor may end up teaching the substantive law needed for the problem. If the analysis is too difficult, he or she may end up walking through the analysis rather than having the students figure it out. Small wonder that experienced legal writing faculty often say that a first memo problem cannot be too easy.\textsuperscript{17}

\section*{II. The "Ideal" Memo Assignment}

Given the top ten “mistakes” just discussed, what makes an “ideal” memo assignment? Just as a captain must ensure that her boat is in sailing condition and that the course is appropriate to the winds, weather, and experience of the crew before sailing, a legal writing professor must ensure that the legal writing assignment is effective and engaging before handing it

\textsuperscript{16} See, e.g., Brill \textit{et al.}, \textit{supra} note 14, at 13-16; Neumann, \textit{supra} note 7, at 204; Tonner \& Pratt, \textit{supra} note 7, at 163-165; Laurel Currie Oates, Designing Effective Writing Assignments, Handout for Northwest Regional Legal Writing Conference (1995); Kintzer \textit{et al.}, \textit{supra} note 1, at 152.  

\textsuperscript{17} Shapo \& Lawrence, \textit{supra} note 14, at 94.
out to students. Instead of addressing each of the top ten mistakes in turn, we instead identify five main attributes an "ideal" memo assignment might have. The "ideal" memo assignment should (1) teach, and allow students to practice, specific skills; (2) be neither too difficult nor too easy; (3) involve subjects that are interesting, familiar, and realistic; (4) be well researched; and (5) be sensitive in its treatment of issues and individuals.

A. The Ideal Memo Assignment Should Teach, and Allow Students to Practice, Specific Skills

The memo assignment can be viewed as a secondary "text" for a Legal Writing class. While the texts for the course will explain to students how to conduct legal research, how to analyze and synthesize various sources of law, and how to draft legal analysis, the assignment itself allows the students to apply this knowledge. The assignment can be used in class to illustrate the concepts being taught, and the students’ drafts, coupled with the professor’s critique, provide students with their own "personalized texts" for their work in the class. If the assignment is not designed to teach specific skills (Mistake Number Two of the "Top Ten Mistakes," above), it is not designed to help the students master the course material.

Viewing the assignment as a supplementary text, the professor must have a clear idea of what the assignment is intended to teach. The first step in identifying the goals or objectives for any one assignment is to identify the goals or objectives for the entire course. Then, determine how each memo assignment will help teach those goals or objectives.

The chart set forth below may be a useful tool for mapping out both course and assignment objectives. Read as a whole, the chart identifies course objectives, that is, what students should learn regarding research, analysis, and writing by the end of the course. Each column lists the specific objectives for any given assignment, also in terms of research, analysis, and writing. Note that each assignment is designed to build on knowledge

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18 Rideout & Ramsfield, supra note 7, at 89.
19 See Levine, supra note 4, at 58.
20 See Neumann, supra note 7, at 200; Brill et al., supra note 14, at 15; Levine, supra note 4, at 58.
21 See Neumann, supra note 7, at 204; Tonner & Pratt, supra note 7, at 163-165; Oates, supra note 16; Kintzer et al., supra note 1, at 152.
22 See Oates, supra, note 16; Oates et al., supra note 2, at 287.
gained in the prior assignment and that each assignment is designed to be more challenging than the assignment before it.\(^{23}\) While this chart is designed for a program that assigns three memoranda and one brief (trial or appellate), it can easily be adapted to any program that has multiple assignments.

**OBJECTIVES FOR EACH ASSIGNMENT**

<table>
<thead>
<tr>
<th>First Memo</th>
<th>Second Memo</th>
<th>Third Memo</th>
<th>Brief</th>
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<tbody>
<tr>
<td><strong>Research</strong></td>
<td>Encyclopedias</td>
<td>Digests</td>
<td>Uniform Laws</td>
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<td>Hornbooks</td>
<td>ALR</td>
<td>Restatements</td>
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<td>Constitutions</td>
<td>Law Reviews</td>
<td>Treatises</td>
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<td>Codes</td>
<td>Cite Checking</td>
<td>Loose-leaf Services</td>
</tr>
<tr>
<td><strong>Analysis</strong></td>
<td>Reading and analyzing statutes and cases</td>
<td>More sophisticated reading and analysis of statutes and cases</td>
<td>More sophisticated reading and analysis of statutes and cases</td>
</tr>
<tr>
<td></td>
<td>Elements analysis using the script format</td>
<td>Elements analysis using integrated format</td>
<td>Balancing of competing interests or issue of first impression</td>
</tr>
<tr>
<td></td>
<td>Factual arguments</td>
<td>More sophisticated arguments</td>
<td>More sophisticated arguments</td>
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<tr>
<td></td>
<td>Arguments based on analogous cases</td>
<td></td>
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<td></td>
<td>Policy arguments</td>
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<tr>
<td><strong>Writing</strong></td>
<td>Format of memo</td>
<td>Sentence construction</td>
<td>Bias-free language</td>
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<td></td>
<td>Large-scale organization</td>
<td>Precision</td>
<td>Plain English style</td>
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<tr>
<td></td>
<td>Paragraphing and transitions</td>
<td>Conciseness</td>
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<tr>
<td></td>
<td>Grammar and punctuation</td>
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Appendix 2\(^{24}\) contains an assignment sheet for a second memo problem that incorporates the objectives discussed above. The assignment asked students to research whether a release signed before a river rafting trip is enforceable under California

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\(^{23}\) See Brill et al., *supra*, note 14, at 13; Shapo & Lawrence, *supra* note 14, at 94-95; Kintzer et al., *supra* note 1, at 144, 145, 151.

\(^{24}\) Appendix 2 is an assignment sheet for a second memo problem assigned in the fall of 1996 by Professor Lorraine Bannai at Seattle University School of Law. We recommend reading through the assignment before reading the rest of this article, as reference will be made to it.
common law. While we do not suggest that this is an "ideal" memo assignment, it does provide a useful example for the purposes of discussion.

This second memo assignment was designed to achieve several objectives.\(^{25}\) The first memo assignment had been designed to teach students how to research statutes and a handful of cases interpreting and applying a statute; how to draft an elements-based analysis; and the basic format of an office memorandum. The second memo needed to build on the skills learned as a result of the first memo assignment and to teach new material with regard to legal research, analysis, and writing.

First, with regard to legal research skills, the assignment was designed to teach students how to research a common law, as opposed to a statutory, problem, introducing them to using digests and a range of secondary sources. In addition, this assignment was designed to introduce students to researching out-of-state cases, since the students' first memo had been placed in Washington State, where our law school is located.

Second, with regard to legal analysis skills, the problem was designed so that students had to analyze a larger number of cases than the handful they had to analyze for their first memo, as well as learn how to synthesize the case law in a more sophisticated manner. As with all legal writing assignments, the assignment was designed so that it fit "between" authorities, requiring the students to address and weigh arguments on both sides. In other words, as Richard Neumann has discussed in his teaching manual and in the Sourcebook on Legal Writing Programs, "tension" had to be built into the assignment.\(^{26}\) Tension existed in this assignment because the analysis was fact intensive; because the case law gave both parties rich policy arguments; and because, as a result, both the plaintiff and the defendant had good arguments.

Lastly, with regard to legal writing skills, early assignments should involve a rule with a fairly clear organizational approach, while subsequent assignments might require the students to work harder at organizing the analysis. This release assignment involved one issue that was easier to organize and one that was more difficult to organize. The former issue, which was organizationally similar to the work students had done on their

\(^{25}\) The objectives can be explained in the memo assignment itself. See page 28 for the section of the assignment setting forth the assignment's goals.

\(^{26}\) NEUMANN, supra note 7, at 199; BRILL ET AL., supra note 14, at 15.
first memo, allowed students to demonstrate mastery, and the latter required them to stretch, working harder at organizing concepts where no clear organizational structure was suggested by the existing case law.

For assignments to be effectively used as a “text” for the course, they ideally should involve at least two issues: one, which the professor can work on with students in class, and others, which the students can work on themselves. For the risk release memo assignment, the simpler issue was used in class to illustrate points about, for example, drafting case descriptions and showing the application of law to fact. The students worked on the more complex issue themselves, applying the concepts discussed in class.

B. The Ideal Memo Assignment Should be Neither too Difficult nor Too Easy

Top Ten Mistake Number One, discussed above, warns that an assignment should not be too difficult. Just as novice sailors cannot be expected to navigate rough waters or cross the Pacific while first learning to sail, novice legal writers will learn only if given an assignment that is appropriate to their skill level. Difficulty can be presented in a memo assignment in a number of ways.

First, the assignment can be too difficult if it calls for an exceedingly long, involved memo to analyze the problem adequately. As Top Ten Mistake Number Three cautions, avoid drafting an assignment that is too long. Try not to draft an assignment that calls for a twenty- to thirty- page memo, addressing numerous issues and subissues and/or a large number of cases when a shorter, more focused assignment would still teach the skills the students need to learn. The assignment attached as Appendix 2 suggested a ten-twelve page limit; realizing that the analysis was more complex than anticipated, the legal writing professor increased the suggested length to thirteen-fourteen pages.

Consider two suggestions to help avoid the need for a lengthy memo. First, legal writing professors can make sure that they are drafting focused assignments by researching the problems themselves in advance of handing the assignments out to their students, thereby acquiring a clear understanding of what the research will produce. A legal writing professor might even draft the discussion section of the memorandum, or at least prepare an outline of the discussion section, to get a sense
of the likely content and length of the finished product. Further, as Jan Levine has discussed in his work, consider building walls around the assignment by telling the students which issues to focus on, as well as which issues will likely not be disputed or which issues the students should not address.\textsuperscript{27} The release assignment set forth in Appendix 2 told students to focus solely on the issue of the enforceability of the release, and not to discuss the underlying claim of negligence or any possible defenses.

Second, a memo assignment might be too difficult because it requires too much background knowledge of the law or facts. Certain issues require an understanding of specialized terminology or an understanding of a comprehensive statutory, regulatory, or administrative scheme before even tackling a specific issue to be researched. For example, securities law, insurance law, banking law, and tax law each require knowledge of certain terminology and concepts.\textsuperscript{28} In the same vein, some fact situations may be too difficult for students to grasp if they require specialized technical, medical, or scientific knowledge.

To avoid these problems, try to draft assignments that involve areas of law as well as fact patterns with which students are familiar or can easily become familiar. (This topic will be discussed further below in section 3). The release assignment set forth in Appendix 2 involved aspects of both contract and tort law, both first-year courses the students were taking at the time this assignment was distributed. In addition, the assignment involved a recreational risk release, a fact situation that many students have encountered since many probably signed such risk releases before engaging in recreational activities.

A third circumstance where memo problems can become too difficult arises when the assignment requires the use of resources with which the students are not yet familiar or to which they do not have ready access. For example, a research assignment might require an understanding of the legislative history behind a statute, but the students might not have yet learned how to research a legislative history or might not have ready access to relevant materials. Similarly, an issue might require use of a statute or secondary source, but there might be insufficient

\textsuperscript{27} See Levine, supra note 4, at 60.
\textsuperscript{28} See OATES ET AL., supra note 2, at 288. For example, a memo assignment requiring knowledge of the concept of “basis” in tax law or the complex state and federal regulatory schemes involved in banking, environmental, and insurance law might be unduly difficult.
copies of the required book available. Again, to avoid these problems, know exactly which resources the students will need to analyze the issues adequately before assigning the problem. Further, if there are insufficient copies for all students to use, consider making copies of relevant resources available on reserve.

Even though it is important to avoid assignments that are too difficult, try to design assignments so that they are challenging for students with different skill levels. While an assignment should be designed so that it is "do-able" by most students, it can still have some built-in issues or arguments that can challenge the strongest students.

The risk release assignment set forth in Appendix 2, while meeting many of the criteria of a good assignment, was a somewhat difficult assignment. The professor assigning this problem had to help the students work through some challenging organizational issues and through some ambiguous language in the case law. Even if an assignment is not perfect (in the sense of meeting all the objectives discussed in this article), it is likely to have fewer flaws and less important flaws if it is designed with these objectives in mind.

