CALL IT AN E-CONVO: WHEN AN E-MEMO ISN'T REALLY A MEMO AT ALL

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I came to teach legal writing after nearly twenty years of practicing law. I remember, dimly, the early days, when returning client calls was a multistep, multicolor process that involved a pink telephone message pad, a yellow legal pad, a black plastic two-hole punch, and a two-pronged, red manila correspondence backer. With the handset cradled on my shoulder, I listened to the client's question and scribbled notes with my pen, which I then dutifully punched and filed in the correspondence backer. With each subsequent client contact—whether by phone or by letter—I would punch and file successive notes and correspondence in the backer. Any attorney in our office could reconstruct the status of a matter by flipping through the backer, in reverse chronological order, to see the sequence of notes and letters that memorialized my conversations with the client. Occasionally, a thornier question warranted deeper analysis, and the phone notes and letters would be punctuated by a legal research memorandum addressed to the client and copied for the file.

Those days are long gone. My relationship with the telephone changed substantially over the years, and I used it less and less. Today, the paperless office predominates, and the red manila backer of yore has morphed into the modern lawyer's Microsoft Outlook inbox. Email is now ubiquitous; indeed, it is difficult for me to imagine my former law practice without it. And so it was with great interest in my first year of teaching that I studied the legal writing curriculum as it pertained to email. Given its central importance in my practice, I was stunned by its passing reference in my textbook. Seeking additional resources for teaching students about email, I found numerous sources about best practices for drafting emails of all kinds. But I also stumbled onto the lively debate of legal scholars over the exponential growth of email in modern law practice, and more specifically, the rapid emergence of the substantive email in place of

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the traditional legal research memorandum.[1] The legal scholarship intrigued me, not only for the intensity of the email-as-memo debate, but also for the regular use of the term "e-memo" to describe substantive emails generally.[2]

There is no doubt that over the years, the substantive email has steadily overtaken the traditional legal research memo as the primary means of delivering legal analysis.[3] Wrestling with this reality, legal writing scholars continue to debate how—and how much—to treat the substantive "e-memo" as its own curricular topic. Some question whether e-memos deliver legal analysis with the requisite rigor.[4] Others offer practical recommendations for using the newer medium for clear, confidential, and concise communication of legal analysis.[5] These debates are useful and necessary to understand the role of the substantive email in the modern law office; but in my experience, they are not complete. The substantive email, with its obvious similarities to a legal research memorandum, is easily framed as a substitute for the traditional form. But the substantive email is more than a memo in disguise, and to view the emergence of the substantive email solely in juxtaposition to the decline of the traditional memo is to deflect

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[1] *Compare* Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32 (2008) (announcing the demise of the traditional legal research memo, in the face of the rise of the substantive email), *with* Kirsten K. Davis, "*The Reports of My Death Are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471 (2013) (urging the continued relevance of the traditional legal research memo, despite the rise in email usage). These two scholarly articles sparked a vigorous scholarly conversation about the legitimacy of substantive legal emails as a replacement for traditional legal research memoranda, a conversation that I explore in Part I, *infra*.

[2] *See infra* Part II; *see also* Davis, *supra* note 1, at 484 ("Recently, legal writing textbook authors have begun incorporating into their textbooks the new memo category description, the 'e-mail memo' . . . .") (citing sources); Joe Fore, *The Comparative Benefits of Standalone Email Assignments in the First-Year Legal Writing Curriculum*, 22 LEG. WRITING 151, 154 (2018) (using the term "e-memos" broadly to refer to substantive emails).

[3] *See* Robbins-Tiscione, *supra* note 1, at 34; *see also* Fore, *supra* note 2, at 154 ("Over the past two decades, substantive emails, or 'e-memos,' have replaced traditional, formal legal memos as the most popular way for attorneys to deliver legal advice.").

[4] *See* Davis, *supra* note 1, at 486-508; *see also infra* notes 71-77 and accompanying text.

[5] *See generally* Fore, *supra* note 2; Charles Calleros, *Traditional Office Memoranda and E-Mail Memos, in Practice and in the First Semester*, 21 PERSPS: TEACHING LEGAL RES. & WRITING 105 (2013).

attention from what is perhaps the more compelling and prevalent reason for its ascent: namely, the decline of telephone communications and handwritten notes.

