

# PREPARING FOR PRACTICE FROM BEHIND THE BENCH: OPINION WRITING AS THE “HEART AND SOUL” OF THE FIRST SEMESTER OF LEGAL WRITING

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*In a legal research and writing course, the assignments provide the heart and soul; nothing else is as important because the assignments set the context in which all of the teaching and learning take place.*<sup>1</sup>

The traditional office memo<sup>2</sup> is the “heart and soul” of most first-semester legal writing courses;<sup>3</sup> however, in practice, the office memo appears to be on life support.<sup>4</sup> Writing in practice

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1. Jan M. Levine, *Designing Assignments for Teaching Legal Analysis, Research and Writing*, 3 *Persps.* 58, 58 (1995) (reprinted in *Best of Perspectives: Teaching Leg. Research & Writing* 3 (West 2001)).

2. For more information on the audience, purpose, and content of the traditional office memo, see *infra* nn. 9, 58. The remainder of this Article refers to the traditional office memorandum as the office memo.

3. Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 *J. Leg. Educ.* 32, 32 (2008) (explaining that the office memo is the most widely accepted tool for teaching the communication of objective legal analysis); see also ALWD & Leg. Writing Inst., *2010 Survey Results* i, 13 (available at <http://www.lwionline.org/uploads/FileUpload/2010Survey.pdf>) [hereinafter *2010 Survey Results*] (reporting the use of the office memo by 97.9% of the 191 schools responding to the survey).

4. Robbins-Tiscione, *supra* n. 3, at 32 (explaining that, increasingly, attorneys communicate via email instead of through the lengthy, typewritten office memo); see also Richard K. Neumann, Jr. et al., Oral Presentation, *Rethinking the Traditional Legal Memorandum as a Teaching Tool* (14th Biennial Conf. of the Leg. Writing Inst., Marco Island, Fla., June 28, 2010) (Other presenters included Douglas W. Godfrey, Professor of Legal Research and Writing, Chicago-Kent College of Law; Kristen K. Robbins-Tiscione, Professor of Legal Research and Writing, Georgetown Law Center; and Mary-Rose Strubbe, Associate Professor of Legal Research and Writing, Chicago-Kent College of Law) (notes on

has changed dramatically because of rapidly developing technology and clients' demands for quick, efficient responses to legal questions.<sup>5</sup> According to Professor Kristen Robbins-Tiscione's article published in *The Journal of Legal Education*, sixty-two percent of recent graduates reported that they write between zero and three office memo per year.<sup>6</sup> Instead of the office memo, attorneys write short, organic, answer-focused emails.<sup>7</sup> Typically, these informal emails contain concise responses to legal questions and provide the reader with very limited analytic support.<sup>8</sup> Despite the dramatic changes to the form and substance of the office memo in practice, it is still widely-taught in the same format that has been used since the establishment of legal writing programs in the 1970s.<sup>9</sup>

Why has the legal writing field, often praised for sound and innovative pedagogy,<sup>10</sup> not embraced the new, informal memo as a teaching tool?<sup>11</sup> The answer may be that the informal memo does not provide a student with the opportunity to document his or her thought process.<sup>12</sup> To write a memo similar to one currently used

file with Author).

5. Robbins-Tiscione, *supra* n. 3, at 34, 36; *see also* Steven D. Stark, CLE Presentation, *Legal Writing and Persuasion in the Smart Phone Age* (Pa. B. Inst., Mechanicsburg, Pa., Dec. 14, 2010) (notes on file with Author).

6. Robbins-Tiscione, *supra* n. 3, at 32. According to Professor Robbins-Tiscione's research, seventy-five percent of all graduates surveyed indicated that they write no more than three traditional memoranda a year. *Id.* at 36.

7. *See id.* at 40; Neumann et al., *supra* n. 4; Stark, *supra* n. 5.

8. *See* Robbins-Tiscione, *supra* n. 3 at 40; Neumann et al., *supra* n. 4; Stark, *supra* n. 5.

9. Robbins-Tiscione, *supra* n. 3, at 32. The office memo typically contains a heading, a question(s) presented, a brief answer(s), a statement of facts, a discussion, and a conclusion. John C. Dernbach et al., *A Practical Guide to Legal Writing & Legal Method* 260–262 (4th ed., Aspen Publishers 2010); Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 99 (5th ed., Aspen Publishers 2010).

10. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 104–111 (Jossey-Bass 2007) [hereinafter *Carnegie Report*] (stating that “[t]he legal writing courses the students were describing provide a pedagogical experience that in many ways complements what is missing in the case-dialogue classes that make up most of the students' first year,” *id.* at 104); Michael J. Madison, *Writing to Learn Law and Writing in Law: An Intellectual Property Illustration*, 52 St. Louis U. L.J. 823, 841 (2008) (praising legal writing professors for being in the forefront with their teaching); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?* 100 Dick. L. Rev. 245, 257 (1996) (describing legal writing courses as “fairly dynamic and subject to frequent change and innovation”).

11. “If the traditional memorandum taught to students no longer reflects reality, then LRW programs are not fulfilling their primary mission to prepare students for the world of legal practice.” Robbins-Tiscione, *supra* n. 3, at 34.

12. *See* Neumann et al., *supra* n. 4.

in practice, a first-semester law student would generate an answer to a legal problem without describing, in detail, the analysis he or she used to reach that answer.<sup>13</sup> This is similar to asking an elementary-school student who is learning long division to provide the answer to a problem without writing out the steps taken to arrive at that answer. A student writes out steps in working a math problem, in part, to learn the thinking process involved in solving the problem.<sup>14</sup> Writing out the steps also provides the math teacher with a record of the student's thought process, which the teacher can then assess.<sup>15</sup> Like the math teacher who requires a student to show her work on a long-division problem, a professor who requires a student to write the traditional office memo does so, in part, to capture the student's complete analytical process in writing.<sup>16</sup> The student, as a novice legal thinker, develops her analytical skills through the process of writing.<sup>17</sup> Additionally, the professor receives a written record of the student's thought process, upon which the professor can comment.<sup>18</sup> Writing an informal memo would deprive a new law stu-

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13. See *id.*; Stark, *supra* n. 5.

14. See Linda Gojak, *What's Your Math Problem!?! Getting to the Heart of Teaching Problem Solving* 83 (Shell Educ. 2011) (explaining that notation in math problem-solving allows a student to think more deeply about the solution); see generally Kenneth M. Williams, *Writing About the Problem-Solving Process to Improve Problem-Solving Performance*, 96 *Mathematics Teacher* 185, 187 (2003) (suggesting that writing about the problem-solving process itself helps math students develop their thinking skills).

15. See Marilyn Burns, *About Teaching Mathematics: A K-8 Resource* 47 (Toby Gordon ed., 3d ed., Math Solutions 2007) ("[W]hile assignments and quizzes are useful vehicles for measuring students' progress, and correct answers are important, merely checking whether or not answers are correct is insufficient. Assessments must also uncover what students understand and provide insights into how they think and reason. Key to assessing students' math learning is to delve into how students arrive at answers.").

16. See Neumann et al., *supra* n. 4; see also Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 *Stetson L. Rev.* 1193, 1197-1198 (2000).

17. See Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* xxv-xxvii (5th ed., Aspen L. & Bus. 2010); Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 54-55 (6th ed., Aspen Publishers 2009).

18. See Ellie Margolis & Susan L. DeJarnatt, *Moving beyond Product to Process: Building a Better LRW Program*, 46 *Santa Clara L. Rev.* 93, 98-99 (2005). A discussion of the adoption of the process-oriented approach in teaching legal writing is beyond the scope of this article. For more information on the shift from product to process in legal writing, see *id.* at 99; Commun. Skills Comm., Sec. Leg. Educ. & Admis. to B., *Sourcebook on Legal Writing Programs* 19-20 (Eric B. Easton ed., 2d ed., ABA 2006) [hereinafter *Sourcebook*]; Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 *U. Pitt. L. Rev.* 719, 719 (1997); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 *Wash. L. Rev.* 35, 55 (1994); Rowe, *supra* n. 16, at 1204.

dent of this thinking-by-writing process and deny the professor the ability to evaluate the student's analytical process.<sup>19</sup>

Because of difficulties with introducing students to legal thinking and writing through the informal memo, the traditional office memo continues to be the primary teaching tool in the first semester.<sup>20</sup> The declining use of the office memo in practice, however, has spurred some legal writing professors to consider whether there are any viable alternatives to it.<sup>21</sup> One option is a judicial opinion,<sup>22</sup> which is an equally effective teaching tool and because it “demonstrate[s] the basic methods of legal reasoning that [students] will use in studying and practicing law.”<sup>23</sup> Currently, most students write a traditional office memo even though they will never write or use one in practice. Writing a judicial opinion allows students to produce a primary legal authority like the ones they will evaluate throughout their careers.<sup>24</sup>

Judicial opinions serve students well as the first major legal writing assignment.<sup>25</sup> An opinion accomplishes the same learning

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19. See Margolis & DeJarnatt, *supra* n. 18, at 98–99.