C. The Ideal Memo Assignments Should Involve Subjects that are Interesting, Familiar, and Realistic

Memo assignments should be interesting to both the students and the professor. Just as mastering sailing is easier with an energetic instructor who focuses on practical skills and the joy of the sport, learning legal writing is easier if the assignment captures the student's interest. Avoiding Top Ten Mistake Number Ten, which cautions against boring assignments, will help keep both the students and professor engaged in the course material.

Select fact situations with which students are or can readily become familiar. Doing so will help the students focus more on the skills of legal research, analysis, and writing than on learning about the subject matter of the problem. For example, consider drafting assignments that involve the students' first-year subjects. Using first-year subjects will help the students see how

29 See Levine, supra note 4, at 60.
30 See OATES ET AL., supra note 2, at 288; Levine, supra note 4, at 59.
31 See NEUMANN, supra note 7, at 200; BRILL ET AL., supra note 14, at 15; OATES ET AL., supra note 4, at 288; Shapo & Lawrence, supra note 14, at 94; Oates, supra note 16.
their courses work in application, thereby reinforcing learning in both the doctrinal course involved and the Legal Writing course. 32 Also consider using topics that students might be familiar with from everyday life, whether from common personal experiences or popular media. 33 For example, assignments raising family law, probate, criminal law, or employment issues are ones that many students can readily understand. Draft problems involving issues and concepts that students can grasp intuitively. 34 Finally, consider drafting assignments involving the regulation of the legal profession, for example, attorney admissions and disbarment proceedings. Students can readily relate to these issues as they know they will soon be subject to these rules.

Also make sure that the fact patterns are realistic, that is, fact patterns that might well be a real client's case. 35 Selecting realistic problems will give the students a sense of the type of work they might actually start doing as new associates, and students will likely take the assignment more seriously. 36 The risk release assignment set forth as Appendix 2 was a real case that a legal writing professor had handled while in practice, modified, of course, to protect the client's identity and to better meet the professor's teaching goals.

D. The Ideal Memo Assignment Should be Researched

In order to avoid Top Ten Mistake Number Five (the assignment is not adequately researched), legal writing professors should research the problem themselves 37 in advance of handing

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32 See Brill et al., supra note 14, at 14; Neumann, supra note 7, at 200; Levine, supra note 4, at 60; Tonner & Pratt, supra note 7, at 168. In assigning problems based on first-year courses, become familiar with how the students' doctrinal professor is approaching the subject matter, and caution students if the law applicable to the problem differs in material respects from doctrine taught in their substantive course.

33 However, avoid Top Ten Mistakes Number Nine, which cautions against selecting problems that are interesting but fail to teach skills.

34 Levine, supra note 4, at 60.

35 See Brill et al., supra note 14, at 15; Neumann, supra note 7, at 201; Oates et al., supra note 2, at 288; Levine, supra note 4, at 59.

36 An added side benefit of selecting realistic problems is that the students can more easily use the work they do on such problems as writing samples when they are applying for jobs. See Tonner & Pratt, supra note 7, at 165-66.

37 Some legal writing professors have teaching assistants who research the problem in advance. While using teaching assistants in this manner will give a legal writing professor a more realistic idea of how first year students will approach the research, the legal writing professor should also research the problem so that he or she knows what the research will produce, knows how to narrow the issues, and knows the problem well
the problem out to make sure the problem works.\textsuperscript{38} One would rarely set out on a voyage without knowing the course that will be traveled. “Making sure the problem works” means that the assignment teaches students the skills the professor intends to teach; that students will find the resources the professor intends them to find; and, finally, that students will not end up researching issues the professor does not intend them to research.\textsuperscript{39} Most importantly, legal writing professors should do the research as their students will do the research, making sure that students will find the relevant authorities in the resources that they want the students to use.

Finally, as mentioned above, another aspect of researching the problem is to touch base with other professors teaching the same material to the same students, in order to avoid Top Ten Mistake Number Seven, creating the assignment without consultation.\textsuperscript{40} Doctrinal professors teaching the same material involved in the memo assignment should be consulted as a matter of professional courtesy to help them know how to handle questions they may receive about the assignment, as well as to discover any potential conflicts between the way the analysis will be taught in the doctrinal course and the way the analysis is handled in the specific jurisdiction’s case law.

E. An Ideal Memo Assignment should be Sensitive in its Treatment of Issues and Individuals

In order to avoid Top Ten Mistake Number Eight, which cautions that the assignment should not be too highly charged, avoid potentially offensive language in the fact pattern and be careful about assigning problems that may be highly sensitive\textsuperscript{41} or gruesome. When drafting the assignment, avoid stereotypes based on, for example, gender, race, ethnicity, or disability. Avoid continually making the wrongdoers men or ethnic minori-

\textsuperscript{38} See Oates et al., supra note 2, at 288; Oates, supra note 16.

\textsuperscript{39} See Edwards, supra note 12, at 38; Neumann, supra note 7, at 201. To avoid a more lengthy memo, the assignment set forth as Appendix 2 specifically told the students not to discuss the related issues of whether the risk release was unconscionable, whether the defendant was negligent, and whether the plaintiff was comparatively negligent or assumed the risk of harm. See Appendix 2.

\textsuperscript{40} See Neumann, supra note 7, at 205; Oates, supra note 4, at 288; Rideout & Ramsfield, supra note 7, at 81-82; Oates, supra note 16; Tonner & Pratt, supra note 7, at 168.

\textsuperscript{41} See Tonner & Pratt, supra note 7, at 166.
ties and stereotyping women as helpless or ignorant. Also, be careful in the use of labels describing individuals. For example, avoid using the term "Oriental" for a person of Asian heritage; instead, use the term most preferred by the ethnic group to which it refers, for example, "Asian American" or "Japanese American." In short, model the use of bias-free language in drafting the assignment.

As discussed earlier, when designing the assignment, also be careful about choosing highly charged areas that may adversely affect the ability of some students to focus on the main tasks of learning research, analysis and writing. Avoid, for example, assignments involving violent crimes against children and brutal sexual assaults.

As mentioned above, few, if any, assignments will end up being "ideal" in all respects. A legal writing professor, however, should strive to design an assignment that will have as many of these listed attributes as possible.

III. THE PROCESS OF PUTTING AN ASSIGNMENT TOGETHER

The production of an assignment is a lot like sailing, for it, too, requires careful planning. Just as a sailor seeks to plan a voyage by charting a course that gets the boat to the destination intact and in a challenging manner, so also should the legal writing professor seek to follow a plan that will provide a good result for both the student and teacher. Here, then is a such a plan.43

Step 1: Determine goals

Begin by determining precise research, analysis, and writing goals.44 For example, will this assignment involve research using reporters, legal encyclopedias, statutes, legislative history, or other types of secondary sources? Will it involve common law

42 Conversely, consider using individuals from non-traditional backgrounds as parties even when those backgrounds have no specific bearing on the issues in the problem. In the assignment set forth as Appendix 2, the plaintiff has a Japanese surname. Neither her name nor her ethnic background had any bearing on the problem. However, persons of all ethnic backgrounds have legal problems, and names should reflect the rich diversity of our country.

43 The material presented in this section derives from the authors' experiences in teaching in the Legal Writing Program at Seattle University, which has as its foundation the text authored by Laurel Currie Oates, Anne Enquist, and Kelly Kunsch. See OATES ET AL., supra note 2.

44 See OATES ET AL., supra note 2, at 287-88; Tonner & Pratt, supra note 7, at 163.
or statutory analysis, an issue of first impression or a split of authority? Finally, what level of writing expectation will it involve—a simple elements analysis or perhaps a more complex discussion?

The research, analysis, and writing goals establish the core or the foundation of the assignment. Without these goals, not only will it be quite difficult to design the assignment, but students will find such an assignment confusing and difficult to complete.

Step 2: Determine the schedule

As in any project, having an established schedule to follow is critical to the success of the project. The students must know the overall length of the assignment, due dates, and return dates. So too must the legal writing professor know when to expect material for critiquing, how much time will be allowed for critiquing, and when material may be available for class use.

To establish a schedule, begin by determining the "return date"—the date on which the assignment will be returned, critiqued and graded, to the students. Next, determine the period of time required to complete the critiques and determine the grades and from it predict the "final due date"—the date on which the students will turn in their completed assignments.

Next, examine the manner in which the students will prepare the various parts of the assignment. For example, when will they prepare the Statement of Facts, the Discussion section, the Issue statements? For each part of the assignment, decide whether the students' work will be used to support class discussion and whether it will be individually critiqued. If it will be a part of class discussion, make certain that the due date for that part permits time for thoughtful review and selection of student samples in time for class discussion. If it will be critiqued, make certain that there is sufficient time built into the schedule to permit thoughtful critiquing while returning the critiqued material to the students in sufficient time to be of assistance to them. Finally, consider the students' other class demands!

The schedule that flows from this process will provide a good working basis for the assignment. Do not be afraid, though, to revisit it to make adjustments as the assignment is further defined.
Step 3: Gather Ideas

Armed with assignment goals and a schedule, it is time to begin the search for a specific idea or topic for the assignment. Idea sources include annotated codes and digests; legal journals; practice experience; practice experience of friends; other faculty members; popular press; Internet; source books and old assignments. Be wary, however, of using old assignments for they pose a potential problem. If an assignment is repeated too soon, there may be too much help available to the students in the form of assignments already critiqued and graded. Consider that completed assignments may have even been posted on the Internet. Delaying the repeat of a problem until at least the class to which it had been previously assigned has graduated is the more prudent approach.

Step 4: Rule out Ideas

Assuming that the gathering step produced several possible ideas, the legal writing professor should now eliminate those that will not be suitable. Evaluate the ideas against the Top Ten Mistakes as discussed above. Consider whether conflicts may exist between the idea and other classes the students are taking. For example, if the idea relates to adverse possession and the property law professor prefers that it not be addressed until he or she covers it, the topic may not be the best one to select. Finally, the topic selected should be a topic that the legal writing professor feels comfortable teaching.45

Step 5: Rule in Ideas

At this point, the goal is to whittle the remaining ideas down to a single one. Begin by evaluating the remaining ideas against the attributes of the Ideal Memo as discussed above. Consider discussing the ideas with the doctrinal professors who teach those subjects. Finally, and most importantly, conduct detailed research. There simply is no shortcut or substitute for this step, for it reveals the merits and teaching opportunities inherent in the topic as well as identifies any problems associated with the idea, which should cause the idea to be discarded.

45 See OATES ET AL., supra note 2, at 288.
Step 6: Topic Selected

Next, flesh out the idea. Determine the key cases and authorities on which the students should rely to complete the assignment. Determine the precise issue or issues that they should raise and, in turn, what facts will be required to engage those issues. Determine also the relationships between the cases/authorities and the assignment's goals and issues and ensure that they are in concert. Finally, determine the grading and critiquing criteria for the assignment. This step should help the legal writing professor identify and correct potential problems with the assignment and avoid being surprised by their appearance in the classroom.46

Step 7: Prepare the Fact Pattern

Facts may be presented to students in a variety of ways, including written narrative, components of a typical client file, video, interview, or role play.47 The choice of method, however, should be made by carefully considering two things. First, consider the level of control over the facts. The legal writing professor has the most control over the interpretation of the facts when they are presented in a written narrative. As the amount of material presented and the cast of players presenting it increases, the legal writing professor's control over the students' interpretation of the facts decreases. Accordingly, it may be best to employ the written narrative in first assignments, leaving the other methods for later assignments.

Second, consider the students' skill level.48 Remember that the beginning student is faced with the daunting task of learning many new things simultaneously—a new language—the law; new writing formats; new research tools; and new analytical skills. Amid this barrage, a multi-media presentation of facts may simply be too much. For the beginning student, the written narrative may be the optimum method. Additionally, use of a method in which the student is not yet skilled, such as the interview format, may serve to raise frustration levels for the student and could reinforce bad habits. Thus, an interview format

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46 Id.
47 Id., at 289. For additional comments regarding the format for presenting the facts, see Neumann, supra note 7, at 202; Rideout & Ramsfield, supra note 7, at 72, 85; Levine, supra note 4, at 61-62.
48 See OATES ET AL., supra note 2, at 287.
should be reserved for a time when the legal writing professor can be assured that the students have acquired the requisite skill level.

