Volume 4: A Watershed Moment

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Volume 4 came early in the history of the Journal. At that time, the editorial staff was slight, and the number of submitted manuscripts was small. Nonetheless, the Journal published valuable scholarship. With Volume 4, however, it had reached a watershed moment. The previous volumes offered articles on practical pedagogy and pedagogical theory. Now it was time to expand the horizon.

Although some volumes would continue in the traditional vein, with Volume 4, the Journal took itself in new directions. Two articles explored the frontiers of pedagogy—Suzanne Ehrenberg's article on the role and limitations of computer assisted learning in teaching Legal Writing[1] and Jessie Grearson's article on teaching students how to transition between writing for a legal audience and writing for other audiences.[2] Two articles discussed using portfolios—Steve Johansen's article on student portfolios[3] and Susan Dailey's article on teacher portfolios.[4] And two articles discussed wholly new topics—Dorothy Evensen's article on understanding the performance of nontraditional students in law school settings[5] and Beverly Blair's article on ethical considerations in advocacy.[6]

To my mind, the most innovative article was Diana Pratt's *Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion*.[7] In its analysis on persuasive lawyering, the article broke new ground. It discussed persuasion in the context of actual cases and examined how lawyers made persuasive arguments in their appellate briefs—a resource that other authors had yet to study in any sort of depth. In addition, it dealt with the intercultural aspects of persuasion by discussing how to educate a court about the culture of a native American tribe and the parental fitness of a lesbian mother.

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[1] Suzanne Ehrenberg, *Legal Writing Unplugged: Evaluating the Role of Computer Technology in Legal Writing Pedagogy* 4 LEG. WRITING 1 (1998).

[2] Jesse Grearson, *Teaching the Transitions*, 4 LEG. WRITING 57 (1998).

[3] Steven J. Johansen, *"What Were You Thinking?": Using Annotated Portfolios to Improve Student Assessment*, 4 LEG. WRITING 123 (1998).

[4] Susan R. Dailey, *Integrating Theory and Practice Through Teacher Portfolios*, 4 LEG. WRITING 149 (1998).

[5] Dorothy Evensen, *Trying on a New Discourse: Perceptions of Law Students Enrolled in a Trial Admissions Program*, 4 LEG. WRITING 23 (1998).

[6] Beverly J. Blair, *Ethical Considerations in Advocacy: What First Year Legal Writing Students Need to Know*, 4 LEG. WRITING 109 (1998).

[7] 4 LEG. WRITING 79 (1998).

In the first exemplar, Diana presents the narrative of Carlos Frank, an Alaskan Athabascan native who killed a moose out of season. In accordance with his tribe's custom, he engaged in the illegal hunt so that grieving members of the tribe could have a potlatch—one that included moose meat—as part of a funeral ceremony. He was convicted and sentenced to jail time and a fine. As a defense, his lawyers argued that the Free Exercise clause of the First Amendment justified the hunt. After losing in the lower state courts, they prevailed at the Alaska Supreme Court.[8]

The lawyers' task was to help the court see the facts from the non-mainstream perspective of the defendant. To that end, they had to place the relevant events in their cultural and religious context. They brought in anthropologists and tribal members to testify and characterized the arresting Wildlife Protection Officer as a government official and a Caucasian. Thus they framed him as a representative of the mainstream view who failed to understand the meaning of the moose hunt from viewpoint of non-mainstream tribal members. Nor could the officer understand the meaning of death and the significance of the funeral ceremony in the eyes of the Athabascans.

Although the defense prevailed, Diana points out that it invested considerable resources in the case and more resources than other clients might be able to amass. She also states the important intercultural lesson:

> This education process requires expert testimony of a kind the judges will respect. Historical and anthropological testimony works in the Native-American cases. In addition, the advocate must draw an analogy or build a bridge between the mainstream and nonmainstream perspectives. If the advocate fails to educate the court either by omission or because the opposition concedes the point, the mainstream perspective will prevail or the judge may draw the wrong kind of analogy and, for example, compare a sweat lodge to a sauna. As in other persuasive efforts, a tone that seems unconvinced or a style that divorces the client is also detrimental to the persuasive effort.[9]

Yet, the question remains whether these lessons apply to other non-mainstream cases. To show that they can, Diana considers a Virginia child custody case in which Sharon Bottoms, a lesbian mother, lost custody of her child.[10] Note that in the early nineteen nineties in a conservative state like Virginia, this result was not necessarily a surprise; yet, the state supreme court divided 4-3.

Here, the mother's lawyers employed social science studies to show that living in a lesbian household would not harm the child. Their argument failed at the trial court,

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[8] *Frank v. Alaska*, 604 P.2d 1068 (Alaska 1979).
[9] Pratt, *supra* note 4, at 97.
[10] *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

but succeeded at the intermediate appellate court. At the supreme court, the majority of the justices avoided the controversial issue and deferred to the finding of the trial court.

In contrast, a lesbian mother won a parallel case in the Indiana courts.[11] Diana attributes that outcome to three factors. First, the two mothers were arguing in differing procedural contexts in the two cases. Second, Sharon Bottoms had a number of personal failings. Third, in light of these failings, the sexual issue may have been more influential in Bottoms's case.

In distinguishing the outcomes of the cases of Carlos Frank and Sharon Bottoms, Diana argues that the Frank's lawyers were able to show that their client shared religious values with the court members while the Bottoms's lawyers were unable to show that their client and the court members shared similar values. Diana thus emphasizes the need for lawyers with non-mainstream clients to place those clients in a context with which mainstream judges are comfortable.

I have offered this detailed description to show the depth and breadth of the sort of analysis that our profession had begun to produce. I note as well the value of taking a particular case or controversy and exploring it for what it can offer. As I see it, Legal Writing scholarship is still at an early stage of development. Without dismissing the many excellent pieces of scholarship since 1998, I think we still have a way to go.

[11] *Teegarden v. Teegarden*, 642 N.E.2d 1007 (Ind. Ct. App. 1994).