20. See Robbins-Tiscione, *supra* n. 3, at 32.

21. See Neumann et al., *supra* n. 4 (discussing whether there are alternatives to the office memo as a primary teaching tool); Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography*, 5 J. ALWD 133, 134 (2008) (stating that “[o]ne way to bridge the gap between law school and practice is to teach writing in the context of documents other than memos and briefs.”); see also *infra* nn. 170–171 and accompanying text (describing the use of bench memoranda instead of office memoranda as teaching tools).

22. Throughout this Article, “judicial opinion” refers to a written disposition of a case supported with reasons for the disposition. See Ruggero J. Aldisert, *Opinion Writing* 77–82 (2d ed., AuthorHouse 2009); Elizabeth Fajans et al., *Writing for Law Practice* 357 (2d ed., Found. Press 2004); Joyce J. George, *Judicial Opinion Writing Handbook* 322–330 (5th ed., William S. Hein & Co. 2007). First-semester law students could be taught to write either trial or appellate court opinions. To ensure that students learn all the skills currently developed through the office memo, students should not be taught to write concurring or dissenting opinions exclusively during the first semester. Also, this article does not advocate exclusion of the office memo from the first-year curriculum entirely. A judicial opinion is an alternative to the memo as the primary assignment; however, students should still be exposed to the traditional and informal memo, even if only briefly, during the first year of legal writing.

23. See Dernbach, *supra* n. 9, at 24; see also *infra* nn. 75–76 and accompanying text.

24. See generally Edwards, *supra* n. 17, at 39 (discussing that lawyers work with two primary legal authorities, statutes and cases); Ruth Ann McKinney, *Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert*, at xiii (Carolina Academic Press 2005) (describing that law students read opinions in casebooks to give them the opportunity to do what lawyers do in the real world—evaluate the law).

25. While teaching advanced legal writing courses on judicial opinion writing, I developed an appreciation for how similar an opinion is to an office memo and how an opinion could replace the memo as a primary teaching tool. I also collected my students' insights

objectives as the office memo while delivering unique benefits to new law students. Part I of this Article describes the seven widely-accepted learning outcomes for the first-year of legal writing, and part II describes how writing a judicial opinion achieves these seven learning outcomes. Part II also explains how writing an opinion bestows additional benefits to students that writing an office memo does not. For example, writing a judicial opinion provides students with a hands-on context for learning to read the law, thus, deepening learning.<sup>26</sup> Also, students gain insights into judges as the audiences of the students' future writing, thereby developing an appreciation for how to tailor their writing to a specific reader.<sup>27</sup> Part III addresses the practicalities of switching from an office memo to a judicial opinion as a primary teaching tool, including structuring the course, selecting textbooks, creating assignments, and responding to any concerns raised by the bar. Considering the benefits, and relative ease of, replacing the office memo with a judicial opinion, professors should introduce legal writing to students by putting them "behind the bench."

### I. SEVEN EDUCATIONAL OUTCOMES FOR THE FIRST YEAR OF LEGAL WRITING

Selecting a teaching tool begins with articulating the desired educational outcomes for students.<sup>28</sup> While legal writing programs vary depending upon "a variety of institution-specific factors[,] . . . all programs endeavor to teach students to think and communicate like lawyers."<sup>29</sup> Within this overarching goal of

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into what they learned by writing judicial opinions. Throughout the remainder of the Article, I relay some of the students' experiences and comments.

26. See *infra* nn. 74–86 and accompanying text.

27. See *infra* nn. 108–124 and accompanying text.

28. See Barbara Gross Davis, *Tools for Teaching* 4 (1st ed., Jossey-Bass 1993); Roy T. Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* 130–131 (Clin. Leg. Educ. Assn. 2007) [hereinafter *Best Practices*]; Off. of Academic Planning & Assessment, *Course-Based Review and Assessment: Methods for Understanding Student Learning* 6 (U. Mass. Amherst 2001) (available at [http://www.umass.edu/oapa/oapa/publications/online\\_handbooks/course\\_based.pdf](http://www.umass.edu/oapa/oapa/publications/online_handbooks/course_based.pdf)).

29. *Sourcebook*, *supra* n. 18, at 6. Regarding curriculum, the American Bar Association requires that accredited law schools provide "substantial instruction" in "legal analysis and reasoning, legal research, [and] problem solving." 2012–2013 ABA Standards & Rules of Procedure for Approval of Law Schools 302(a)(2) (2012) (available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf)). The first year of law school must include "at least one rigorous writing experience." *Id.* at 302(a)(3).

teaching legal thinking and communicating, the *Sourcebook on Legal Writing Programs* identifies seven educational outcomes for the legal writing courses in the first year of law school.<sup>30</sup> An examination of some of the leading legal writing textbooks confirms the legal writing community's commitment to achieving these seven outcomes.<sup>31</sup>

**Outcome #1: Reinforce students' understanding of the American legal system.**<sup>32</sup> After the first year of law school, students should know how the American justice system works, including the concepts of federalism, sources of law, hierarchies within court systems, and weight of authority.<sup>33</sup>

**Outcome #2: Develop students' abilities to analyze facts, issues, and legal authorities.**<sup>34</sup> In first-year legal writing courses, students should learn to "think like lawyers" by working through problems set in specific jurisdictions.<sup>35</sup> Students should develop their analytical abilities by reading legal authorities critically,<sup>36</sup> identifying and diagnosing legal issues,<sup>37</sup> synthesizing diverse precedents,<sup>38</sup> and applying the synthesized precedents to the facts of problems to reach conclusions.<sup>39</sup>

**Outcome #3: Ensure students can conduct thorough and efficient legal research.**<sup>40</sup> Students should learn how to develop research strategies appropriate to resolving legal problems.<sup>41</sup> A first-year legal writing course should introduce students to primary and secondary sources of law, as well as the tools that lawyers use to find these sources, such as digests, cita-

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30. *Sourcebook*, *supra* n. 18, at 6.

31. See e.g. Dernbach et al., *supra* n. 9; Edwards, *supra* n. 17; Fajans et al., *supra* n. 22; Neumann, *supra* n. 17; Oates & Enquist, *supra* n. 9; Helene S. Shapo et al., *Writing and Analysis in the Law* (5th ed., Found. Press 2008).

32. *Sourcebook*, *supra* n. 18, at 6–7.

33. *Id.* at 6; see also Dernbach et al., *supra* n. 9, at 3–22; Neumann, *supra* n. 17, at 3–35; Shapo et al., *supra* n. 31, at 3–29.

34. *Sourcebook*, *supra* n. 18, at 7–8.

35. *Id.* at 7.

36. See McKinney, *supra* n. 24, at xiii; Oates & Enquist, *supra* n. 9, at 27–35; Shapo et al., *supra* n. 31, at 39–55, 89–94.

37. See Dernbach et al., *supra* n. 9, at 73–94; Edwards, *supra* n. 17, at 82–86.

38. See Oates & Enquist, *supra* n. 9, at 149–153; Shapo et al., *supra* n. 31, at 80–87.

39. See Neumann, *supra* n. 17, at 95–136; Shapo et al., *supra* n. 31, at 117–159.

40. *Sourcebook*, *supra* n. 18, at 8–9.

41. See Oates & Enquist, *supra* n. 9, at 39–95; Rowe, *supra* n. 16, at 1197; Shapo et al., *supra* n. 31, at 277–280.

tors, and search engines.<sup>42</sup> Students should gain experience with both print and electronic research.<sup>43</sup>

**Outcome #4: Produce students who can communicate effectively.**<sup>44</sup> Students should practice conveying legal analysis to different audiences, for different purposes, and through different forms—both spoken and written.<sup>45</sup> While developing their communication skills, students should acquire an appreciation for the writing process<sup>46</sup> and refine their abilities to ensure that they write clearly, concisely, and correctly.<sup>47</sup>

**Outcome #5: Instill students with professionalism.**<sup>48</sup> First-year legal writing courses should begin to familiarize students with what is expected of attorneys as professionals, from ethical responsibilities to good practices.<sup>49</sup>

**Outcome #6: Introduce students to the various roles of the lawyer, from analyst to advocate.**<sup>50</sup> During the first year of legal writing, students should gain an understanding of some of the different ways that attorneys serve clients and society.<sup>51</sup> Students should be exposed to both predictive and persuasive legal writing.<sup>52</sup>

**Outcome #7: Equip students to apply the knowledge and skills that they have learned to solve real-world legal problems.**<sup>53</sup> In legal writing, first-year students should be intro-

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42. See Oates & Enquist, *supra* n. 9, at 39–95; Shapo et al., *supra* n. 31, at 280–296; Amy E. Sloan, *Basic Legal Research: Tools and Strategies* 299–326 (5th ed., Aspen Publishers 2009).

43. See Robert C. Berring & Elizabeth A. Edinger, *Finding the Law* 17–337 (12th ed., Thomson/West 2005); Oates & Enquist, *supra* n. 9, at 46, 50–92; Shapo et al., *supra* n. 31, at 286–290.