**Step 8: Prepare Assignment Handout**

The assignment’s requirements must be presented to the students in an organized and written fashion. Such a handout should include the fact pattern materials; the various policies and procedures governing the completion of the assignment; the expectations and grading standards for the assignment; the assignment’s learning goals, and schedule or time line; and the amount of assistance that will be permitted for the assignment. In addition to providing a copy to each student, it is wise to share copies of the assignment handout with librarians, writing/academic support advisors, and any doctrinal professor who is teaching that subject so that he or she will be prepared to address students’ questions.

**Step 9: Assemble an Assignment Notebook**

In order to have the pertinent materials quickly available from which to address students’ questions, assemble an assignment notebook. It should include a complete copy of the assignment handout; the specific goals identified for the assignment; lesson plans; copies of the significant cases/authorities on which the students are likely to rely in completing the assignment; and a citation sheet. The last, the citation sheet, forces the legal writing professor to confront the details of the citation form early on to enable him or her to deal more effectively with students’ questions.

**Step 10: Evaluation of the Assignment**

Although the legal writing professor may well conclude that upon return of the graded assignments, the assignment is complete—such a notion is a bit premature. For while the students’ portion is complete, the legal writing professor has one important task remaining—evaluation of the assignment. Regardless of whether the legal writing professor is considering recycling

49 For examples of assignment handouts see, OATES ET AL., supra note 2, at 72-73, 83-84, 88-89, 135-36; Appendix 2, pages 27-30.

50 See OATES ET AL., supra note 2, at 288.

51 See id., at 289.
the assignment, important lessons can be learned from it. It is from this step that the legal writing professor learns how to avoid the problems encountered and repeat the successes. Consider carefully the problems that crept up during the assignment: how could they have been avoided; how were they handled? How did the students react to the assignment—did they find it engaging and challenging or boring and frustrating? Did the assignment fulfill all of the goals set? If not, how can the unfulfilled goals be folded into the next assignment(s)? Is this assignment worth repeating? Finally, regardless of whether the assignment is a candidate for repetition, file a copy of it, the completed evaluation, and a copy of an “A” memo in a project notebook or file drawer to serve as a source from which to gather ideas in the future.

An exhilarating legal writing assignment can be achieved with some careful thought and design. Although, at first blush, the project can seem daunting, the evaluation techniques and assembly steps presented here should make the legal writing professor's task more manageable as well as more rewarding. By seeking to avoid the top ten mistakes and working to meet the criteria of the ideal assignment, the legal writing professor should be able to develop assignments more easily that provide both the students and the teacher with a successful legal writing experience. And as the sailor's maxim wishes, may you, too, enjoy fair winds, following seas, and a safe harbor in the design of all your legal writing assignments.

52 See, e.g., Kintzer et al., supra note 1, 154-55, 161-62 (recognizing difficulty in a particular constitutional problem and a complicated proof model combined with the summary judgment posture in another problem in retrospect).
Top Ten Mistakes
in Designing Legal Writing Assignments

10. The assignment is too boring.
9. The assignment is “all flash and no cash.”
8. The assignment is too highly charged.
7. The assignment is created without consultation.
6. The assignment requires resources that are not available.
5. The assignment is not adequately researched.
4. The assignment is ill-defined.
3. The assignment is too long.
2. The assignment fails to develop skills.
1. The assignment is TOO DIFFICULT.
APPENDIX 2

Lorraine Bannai Legal Writing I, Section B1 Second Memo Assignment Fall 1996 ASSIGNMENT SHEET

Your second memo involves researching the enforceability of a release agreement. Enclosed find a memo requesting your assistance and part of the client's case file in *Yoshida v. Tatum*, a case filed before the Alameda County Superior Court in Oakland, California.

I. **Due Dates:** The due dates for the various parts of the assignment are set forth below. In the event of any inconsistency between the syllabus due dates and these due dates, these due dates control.

**Complete Research**

Of course, understand that research is a continuing process. You should, however, have a substantial portion of your research done by this time and have a fairly clear idea of what cases speak to what issues.

**Prepare Outline of Discussion Section**

For each issue, include what you will put in each section of the Discussion Section and, to the extent possible, each paragraph. Remember the format for structuring a Discussion Section. Students who have not turned in outlines will not be able to attend subsequent classes in which the problem is

**By class Monday, November 4, 1996**

Put a copy in my locked box by 10:00 a.m.

**Wednesday, November 6, 1996**
discussed. This will not be individually critiqued.

Prepare First Draft of Discussion of whether language clear and explicit issue (not typeface or placement issue)

Students who have not turned in this draft will not be able to attend subsequent classes in which the problem is discussed. This will be individually critiqued.

Prepare Final Draft of Second Memo.

Attach the critiqued draft of your discussion of the “clear and explicit” issue to the final memo when you submit it. If your memo is late, see Lori Lamb and fill out a late form. Review the policies and procedures handout for grade penalties for late papers.

II. Learning Goals:

Research and Analysis: Your first memo involved researching Washington statutory law. In researching this memo, you will learn how to research common law and to research law in another jurisdiction. This memo will also require you to read, understand, and synthesize a greater number of cases. Finally, as a result of your work on this assignment, you should learn how to look for and use policy arguments.

Writing: You should learn how to integrate your discussion of the law and facts, moving from the script format to a more integrated format. Also, we will focus more on writing at the sentence and word levels - writing more concisely and precisely.
III. Grading and Expectations:

Please review the hand out “Checklist for an Effective Memo” for what I will look for in evaluating your memo. Also, consult the course Policies and Procedures for the grading standard I will apply. I will review your citations more carefully on this memo than I did for your first memo assignment. They should all be in Bluebook form.

IV. Form:

1. Use the following format, as set forth in the text and in class.
   1. Heading (modify form on attached memo from me to you)
      Statement of Facts
      • Question(s) Presented
      • Brief Answer(s)
      • Discussion Section, and
      • Conclusion
   2. Your memo should be no longer than 10-12 double-spaced, letter sized pages.
      • Use true double-spacing between lines, not space-and-a-half. You may single space your Question(s) Presented and Brief Answer(s), but double space between the two sections and between the individual questions and answers.
      • Use no smaller than 12 point typeface.
      • Leave at least one-inch margins at the top, the bottom and on each side.
      • Number each page at the bottom center (do this on drafts, as well).

V. Assistance:

You may work together to the following extent: you may discuss the law and how the law applies to our facts. You should not, however, give each other authorities, that is, copies of cases or other authorities or citations to them (unless the authorities are ones that I have put on reserve for you).

Your written work must be your own. Do not share a computer disk with another student, let another student read your paper, or read another student’s written work, unless directed to share portions as part of a class exercise. I encourage you to see me about any questions you may have about your research, analyzing the problem and your writing. You may also see Professor
Enquist for writing advice. Before you make an appointment to see one of us, prepare an agenda for the conference.

To: Law clerk  
From: Lorraine Bannai  
Date: October 28, 1996  
RE: Yoshida v. Tatum, our file number LB 96-250, Alameda County Superior Court Case No. 15607

Enforceability of release

I just met with our client, Joellen Yoshida, who was injured during a river rafting trip earlier this year. I'd like you to research the enforceability of a release that she signed before embarking on her river rafting trip. I think we can expect that the defendants will file for summary judgment fairly soon, claiming that the case (based on negligence) should be dismissed because the release bars the action.

This area of the law involves a combination of contract law and tort law. A release (also known as an exculpatory clause) is a contract by which the potential plaintiff purportedly agrees to relieve the potential defendant of tort liability. I am primarily interested in whether the release is enforceable.

Several issues come to mind that I think you should look into:

(1) Whether the physical layout (the type size and placement) of the exculpatory clause presents any problems in terms of the enforceability of the release.

(2) Whether the exculpatory language used (as opposed to the physical layout of the terms) is clear enough to show that the plaintiff released the defendant from an action for negligence, or that plaintiff expressly assumed the risk of harm.

I will help you with the second issue, but see what you can find on both issues first.

In your research, you will find some cases that deal with setting aside releases based on the arguments that they (1) are unconscionable and (2) violate public policy (Civil Code Section 1668 and the Tunkl decision). At this time, I don't think we can prevail on these arguments, so I don't want you to address them in your memo. You may want to understand these issues, however, if they help you understand the overall area of enforceability of releases. I have put copies of Civil Code Section 1668 on reserve.
Further, as stated above, I want you to focus on whether the release is enforceable to bar Ms. Yoshida's suit. Do not research or discuss whether the Art Tatum School was negligent or whether Ms. Yoshida impliedly assumed the risk of harm or was contributorily or comparatively negligent. I will have one of the other clerks look into these issues. Further, do not concern yourself with summary judgment procedure.

Note: We have filed our suit in the Alameda County Superior Court, which is in the 1st Appellate District. Use citation form for citing out of state cases to a Washington court.

Monday, July 22, 1996

Transcript of Interview with Joellen Yoshida

Attorney: Good morning, Ms. Yoshida.

Ms. Yoshida: Good morning. It's nice to meet you.

Attorney: I understand you live in Oakland, California. When we spoke on the phone, you told me that you are staying up here in Tacoma to care for your mother. I think we can help you start your case out and then transfer the case to our San Francisco office for litigation, if necessary. You told me that you were involved in a river rafting accident.

Ms. Yoshida: Yes, back on June 8, 1996.

Attorney: Let's back up and let me get some general information. You've already given us your address and phone number in Oakland. Are you married?

Ms. Yoshida: Yes, and I have 2 children, a boy who is 5 and a girl who is 7.

Attorney: How old are you?

Ms. Yoshida: I will be 29 years old in December.

Attorney: Are you presently employed?

Ms. Yoshida: Yes. I am an elementary school teacher in Oakland.

Attorney: Can you tell me about how you ended up on this river rafting trip?
Ms. Yoshida: Yes. In April of this year, I saw an advertisement for a whitewater river rafting trip in the Oakland Times. I called the Art Tatum School of River Rafting - it was the company that placed the advertisement and it has its offices in Berkeley, California. I made reservations to join a trip on June 8, 1996.

Attorney: Tell me what happened then.

Ms. Yoshida: Well, I drove up to the Whitecap River to meet instructors from the school and my fellow students early in the morning on June 8, 1996. When I got there, I reported to a tent set up at a base camp to register. Ms. Gina Cheasty - who worked for the school, was in charge of registering guests. I paid my fee and Ms. Cheasty gave me a life vest and a helmet. Oh, yes, she also gave me this [handing attorney piece of paper]. This is a copy of the registration card that I got from them when they told me they couldn't cover my medical bills.

[The paper is a two-sided registration card. A copy of the registration card is attached. The front side of the registration card is in 13 point type. On the back side of the registration card: the heading is in 14 point type, the first paragraph and last line are in 12 point type, and the rest of the document is in 7 point type.]

Attorney: Did Ms. Cheasty say anything to you when she handed you this card?

Ms. Yoshida: Yes. As she handed me the card, she said something along the lines of “please fill out, read and sign this and bring it back to me when you're done.” I really wanted to get started with the class and so I just glanced over the document. I have to admit that I did not read it carefully. I filled out the front side of the card and signed it, just like it shows on the copy. The only part that I recall noticing on the back side of the form was the part that asked if I could swim. I then returned the form to Ms. Cheasty.

Attorney: And what happened then?

Ms. Yoshida: Well, then Jacob Rentz, the coordinator of this trip, called all of the participants together and then divided us into groups for instruction. I was assigned to a new instructor,
Donna - her name was Donna Soper. Ms. Soper told us the schedule of events for the day, told us how to put our life vests and helmets on and told us how to sit in the raft. She told us to wedge our feet under the pontoon at the edge of the raft to brace ourselves against the movements of the raft. I think that wasn't the right instructions. I think I ended up breaking my ankle because my foot was lodged under the pontoon when I got thrown forward.

Attorney: So, let me get this right. Your instructor told you to place your feet under the pontoon and your foot then got lodged under the pontoon.

Ms. Yoshida: Yes.

Attorney: Then what happened?