Just as the emergence of email has displaced the traditional legal research memorandum, the emergence of email has transformed traditional oral communications, too. As compared to analog methods, which imperfectly record oral exchanges in handwritten counterparts, email communications are marked by the ease with which the digital medium simultaneously facilitates notetaking, recordkeeping, and retrieval of information from routine conversations, in a form vastly superior to the previous paper record. For nearly two decades now, email has enabled lawyers to conduct asynchronous conversations with their colleagues and clients and to reduce those interactions to an electronic exchange, and specifically one that serves as an extensive set of notes, documented answers and advice, and a searchable (and readily retrievable) time-stamped record, all at once.

Given the advantages of digital dialogue, brief oral exchanges that at one time may not have ever found their way to written form at all are now documented and augmented by email. Viewed from this perspective, the substantive email is not a poor substitute for the traditional memo, but a rich written supplement to previously unrecorded conversation; and as such, it represents a new body of written work that did not exist before the advent of email. This new avenue for legal writing warrants independent attention in the legal writing curriculum, and even a moniker of its own. By my definition, an "e-convo" is an email sent in lieu of an oral communication that, before the widespread use of email, would not have been reduced to a written communication at all, whether by memo, letter, or otherwise. The "e-convo" is neither a letter nor a memo, in the traditional sense, nor is it merely a phone call or office conference. To teach the substantive email as a mere adaptation of any of these modes does not do it justice. In my view, the e-convo comprises a body of legal writing that has newly emerged in our increasingly text-heavy era, and it deserves an exegesis of its own.

This Article will demonstrate and discuss the specific drafting considerations that arise for emails when they replace or supplement what would otherwise be oral communications and handwritten notes, and it urges the inclusion of e-convos as a construct in the legal writing curriculum. Part I surveys the existing legal scholarship on the

rise of substantive emails and notes the extent to which such scholarship hints at the conversational quality of the digital medium, even as it persistently adheres to an interpretive framework that examines the substantive email solely as a replacement for the traditional legal memo. Part II posits that the rise of the substantive email in the modern law office also coincided with a decline in synchronous oral conversation, with its attendant handwritten notes, and proposes that a new category of substantive email arose in its place, one which is distinct from the predictive legal research memorandum and in many ways more robust than the oral communications it usurped. Finally, Part III examines the benefits of e-convos as documented dialogue and urges legal educators to include e-convos as a concept in the legal writing curriculum—not because the process of drafting an e-convo is so very different from drafting an e-memo, but because e-convos are different in so many ways from the oral communications they replace. After a survey of best practices for drafting legal emails of all kinds, Part III concludes by highlighting those existing best practices that assume greater importance when drafting an email in lieu of conversation.

I. The Rise of Email, the Decline of the Traditional Memo, and the Incomplete Picture That Has Emerged Thus Far

To date, the legal scholarship regarding substantive e-mails has largely focused on their resemblance to traditional legal research memoranda, notwithstanding the concomitant similarities of the very same mails to oral communications. As discussed below, this singular focus likely has its origins in the history and trajectory of such scholarship, including early definitions of "substantive e-mail," and contemporaneous data indicating a steep decline in the use of traditional legal research memoranda. This focus is wholly appropriate: The traditional legal research memorandum has historically been a linchpin of conventional legal writing courses, and no doubt there are substantial numbers of emails sent by lawyers today that would have been communicated in the form of a traditional legal memo in an earlier era. To describe such emails as "e-memos" is entirely accurate, and the ensuing discussion of their place in the legal writing curriculum is essential.

But not all legal emails are merely modern-day incarnations of traditional legal research memoranda, even substantive emails that contain thoughtful legal analysis. Most of them—including those that are unmistakably "e-memos"—also contain a conversational quality that goes far beyond what one would find in a traditional legal

memorandum. Existing literature frequently recognizes this conversational quality but stops short of expressly examining substantive email *as* conversation, and as a result, fails to capture its full function in modern law practice.

A. Substantive Emails Appear to Be Replacing the Traditional Legal Memorandum

The prevailing academic comparison of substantive emails to traditional legal memoranda began as early as 2006, when Professor Kristen Robbins-Tiscione conducted a survey of Georgetown University Law Center alumni, seeking "to determine the current methods used to communicate with and advise clients and to explore the ramifications for LRW curricula."[6] Of those alumni responding to the survey, a whopping 92 percent reported using substantive email to communicate with clients.[7] The same survey showed that even then, over ten years ago, the use of traditional legal research memoranda was on the wane, with 75 percent of respondents reporting that they wrote no more than three traditional legal research memoranda per year.[8] The survey results thus implied a dramatic rise in email usage and a sharp decline in the drafting of traditional legal memos, with an unmistakable correlation between the two.[9] In the face of this correlation, Robbins-Tiscione urged legal educators to recognize the "shift from traditional to informal memoranda and e-mail,"[10] by incorporating substantive email into the legal writing curriculum.[11]