44. *Sourcebook*, *supra* n. 18, at 9–10.

45. See Dernbach et al., *supra* n. 9, at 211–115; Edwards, *supra* n. 17, at 2–3; Neumann, *supra* n. 17, at 415–536.

46. See Neumann, *supra* n. 17, at 53–62; Shapo et al., *supra* n. 31, at 193–208.

47. See Neumann, *supra* n. 17, at 205–237; Oates & Enquist, *supra* n. 9, at 453–715.

48. *Sourcebook*, *supra* n. 18, at 10–11. While the legal profession has struggled to define professionalism, many agree that professionalism encompasses competence in practice, accountability to the client, devotion to the public good, and civility in dealing with others. See Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 *Leg. Writing* 113, 118–122 (2007); David S. Walker, *Teaching & Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 *U. Toledo L. Rev.* 421, 424–425 (2009).

49. See Edwards, *supra* n. 17, at 8–11; Fajans et al., *supra* n. 22, at 132–134, 350–351; Neumann, *supra* n. 17, at 323.

50. *Sourcebook*, *supra* n. 18, at 11.

51. *Id.*

52. See *2010 Survey Results*, *supra* n. 3, at iv, 13.

53. *Id.* at 11–12.

duced to lifelong learning skills.<sup>54</sup> Students should learn how to educate themselves in unfamiliar areas of law and communicate their understanding to others.<sup>55</sup>

## II. A JUDICIAL OPINION AS A MEANS OF ACHIEVING THE SEVEN EDUCATIONAL OUTCOMES

For most legal writing programs, the office memo serves as the starting point in reaching all seven of the educational outcomes.<sup>56</sup> According to the *ABA Sourcebook on Legal Writing Programs*, the office memo is one of the first, and most widely taught, documents “because it introduces the basic skills that all law students and attorneys need to communicate their analysis effectively in writing.”<sup>57</sup>

Similarities between an office memo and a judicial opinion support the use of an opinion as an alternative tool through which to meet the seven outcomes.<sup>58</sup> Like the office memo, a judicial opinion introduces students to basic lawyering skills.<sup>59</sup> Similar to

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54. See generally *Best Practices*, *supra* n. 28, at 67.

55. *Sourcebook*, *supra* n. 18, at 11–12; see also Dernbach et al., *supra* n. 9, at xxi–xxiii; Fajans et al., *supra* n. 22, at xix–xxiv.

56. *Sourcebook*, *supra* n. 29, at 17, 21; see also Lorraine Bannai et al., *Sailing through Designing Memo Assignments*, 5 Leg. Writing 193, 200 (1999); Rowe, *supra* n. 16, at 1202.

57. *Sourcebook*, *supra* n. 18, at 21.

58. See Tom Cobb & Sarah Kaltsounis, *Real Collaborative Context: Opinion Writing & the Appellate Process*, 5 J. ALWD 156, 166 n. 32 (2008) (observing that a judicial opinion is merely a different form of a traditional office memo). An office memo and a judicial opinion contain similar components: statements of the issues, statements of facts, legal analysis sections, and conclusions. Compare Dernbach et al., *supra* n. 9 (listing the components of an office memo), with Fajans et al., *supra* n. 22, at 362–363 (listing the components of a judicial opinion as an introduction, statement of the issues, statement of facts, analysis, and disposition). The purposes of writing an opinion and a memo are also similar. In a judicial opinion, the judge writes to resolve a legal dispute between parties. Aldisert, *supra* n. 22, at 12; Gerald Lebovits & Lucero Ramirez Hidalgo, *Advice to Law Clerks: How to Draft Your First Judicial Opinion*, 36 Westchester B.J. 29, 29 (2009). The judge also writes to persuade the parties, fellow judges, and the legal community that the judge reached the correct decision. Aldisert, *supra* n. 22, at 27–30; Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, & Style*, 54 Me. L. Rev. 47, 53 (2002). Similarly, in an office memo, the junior attorney writes to predict objectively how to resolve a legal issue. *Sourcebook*, *supra* n. 18, at 17; Oates & Enquist, *supra* n. 9, at 99–100. The junior attorney also writes to persuade the senior attorney that the junior attorney reached the correct decision. Oates & Enquist, *supra* n. 9, at 5.

59. See Cobb & Kaltsounis, *supra* n. 58, at 166 n. 32 (observing that judicial opinions and traditional office memoranda both “require[] students to identify and articulate the legal issue, to present the facts in an objective manner, and to explain how the governing legal authorities applied to the facts of the case”).

a memo writer, an opinion writer identifies legal issues,<sup>60</sup> researches,<sup>61</sup> synthesizes precedents,<sup>62</sup> analyzes the law and its application to a set of facts,<sup>63</sup> drafts the analysis in writing,<sup>64</sup> supports the analysis with citation to authority,<sup>65</sup> and edits and revises.<sup>66</sup> An examination of the seven educational outcomes through the lens of opinion writing demonstrates that an opinion is as effective as the office memo at introducing basic skills and also bestows additional benefits to students.

**1. Opinion writing immerses students in the American legal system.** Many first-semester legal writing courses review various concepts within the American legal system to ensure that students have a solid foundation from which to learn legal analysis.<sup>67</sup> For example, students explore topics such as systems of government, hierarchies within court systems, sources of law, primary and secondary authorities, and weight of authorities.<sup>68</sup> Students use this information to assist in selecting, interpreting,

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60. Compare Dernbach et al., *supra* n. 9, at 73 (explaining that a writer must identify the issues when drafting an office memo); Edwards, *supra* n. 17, at 82–83 (same), with Aldisert, *supra* n. 22, at 115–129 (stating that a writer must identify the legal issues when drafting an opinion); Jennifer Sheppard, *The “Write” Way: A Judicial Clerk’s Guide to Writing for the Court*, 38 U. Balt. L. Rev. 73, 77 (2008) (same).

61. Compare Oates & Enquist, *supra* n. 9, at 115–120 (explaining research stage in drafting the office memo); Fajans et al., *supra* n. 22, at 280–81 (same), with Mary L. Dunnewold et al., *Judicial Clerkships: A Practical Guide* 59–81 (Carolina Academic Press 2010) (describing research process for writing a judicial opinion); Lebovits & Hidalgo, *supra* n. 59, at 29–30 (same).

62. Compare Neumann, *supra* n. 17, at 155–156 (describing synthesis of precedent as part of legal analysis in memo writing); Shapo et al., *supra* n. 31, at 80–87 (same), with Aldisert, *supra* n. 22, at 45–50 (describing synthesis of precedent in the context of opinion writing); George, *supra* n. 22, at 349–368 (same).

63. Compare Dernbach et al., *supra* n. 9, at 95–127, 211–239 (describing how to apply the law to the facts to reach a prediction in an office memo); Oates & Enquist, *supra* n. 9, at 136–169 (same), with Aldisert, *supra* n. 22, at 141–173 (describing how to apply the law to the facts to reach a decision in a judicial opinion); George, *supra* n. 22, at 231–242 (same).

64. Compare Dernbach et al., *supra* n. 9, at 211–213 (describing writing process before introducing office memo); Neumann, *supra* n. 17, at 53–59 (same), with George, *supra* n. 22, at 12–15 (describing prewriting, writing, and postwriting stages in opinion writing); Sheppard, *supra* n. 60, at 76–78 (same).

65. Compare Neumann, *supra* n. 17, at 239–255 (describing legal citation), with George, *supra* n. 22, at 30–32 (discussing citation within the context of opinion writing); Dunnewold et al., *supra* n. 61, at 111–123 (same).

66. Compare Oates & Enquist, *supra* n. 9, at 171–183 (describing revising and editing of office memo), with Aldisert, *supra* n. 22, at 321–323 (describing editing of judicial opinion); Lebovits & Hidalgo, *supra* n. 59, at 33–35 (same).

67. See Dernbach et al., *supra* n. 9, at 11; Oates & Enquist, *supra* n. 9, at 15.

68. See Dernbach et al., *supra* n. 9, at 11–22; Oates & Enquist, *supra* n. 9, at 15–25.

and synthesizing the law for their memoranda.<sup>69</sup> While students similarly use this information to select and analyze the law when writing opinions, writing on behalf of a court also immerses students within the legal system itself. Students research and write with an awareness of how their court fits into the system and how courts use different authorities to support decisions. The immersion within the legal system, as one student explained, helps students appreciate and understand the legal process and court structure.<sup>70</sup>

**2. Opinion writing develops students' analytical abilities, while also strengthening students' critical reading skills and demonstrating the interdisciplinary nature of practice.** Both the office memo and judicial opinion provide students with opportunities to develop their analytical abilities by applying precedent to the facts of specific problems.<sup>71</sup> Opinion writing provides two additional benefits. First, writing an opinion improves students' critical reading skills by teaching students the structure of a judicial opinion.<sup>72</sup> Second, writing an opinion, while reading opinions in other courses, helps students see the crossover in their coursework and the integrated nature of the practice of law.<sup>73</sup>

**(a) Opinion writing improves critical reading skills and deepens student learning.** Sound analysis by law students and lawyers rests upon the critical reading of legal authority.<sup>74</sup> "One of the most important skills in law school is the ability to read a judicial opinion efficiently and accurately . . . ."<sup>75</sup> Additionally, judicial opinions are the primary vehicle through which students are taught in their casebook courses during the first year.<sup>76</sup> In writing a judicial opinion, students gain hands-on ex-

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69. See generally Rowe, *supra* n. 16, at 1196–1197.