Ms. Yoshida: Well, like I said. I wedged my foot under the pontoon and the rafting trip began. At a rough spot in the water, the raft lurched and I was thrown forward. My foot, which was wedged under the pontoon, was struck and I broke my ankle.

Attorney: Did you get medical assistance?

Ms. Yoshida: Yes, everyone was very nice and helpful. They stopped the raft and I got airlifted to the hospital.

[Balance of interview, which covered nature of injuries, medical bills, wage loss information and fee arrangement omitted.]

RIVER RAFTING REGISTRATION CARD

Name:
Address:
Phone:
Name and Phone Number of Emergency Contact:
Name and Phone Number of Doctor:
Medical Insurance Information:

(Front side of Form)
RIVER RAFTING REGISTRATION CARD

Welcome to the ART TATUM SCHOOL OF RIVER RAFTING! We are delighted that you have chosen us to introduce you to the fabulous world of river rafting . . . you are in for a real treat. We hope to join you in hours of enjoyment.

River rafting is an exciting, challenging recreational activity. There are also some dangers attendant to it. It is never the intention that anyone become injured, but, occasionally, accidents happen. Release: Without any duress or coercion and understanding that your participation in this river rafting trip is entered into of your own free will and choice, make the following representations: I, the undersigned, for myself, my personal representatives, heirs and estate, hereby discharge, covenant not to sue, release and hold harmless the Art Tatum School of River Rafting, its officers, agents, and employees (hereinafter Releasees) from all liability to the Undersigned for all loss or damage and any claim or demand therefore (including, but not limited to claims for negligence in the maintenance of equipment, in piloting the raft, in providing transportation back to the base camp, etc.), whenever such claim may arise in the future, on account to injury to person (including, but not limited to, drowning, exposure to cold, injury to limbs and other parts of the body, and death) or property of the Undersigned, whatever the cause.

__ I understand and accept the hazards and risks inherent in river rafting.

__ I can swim.

__ If my picture is taken, I will allow it to be used for promotional purposes.

I HAVE READ AND UNDERSTAND THIS ENTIRE AGREEMENT.

(Back side of Form)

[Enlargement of the above language]:

River rafting is an exciting, challenging recreational activity. There are also some dangers attendant to it. It is never the intention that anyone become injured, but, occasionally, accidents happen. Release: Without any duress or coercion and understanding that your participation in this river rafting trip is entered into of your own free will and choice, make the following representations: I, the undersigned, for myself, my personal representatives, heirs and estate, hereby discharge, covenant not to sue, release and hold harmless the Art Tatum School of River Rafting, its officers, agents and employees (hereinafter Releasees) from all liability to the Undersigned for all loss or damage and any claim or demand therefore (including, but not limited to claims for negligence in the maintenance of equipment, in piloting the raft, in providing transportation back to the base camp, etc.), whenever such claim may arise in the future, on account to injury to person (including, but not limited to, drowning, exposure to cold, injury to limbs and other parts of the body, and death) or property of the Undersigned, whatever the cause.

__ I understand and accept the hazards and risks inherent in river rafting.
I can swim.
If my picture is taken, I will allow it to be used for promotional purposes.

DECLARATION

I, Wendall Johnson, state,
I live at 157 Friendship Lane, Sonoma, California, and am employed at the Safeway Store in Sonoma.
On June 8, 1996, I went to the Art Tatum School of River Rafting with several of my friends from work. I met a woman before the class began and she introduced herself to me as Joel- len Yoshida. Our instructor was Donna Soper. Ms. Soper told our class to wedge our feet under the pontoon of the raft to brace ourselves against the movement of the raft.
After we started our rafting trip, the raft hit some white water and lurched forward. Ms. Yoshida, who was sitting in front of me, fell forward.
Ms. Soper then pulled the raft over to the shore. Ms. Yoshida was crying and appeared to be in a great deal of pain.
I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on August 15, 1996, in Sonoma, California.

DECLARATION

I, Howard Larson, declare:
I am the owner and operator of Larson’s River Rafting in Sacramento, California. I have been in the river rafting business for ten years and have enjoyed river rafting as a sport for twenty years.
Whenever I instruct people on how to ride in river rafts, I always tell them to brace their feet against the pontoon and not under the pontoon. If they lodge their feet under the pontoon, they will get their feet stuck and risk injury when the raft lunges forward.
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 14, 1996, at Sacramento, California.
Bibliography for Designing Legal Writing Assignments

Books:

RALPH L. BRILL ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS (1997).

Teachers' Manuals to Legal Writing Textbooks:


Periodicals:


Helene S. Shapo & Mary S. Lawrence, Designing the First Writing Assignment, 5 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 94 (1997).

Grace Tonner & Diana Pratt, Selecting and Designing Effective Legal Writing Problems, 3 LEGAL WRITING 163 (1997).

Unpublished Notes:

Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors

Toni M. Fine*

I. INTRODUCTION

Over the past several years, legal research and writing instructors1 have made great strides at many schools. Once largely marginalized,2 legal writing instructors as a group have made important and effective attempts to exalt their positions beyond that of lowly "mechanics"3 (as they have often been viewed by many within their own institutions) to important

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1 The terms "legal research and writing instructor," "legal research instructor," "legal writing instructor," "legal research and writing faculty," and the like are used interchangeably. The use of the term "instructor" is not intended to be pejorative, but simply reflects the reality that many teachers in the field lack tenure-track status or the full benefits of core faculty members. Cf. notes 2, 3, 8-10, infra and accompanying text.


3 "Despite the tremendous value and importance of what is taught in this course, in many law schools there is a perception that this is a 'soft' area of teaching, i.e., it does not require any skill to teach it." Verna C. Sanchez, Legal Methods Teaching Programs, 1 MICH. J. OF RACE AND L. 573, 573 (1996). See also Russell L. Weaver, Langdell's Legacy: Living With the Case Method, 36 VILL. L. REV. 517, 596 (1991) ("'Serious' faculty do not teach skills courses, nor do they respect those who do.").
members of law school communities who serve essential functions to the students and to legal education more generally.

For example, some schools now hire full-time legal writing directors with some level of job protection either through tenure or long-term contracts.\footnote{See Jan M. Levine, Response: "You Can't Please Everyone, So You'd Better Please Yourself": Directing (or Teaching in) a First-Year Legal Writing Program, 29 VAL. U. L. REV. 611, 612 (estimating that there are thirty-four ABA-accredited law schools where legal writing instructors have tenure-track positions, and noting that this is a fairly recent phenomenon); Pamela Edwards, Teaching Legal Writing As Women's Work: Life on the Fringes of the Academy, 4 CARDOZO WOMEN'S L. J. 75, 76 & n.5 (1997).} Instructors, too, at some law schools are now even permitted to teach doctrinal courses,\footnote{For example, Visiting Assistant Professors at the Chicago-Kent College of Law, Illinois Institute of Technology, teach doctrinal courses in addition to teaching legal research and writing to first year students. Cf. Eichhorn, supra note 2, at 131.} while tenure-track faculty at other schools now teach legal research and writing.\footnote{This is true at Oklahoma State University Law School and the University of Iowa College of Law, among other law schools.} Legal research and writing instructors, therefore, have every reason to be cautiously optimistic about the future of legal research and writing programs and to continue their joint efforts to enhance the lot of legal research and writing instructors and programs.\footnote{As one group of authors has noted, “increasing resources [are being] devoted to writing programs at law schools throughout the country . . . .” Jo Anne Durako, Kathryn M. Stanchi, Diane Penneys Edelman, Brett M. Amdur, Lorry S.C. Brown, Rebecca L. Connelly, From Product to Process: Evolution of a Legal Writing Program, 58 U. PITT. L. REV. 719, 720 (1997). As Jan Levine has graciously stated, legal writing teachers comprise “a growing and vital community of teachers and scholars. You should be optimistic about your career while being cognizant of the challenges that you will face.” Levine, supra note 4, at 612.}

Despite the fact that there are many reasons to feel sanguine about the progress of legal writing instructors, the legal writing community nevertheless remains somewhat on the periphery of the legal academy.\footnote{Edwards, supra note 2, at 78 (footnotes omitted) (“while giving lip service to the importance of legal writing, law schools, as a whole, grant low status to legal writing teachers, and usually devote a low level of resources to legal writing instruction”); Eichhorn, supra note 2, at 117 (noting that legal writing instructors are deemed to be “second-class citizens” within the academy). This view has been expressed in numerous ways. For instance, some studies omit legal writing instructors from its population database in studying the presence of women in tenure-track positions in US law schools. This, the authors of the study noted, reflected the fact that “[a]lthough some of these individuals are eligible for tenure, their credentials or status often differ significantly from those of tenure-track classroom professors.” Deborah J. Merritt, Barbara F. Reskin, &}
have limited, often short-term contracts,\textsuperscript{9} or are merely part-time adjuncts or graduate fellows.\textsuperscript{10} Legal research and writing instructors are paid far less than their colleagues who teach doctrinal courses.\textsuperscript{11} In most cases, the perception of legal research and writing teachers still is that they lie at the edge of the academic faculty in their institutions; this despite the widespread recognition among practitioners and judges that legal research and writing are among the most important skills for a young attorney to possess.\textsuperscript{12}

One way to reduce the view of legal writing instructors as being of secondary importance to legal education is for those instructors to engage in scholarly research and publication.\textsuperscript{13} There are several reasons why scholarship makes sense for legal research and writing instructors.

First, because publishing reflects another, more traditionally academic dimension, engaging in scholarship can heighten


\textsuperscript{9} \textit{See} Eichhorn, supra note 2, at 124; Edwards, supra note 2, at 96 \& n. 129.

\textsuperscript{10} \textit{See}, e.g., Levine, supra note 4, at 627; J. Christopher Rideout \& Jill J. Ramsfield, \textit{Legal Writing: A Revised View}, 69 \textit{Wash. L. Rev.} 35, 87 (1994); Arrigo, supra note 2, at 144.

\textsuperscript{11} \textit{See}, e.g., Eichhorn, supra note 2, at 113 and n. 57; Edwards, supra note 2, at 87, 88.

\textsuperscript{12} “Law is writing . . . . [W]riting is the single most important lawyering skill.” Matthew J. Arnold, \textit{The Lack of Basic Writing Skills and its Impact on the Legal Profession}, 24 \textit{Cap. U.L. Rev.} 227, 229, 230 (1995); “There is a growing ‘recognition among legal educators and the practicing bar that effective communication skills are essential to competent legal practice.’” Durako, et al., supra note 7, at 745, quoting \textit{Section on Legal Education \& Admissions to the Bar, American Bar Ass’n, Legal Educ. and Prof. Development – An Education Continuum} 175 (1992).

In addition, the cornerstone of the Cramton Report’s proposed program to improve teaching skills training in law schools was its proposal that law schools do a better job of teaching communications skills. \textit{See} Report and Recommendation of the Task Force on Lawyering Competency: The Role of the Law Schools, ABA Sec. Legal Educ. and Admissions to the Bar (Aug. 1989).

\textsuperscript{13} This is not intended to suggest that there are not many other ways in which legal writing instructors can and should attempt to enhance their level of prestige and professionalism within the law school community. To be sure, there are many other ways in which such changes can be pursued and accomplished. The focus in this article on scholarship simply reflects the theme of this paper.
the prestige and sense of importance within an institution of writing programs and instructors. And because students react to the perceived second-class status of legal writing instructors, enhancing the status of legal writing courses and instructors within the law school may have a reciprocal effect on the students' perception of the value and importance of their legal writing course and instructor. 14

Second, there are solid pedagogical reasons for legal writing teachers to pursue scholarly endeavors. Engaging in scholarly endeavors may invigorate one's teaching by imparting a renewed awareness of the process of legal research and writing; by renewing one's sensitivity to the challenges faced in attempting to master new, complex tasks in a systematic way; and in providing inspiration to the teacher in developing new and more interesting projects for students by gaining exposure to timely issues and areas of the law.

In addition, somewhat paradoxically, engaging in research can also help enliven one's teaching as an antidote to "burnout." While many revel in the excitement of the opportunities provided by teaching a legal research and writing course, some instructors may also experience exhaustion from the enormous workload and intensive, nearly continuous, student contact. 15 Scholarship can add a new dimension to one's academic/professional life and help assuage the exhaustion that sometimes sets in after years of teaching legal research and writing.