In her article reporting the survey results, Robbins-Tiscione also offered some working definitions that provided a helpful vocabulary for future scholarship, as well as her own. She defined the "traditional legal memorandum" as "a formal written memorandum that used to be sent through the mail to clients, usually containing a prescribed number and order of elements: a question presented or issue, brief

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[6] Robbins-Tiscione, *supra* note 1, at 34.
[7] *Id.* at 32.
[8] *Id.* at 36.
[9] *Id.* at 48 ("Although legal advice was once sent via snail mail and communicated through traditional memoranda, informal memoranda and substantive e-mails appear to have supplanted them.").
[10] *Id.* at 49.
[11] *Id.*

answer or summary of analysis, statement of facts, discussion or analysis, and conclusion."[12] In contrast, she defined "substantive email" as "e-mail that contains legal analysis and/or advice in the body of the message as opposed to in an attached formal or informal memorandum."[13] Subsequent scholars have referred to such substantive legal emails as "e-mail memos"[14] and even simply as "e-memos."[15]

In discussing the work of Robbins-Tiscione in this Article, I attempt to use defined terms as she defined them, and I take a similar approach to the work of other legal scholars discussed herein. But to the extent that the definitions in existing scholarship are not uniform, and to the extent that I am attempting to draw distinctions not drawn by existing scholarship, for my purposes here, I fashion some definitions of my own. Accordingly, in this Article, I use the term "traditional legal memorandum" to include not only "a written memorandum that used to be sent through the mail to clients," as defined by Robbins-Tiscione,[16] but also interoffice memoranda that used to be provided in hard copy to supervising attorneys. Further, for my purposes here, I use the term "traditional legal memorandum" broadly, so as to encompass both formal and informal hard copy memoranda.[17] I adopt Robbins-Tiscione's definition of "substantive

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[12] *Id.* at 32, n. 1; *see also* Davis, *supra* n. 1 at 482 (adopting a similar definition of a "traditional" memo as "a memo that is based upon the 'classic' or 'comprehensive' structure and contains most or all of the following parts: question presented, brief answer, statement of facts, discussion, and conclusion").

[13] Robbins-Tiscione, *supra* note 1, at 32, n. 3. Robbins-Tiscione also defines a "substantive email" as "a message containing substantive information and not serving simply to forward an attachment." *Id.* at 42.

[14] *See* Davis, *supra* note 1, at 484 ("Recently, legal writing textbook authors have begun incorporating into their textbooks the new memo category description, the 'e-mail memo,' a term which can refer to either the delivery method or memo content or both.") (citations omitted); Calleros, *supra* note 5 (referring to "e-mail memos" throughout).

[15] *See, e.g.*, Fore, *supra* note 2, at 153.

[16] *See supra* note 12 and accompanying text.

[17] Some authorities that I cite in this Article, including Robbins-Tiscione, further distinguish between "formal" legal memoranda and more "informal" ones, which consist of some but not all of the traditional elements, such as a memo that includes only the question presented and brief answer. *See* Robbins-Tiscione, *supra* note 1, at 33 ("As for substantive e-mail, the formats currently being used . . . seem to vary, but they approximate an informal memorandum, which includes a statement of the legal issue and the attorney's conclusion or advice, followed by supporting analysis."); Sheila F. Miller, *Are We Teaching What They Will Use? Surveying Alumni To Assess*

email" insofar as it pertains to an email "that contains legal analysis and/or advice in the body of the message," but without regard to whether or not the email may be replacing a traditional legal memorandum.[18] Finally, as for the term "e-memo," that term has been less well-defined in the literature to date;[19] and, as I argue in Part II, its use is more problematic. Accordingly, I reserve my own

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Whether Skills Teaching Aligns with Alumni Practice, 32 MISS. C. L. REV. 419, 433-34 (2014) (describing a survey of law school alumni, for purposes of which "formal interoffice memoranda" are distinguished from "informal interoffice memoranda" by the elements they contain). Other sources refer to internal "office memos" delivered to supervising attorneys, as distinct from traditional legal memoranda that may be addressed or delivered to clients. *See id; see also* Calleros, *supra* note 5 (discussing email memos in the context of law office communications). For my purposes here, the relevant distinction is between any kind of traditional legal memo (whether formal or informal, and whether drafted for an internal or external audience) that is prepared in hard copy, as opposed to digital form. For simplicity, in this Article I refer to all such hard copy memoranda broadly, as "traditional legal memoranda," or, to avoid ponderous repetition, simply as "legal memos."