70. Student Comments from Judicial Opinion Writing, Widener Sch. of L. (June 15, 2010) (written comments on file with Author).

71. See *supra* n. 63 and accompanying text.

72. See *infra* sec. II(2)(a).

73. See *infra* sec. II(2)(b).

74. Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 Vand. L. Rev. 135, 152 (1987); see also McKinney, *supra* n. 24, at xiii; Oates & Enquist, *supra* n. 9, at 28.

75. Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 Seattle U. L. Rev. 603, 603 (2006); see also Michael Hunter Schwartz, *Expert Learning for Law Students* 85 (2d ed., Carolina Academic Press 2008) (explaining "expertise in reading cases is crucial to [law] student success").

76. Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal*

perience with the structure of an opinion, which aids in the development of critical reading skills.

Learning to read legal authorities is difficult for the novice legal reader.<sup>77</sup> Beginning law students lack extensive background knowledge about the law, which is necessary for understanding legal precedent.<sup>78</sup> Because law students do not have this background knowledge, they rely more heavily on text-based strategies when reading.<sup>79</sup> In a text-based strategy, a reader follows the text's structure and organization in working to comprehend the material.<sup>80</sup> For many new law students, the text-based strategy is of little help because they do not understand the structure and organization of a judicial opinion.<sup>81</sup> Many law professors assume law students are strong readers and do not teach students about an opinion's structure.<sup>82</sup>

Because beginning law students default to text-based reading strategies, learning the structure of judicial opinions improves their reading comprehension.<sup>83</sup> While writing an opinion, students internalize the common organizational structure of opinions, which takes students a step beyond case briefing in the de-

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*Course*, 3 Nev. L.J. 32, 32 (2002); see also Schwartz, *supra* n. 75, at 10–11, 85 (“Law school instruction principally deals with four related units of instruction taught together as an integrated whole: rules of law, court opinions, public policies, and hypotheticals. . . . [Judicial opinions are] the axis around which the other three units revolve.”).

77. Both Professor Christensen and Professor Dewitz reference novelist Scott Turow's comparison of learning to read legal authority to “something like stirring concrete with my eyelashes.” Christensen, *supra* n. 75, at 604; Peter Dewitz, *Conflict of Laws Symposium: Reading Law: Three Suggestions for Legal Education*, 27 U. Toledo L. Rev. 657, 661 (1996).

78. Dewitz, *supra* n. 77, at 661–662.

79. *Id.* at 662.

80. *Id.* “The more a reader knows about the structure or organization of a text the more smoothly comprehension can proceed.” *Id.* at 658. Professor Dewitz illustrates this point with reference to reading a newspaper article. *Id.* A reader that is familiar with the structure of a newspaper article knows the most important parts will be covered in the first sentences and paragraph. *Id.* The rest of the article develops and elaborates on the beginning information. *Id.* A reader that understands this structure can focus attention on the lead information and stop reading when he or she has learned what he or she wants to know. *Id.*

81. Christensen, *supra* n. 75, at 607.

82. Leah M. Christensen, *Learning outside the Box: A Handbook for Law Students Who Learn Differently* 33 (Carolina Academic Press 2011) (explaining to law students “rarely will your law professors discuss *how* you should approach legal reading. Instead, law professors will assume that you are an excellent reader because you have obviously been successful as a student before getting into law school.”); see also Fajans, *supra* n. 22, at 337 (explaining that discussion of judicial opinions in the law school classroom focuses on content and not structure).

83. See generally McKinney, *supra* n. 24, at 17–23; Christensen, *supra* n. 75, at 640; Dewitz, *supra* n. 77, at 659.

velopment of critical reading skills.<sup>84</sup> Knowing the general layout of an opinion provides an organizational framework that students can use as they read judicial opinions in their courses. When students read using a framework, or context, they read more effectively and efficiently.<sup>85</sup> Having a context when reading new material results in a deeper level of engagement between students and the material and increases the likelihood that students will understand the material.<sup>86</sup>

Internalizing an opinion's structure is also a step in a student's development as an expert legal reader. Most expert legal readers understand the organization of an opinion and use that knowledge to read opinions deeply.<sup>87</sup> After writing a judicial opinion, one student noticed she was reading cases more quickly and effectively, like an expert legal reader.<sup>88</sup> By writing an opinion, the student learned that most court opinions begin with a quick overview and end with the disposition. The student applied this knowledge to reading opinions. Now when she reads, she previews the opinion by reading the first few paragraphs and verifies the outcome by flipping to the end, just like an expert legal reader.<sup>89</sup> As students develop as expert legal readers, their understanding of the legal texts improves and learning is accelerated.<sup>90</sup> Therefore, learning an opinion's structure through writing im-

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84. See generally Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J ALWD 73, 97 (2004) (discussing process approach to writing and explaining "[w]riting is a way of thinking and learning, not just a means of recording thought or testing students' abilities"). For a description of the general structure of a judicial opinion, see *supra* note 58.

85. See generally *Best Practices*, *supra* n. 28, at 141–142; Rideout & Ramsfield, *supra* n. 18, at 81–82; see also Woei Hung et al., *Problem-Based Learning*, in *Handbook of Research on Educational Communications and Technology* 488 (3d ed., Routledge 2008) (“[K]nowledge that is anchored in specific contexts is more meaningful, more intergraded, better retained, and more transferable.”); Susan A. Ambrose et al., *How Learning Works: Seven Research-Based Principles for Smart Teaching* 53 (Jossey-Bass 2010) (explaining that “when students are provided with an organizational structure in which to fit new knowledge, they learn more effectively and efficiently than when they are left to deduce this conceptual structure for themselves”).

86. *Best Practices*, *supra* n. 28, at 141–142; Comm. on Devs. in Sci. of Learning et al., *How People Learn: Brain, Mind, Experience, and School* 17 (Nat'l. Academy Press 2000); McKinney, *supra* n. 24, at 17–19; Schwartz, *supra* n. 75, at 5.

87. See Dewitz, *supra* n. 77, at 659 (describing how an expert reads a judicial opinion, which is based upon the expert's understanding of the structure of an opinion).

88. See Student Comments from Judicial Opinion Writing, *supra* n. 70.

89. See Christensen, *supra* n. 75, at 610 (explaining that expert legal readers preview a judicial opinion before reading it in greater depth).

90. See Dewitz, *supra* n. 77, at 672.

proves students' critical reading skills and deepens their learning.<sup>91</sup>

**(b) Teaching students to write opinions, as they simultaneously read them in other classes, helps students see the interrelation between their coursework and, ultimately, the integrated nature of practice.**<sup>92</sup> Students tend to compartmentalize knowledge by course, semester, or professor.<sup>93</sup> Most law schools encourage compartmentalization by packaging theory into separate subjects and separating theory from skills.<sup>94</sup> It should not surprise legal educators that students then learn the law compartmentally.<sup>95</sup> Teaching students compartmentally fails to equip them for practice.<sup>96</sup>

Recently, much has been written on the benefits of incorporating more skills and values into substantive law and theory courses.<sup>97</sup> Introducing students to legal writing through a judicial opinion creates another opportunity to integrate skills and casebook courses. For example, writing an office memo about a contracts issue demonstrates a link between legal writing and contracts classes; writing a judicial opinion about a contracts issue shows an even closer connection because students use the same vehicle to learn about the same subject matter in both courses. As students read opinions while they write them, students begin to view the law in a more integrated fashion, which is how they will work with the law in practice.

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91. In her article on the declining use of the office memo in practice, Professor Robbins-Tiscione reported some recommendations from law school graduates about how to structure the legal writing curriculum to reflect the realities of practice. Robbins-Tiscione, *supra* n. 3, at 47. One graduate suggested that law schools teach judicial opinion writing because it deepens understanding of the law. *Id.*

92. See Karen Gross, *Process Reengineering and Legal Education: An Essay on Daring to Think Differently*, 49 N.Y. L. Sch. L. Rev. 435, 442 (2004). "And, perhaps it goes without saying but the signal to students would be that everything taught is not only related but of co-equal importance. In other words, researching and writing about Contract law is as important as substantive Contract law." *Id.* at 456.

93. Ambrose et al., *supra* n. 85, at 31–32.

94. Gross, *supra* n. 92, at 441; Noble-Allgire, *supra* n. 76, at 32–33.

95. Gross, *supra* n. 92, at 443–444; Noble-Allgire, *supra* n. 76, at 40.

96. Gross, *supra* n. 92, at 443. As Professor Gross explains, a client does not go to a lawyer with a UCC issue, possible tort claim or criminal law question. *Id.* A client goes to a lawyer with a problem and the lawyer must identify the different areas of law involved. *Id.*; see also Noble-Allgire, *supra* n. 76, at 33 (discussing the need to integrate the study of skills and substance as a way to more fully prepare students for the practice of law).