Third, many (although certainly not all) legal research and writing instructors use their positions as a way to segue from practice into traditional law teaching. 16 One of the crucial cre-

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14 See Edwards, supra note 2, at 96-97 (observing that "[l]aw schools' institutionalized contempt toward legal writing teachers and instruction is transmitted to law students"); id. at 99-100 (footnotes omitted) ("students get the message that the skills taught in these courses are relatively unimportant, and consequently do not put the time and effort necessary to develop effective legal research and writing skills. At times the message is explicit . . . ").

15 Legal research and writing instructors are "devoured by excessive demands for interpersonal attention, choked by thorns of oppressive workload, or scorched and killed by lack of professional encouragement, low status, and low pay." Arrigo, supra note 2, at 121. See also id. at 86, 147; Eichhorn, supra note 2, at 124; Sanchez, supra note 3, at 573; Edwards, supra note 2 at 86.

16 See, e.g., Sanchez, supra note 3, at 573 ("Teaching legal methods is one way to gain entry into the legal academy. Many people start out teaching in this area and move on to other areas of law when they are able.").

Nothing herein should be construed to imply that legal research and writing instructors should not find long-term fulfillment in these positions. Many instructors are career legal writing instructors because they choose to be, and all such individuals
dentials that many of these individuals lack at the time they begin to teach legal research and writing is a record of scholarly publications. Yet of the credentials that are generally regarded as necessary for tenure-track teaching positions, scholarly writing remains of singular importance to career advancement in legal academia. Legal research and writing instructors who have their sights on substantive law teaching positions must be able to prove that they are capable of fulfilling the rigors of scholarly research and writing when they enter the traditional law teaching market.

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Part I of this article provides some practical pointers for writing law review articles. Part II discusses ways in which to market an article, and Part III raises some of the issues an author should consider in selecting a journal in which to publish from among multiple offers. Finally, Part IV provides some words of advice regarding book writing, publishing, and marketing.

II. WRITING FOR LAW REVIEWS

A. Types Of Submissions

When speaking in terms of publishing in law reviews, any number of forms of writing can be discussed. Articles, replies to articles, essays, and book reviews are the main genres of academic writing.

Articles, or "lead articles" as they are sometimes known, are probably the best type of piece to write; they are generally should be proud and unapologetic about their professional objectives.

17 Law schools often make tenure-track hiring decisions based largely on the applicant's scholarly contributions. See, e.g., Philip C. Kissam, Thinking (By Writing) About Legal Writing, 40 VAND. L. REV. 135, 158 (law schools often evaluate faculty by "focusing on how many articles law faculty publish and the number, length, and prestige of a professor's publications."). See also id. at n.39 and sources cited therein; Trail & Underwood, supra note 2, at 213 & n.53; Edwards, supra note 2, at 101.

18 The terms "law reviews" and "law journals" in this article are used interchangeably.

The Journal of the Legal Writing Institute

lengthy, well-documented, and scholarly in approach and presentation.\textsuperscript{20} Thus, while publishing at all — in whatever form — is to be encouraged, formal articles are generally vested with the greatest level of respect from the legal academe.\textsuperscript{21}

B. Developing Ideas: Choosing A Topic

The first step in beginning to write, of course, is to develop an idea. The idea-formulation stage is not one that should — or can — be rushed. Rather, it is important to take considerable time and care in thinking about the subject area and topic about which to write. The writer will be living with his chosen topic for quite some time, so it ought to be something that will retain his continued interest, energy, and inspiration.

1. Select a Subject Area

a. Choosing a subject area: write about what you know

The best idea for new (and even seasoned) writers is to write about what they know. Regardless of how one develops an expertise — from practice, from teaching in a particular subject area, from using problems in a legal research and writing class, or simply from one's own academic interest and professional reading — that is probably the best place to begin. For one thing, it allows the writer to begin working with a base of knowledge so that he avoids having to spend too much time learning the basics. In addition, choosing a subject area about which the reader already knows a good deal will facilitate the selection of a particular topic. The challenge of narrowing a subject to a topic that is specific enough to be workable and to discuss in sufficient detail is often seemingly insurmountable. Only when

\textsuperscript{20} Lead articles "tend to be quite substantial, containing many pages (sometimes more than 100 published pages) and containing many footnote references (sometimes 300 - 500 citations or more)." Michael L. Closen & Robert J. Dzielak, The History of the Law Review Institution, 30 Akron L. Rev. 15, 18 (footnotes omitted) (1996). Replies to articles may also be lengthy, scholarly, and more like primary articles than anything else. For example, one reply — Lon L. Fuller, Positivism and Fidelity to Law— A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958) — is listed as the thirty-sixth most cited article. See Fred R. Shapiro, The Most-Cited Law Review Articles Revisited, 71 Chi.-Kent L. Rev. 751, 768 (1996).

\textsuperscript{21} Stier, et al., supra note 19, at 1497 (finding that the ratings for reader usefulness declined significantly for types of writing other than standard articles).
one has some understanding of the subject area can one even hope to adequately define a subject worthy of one's efforts.

b. Use current events

Many of the best ideas for law review articles are those that are of current concern. Not only do such topics catch the attention of law review selection boards and, ultimately, of law review consumers, but they often present a rare opportunity to say something new. As of the time of this writing, there are any number of newsworthy topics that could provide opportune issues for law review articles.

The scandal surrounding President Clinton's relationship with Monica Lewinsky alone presents any number of potential issues that might warrant serious attention by academics: Must the House of Representatives hold impeachment hearings if there is evidence that the President may have (in the representatives' view) committed impeachable offenses? What is the proper standard for impeachment under the Constitution? Is there any constitutional basis by which Congress can reprimand or censure the President, or impose some other penalty short of impeachment and conviction? Should Paula Jones's sexual harassment suit be reinstated by the court of appeals, in light of the facts that have since come to the attention of the court and the public? If there were leaks from the Independent Counsel's office, how should that affect the outcome of any impeachment hearings against President Clinton? Can President Clinton make any "entrapment" argument in his defense? What is wrong with the Supreme Court's unanimous decision to allow the Paula Jones case to proceed while President Clinton remained in office? Should the independent counsel statute be renewed next year and, if so, what changes from the currently applicable statute should Congress make?

As to other recently newsworthy events, there are myriad issues that present potential topics for legal academic work. The following are examples of topics that have been raised in recent press accounts:

- To what extent should US securities laws be extended to transactions that take place over the internet?
- What level of privacy attaches to electronic mail, especially in the context of discovery?
- Should federal bias crime law be extended to anti-gay attacks?
• What will or should be the outcome of the Microsoft antitrust litigation, given the somewhat confusing state of the federal antitrust law?

• What would be a fair procedure for transitional justice in Rwanda, for example, where hundreds of thousands of prisoners await trial in dismal, inhumane conditions, many of whom are being held based on the bare accusations of one person, and where the chief prosecutor himself has admitted that fair trials for all those being held would take up to 200 years to complete?

• What is the viability of the proposed international criminal tribunal?

• What does international law provide in terms of the ability of another country to arrest and try a deposed dictator, such as Pinochet, who has been given immunity in his home country?

Legislation that has either recently passed Congress or that is under serious legislative consideration make splendid ideas for law review articles, discussing, for example, the probable impact of the legislation or the deficiencies and benefits of the legislation. Topics could include a consideration of the following pieces of legislation, which have either recently passed or are expected to pass.

• The Copyright Term Extension Act (extending protection by twenty years of certain cultural icons) (the “Sonny Bono Copyright Extension Act”)

• The On-Line Copyright Infringement Liability Limitation Act (limiting responsibility for copyright infringement for on-line providers of artistic materials)

• The Y2K Liability Disclosure Act

• The Digital Copyright Protection Act

• The Securities Litigation Uniform Standards Act

• The Internet Tax Freedom Act

• The On-Line Privacy Act

• The On-line Pornography Act

Another way to find timely issues that have not been fully resolved by the courts is to look for cases that have gone to the US Supreme Court on petitions for a writ of certiorari – whether certiorari has been granted or denied, the petitions may
reflect important issues as to which there is a split among the circuits.\textsuperscript{22}

There are, however, risks associated with using current news events as the basis for law review topics. One risk is that a writer may be seduced into approaching these topics without having any real expertise in the field. The dangers of doing that should seem apparent.\textsuperscript{23} In addition, because media-worthy events often raise important issues of constitutional, criminal, or other forms of difficult and specialized areas of law, it is likely that pieces about these topics will be addressed in the literature by true experts.

c. Participate in classes and colloquia

Most law schools (albeit to varying degrees) host colloquia, roundtable discussions, and the like. At these sessions, experts in their fields debate and discuss issues, often of current interest and scholarly importance. Simply listening to these discussions can provide ideas for article topics, as well as new ways of thinking “academically” about one’s own area(s) of interest.\textsuperscript{24}

d. Keep current with the law

As is the case with current events, keeping abreast of important legal developments provides excellent inspiration for article topics. Some of the ways in which to do this include reading legal news sources, keeping abreast of major cases, and reading newsletters and other issuances in areas of interest. It is also a good idea to scan new issues of at least a few law reviews to see what types of articles are getting published.

2. Turning a Subject into a Topic

After selecting a subject, the next task is at once the most difficult and the most crucial: constructing a thesis or precise

\textsuperscript{22} Westlaw\textsuperscript{©} has a relatively new service called “Circuit Split Roundup” that identifies cases as to which the US courts of appeals have applied different interpretations to the same or a similar legal issue.

\textsuperscript{23} Writing about a topic that the author does not truly understand will usually be obvious to law journal staffs reviewing that submission, as well as to any readers should the article get published. Moreover, faculty considering a candidate for a position will scrutinize the applicant's work, and will also no doubt recognize a lack of knowledge underlying a candidate's publications.

\textsuperscript{24} Attending events like this has the added benefit of showing an interest in academic matters and becoming more a part of the core faculty by association of interest.
topic for the article. Articles may take any number of approaches, such as arguing for a legislative change from the status quo, suggesting a modification to a judicial approach, calling for a legislative initiative, urging the Supreme Court to resolve a split among the circuits, or analyzing the meaning and likely precedential value of a set of confusing cases. Of course, before getting too far in thinking about a particular topic, the writer should do a search of published articles to make certain that his topic has not already been addressed in more or less the same way in another published piece, and is thus preempted.

There also seems to be a growing trend towards interdisciplinary scholarship. One who has had formal academic training in another discipline should use that to one's advantage and try to develop an article that includes law and that other field. Such articles have become enormously popular, and being able to write a cross-disciplinary piece gives that author a decided advantage over most legal writers who have only the law (and, in reality, some sub-set thereof) to claim as their area of expertise.

3. Practical or Theoretical Focus

Whether one should write an article that is practical or one that is theoretical also depends largely on one's personal goals and interest.

There is little doubt that the legal academy today looks more generously on articles that are more theoretical than practical. Yet this may pose something of a dilemma for many writers, who feel that the most useful law review articles are those that tend towards the practical. Ideally, then, a law review article that includes both practical and theoretical elements would satisfy the elevated appetite of the more erudite members of academe, while serving one's own interests (and the interests of many readers) in providing information that is useful for the reader.

Again, the decision whether to write an article that is more practical or more theoretical depends largely on the author's personal interests, knowledge, talents, and career objectives. It may also depend on the field in which one is prepared to write, as certain issues and themes are more amenable to a more practical approach while others demand a more theoretical undertaking.
4. **Collaborating or Going Solo**

The question whether to collaborate on an article is difficult to answer, because it depends on a number of factors: one's own stage of professional development and desires; the professional status and reputation of the person with whom you would be collaborating; and whether a second author can bring something new and invaluable to the project so that the end-result would be far superior than a solo project could have been.

First, the stage of one's own professional development and one's professional goals is important to one's decision whether to collaborate on an article. It would probably not be prudent for a young, inexperienced, as of yet unpublished author to co-author her first article. Generally, for job-search and tenure purposes, the value of a co-authored piece will be significantly discounted, because the evaluators will not be able to discern how much of the development of the piece is attributable to each author. Once one is more developed professionally, especially as a scholar, doing a piece jointly with someone else of similar stature can result in an article of great interest and impact.