[18] *Cf. supra* note 13 and accompanying text.

[19] Existing authorities do not use the term "e-memo" uniformly, and not all of them attempt to define the term with any particularity. *See, e.g.*, Fore, *supra* note 2, at 154 (referring to "e-memos" as "substantive e-mails," without further definition); Calleros, *supra* note 5, at 105 ("[A]n email memo should be defined as a presentation of legal analysis—or at least the fruits of legal research—set forth in a streamlined format in no more than one or two single-spaced pages so that a recipient on the move can read it without difficulty by scrolling down the screen of a compact hand-held electronic device such as a BlackBerry or iPhone."); Ellie Margolis, *Is the Medium the Message*? *Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC 1, 9 (2015) ("The key feature of the email memo is that the lawyer sends legal analysis directly in the body of the email, rather than attaching a separate legal document."). *Accord* Davis, *supra* note 1, at 485 (discussing legal writing texts and their treatment of e-memos and referring to a "lack of consistency in terminology, definition, and approach to contemporary legal memo writing in an electronic setting"). Generally speaking, these authorities define e-mail memos and e-memos as substantive emails. To the extent the sources cited in this Part I use the terms "e-mail memo" or "e-memo" to refer interchangeably to interoffice emails, client communications, or both, I do as well. The recipient of the e-memo is not my concern here, only its use in place of a traditional legal memorandum, in hard copy.

definition of an "e-memo" for Part III. Until then, I use the term as others do, as if it were a synonym for substantive emails generally.[20]

Much of the academic discourse in the wake of Robbins-Tiscione's article has focused on how substantive email has replaced traditional legal research memoranda. As Professor Ellie Margolis stated bluntly, "email has become the predominant means of communicating legal analysis, replacing the traditional office memorandum."[21] This scholarly focus on the traditional legal memorandum is no surprise, given its prominent place in a typical legal writing curriculum, as compared to its declining use in practice.[22] With the rising use of substantive email, legal educators have questioned the proper role of the traditional legal research memorandum versus the e-memo in the legal writing curriculum. The ensuing scholarship has been robust, with scholars on the one hand proposing that the e-memo is a new form of legal writing and that traditional legal memoranda may no longer be a helpful teaching tool,[23] and on the other, arguing that the traditional legal research memorandum remains the gold standard for teaching students rigorous legal analysis and competent representation.[24]

Mediating this divide, Professor Joe Fore has proposed that at this stage of the scholarly debate, the question is not whether to include email assignments in the first-year legal writing curriculum, but

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[20] *See generally supra* note 19.

[21] Margolis, *supra* note 19, at 3.

[22] *See* Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-Mail Professionally*, 71 MD. L. REV. ENDNOTES 1, 1 (2011) ("[L]awyers have retreated from writing formal memos to instead distilling the salient arguments of their legal analysis into an e-mail that recipients can read and share quickly and efficiently."); Fore, *supra* note 2, at 154 ("Over the past two decades, substantive emails, or 'e-memos,' have replaced traditional, formal legal memos as the most popular way for attorneys to deliver legal advice."); Kristen K. Tiscione, *The Rhetoric of Email in Law Practice*, 92 OR. L. REV. 525, 525 (2013) ("We have known for some time that e-mail messages are often used in lieu of traditional memoranda to convey objective legal analysis both to attorneys and clients.").

[23] *See* Margolis, *supra* note 19, at 4 ("It is time to question whether teaching traditional memos and briefs is the best way to prepare students for law practice.").

[24] *See* Davis, *supra* note 1, at 524 ("The traditional memo is not dead. In fact, in the technological, fast-paced society that legal practice replicates, it deserves to be revived fully to facilitate deliberative decision making and reduce the risks that come with efficiency, bias, and intuitive decision making.").

how.[25] In offering an approach, Fore first observes that "there are different types of e-memos—just as there are different types of traditional, formal memos."[26] Considering the different types of e-memos, Fore goes on to observe that "[s]ome involve simple legal issues that call for short, simple responses; some involve complex matters calling for complex analysis."[27] As a means of educating law students, Fore capitalizes on the type of email that calls for short, simple responses, and he advocates for the use of what he dubs "standalone e-memo" assignments[28] in the first-year writing curriculum. Fore distinguishes "standalone e-memo" assignments from "summary e-memo" assignments that ask students merely to write an email that summarizes another piece of writing – generally, a legal research memo or a brief.[29]