97. See Lysaght & Lockwood, *supra* n. 85, at 106–107; Noble-Allgire, *supra* n. 76, at 33, 36–41.

**3. Familiarizing students with the structure of a judicial opinion also assists students in becoming efficient case-law researchers.**<sup>98</sup> An opinion provides students with similar research opportunities as the office memo.<sup>99</sup> While opinion-writing students may have some research leads from which to start,<sup>100</sup> these leads do not eliminate the need for additional research to ensure that students have law that is complete, accurate, and up-to-date.<sup>101</sup>

While the research process for the office memo and a judicial opinion is similar, the opinion-writing process actually helps some students develop as researchers. In a recent study, Professor Anne Enquist discovered that one of the keys to student success in legal writing courses is the ability to research efficiently.<sup>102</sup> She discovered that highly successful students used case headnotes as time-saving devices to assist in focusing on the relevant portions of opinions.<sup>103</sup> Opinion writing leads some students to discover that parts of opinions can be used like headnotes to save time during research. For example, one opinion-writing student had not been using headnotes when researching, but learned to scan and select cases more quickly based on her new understanding of the structure and content of an opinion.<sup>104</sup> Writing an opinion taught her that opinions begin with introductory sections con-

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98. See Aldisert, *supra* n. 22, at 103 (suggesting that efficient legal researchers use the introductory paragraphs of opinions as filtering tools).

99. See Fajans et al., *supra* n. 22, at 358; George, *supra* n. 22, at 713–714.

100. Before beginning her research for a judicial opinion, a student may have parties' briefs and lower court opinions in the case. See Dunnewold et al., *supra* n. 61, at 62–64; Lebovits & Hidalgo, *supra* n. 59, at 30–31. Providing the legal authorities on an issue through such documents in an opinion writing assignment would be similar to providing students with authorities through the closed-universe office memo assignment. See generally Rowe, *supra* n. 16, at 1202 (explaining that the first assignment in a legal writing course is usually a "closed universe" memorandum in which the professor provides the legal authorities to the students). Also, the possibility exists for legal writing professors to create opinion-writing problems that mirror real-life judging, but do not give students any leads. For example, student may draft an opinion that addresses subject matter jurisdiction *sua sponte* without the benefit of briefing or lower court decisions on the issue. The amount of research leads that a professor provides in an opinion-writing assignment is limited only by the professor's imagination and comfort level.

101. See Fajans et al., *supra* n. 22, at 358; George, *supra* n. 22, at 713–714.

102. Anne M. Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students*, 82 St. John's L. Rev. 609, 629, 635–637 (2008).

103. *Id.* at 636. Conversely, less-successful students did not read headnotes and reported spending more time researching than did the highly successful students. *Id.*

104. Student Comments from Judicial Opinion Writing, *supra* n. 70.

taining information similar to that found in headnotes.<sup>105</sup> She applied this knowledge to her research process and began to read the introductory paragraphs of an opinion first, and based upon that reading, decided whether to continue reading further.<sup>106</sup> Drafting the introductory section of an opinion taught this student that she could use that section as a filtering tool to research more efficiently.

**4. Opinion writing encourages students to become more effective writers by having them assume the role of their future audience.**<sup>107</sup> A judicial opinion offers a writing experience similar to that of the office memo;<sup>108</sup> however, writing an opinion provides an additional advantage to students as they develop as writers. After students write an opinion as a judge in the first semester, they draft a brief to a judge in the second semester.<sup>109</sup> Writing to a judge, after having written *as* a judge, helps students appreciate writing to an audience and develop as effective writers.

Writing and revising with the reader in mind is a hallmark of an experienced and effective legal writer.<sup>110</sup> As novice legal writers, most first-semester law students struggle with viewing their writing from their readers' perspectives.<sup>111</sup> Typically, they present their analyses in the manner in which they learned the materials, reporting case-by-case details without any explicit statements of the synthesized legal rules.<sup>112</sup> Most students also ne-

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105. See Aldisert, *supra* n. 22, at 103 (explaining that the introductory sections of opinions should let the reader know the scope, theme, content, and outcome as concisely as possible); Erik Belt, *Concerned Readers a/k/a Lawyers, Law Students, and Legal Scholars, Plaintiffs/Petitioners v. Judicial Opinion Writers a/k/a Judges and Judicial Clerks, Defendants/Respondents*, 23 U. Mich. J.L. Reform 463, 466 (1990) (stating that the introductory paragraph should quickly and concisely summarize the case, including the issues, identity of the parties, procedural history, key facts, and holding).

106. Student Comments from Judicial Opinion Writing, *supra* n. 70.

107. This Article does not suggest complete elimination of a predictive writing experience from the first year of legal writing. While students could write an opinion as the first major assignment, they should also be introduced to the office memo and client letter, which provide additional opportunities to write for various audiences.

108. See *supra* n. 58–66 and accompanying text.

109. See *Sourcebook*, *supra* n. 18, at 21 (explaining that most students write a trial and/or appellate brief in the second semester of the first year of law school); Rowe, *supra* n. 16, at 1202 (same).

110. Patricia Grande Montana, *Better Revision: Encouraging Student Writers to See through the Eyes of the Reader*, 14 Leg. Writing 291, 294–302 (2008).

111. *Id.* at 303.

112. *Id.* at 302.

glect to define key legal concepts for the reader and assume that the reader understands how the law applies to a particular set of facts.<sup>113</sup> This differs greatly from the organizational paradigm that experienced legal readers expect: a statement of the conclusion or issue, a detailed description of the synthesized legal rule, and an application of the rule to the facts to support the conclusion on the issue.<sup>114</sup> When students learn to set aside their perspectives and adopt those of their readers, the students unlock a key to communicating their legal analyses effectively.<sup>115</sup> Effective writers step outside themselves and their own understanding to communicate in a way that satisfies the readers' needs and expectations.<sup>116</sup>

By writing as judges during their first semester, students gain insights into what judges expect from briefs. Then, when students write briefs in the second semester, they have a better understanding of how to tailor their briefs to better serve their readers' needs.<sup>117</sup> Students have repeatedly expressed how helpful it was to them, as developing attorney-writers, to write as judges. One student stated,

I think the most important thing that I took from "being behind the bench" is the importance of effective brief writing . . . . If something is a chore to read, I think it is not going to be read as much, or at the very least, it discredits the party somewhat in the eyes of the reader.<sup>118</sup>

Another student reflected:

I recognize that as a practicing attorney, it is of the utmost importance to make things convenient for the judge and the judge's staff. Specifically, I had a difficult time analyzing

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113. *Id.* at 304.

114. *Id.* at 302; *see also* Edwards, *supra* n. 17, at 83–118; Neumann, *supra* n. 17, at 92–97.

115. *See* Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 *Leg. Writing* 1, 2 (2003); Montana, *supra* n. 110, at 302.

116. Montana, *supra* n. 110, at 309.

117. *See generally* Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 *Geo. J. Leg. Ethics* 237, 237 (2008) ("Opinions open windows into judges' minds and show how judges fulfill their duties.").

118. *Judicial Opinion Writing Students' Journal Entries* (Nov. 11–14, 2011) (on file with Author). Another student responded similarly. She learned that "[t]he judge doesn't want to have to spend time figuring out what your argument was. He/she just wants to know what and why you are arguing what you are." *Id.*

the merits of [the party's] case because her counsel wrote an ineffective brief. She cited too few sources, and when she did, she would simply copy and paste block quotes. This was not helpful in articulating why her position should prevail. An attorney should cite to proper authority and give brief summaries of the cases. All the while, the attorney should make a concerted effort to apply his client's position to the case law. Sometimes I felt like [the party's] attorney was citing to case law and wanted the court to construct her argument through inference.<sup>119</sup>

Although these students had written briefs and been introduced to the importance of writing for an audience, writing as a judge drove that lesson home.

Teaching practices in other disciplines support these students' experiences.<sup>120</sup> Role-play lessons are used to provide business students with insights into the needs of audience members so that the students can modify their own behaviors to both satisfy their audiences' expectations and achieve the students' own personal goals.<sup>121</sup> Sales persons are typically taught persuasive strategies by assuming the role of the prospective buyer.<sup>122</sup> They learn that they will be more successful if they think like a buyer and stop acting like a seller.<sup>123</sup> This same lesson from sales train-

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119. *Id.* An additional student indicated that one of the most important lessons that he took away from writing a judicial opinion was to "Roadmap!" in his briefs. *Id.* The student noted that the easier you make a judge's job, the happier the judge will be. *Id.*

120. Role-playing has been recognized as an effective and powerful technique to teach communication and negotiation skills to world and business leaders. See Michael D. Kanter, *War and Peace: Simulating Security Decision Making in the Classroom*, 40 *PS: Political Sci. & Pol.* 795, 795-798 (2007); Olusegun Agboola Sogunro, *Efficacy of Role-Playing Pedagogy in Training Leaders: Some Reflections*, 23 *J. Mgt. Dev.* 355, 356, 358 (2004); Jane Z. Sojka & Mark S.B. Fish, *Brief In-Class Role Plays: An Experiential Teaching Tool Targeted to Generation Y Students*, 18 *Mktg. Educ. Rev.* 25, 25 (2008); Scott Widmier et al., *Using Role-Play Competition to Teach Selling Skills and Teamwork*, 17 *Mktg. Educ. Rev.* 69, 69-70 (2007). In addition, when students are engaged in role-playing they "become more aware of their own roles, and understand more clearly other people's roles and points of view." See Sogunro, *supra* n. 120, at 358.