The identity, status, and professional stature of one's prospective co-author is a critical consideration. If a well-known academic of great scholarly stature presents the possibility of co-authorship, it would be foolish to decline, even if you get little academic credit for the completed piece. The very fact of having been given such an opportunity gives one an enormous level of esteem and recognition from one's colleagues. There is also a great deal to be learned from working with an already accomplished scholar.

The decision whether to co-author an article may turn on what each author can bring to the process that can result in a far more absorbing, bold, and profound article. For example, if another author can bring an interesting interdisciplinary angle or a different expertise to the piece, then co-authorship may widen the scope of the article and thus be extremely desirable. On the other hand, to add a co-author who is in the same field and who shares the same expertise — subject to the exceptions noted above — may not add significantly to the quality or scope of the article.

When co-authoring an article, of course, it is important to communicate each author's work habits, level of commitment, the timing of the project, the organization of the research and writing, and other issues. The authors must work well together.
and maintain a positive and fruitful working relationship in order to realize the article’s potential for the benefit of both authors and its interested readership.\(^{25}\)

C. Outlining

Creating an outline early on in the process of writing is of critical importance. Outlining not only provides the organization necessary to complete a complex writing task, but serves as a perpetual reminder of the “big picture.” This is particularly necessary when engaging in academic writing, where the task looms so large and generally raises myriad issues of infinite complexity.

Of course, one should not slavishly follow an outline developed at an earlier point in the process; outlining is a dynamic process and continuously revising an outline as one’s research and thinking evolve is an essential part of the writing process.

An outline can also be used as a space in which to keep notes about ideas specific to certain portions of the paper by annotating a copy of the outline with thoughts, ideas, references, and other information that then will be at the writer’s fingertips as he begins to draft each particular section.

D. Drafting

Drafting is for many writers the easiest part of writing an article. Once a well-thought-out, well-developed outline has been created, the writing should flow easily from beginning to end. Nevertheless, the more one reads, thinks, and learns about a particular topic, the more one recognizes new complexities and new angles that warrant at least parenthetical, and sometimes significant, attention.

A good way to begin drafting is to create a template of the outline as the first draft of the article, leaving ample space in between each part and section to be filled in as the writer proceeds through the project.

Writers differ as to which part of the article they draft first. Some prefer to write the easiest part first – which, depending

\(^{25}\) Whether one decides to formally collaborate on an article or not, a writer – whether experienced or not – should consult informally with as many people as possible. Ideally, this would include colleagues who are familiar with the subject area of one’s paper (mostly for substantive comments) as well as colleagues who are not as expert in the field (for a test of clarity). The importance and value of getting the input of colleagues on one’s thoughts, outlines, and drafts cannot be overstated.
upon the article, may be an historical account, a discussion of a case of central importance to the article, or a description of certain legislation. Others begin with the Introduction. Writing the Introduction first offers the advantage of being able to get a concrete perspective of what the article will entail. It can be truly astonishing for a writer to articulate for the first time in writing what it is that she is attempting to do in the article. This also gives the writer the opportunity to rethink some of her initial impressions as to structure and substance. Although the Introduction will most likely have to be rewritten as the article comes to full fruition, having the guide that it presents can be enormously helpful in guiding one's thinking and writing.

E. Editing

Painstakingly editing one's own work is one of the most important elements of the writing process. When taking on a task as formidable as writing a law review article, there will certainly be much room for improvement after the first several drafts – and probably beyond.

The fact that great attention should be paid to the editing process actually leaves the writer more free in drafting to work undistracted by word choice, sentence construction, and grammatical niceties. The editing process also allows the writer to correct not only the smaller details of the article, but to step back and look at the larger-scale structure of the piece. Finally, editing over and over again will ensure that the manuscript submitted for publication will be polished and presentable.

There are resources to which a writer can turn in editing his article. Several publications address writing scholarly works. There are also several popular legal writing texts that can assist a writer in perfecting his article. Indeed, some of the leaders in the field of legal writing present instruction on editing that – while perhaps not directed to article writing – can prove very helpful for any legal writing project. These authors include Gertrude Bloch, Charles Calleros, Linda Edwards,

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Richard Neuman,³⁰ Helene Shapo,³¹ and Nancy Schultz and Louis Scirico.³²

1. No need to Write a Perfect Draft

Many writers who began their legal education or careers before the affordability and popular use of personal computers have retained the unfortunate habit of choosing words and phrases, organization, and syntax with the greatest (time-consuming) care, even in an initial draft. But now that computers are commonplace, it is time to adopt the practice of recording thoughts swiftly, without undue attention to detail, leaving corrections and perfection for subsequent drafts.

Likewise, while it is important to include source footnotes along the way, there is no need to be overly concerned with conforming precisely to Bluebook format at that time.

2. Trees and Forest

One's first venture into scholarly writing often represents one's first undertaking into the truly elaborate and detailed process of legal research and writing. Even when an issue is tailored rather narrowly (as it should be), multitudinous issues of complexity seem to emerge at every turn.

Although it is easy to become closely focused on these smaller issues, it is important to keep in view the prominent issue or issues. Careful editing of one's work gives the author as many opportunities as he may think necessary to ensure that the larger issues are dealt with clearly and take their proper place in the article and that the smaller, more subsidiary issues are presented to the extent necessary but not in a way that detracts unnecessarily from the article's main theme(s).

3. Neatness and Completeness: Polishing the Article

By the time an article is ready to be submitted to journals for consideration, the neatness and completeness of the draft should be a major priority.

Although it seems obvious, it bears emphasizing that the general appearance of a submission makes a tremendous impression on the reader. It reflects a carefulness and an attentiveness to detail that many writers lack, while these qualities are critical to the perceived credibility of the writer. If her work lacks attention to detail, the writer may tend also to lack the careful scrutiny required for a credible legal analysis. Above all, the neatness and general appearance of one's written product makes a positive subconscious impact on the reader.

Special attention should be given to the writing and polishing of the Introduction and the Conclusion of one's draft. These sections are pivotal to an article, and law review editors tend to pay special attention to these parts, especially in their initial evaluation of a submission. In particular, the Introduction will be especially appealing to the law journal reviewers if it contains a clear statement of the issue addressed, a road-map to the rest of the article, and a sexy twist, whenever possible. At the very least, it is effective to show why the issue is timely and important beyond the four corners of the article itself.

In addition, law review editors are generally overworked and understaffed, and therefore anxious to put out issues consistent with their publication schedules. While their choice of articles is probably not based to any great extent on the citation form and other more-or-less minute details of a submission, anecdotal evidence suggests that law review editors do tend to favor articles that will not require extensive staff time in tracking down sources, fixing citation form, and correcting other sloppy elements of the author's submission.

III. MARKETING AN ARTICLE

A. Format For Submissions

Many law reviews have standard formatting that authors are requested to use for their submissions. However, for the most part, authors disregard these law review requests, generally without adverse impact. Indeed, relatively few authors are even aware of the guidelines published by each journal.

As a result, there are probably as many different formats as there are submissions; some draft articles are double-spaced, while others are triple-spaced, and still others are quadruple-spaced. Some use footnotes while others use endnotes. And law
review submissions will be in myriad formats insofar as the numbering of parts, sections, etc.

So what is the most preferable approach? Other than learning the submission guidelines for each journal and adhering to them by preparing myriad drafts to satisfy the formatting requirements of each law review, the best advice would seem to be for each author to submit drafts that—in his or her view—present the most cosmetically appealing manuscript and are easy to read. For this author, that means a draft that is double-spaced and that uses footnotes, not endnotes. Others may differ as to whether double, triple, or quadruple spacing would be more appealing, but the use of footnotes rather than endnotes plainly facilitates the reader's task.

Finally, recall that the format selected for the submission is only that; a journal having accepted—or even seriously considering accepting one's article for publication—might well ask the author to supply a draft in a different format to facilitate its editing or review process.

B. Take Advantage Of The Rule Of Multiple Submissions

Unlike many other professional publications, law journals accept simultaneous submissions. Indeed, submitting articles to multiple journals at the same time is the norm, and it is a practice of which all legal writers should avail themselves.33

There are a number of questions that arise regarding multiple submissions. For example: (1) how many submissions should be made at a time and to which journals should an author submit his article?; and (2) when should articles be submitted to law reviews for publication?

As to these questions, most academics would probably give different responses. Without endeavoring to answer them, some of the issues to consider will be identified and analyzed below. In the end, it is probably best to seek the advice of members of the legal academe whom the writer knows and respects.

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33 Once a writer is extremely well established, he may feel comfortable submitting his article to only a few of the most selective law reviews, safe in the knowledge that his piece will be accepted by almost any journal. Only a handful of academics can rest safe in such beliefs, however; even seasoned writers and accomplished academics follow the practice of multiple submissions, and are wise to do so. Nevertheless, the number and selection of law reviews in which they seek publication will often differ from that of the novice writer.
1. How Many Submissions and to Which Journals

When considering how many law reviews to which to submit an article for publication, more is better. The only tangible downside is the cost of copying and mailing the draft article. If this is not a particular concern (for example, most law schools will cover these expenses), then there is generally no danger posed by sending out dozens, even scores, of copies in seeking publication offers.

There is also the issue regarding which journals to choose when submitting an article. There is really no downside to sending the article to the full range of journals— from the top-rated journals to the more realistic (for the novice writer) lower-rated journals.34 In addition, if the article fits the theme of one or more specialized journals, the article should be submitted there, as well.35

2. When Should Articles be Submitted

There are many "theories" about when articles should be submitted for publication in law reviews. One theory suggests that articles should be submitted in late February or March, when the editorial positions at most journals are shifting to the new editorial staff. This is a time of great excitement and fervor among the newly appointed editors, when they are known to be at their most energetic and enterprising.

Others take an entirely different spin on the best time to submit an article vis-à-vis the timing of the new editorial staffs: That one should wait several months beyond March until after the new editorial positions have been assumed before submitting one's article for consideration. This theory assumes that editors at many or most journals will have overblown expectations about the quality and type of articles they will be receiving for consideration. After the first few months, the editors' expectations will be more reasonable, and an article that might have looked unappealing when these editors first took over might look far more attractive as a publication possibility once their expectations have become more modest and reasonable. Under this theory, August is a particularly propitious time to submit a manuscript.

34 See Part IV.A., infra.
35 See Part IV.C., infra.
Finally, most law reviews virtually shut down between December and early February, when the students are preparing for examinations and on break. If one's article is ready to be submitted during that time frame, it might be prudent to wait to send it until the staff is back at the journal, rather than having one's manuscript be among the piles of mail to which the staff will return after their absence.

These caveats aside, in the end, the best time to send out an article for consideration by journals is probably the time at which the writer is fairly satisfied that the piece is as good as it can be without an undue further expenditure of time.\footnote{In other words, do not spend so much time on an article that the returns become diminished and no longer worth the additional time spent.}

C. Ratchet Up From First Offer Of Publication

Getting the first offer enables the writer to begin the process of trying to “ratchet up” to placement in a more preferable journal.\footnote{See Part IV, infra.} Once armed with an offer, the writer can seek expedited review from other journals. This is basically the way the process works:

- Author receives an offer of publication from Journal X, rated in the third tier of law schools.
- Author asks Journal X how much time she has to consider its offer. She tries to get as much time as possible.
- Author creates list of journals in which she would prefer to publish than the journal from which the offer was received.\footnote{Ideally, the author will have made this analysis before the first offer appears, so that this step can be eliminated at a juncture when time is of the essence – as it is when an offer has been received. While some second- and third-tier journals may be willing to give an author up to two weeks to contact other law reviews, the very top journals may insist upon an answer within one day. See Part IV, infra, for a discussion of selecting the journal in which to publish. Obviously, these decisions need to be made on a continuous basis.}
- Author calls editors of those other journals\footnote{An author may want to ratchet up more slowly, by bringing the first offer only to journals with slightly better rankings than that of the initial offer. If successful, the author can later attempt to ratchet up to even better journals, using subsequent offers from better journals than that which made the initial offer.} and indicates that she has an outstanding offer and would like “expedited review” from these schools, with a date by which she needs a response. Most journals will agree to
do so, at least in theory.\textsuperscript{40} 

- Once Author receives an offer from Journal Y, which she prefers to Journal X, she should immediately contact Journal X to decline its offer of publication. Then she should call remaining, higher ranking journals from which her article has not yet been rejected. Again, the editors of these journals should be given deadlines based on the deadline given the author by Journal Y.