After cataloging the benefits of standalone email assignments as compared to summary e-memos,[30] Fore offers as a teaching tool a sample standalone assignment in the form of a "procedural e-memo."[31] The assignment asks students to assume receipt of an email from the supervising attorney, requesting the associate to find and report information about how to appeal an unfavorable discovery ruling by the magistrate judge.[32] Preparing a response requires students to research local court rules and write an email stating the timeline and procedure for appealing the magistrate's ruling.[33] Fore provides a sample student response in the form of a well-structured email, approximately one page in length, that serves as a model of clarity and readability.[34]

What strikes me about Fore's procedural e-memo assignment is that the gist of both the imagined question and the sample response could just as easily—indeed, perhaps *more* easily—be communicated orally, by phone or in person, with notetaking on both sides. And yet Fore's imagined circumstance rings true in my experience, as the sort

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[25] Fore, *supra* note 2, at 154.
[26] *Id.* at 158.
[27] *Id.*
[28] *Id.* at 161.
[29] *Id.* at 159.
[30] *Id.* at 161-171.
[31] *Id.* at 178-182; *id.* apps. A-C at 184-86.
[32] *Id.* app. A at 184.
[33] *Id.*
[34] *Id.* app. C at 186.

of unspoken email exchange that happens among lawyers and clients all day, every day, in law offices across the country. Why take the effort to compose an email? Why would a lawyer spend the extra time to convert what could be a simple sequence of conversation/research/conversation into a full page of text, given the paramount importance of efficiency in today's legal environment? And does this sort of perfunctory information exchange—which, as Fore expressly notes, hardly requires any predictive legal analysis—really rise to the level of an "e-memo" at all? As Part I.B demonstrates, the answers to the foregoing questions are hiding in plain sight, in the very body of scholarly work that generally depicts substantive emails as replacements for traditional legal research memoranda.

B. Prevailing Scholarship Implicitly Recognizes the Conversational Quality of Email, Without Expressly Examining It as Such

In the same scholarship that expressly explores substantive emails as substitutes for traditional legal memoranda, there are subtle clues that some of those emails may in fact be something else. For example, Professor Fore counsels that "legal writing faculty must avoid thinking that 'e-memos' are a monolithic category."[35] Among other distinguishing features, he notes that many of the legal emails that lawyers exchange today are "rule-focused, with little application;"[36] that they address questions that "have right and wrong answers;"[37] and that they are "time-sensitive."[38] Notably, these features stand in stark contrast to the usual circumstances under which the need for a traditional legal research memo arises: when the question calls for rule synthesis, the application of the synthesized rule or rule to a particular set of facts, and predictive, not definitive, conclusions.[39] If the features Fore describes accurately capture a large

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[35] *Id.* at 153.
[36] *Id.* at 166.
[37] *Id.*
[38] *Id.* at 167.
[39] *See* Davis, *supra* note 1, at 472 n. 2 (stating that the "typical purpose" of objective legal memos, sometimes referred to as "predictive" memos, is "to analyze a legal issue, offer a prediction on the outcome of the issue, and either offer or provide the basis for advice based upon that analysis and prediction"). *Cf.* ELIZABETH FAJANS ET AL, WRITING FOR LAW PRACTICE 265 (3d ed. 2015) (describing an office memorandum and stating that "[t]he memo is written to provide information, evaluation, and criticism about the law that controls the particular issue. The memo should identify all the issues

segment of today's substantive emails—and I believe they do—then "e-memo" may be a misnomer for this class of communication, and somewhat misleading to the extent it conjures associations with the traditional legal memorandum, in what is instead essentially a conversational context.

Moreover, Fore and other legal scholars consistently acknowledge the conversational qualities of email, despite persistent reference to substantive emails as a form of legal memo. Fore cites both Tiscione and Margolis for their description of email as "an 'ongoing conversation.'"[40] Legal writing expert Bryan Garner notes that "email often imitates conversation: There's a back-and-forth quality to it."[41] Tiscione directly acknowledges that email is in the nature of a conversation."[42] She goes so far as to compare email directly to the telephone, describing both as disruptive technologies of their day that require active participation from the recipient; [43] yet she stops short of analyzing the substantive email *as a phone call*, rather than as a memo. Indeed, even after expressly comparing an email to a phone call, her focus remains on the characteristics of email in contradistinction to those of the traditional legal memorandum,[44] thus impliedly accepting—or at least, perpetuating—the premise that a substantive email is most properly compared to a legal memo.[45]

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involved in the assignment and analyze all the arguments that can plausibly be made by each party.").