121. Kellye Whitney, *Simulations in Management Education*, 5 *Chief Learning Officer* 48, 48-51 (2006); Widmier et al., *supra* n. 120, at 72.

122. Widmier et al., *supra* n. 120, at 69-72; see generally Jerry Acuff & Wally Wood, *Stop Acting Like a Seller and Start Thinking Like a Buyer: Improve Sales Effectiveness by Helping Customers Buy* (Wiley 2007); Bill Stinnett, *Think Like Your Customer: A Winning Strategy to Maximize Sales by Understanding How and Why Your Customers Buy* (McGraw-Hill 2004).

123. Acuff & Wood, *supra* n. 122, at 21 ("The important point here is that you obtain credibility by not focusing on yourself. Don't think 'How do I make this sale?' 'How do I make my quota?' or 'How do I get to yes?' Think like a buyer, don't act like a seller.").

ing applies to law students. Writing an opinion helps students think like judges and discover the best ways to write effectively, so that they can advocate effectively.<sup>124</sup>

**5. Writing as judges enhances students' development as professionals.** Much has been written on the duty of law schools to cultivate professionalism in students.<sup>125</sup> Much has also been written on how some law school practices are actually detrimental to students' well-being, which consequently adversely impacts their professionalism as practicing attorneys.<sup>126</sup> Legal educators teach professionalism not so much in what they say but in what they do.<sup>127</sup> Students learn to treat others with respect and value others' contributions when they feel respected and valued while they are learning.<sup>128</sup>

Having students play the roles of judges writing opinions, rather than the roles of junior associates writing memoranda, is a small step toward valuing students, and in turn, promoting their professionalism.<sup>129</sup>

124. See Aldisert, *supra* n. 22, at 142 (“In substance, then, to write effectively is to sell effectively. That is why I can comfortably think of judges and lawyers as salesmen, a function they do not always recognize and one that many of them would probably deny.”).

125. See e.g. *Best Practices*, *supra* n. 28, at 79–91; *Carnegie Report*, *supra* n. 10, at 29–34; Patrick E. Longan, *Teaching Professionalism*, 60 *Mercer L. Rev.* 659 (2008); Walker, *supra* n. 48, at 422–425.

126. See e.g. *Best Practices*, *supra* n. 28, at 32–34 (discussing sources of law student distress such as the grading and ranking system, high cost of law school, overwhelming workload, and curriculum that discounts interpersonal skills); *Carnegie Report*, *supra* n. 10, at 31 (discussing competitive classroom environment and grading on the curve as obstacles to students' ethical development as lawyers); Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity, and Happiness*, 11 *Clin. L. Rev.* 425, 433–438 (2005) (“All of the data provides empirical support for the concern that our legal training has precisely the opposite impact on students from that suggested by our rhetoric—it appears to undermine the values and motivation that promote professionalism as it markedly diminishes life satisfaction.”); Nancy Levit & Douglas O. Linder, *Happy Law Students, Happy Lawyers*, 58 *Syracuse L. Rev.* 351, 352 (2008) (stating that legal education can adversely affect law students' well-being and the “corrosive effect[s] carry over into legal practice”).

127. Krieger, *supra* n. 126, at 425; Sparrow, *supra* n. 48, at 142–143.

128. Levit & Linder, *supra* n. 126, at 359–362; Sparrow, *supra* n. 48, at 142–143.

129. Professor Krieger suggests that law teachers

[d]o everything possible so that the law school experience preserves and strengthens, rather than dampens, the enthusiasm, idealism, and integrity (in its broadest sense) of your students. Because intrinsic pursuits and basic need satisfaction are foundational to both professionalism and personal satisfaction, we need to model and encourage them persistently if we genuinely intend to produce happy, thriving, professional lawyers.

Krieger, *supra* n. 126, at 438. For a discussion on why legal writing courses are good plac-

[A]ssignments that place law students in the role of “lowly summer clerk” working for an impatient and demanding “senior partner”—though they might imitate some students’ first jobs—somehow don’t seem as inspiring as ones that let the students play the role of a judge.<sup>130</sup>

In addition, students’ confidence increases when they write as judges. Students have expressed how good it feels to be a judge.<sup>131</sup> They feel respected and powerful, yet challenged.<sup>132</sup> They are encouraged that they have the ability to write well-reasoned opinions as law students. Many students recognize instances when their own opinions are better organized, drafted, and supported than published decisions.<sup>133</sup> Students enjoy writing as judges. The experience encourages students and cultivates their professionalism.

**6. Opinion writing introduces students to the role of attorney as analyst and assists their development as decision makers.**<sup>134</sup> Most legal writing programs use the office memo to introduce students to an attorney’s role as predictor and advisor.<sup>135</sup> A student’s task in writing an opinion is essentially the same as in an office memo—he or she objectively weighs the

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es for students to develop professional values, see Sparrow, *supra* n. 48, at 133–134 (suggesting that legal writing courses are appropriate arenas to teach civility because the courses are required, relate to the practice of law, usually have smaller numbers of students, and are often taught by innovative and dedicated professors), and Walker, *supra* n. 48, at 439–440 (explaining why ethics and professionalism have been incorporated into the law school’s legal writing program).

130. Cobb & Kaltsounis, *supra* n. 58, at 163–164.

131. In the fall of 2012, I taught judicial opinion writing as an advanced legal writing course. Students drafted a majority opinion in a pending state appellate court case. Within a few weeks of when the students submitted their opinions, the state court published its decision. The situation presented a great opportunity for students to compare their work to that of the court, which we did during a class discussion.

132. *Id.*; see generally Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F.L. Rev. 941, 942 (1997) (“[A] difficult but essential task for the teacher is establishing a classroom climate and culture in which students feel and show respect and are willing to challenge and be challenged.”).

133. A professor could provide an opportunity for first-semester students to compare their opinions to a published decision. A professor can create a closed problem based upon an actual case. After students submit their opinions, the professor can direct students to the “real” opinion for the problem and ask students to compare their work to the published decision.

134. For a discussion of how opinion writing also enhances students’ development as advocates, see *supra* notes 117–124 and accompanying text.

135. See Edwards, *supra* n. 17, at 2; Neumann, *supra* n. 17, at 50–51.

strengths and weaknesses of arguments on both sides of a legal issue and decides which position should prevail.<sup>136</sup>

In writing an office memo, most students struggle with objectively analyzing the law and tend to skew their predictions in favor of their clients.<sup>137</sup> This “proclivity to overoptimism” in assessing the probability of success in their cases continues into practice.<sup>138</sup> While legal writing professors can design office memo problems to limit bias toward a client’s position,<sup>139</sup> a judicial opinion, by its very nature, requires students to analyze issues independent of a tug toward any client.<sup>140</sup> In writing an opinion, students are confronted with competing interests, which the students must evaluate in order to make the best legal decision. This experience of playing the judge helps students recognize the importance of weighing both sides of an issue when analyzing the law for a client.<sup>141</sup> As one student that had written an opinion explained, “[t]he insight I gained on the judicial decision-making process has already aided me in my career as I find myself more wisely considering the decision-making process that judges will go through on cases on which I’m working.”<sup>142</sup> Additionally, the idea of developing students’ analytical skills as attorneys by having them make decisions as judges is supported by the fact that students are taught to make decisions in a similar manner in other disciplines.<sup>143</sup>

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136. See Fajans et al., *supra* n. 22, at 337; Shapo et al., *supra* n. 31, at 171–172. While the decision-making process is objective in opinion writing, the writing could be considered persuasive, as the judge seeks to convince the readers that the case was properly decided. Fajans et al., *supra* n. 22, at 337; Shapo et al., *supra* n. 31, at 171–172. This objective decision-making/persuasive writing dynamic is the same for the office memo. Shapo et al., *supra* n. 31, at 171–172 (explaining that the memo is persuasive “in the sense that you convince your reader that your analysis of the problem is correct”).

137. Rowe, *supra* n. 16, at 1198.

138. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 *Psychol., Pub. Policy & L.* 133, 149 (2010).

139. Professors may have students draft the memo without assigning a client or have students switch clients mid-way through the semester. See Levine, *supra* n. 1, at 6.