- Author should follow the same process until she has exhausted all of the outstanding journals to which she has sent her article, or until she is forced by the best outstanding journal to give a definitive response.

This, then, is the general approach by which to use a first offer of publication to seek additional offers from more desirable journals.

IV. CHOOSING A JOURNAL FROM AMONG MULTIPLE OFFERS OF PUBLICATION

There are several criteria that should be considered in making a decision of publication from among several offers. For example, as to each law review from which an offer of publication has been received, the following issues should be considered: The ranking of the journals relative to each other; whether the journal is student edited or peer edited; whether the journal is of a general or specialized subject matter; whether the issue for which an offer of publication has been made is a general issue or a symposium issue; when the issue containing an author's article will be published; whether it is a good idea to accept an offer of publication from the school at which the author teaches; and lead article status.

One additional factor that must be considered is the availability of a journal's publications on Lexis and Westlaw. Given the enormous popularity of these services over the past several years (especially to law school professors for whom their use is \textit{gratis}), the availability of an article on these computer-assisted research tools facilitates and maximizes the exposure of an arti-

\textsuperscript{40} The date given should be \textit{before} the date by which the original offer must be accepted.

Generally, editors will profess to let the author know by the arranged date whether the article will be given an offer of submission. Of course, it can never be known whether editors actually do the expedited review.
cle. Thus, most legal academics surely would want their work to be available on-line.

While these issues are discussed below, it is impossible to offer any formulaic or systematic response. Decisions of this nature are complicated and require a balancing of numerous factors. Because of the many factors that play a role in the decision of where to place an article, in the end, reliance on one's own informed judgment and on the views of respected colleagues will probably do most to influence one's decision.41

A. Rank Of Journal

There have been numerous efforts to "rank" the law reviews, using criteria such as author prominence,42 the law reviews that publish the most prolific law professors and faculties,43 the most cited law reviews by other academics,44 the number of citations of journals in United States Court of Appeals opinions,45 and the number of citations of journals in United States Supreme Court opinions.46 Others equate the quality of a law review with the ranking of the school with which it is affiliated.47 Some of these measures include the law school rankings offered by United States News and World Report, for example.48

41 Anderson Publishing Company for several years has published the Directory of Law Reviews and Scholarly Legal Periodicals by Michael H. Hoffheimer. The current version of the Directory, which among other things provides the addresses and phone and fax numbers for all US law reviews, by category, is on-line and may be accessed through Anderson's web site, http://www.andersonpublishing.com. The website is designed to allow users to download needed information.


47 At least one author takes the position that "[t]he quality of a law school is best judged by the quality of its student-written and -edited law review." William L. Boyd, Judging Iowa Law School, 75 IOWA L. REV. 819, 819 (1990).

48 Such rankings may be deceiving, not only because of their controversial status, but because a school's overall ranking may not be the same as its ranking by academics,
B. Student-Edited Journal Versus Peer-Edited Journals

Student-edited journals were once recognized as being overwhelmingly more desirable than non-student-edited journals. In addition, student-edited journals offer the author a level of labor that is not typical of non-student-edited journals and that is virtually unheard of in other academic areas. When one thinks about the time savings of having citations verified and citation form perfected by staff members, it becomes difficult to overestimate the value of such work.

But of late, peer-review or non-student-edited journals have become increasingly more prominent and worthy of respect, especially in specialized areas. For instance, peer-edited journals such as the Journal of Legal Studies, the Supreme Court Review, the American Journal of Legal History, Constitutional Commentary, are extremely well regarded. This movement could well be due to the fact that – whatever the value and competence of student editing – peer-reviewed articles (especially of a highly specialized nature) reflect a level of experience and knowledge that simply cannot be offered by students.

C. Specialized Journals Versus Journals Of General Subject Matter

Law journals may be divided into those that are specialized and those that are of a more general nature. Other things being equal, journals of general subject matter are con-
sidered to be of a higher caliber than specialized journals. On the other hand, specialized journals, which have experienced significant growth over the past few decades, do offer the writer the advantage of being able to reach his target audience.

Of course, all other things are rarely if ever equal. When presented with a choice, for example, between a generalized journal from a third-tier law school and a specialized journal at a first-tier law school, selecting the specialized journal may well be the better choice.

D. Symposium Issue Versus General Issue

Many general-area law reviews develop symposium issues on a regular or occasional basis. These issues deal with a particular topic of law, generally one that is particularly timely, and that solicits writings from authors who are generally known in the field. Commentators have recognized the advantages and disadvantages of publishing in a symposium issue.

Benefits that have been recognized in connection with publishing in a symposium issue include the name recognition that being selected for a symposium issue suggests, the prestige that is gained by having authored a piece in the same symposium as recognized names in the field, and the large (albeit self-se-

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54 A "limited quantity of submissions makes it difficult for specialty law reviews to equal the quality or reputation of the generalist law reviews." Clossen & Dzielsk, supra note 20, at 40; publication in a specialized journal "may come at a high cost in terms of optimal presentation of one's work for tenure or promotion reviews." Gregory Scott Crespi, Ranking International and Comparative Law Journals: A Survey of Expert Opinion, 31 INT'L LAW J. 869, 878-89 (1997).

55 See Harpur, supra note 50, at 1265-66.

56 Crespi, supra note 54, at 878; Harpur, supra note 50, at 1266 ("specialty journals can find a reliable audience in individuals with particular practices and interests").

57 Examples of specialized journals at first-tier law schools include the Yale Journal of Regulation, the Harvard Civil Rights-Civil Liberties Law Review, and the NYU Environmental Law Journal.

58 Symposium issues should not be confused with specialized law journals. See Part IV.D., supra.

59 The Duke Law Journal, for example, publishes a quarterly issue dedicated to issues of administrative law. Other journals publish an occasional issue devoted to a particular subject.

60 "[A] number of highly visible and accomplished scholars were indeed publishing in law review symposia sponsored by law reviews outside the top ten . . . . It appears, then, that a law review may indeed attract a stronger group of authors for a symposium issue than for a non-symposium issue of that same review." Jean Stefanck, The Law Review Symposium Issue: Community of Meaning or Reinscription of Hierarchy?, 63 U. COLO. L. REV. 651, 666, 667 (1992).
lected) readership that is normally attracted to symposia. Respect and prestige for symposia issues seem to have grown in recent years, and the fact that there is usually an important legal scholar participating in the selection of the participants in the symposium provides a way for an author to claim that her article has withstood peer review.

On the other hand, publication in symposia may carry some of the trappings of specialized journals: that they "ghettoize" writers as being of narrow academic abilities and interests; that they may discourage readership among those who lack an interest in the subject matter of the symposium; and that those who publish in symposia are unable to place an article in a law school's top journal.

There is another potential drawback to placing one's article in a symposium: If an author is concerned about when the issue will be published, a symposium issue may not present the best possibility for timely publication. While in a general issue, an article that is delayed can be bumped to the next issue, this is impossible in the case of symposia issues for obvious reasons.

E. Timing Of Publication

An author may be interested in having her article published sooner rather than later for any number of reasons (personal concerns, job searching, etc.). While law review editors may give a date of anticipated publication in all good faith, that date is likely to be inaccurate, and the issue in question will more likely than not appear some time after the date pledged by the editor. To the extent an author's choice of a journal in which to publish is at all motivated by publication date, there are some objective bases for making a determination as to when a law review issue will be published. Most relevant would be the journal's track record, at least over the past year or two, and where the journal is currently in terms of its publication timetable.

61 Cf. Stier et al., supra note 19, at 1468 (concluding that "[r]eaders find symposia . . . less useful than standard law review articles"). See also id. at 1496-97 ("[T]he typical symposium issue may be written less because an author has an interest in a particular symposium topic than because the symposium provides a forum for publication; in turn, this might lead to works of lower quality than individual articles. Alternatively, the time tables demanded by symposia might lead to hurried works").

62 As one commentator calculated, symposia do not generally receive high marks for citation success. See Stefanck, supra note 60, at 668, 663. See also id. at 663 (noting that "in general, top tier law reviews published fewer symposia than those outside this group.").
Many law school libraries keep records of law review publication dates as compared with their scheduled publication dates. Even if such records are not available, a quick review of when the most recent issues were published vis-à-vis their publication dates will give a reasonable indication as to how far behind the journal is in publishing its issues. Also, the number of issues that a journal needs to publish before the issue in which an author’s article would be published may help determine when a particular issue can be expected to be published.

F. In-House Publication Versus Publication In Another School’s Journal

Accepting an offer of publication from the school at which one teaches has both drawbacks and advantages. In terms of advantages, an article will likely be seen by more of one’s colleagues than it might were it published somewhere else. Law journal staffs generally see to it that their publications are circulated throughout the law school community. Thus, publishing in one’s own school is likely to maximize the article’s renown within that institution.63

One downside should be considered: There is at least some suggestion that having published in a journal at the school in which one teaches may be at least in some measure the product of favoritism, even if it is implicit or subconscious.64 Whether this is true or not, the possibility at least exists that others may operate under some presumption that an equivalent journal at another institution would not have accepted the same article.

63 Having published an article in a journal at one’s school will be worthy of some respect by faculty members. It would be curious indeed if a faculty member were to disparage the value of an article published in a journal at the institution where that faculty member teaches.

64 At least one author has strenuously argued that publishing in an in-house journal has an enormously negative impact on how the article will be perceived. Harpur, supra note 51, at 1275-76 (noting the “unwritten code that professors should avoid publishing at their home schools’ journals . . . . because of the apparent conflict publishing at home creates . . . . Publishing at home creates the appearance that a professor has used this power, or even just personal relationships, to win a place for an article or to get an easy edit.”).

Some studies that rank law reviews exclude so-called “in-house” publications from their ratings. See, e.g., Colleen M. Cullen & S. Randall Kalberg, Chicago-Kent Law Review Scholarship Survey, 70 CHI.-KENT L. REV. 1445 (1995); Lindgren & Seltzer, supra note 43. Presumably, these authors consider in-house publications to be not as well-regarded as articles published in a journal from a school with no formal affiliation with the author.
Again, these factors must be weighed in light of the particular circumstances and in conjunction with the other factors. One relevant criterion, for example, would be to consider whether other, more prominent, members of the faculty have published in that journal, despite the affiliation. If so, there is not likely to be any negative connotation from publishing in that journal.

G. Cultivating Recognition Within Your Own Institution

Whether one's goals are for career advancement or to improve the respectability of the legal writing program and instructors within one's own school, it is important to get the news out that you have published or are in the process of writing an article. In particular, cultivating recognition within one's own institution is of critical importance.

One of the ways to get the word out that you are in the business of serious writing is to seek the assistance of colleagues in writing, researching, thinking about your topic, etc. This is an extremely effective tactic because it serves the dual purpose of communicating that you are involved in scholarship and because it gets you needed assistance from a colleague with some expertise in the subject area of your article.

Another way to obtain recognition within your own institution for engaging in scholarship is to participate in colloquia, faculty workshops, and other similar events at your law school. While this certainly takes courage, it also serves the twofold interests of communicating to others within the organization that you are working on scholarly endeavors, while getting feedback from others with more experience in the writing and publishing game.

Most law reviews provide offprints to the author after publication of an article. Normally, the law reviews are generous and send enough copies of offprints to cover your needs. If not, you may order additional copies from the journal at what is likely to be a minimal cost – it will be well worth it to have sufficient copies for your personal use and to "advertise" your published work. Send around copies of your article to professors in the school with whom you are acquainted or who you think might be interested in seeing your work. This is not the time to be shy or humble – be proud to send your work to your colleagues!