140. See generally Aldisert, *supra* n. 22, at 45–55; George, *supra* n. 22, at 626–637. Generally, law professors should refrain from distancing students from clients. See *Carnegie Report*, *supra* n. 10, at 56–57. However, separation in this situation is to develop decision-making skills. Students could develop client-interaction skills through other legal writing assignments, which may include client interviewing or counseling through a client letter.

141. Student Comments from Judicial Opinion Writing, *supra* n. 70.

142. Email from Judicial Opinion Writing Student (Mar. 16, 2012) (on file with Author).

143. See generally Kanner, *supra* n. 120, at 795–798 (discussing role play in War, Peace, and National Security course); Sogunro, *supra* n. 120, at 356–368 (discussing role-

**7. Opinion writing offers students opportunities to develop the lifelong learning skills necessary to solving real-world legal problems.**<sup>144</sup> Due to the diversity of law practice, sheer volume of legal material, and continuing evolvement of the law, legal educators cannot teach students everything in three years of law school.<sup>145</sup> These same considerations—diversity of practice, volume of material, and evolvement of law—require that attorneys be lifelong learners.<sup>146</sup> “[A] crucial quality for a lawyer is autonomous learning, the ability to learn what needs to be learned to cope with a novel situation.”<sup>147</sup>

Students can be taught to be lifelong learners,<sup>148</sup> and most legal writing courses are designed to teach “lifelong skills adaptable

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play pedagogy in training leaders in various disciplines); Whitney, *supra* n. 121, at 49–51 (discussing role-play in business management training).

144. Theories behind developing students’ independence and lifelong learning skills are prevalent in educational research. Avi Kaplan, *Clarifying Metacognition, Self-Regulation, and Self-Regulated Learning: What’s the Purpose?* 20 *Educ. Psychol. Rev.* 477, 477 (2008). Experts use a variety of terms in discussing these skills in educational theory, such as metacognition, self-regulation, and self-directed learning. *Id.*; Daniel L. Dinsmore et al., *Focusing the Conceptual Lens on Metacognition, Self-Regulation, and Self-Regulated Learning*, 20 *Educ. Psychol. Rev.* 391, 391 (2008). The differences and overlap between metacognition, self-regulation, and self-directed learning is beyond the scope of this Article, and this section uses “lifelong learning skills” to encompass the broad range of abilities attorneys use to regulate and direct their learning throughout their law practice. *See generally Best Practices, supra* n. 28, at 66–67 (describing part of the skill set needed by attorneys in practice as “lifelong learning skills”); Dinsmore et al., *supra* n. 144, at 391–409 (exploring the differences and overlap among the terms metacognition, self-regulation, and self-regulated learning in educational literature).

145. *Best Practices, supra* n. 28, at 67; Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 *Geo. L. J.* 875, 889–894 (1984).

146. Feinman & Feldman, *supra* n. 145, at 894. Professor Michael Hunter Schwartz refers to these lifelong learning skills as “expert learning.” Schwartz, *supra* n. 75, at 3. Expert learning involves actively engaging with the material to be learned, taking responsibility for learning, and utilizing a three-phase learning cycle. *Id.* The three-phase, expert learning cycle, which includes forethought, performance, and reflection, can be described as it relates to the practice of law. *Id.* at 30–33; Feinman & Feldman, *supra* n. 145, at 894. First, as part of the forethought phase, a lawyer must recognize when he or she does not possess the knowledge and skill level for a new situation. *Best Practices, supra* n. 28, at 66; Feinman & Feldman, *supra* n. 145, at 894. In this phase, the attorney prepares herself to learn the new knowledge and skill. Schwartz, *supra* n. 75, at 35. The lawyer identifies what he or she needs to learn, knows the means through which he or she learns best, and develops strategies for acquiring the knowledge and skills. *Id.* at 35–52; Feinman & Feldman, *supra* n. 145, at 894. Second, in the performance stage, the attorney implements her learning strategies while monitoring the effectiveness of the strategies and making adjustments based on self-reflection. *Best Practices, supra* n. 28, at 66; Schwartz, *supra* n. 75, at 67–71. Finally, in the reflection stage, the lawyer evaluates her work and makes improvements in the future. Feinman & Feldman, *supra* n. 145, at 894.

147. Feinman & Feldman, *supra* n. 145, at 894; Schwartz, *supra* n. 75, at 73–80.

148. Schwartz, *supra* n. 75, at 5.

to new writing situations.”<sup>149</sup> When writing a judicial opinion, as when writing the office memo, students learn within the context of a legal problem.<sup>150</sup> Research suggests that such problem-based learning supports the development of lifelong learning skills.<sup>151</sup> In drafting an opinion, students practice developing planning strategies and identifying knowledge deficits.<sup>152</sup> During the writing process, students cultivate organization, time management, and self-assessment skills.<sup>153</sup> Finally, throughout drafting and after the final work is complete, students have opportunities to reflect upon their work and identify areas for improvement in the future.<sup>154</sup> By writing a judicial opinion, like the office memo, students build lifelong learning skills that will serve them well when writing in practice.

In sum, judicial opinions assist students in achieving the seven learning objectives outlined in the *Sourcebook*, while bestowing benefits the office memo cannot. Therefore, a judicial opinion is a viable alternative to the office memo as a primary teaching tool.

### III. THE PRACTICALITIES OF REPLACING THE OFFICE MEMO WITH A JUDICIAL OPINION

Replacing the office memo with a judicial opinion is a sound pedagogical decision. Considering the practicalities of carrying out that decision, professors can switch to an opinion rather painlessly.

#### A. Course Structure and Textbooks

Replacing the office memo with a judicial opinion as the primary teaching tool need not change the overall course structure in the first semester. The steps and sequence of writing an opinion are essentially the same as writing a memo.<sup>155</sup>

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149. Durako et al., *supra* n. 18, at 722; *see also* Margolis & DeJarnatt, *supra* n. 18, at 100.

150. *See supra* n. 59.

151. Sofie M.M. Loyens et al., *Self-Directed Learning in Problem-Based Learning and its Relationship with Self-Regulated Learning*, 20 *Educ. Psychol. Rev.* 411, 415 (2008).

152. *See generally* Schwartz, *supra* n. 75, at 190–196.

153. *See generally id.* at 195–198.

154. *See generally id.* at 192, 198–199.

155. *See supra* nn. 58–66 and accompanying text.

While the course structure and sequence would remain mostly unaffected by the switch, professors may choose to use a different textbook. Most legal writing textbooks showcase memoranda writing,<sup>156</sup> while only one includes judicial opinion writing.<sup>157</sup> The lack of textbook selection should not stop professors from making a judicial opinion the first assignment. First, most textbooks are written generally enough that professors could use them to teach opinion writing.<sup>158</sup> For example, the textbook *Legal Writing* presents many topics relevant to opinion writing, such as understanding legal rules, selecting authority, organizing analysis, and writing effectively.<sup>159</sup> Most of the text's material is not associated with writing a particular type of legal document, but applies to legal writing in general.<sup>160</sup> In addition, the book contains a chapter on the structure of a judicial opinion and includes a sample opinion.<sup>161</sup> A professor could refer to this book throughout most of the semester and then provide a few additional resources on the unique particulars of opinion writing.<sup>162</sup> Second, if professors did not want to use a general legal writing textbook, they could adopt one of the several books on judicial opinion writing.<sup>163</sup> Third, if opinion writing becomes more popular and widely taught in the first semester, new or updated textbooks reflecting this change will likely come onto the market.<sup>164</sup> Therefore, professors can

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156. See e.g. Dernbach et al., *supra* n. 9, at 259–291; Edwards, *supra* n. 17, at 13–232; Neumann, *supra* n. 17, at 65–88; Oates & Enquist, *supra* n. 9, at 97–239; Shapo et al., *supra* n. 31, at 171–208.

157. Fajans et al., *supra* n. 22, at 337–373.

158. See Dernbach et al., *supra* n. 9; Edwards, *supra* n. 17; Neumann, *supra* n. 17; Shapo et al., *supra* n. 31.

159. See Richard K. Neumann & Shelia Simon, *Legal Writing* (2d ed. Aspen Publishers 2011).

160. See *id.* at 9–99, 117–185.

161. *Id.* at 27–31. The book also covers topics such as “why courts care about policy,” “how courts use dicta,” and “how courts react to precedent from other jurisdictions,” which would be helpful in teaching opinion writing. *Id.* at 39–40, 47–49.

162. There are several books and articles on how to draft particular sections of judicial opinions, many of which include sample opinions. See e.g. Aldisert, *supra* n. 22; Dunnewold et al., *supra* n. 61; George, *supra* n. 22; Aliza Milner, *Judicial Clerkships: Legal Methods in Motion* (LexisNexis 2011); Ruggero Aldisert et al., *Opinion Writing and Opinion Readers*, 31 *Cardozo L. Rev.* 1 (2009); Lebovits & Hidalgo, *supra* n. 59; Sheppard, *supra* n. 60.