Other schools have other institutional mechanisms to display their faculty members' achievements – listings in the school's magazine, displays of the school's new authors in the li-
library, a reception to celebrate those faculty members who have published in the past year. Attend such functions proudly.

H. Lead-Article Status

To some writers, having a piece be the lead article in a law review is an important consideration. While the psychological effects of lead-article status can be enormous for the writer, the practical impact is probably not significant. With the burgeoning use of computer-assisted legal research to download or print articles, lead status is usually not apparent to the reader.65

Nevertheless, if this is an important issue to the writer, it is a bargaining point that can be used to help one decide between journals of otherwise equivalent interest to the author. Overall, however, the other issues discussed above are likely to be far more important considerations in selecting from among multiple offers of publication.

V. A Few Words on Book Writing and Publishing

A. The Value Of Publishing A Book

In considering whether to attempt to write and market a book, there are a number of issues to consider.

First, vis-à-vis articles, some law-related books are considered by the legal academe to be less prestigious than are academic articles. This is because many books are written to be sold to students and practitioners (the most profitable markets for sales), and are therefore not generally considered to be academically rigorous. There are books, however, that are academically demanding and would, therefore, probably be as good or even better a qualification for a tenure-track position. But unless one is capable of and willing to write a book that is as well researched and as academically oriented as an article, and if the writer's main goal is to achieve some level of respect and credibility from her colleagues or to secure a doctrinal position, writing articles may be the better approach.

Another consideration is the relative difficulty of placing articles with law reviews versus selling books to publishers. An ar-

65 If an article begins on page 1 of a journal issue, then it is clear that the article was the lead. If a lead article does not begin on page 1 because it is not the first installment in the volume, unless one reads the hard copy of the entire issue, the reader will not even know that the article was the lead in a particular issue.
article that has a beginning and an end and that looks and feels like an article will most often find some journal that will publish it. This is not true of book publishing, however. Book publishers, like other commercial, for-profit entities, are concerned mainly with the bottom line and need to be assured of the commercial viability of taking on a new book, particularly by an author who has not published a book and who therefore has no proven "track record." Law review editors, however, are not concerned with profits or sales; their dual goals are to fill the journal with the best possible written pieces and to meet as closely as possible the journal's publication deadlines.

On the other hand, an important consideration for some writers may be that books compensate the author (at least theoretically), whereas articles do not provide any recompense. Depending upon the royalty terms of the contract offered by the publisher, the price of the book (often dictated by its length), and, of course, the number of copies that are sold, book writing can be a lucrative activity.

B. Developing An Idea For A Book

The market is glutted with law books of all types. It will be difficult to attract a publisher (or to sell many copies even if a publisher is found), unless the book offers something new. So the prospective writer's first task is to come up with an idea or an approach to a topic that is different and that will attract first a publisher and second, readers.

There are certain trends that can be identified in the law school book market from which a prospective book writer can learn a great deal in thinking about what kind of book to write.

First, there seems to be a movement towards problem-oriented books and away from pure case books. Thus, a book

66 In this regard, the vast increase in the number of law journals and the size of each issue may have an impact. Cf., e.g., Saks, et al., supra note 19, at 363-64; Michael J. Saks, Howard Larsen, and Carol J. Hodne, Law Review Articles One Generation Apart, 30 Suffolk U. L. Rev. 353, 363-64 (1996); Arthur D. Austin, Footnote Skulduggery and Other Bad Habits, 44 U. Miami L. Rev. 1009, 1015 (1990); Closen & Dzielsak, supra note 20, at 38.

67 With the possible exception of highly established authors, there is probably little room for negotiation with the publisher. It would be prudent, however, to speak with colleagues who have already published books to confirm that the arrangements offered to you fall within the range of normal industry standards.

68 In speaking of "readers," what is really meant is adoptions by instructors for use by their students. In law publishing, the value of sales is normally tied to course adoptions rather than individual unit sales.
that contains attributes of a traditional case book and effectively combines more reality-based problem-oriented qualities may attract a significant market—particularly younger faculty who may see the benefits of a problem-oriented approach while being respectful of the age-old appellate case law approach.

Second, a potential book author should also think about writing in a niche area as to which he can claim special expertise or knowledge. If one is known as a leader in a particular area, a book responding to that niche market may sell well given the strength of the name of the author. Likewise, a well-written book that goes to a specialized area of law will do much to enhance the professional status and respectability of an otherwise not-well-known author. These kinds of decisions are largely driven by the author's own experiences.

Third, there has been a recent trend towards anthologies—especially those that present interdisciplinary approaches. As is the case with more problem-oriented books, there seems to be a growing response to texts that bring ideas and approaches to the law by those with non-traditional legal backgrounds, such as those in the fields of anthropology, economics, government, history, international relations, psychology, sociology—the list goes on and on. Members of law faculties have come to recognize the benefits—indeed the need—to allow perspectives from other fields to influence legal problems and their potential solutions. Bringing in these perspectives through interdisciplinary texts allows for such an integrated approach to legal thinking.

Finally, there are certain areas of the law that are becoming more and more important or that are questioning traditional legal assumptions. New books reacting to these changes are of course needed to confront those changes. One obvious issue is the emergence of the European Union and the new system of coinage that is a product of the new regime. There will certainly be a need for books in this emerging area of the law.

C. Reeling In A Publisher

1. Take Advantage of Opportunities Presented

Once or twice a year, one publishing company sends out letters to law teachers (including, significantly, legal research and writing instructors), inviting visits with the Chair of its editorial board when he will be in that law school's town. Another pub-
lisher's representatives stop by professors' offices from time to time to discuss publishing possibilities with faculty members. These are opportunities of which one should take advantage, despite any misgivings about the viability of one's book proposal. Most publishers who have been in the business know when an idea is worth pursuing and how to take a half-baked idea and assess its viability once it is more fully developed.

Likewise, if you have a friend or colleague who has published a book, ask her for the name of a contact person at her publishing house. These are the kinds of contacts that will maximize the likelihood that a publisher will at least take the time to speak to you about a proposal.

Nevertheless, anyone with an idea for a book should be aggressive about presenting that idea to publishers, even if the ideas are somewhat underdeveloped and even without having had any prior contact with a publisher. Even more so than with regard to articles, potential book authors must take control.

2. Prepare Some Written Ideas in Advance

Before meeting or speaking with a publishing house representative, a prospective author should be armed with the kind of information that the publisher will be interested in having. This includes information pertaining to the substance of the proposed project, as well some ideas for marketing the book.

a. Work product

Prospective authors should be prepared to show a publisher some tangible work product towards fulfillment of the book — an outline, one or more chapters, a prospectus, etc.

Having some material evidence of work in advance of discussing a proposal with a publisher is critical for two reasons. First, the publisher will have some reason to believe that the prospective author is serious about the task she proposes. Having taken serious steps in writing towards the fulfillment of the proposed project gives the publisher some tangible evidence of the potential author's commitment.

Second, presenting the publisher with some well-developed work product gives the publisher more of a basis upon which to evaluate the structure and substance of the proposed work. An outline, a chapter, or even a well-developed prospectus gives the publisher a sense of the author's style and of the essence of the proposed work before committing to that author and the pro-
posed project. Also, since many publishers use peer review to help analyze the viability of the project, there must be something in writing by which such review can take place.

b. Marketing plan

A prospective author should also be prepared to suggest to the publisher some specific ideas for marketing the book. This includes contacts the author has for sales of the book and various markets – law schools, law firms, law libraries, and even prisons – for which the book might be appropriate. The greater the potential market for the book that the author can expose, the more favorable will be the publisher’s analysis of the financial viability of the book.

3. Have a record of law review publication

Publishers who are considering a book proposal by an unknown writer will want some assurance that the prospective author is capable of bringing a challenging, complex writing task to completion. The fact that one has been able to formulate and write a quality law review article will be one signal to the publisher that the prospective author is worthy of the publisher’s trust in agreeing to publish that author’s work.

D. Selecting A Publisher

There is a growing number of important players in the legal publishing business. The first thing to remember, of course, is that getting an offer of publication from any publisher is something about which to be overjoyed. If that is the only offer to come along, there is still every reason to rejoice. If more than one legal publisher is interested in a given project, there are several factors to consider in selecting from among them.

One issue is the size and reputation of the house. The obvious advantage of publishing with a well-known and established entity of course comes from that status and the know-how, experience, and resources that come with it. On the other hand, those houses have many books and authors to edit, market, etc., and the attention that one book will get from the editors – especially one written by a previously unknown author – may thus be limited.

The advantages of working with a smaller or less well-established house are that the editors and other personnel have more time to spend with individual authors; more attention gen-
erally may be paid to a single book as having more value proportionately than each book handled by a larger publisher; and there is often more room for author control over various issues such as contents, text, design, and other elements of the book's substance and appearance.

While different people may weigh these factors differently, a writer with a choice between or among publishers would certainly want to balance these factors when making her decision.

There is also the question of how aggressively each publisher will market a particular book and how much it will allow the author to play a role in that process. Depending upon what a particular author's preference is, the marketing policy of a particular publisher may also be an important issue to consider.

Finally, talking to other authors who have published with the various houses about their respective experiences may also provide very useful guidance.

E. Marketing A Book: The Value of Working With The Publisher

While marketing is the primary responsibility of the publisher, authors themselves have much to contribute to — and much to gain from — this endeavor. An author who can find the time to engage in marketing activities will reap numerous benefits.

1. Improve Sales

The main reason to assist the publisher in its marketing efforts is to increase sales. Whether an author is primarily interested in generating royalties or in expanding the book's readership for more lofty reasons, increasing sales is of primary importance to any author. Of course, the publisher's primary interest will also be in generating book sales.69

While the publisher clearly has the marketing knowledge and experience that individual authors lack, there are certain markets that the author may be in more of a position to tap than is the publisher. For instance, if an author writes a book about legal research and writing, she will most likely have had a great deal of contact with other legal research and writing in-

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69 “Primary,” because the publisher may have subsidiary interests, such as using a book to engage the publisher in a new market for purposes of selling other books to that new market.
structors through professional connections, conferences, and the like. In addition, the book may have peripheral markets in which the author may have some contacts (such as law firms, undergraduate institutions, etc.). The author may be in a position to access these markets, just as the publisher, of course, will have entry to markets with which the author will have no contact. Combining efforts to reach the most markets possible maximizes potential sales.

2. **Enhance One’s Professional Reputation**

   While books may not always count as scholarship that will position one for a tenure-track position, books do tend to give authors more name recognition than articles, for example, which generally are read by a relatively small and limited audience. Books, however, are widely distributed and usually become known within a larger circle of academics than most articles ever will be. Thus, even if a book does not serve to establish the author on a tenure track, there are other professional advantages to be gained from publishing and marketing a book.

3. **Develop Good Will with the Publisher**

   An author’s enthusiasm for her published work will often have a reciprocal effect on the publisher. As with other things, enthusiasm can be contagious, and publishers respond in kind to gratification and excitement about a particular project. The feeling that marketing efforts are a joint venture that will inure to the benefit of both author and publisher makes for a complementary and happy co-existence.

**CONCLUSION**

This article has touched upon a multitude of topics, which should not divert from its primary message: that engaging in the time-honored tradition of scholarship is one of the many ways in which legal research and writing instructors can continue to enhance their reputations and the credibility of the programs in which they teach; strengthen their teaching skills; and improve their career opportunities. While some may view schol-

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70 Even if an author is not interested in engaging in marketing activities, an author should extend one’s gratitude to the publisher for a job well done. Developing good will with one’s publisher is of critical importance in helping to ensure the success of one’s project.
arship as acceding to the priorities of colleagues who often have not been receptive to the needs and efforts of legal writing instructors, the academy's interest in scholarship is well entrenched, if not indelible. For those legal writing teachers who hope to teach doctrinal courses in the future, there is probably no better investment of time and energy than engaging in scholarship before beginning a job search in earnest.

For those who have no such career plans, there are still ample reasons to consider academic scholarship. While instructors of legal research and writing should continue their valiant efforts to gain recognition by doing what they do and doing it well, undertaking a classic venture that is well recognized and admired by the academy will add some much needed ammunition in the fight to achieve greater recognition, job security, benefits, and program resources.