163. See Aldisert, *supra* n. 22; Dunnewold et al., *supra* n. 61; George, *supra* n. 22; Milner, *supra* n. 162.

164. For example, as contract drafting progressed from a boutique course to a more widely taught course, more textbooks and teaching materials became available. Telephone Interview with Tina L. Stark, Prof. in the Prac. of L. & Exec. Dir., Ctr. Transactional L. & Prac., Emory Sch. of L. (Nov. 19, 2010) (notes on file with Author).

change assignments and provide students with all the benefits of opinion writing without substantially changing how they teach the first semester of legal writing.

### B. Assignments

The approach to designing an opinion-writing assignment is the same as that taken to create a memo assignment.<sup>165</sup> The main difference between opinion and office memo assignments is how the facts are delivered to students. With the office memo, facts may be presented by written narrative, client file, or client interview (live, recorded, or written transcript).<sup>166</sup> A written narrative, or summary, of the facts is the traditional means of delivery<sup>167</sup> and provides the legal writing professor with the greatest amount of control over the students' interpretations of the facts.<sup>168</sup> The written narrative would not be a viable means of delivering facts to an opinion writer. An opinion writing assignment would likely resemble the court's case file,<sup>169</sup> and may contain parties' filings, deposition transcripts, briefs, and possibly trial and intermediate appellate court opinions. This method of fact delivery is being used successfully at the University of Maine School of Law, where students write bench memos,<sup>170</sup> instead of office memos, during their first semester of legal writing.<sup>171</sup> Students at

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165. In creating an opinion-writing assignment, much like an office memo assignment, professors must consider the objectives for the assignment, the time frame, and the degree of difficulty. For guidance on creating assignments, see Bannai et al., *supra* n. 56, and Levine, *supra* n. 1.

166. Bannai et al., *supra* n. 56, at 211; Levine, *supra* n. 1, at 6.

167. Levine, *supra* n. 1, at 6.

168. Bannai et al., *supra* n. 56, at 211. While a written narrative of the facts may be easier to create than some of the other forms of delivery, it has drawbacks. The fact summary is often copied by students when they write their own memoranda, and it does not reflect how facts are delivered in practice. See Levine, *supra* n. 1, at 6.

169. Writing an opinion based upon a court case file would not deprive students of the opportunity to work with a client case file. Students would still work with client files to draft a formal or informal office memo, client letter, or brief.

170. A law clerk typically writes a bench memo for the judge. Mary Dunnewold, *Please the Court: How to Write a Judicial Bench Memo*, 33 Student Law. 23, 23 (2005). After reviewing the parties' briefs, record, and lower court opinion (if any), a clerk drafts a bench memo to communicate an objective analysis of the case and recommend a course of action. *Id.* at 23–25.

171. Email from Nancy Wanderer, Leg. Writing Prof. & Dir., Leg. Research & Writing Program, to LWI listserv, *Re: The Chicken or the Egg* (Sept. 2, 2010) (on file with Author). A bench memo is also a good alternative to the office memo.

Maine Law receive the parties' briefs, appendix, and limited relevant authority in a pending Maine Supreme Court case.<sup>172</sup>

While preparing the materials for a judicial opinion assignment requires more work than summarizing the facts in a memo narrative, it does not need to be an overwhelming task. Professors may start with a trial brief, appellate brief, or moot court problem that they or others have used in the past. Brief assignments and moot court problems will likely have all the materials needed for the court record. There may also be sample briefs from each party, which may serve as the foundation for the briefs for an opinion assignment. Professors may also look to materials from real cases. The level of sophistication in real cases may be higher than would be appropriate for the initial assignment in the first semester of legal writing, but professors can trim and tweak a real case to adjust the degree of difficulty.

In switching from an office memo to a judicial opinion assignment, legal writing professors may initially hesitate to provide students with briefs and lower court opinions because these give "the answers" to students. Rather than giving students "the answers," the briefs and lower court opinions can be tools that professors use to provide guidance and structure to new law students who are completely unfamiliar with the law.<sup>173</sup> This is similar to the approach taken with closed-universe memo assignments, in which the major substantive issues are easily identifiable and students receive a limited number of legal authorities.<sup>174</sup> In addition, if there is a concern that briefs and lower court opinions eliminate the opportunity for students to analyze the issues

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172. *Id.* When I have taught opinion writing as an advanced legal writing course, I have used materials from pending state court cases for my assignments. My students appreciated the opportunity to work with real briefs and court records. Student Comments from Judicial Opinion Writing, *supra* n. 70. Using real materials may work best for closed-universe problems because there is always the possibility that a court will render its decision in the case while the students are drafting the opinion.

173. See Bannai et al., *supra* n. 56, at 193 (stating that a first writing problem "cannot be too easy"); Levine, *supra* n. 1, at 5 (suggesting that professors "cannot make an early assignment 'too simple'"); see also Anna P. Hemingway, *Making Effective Use of Practitioners' Briefs in the Law School Curriculum*, 22 St. Thomas L. Rev. 417, 418 (2010) (proposing the use of practitioners' briefs in the law school classroom because "[p]roviding students with practitioners' briefs filed in cases they are studying enhances students' learning by exposing them to more legal methods and practice").

174. See Levine, *supra* n. 1, at 5 (providing suggestions for initial legal writing assignments, including building "realistic walls" around the assignment); Rowe, *supra* n. 16, at 1202 (the initial first assignment is set in a closed universe).

for themselves, professors have the option of requiring students to draft trial court opinions without the benefit of briefs or providing redacted briefs or lower court opinions.<sup>175</sup> Designing opinion-writing assignments is similar to developing office memo assignments and is not an obstacle in using the opinion as the primary teaching tool in the first semester.

### C. Responding to the Bar

Despite the benefits to students in replacing office memoranda with judicial opinions, the bar may react negatively to the change. Some practicing attorneys<sup>176</sup> may perceive opinion writing as even farther removed from the realities of practice than memo writing.<sup>177</sup> Any resistance could be met, first, by assuring practitioners that students would still be exposed to the office memo. A judicial opinion would be a means of introducing students to analysis and writing, but students would still have the opportunity to write in a mock law office setting.<sup>178</sup> Second, professors should avail themselves of opportunities to explain to the bar that the use of an opinion as a teaching tool is part of an effort to better prepare students for practice. Opinion writing is as effective as the office memo in training students to become lawyers and bestows additional benefits in areas such as critical reading, research, and writing. Because the change to opinion writing is taking place during a time of wide-spread curricular reform among law schools,<sup>179</sup> the change in the first writing assignment should be highlighted as the innovative decision that it

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175. The redacted briefs or lower court opinions would contain the facts and holdings on issues, but not contain any analysis.

176. Presumably, judges would react positively to law students, their future law clerks, learning to research, write, and edit judicial opinions.

177. According to Professor Robbins-Tiscione's research on the use of the office memo in practice, very few experienced attorneys recommend abandoning the office memo despite its infrequent use in practice. Robbins-Tiscione, *supra* n. 3, at 45. Attorneys that supported replacing the office memo as a teaching tool were the most recent graduates. *Id.* at 46. Another indication of the bar's attachment to the office memo is that it has been the most frequently tested document in the National Conference of Bar Examiners' Multistate Performance Test. Natl. Conf. of B. Examrs., *Multistate Performance Test, Summaries 1997-2010*, [www.ncbex.org/multistate-tests/mpt](http://www.ncbex.org/multistate-tests/mpt) (accessed Apr. 28, 2013).

178. See *supra* n. 22.

179. See Karen Sloan, *Reality's Knocking As Law Schools Focus on Training*, Natl. L.J. (Sept. 11, 2009) (available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=120243376S1701>); Assn. of Am. L. Schs., *Conference on the Future of the Law School Curriculum* (June 11-14, 2011) (materials on file with Author).

would be. Third, the use of opinion writing as a primary teaching tool in the first semester should be empirically tested.<sup>180</sup> If there is empirical support for the use of an opinion instead of the memo, that evidence should be shared with the bar.

#### IV. CONCLUSION

The office memo is at the heart of most first-semester legal writing courses despite evidence that it is no longer widely written in practice. It continues to be the foundational assignment used in most legal writing programs because it requires students to engage in a variety of skills essential to communicating legal analysis and is a detailed document that professors can assess. Legal writing faculty can reap the benefits associated with the office memo as a teaching tool, while bestowing additional advantages to students, by replacing the memo with a judicial opinion as the first assignment. Opinion writing serves students by deepening their learning across their courses, advancing reading and research skills, enhancing students' writing abilities, and improving their confidence. If attachment to the memo as the heart of the first semester proves to be more sentimental than pedagogical, the time has come to prepare students for practice by putting them behind the bench.

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180. For an example of an empirical model for testing the efficacy of switching to opinion writing see Andrea A. Curcio et al., *Developing an Empirical Model to Test Whether Required Writing Exercises or Other Changes in Large-Section Law Class Teaching Methodologies Result in Improved Exam Performance*, 57 J. Leg. Educ. 195 (2007). See also Richard K. Neumann, Donald Schön, *the Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 Clin. L. Rev. 401, 421–422 (2001) (suggesting that we should not be teaching out of “habit and casual intuition,” but rather teaching ideas that we have tested empirically for validity).