[40] Fore, *supra* note 2, at 157 (citations omitted).

[41] *See* Bryan A. Garner, *The Situation As I Understand It: Strive for Clarity and Context in Emails That Address Legal Questions*, ABA J., Aug. 2018, at 26, 26.

[42] Tiscione, *supra* note 22, at 536; *see also* FAJANS, *supra* note 39, at 259 (noting that "email is easily used as a substitute for a telephone call"); RICHARD K. NEUMANN, JR. & KRISTEN CONRAD TISCIONE, LEGAL REASONING AND LEGAL WRITING 227 (7th ed. 2013) (referring to the "conversational nature" of email).

[43] *See* Tiscione, *supra* note 22, at 528.

[44] *See id*. at 529-39. Tiscione's persistent depiction of the e-mail as a form of legal memo is particularly noteworthy, given her direct reference to email as "one link in the chain of conversation," *id*. at 528, and "part of an ongoing conversation," *id*. at 530.

[45] *Cf*. *id*. at 530-31 ("*Like a telephone call*, an e-mail feels more intimate than the traditional memorandum, affecting its structure, sentence length, and word choice.") (emphasis added).

In sum, despite numerous overtures in the direction of dissecting email as dialogue, the bulk of legal scholarship pertaining to emails in the legal writing curriculum steadfastly depicts substantive emails as e-memos. While many of these authorities allude to the conversational quality of substantive emails and their numerous purposes, they do so without expressly exploring the possibility that a certain percentage of substantive emails may be replacing oral communications in addition to, or instead of, replacing traditional legal memos.[46] And despite some disagreement over whether e-memos constitute a new genre of legal writing or simply another medium for conveying the contents of a traditional legal research memorandum, the underlying, unspoken premise is the same: On the continuum of legal communication, the substantive email stands in for what would otherwise be a traditional, written legal memo. This premise warrants further examination, as discussed in Part II.

II. Another Perspective: The Rise of Email, the Decline of Oral Communication, and an Emergent Body of Legal Writing

The substantive email, being a form of written legal analysis, bears a direct resemblance to the traditional legal memorandum; but this resemblance makes it all too easy to understand the one strictly in terms of substitution for the other. It is certainly true that "[b]efore email, written, objective analysis was delivered in the form of a single medium: the traditional memorandum."[47] But that is not to say that before email, *all* objective analysis was delivered solely in the form of a traditional, written memorandum. Necessarily, even before email, some objective analysis and other legal research results were not written down at all. Rather, substantive responses to certain legal questions could be delivered orally instead, by phone or in person,

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[46] A final example may be found in the work of Professor Katrina June Lee, who draws a connection between composing emails and engaging in oral argument, without equating the two. She describes how drafting legal emails can enhance analytical thinking skills, in much the same way as engaging in oral argument and conversations can help legal writing students articulate their thoughts. However, she does not undertake to explore how drafting emails may, in turn, help students further illuminate their oral communications, nor does she query whether emails may potentially replace oral communications. *See* Katrina June Lee, *Process Over Product: A Pedagogical Focus on Email as a Means of Refining Legal Analysis*, 44 CAP. U. L. REV. 655, 659-60 (2016).

[47] Tiscione, *supra* note 22, at 540.

especially if the questions called for short, time-sensitive, rule-based, and definitive answers.

This Article posits that substantive emails are overtaking not only the traditional legal memorandum but also the conventional phone call and other oral communications, too. If that is indeed the case, then lawyers today are committing to writing that which was never written down before, save perhaps as a set of notes. And in turn, to the extent that is true, we can say that a genuinely new body of legal writing and analysis has emerged, one which arguably evinces more rigor than the notes and conversations that preceded it, and which calls for its own place in the legal writing curriculum.

A. There Is Reason to Believe Emails Are Replacing Conversations, Too

The same evidence that spurred the e-memo debate suggests that email is encroaching on lawyers' ordinary conversation, as well as on the traditional legal research memo. Notably, based on her survey of Georgetown University Law Center graduates, Professor Robbins-Tiscione suggested not only that "the traditional legal memorandum is all but dead in law practice."[48] She also indicated that the survey respondents were "far more likely to communicate with clients about their research results by e-mail, *telephone*, face-to-face discussion, informal memorandum, or a letter, and *in that order of preference*."[49] In other words, even as early as the date of the survey, over ten years ago, practicing lawyers were *more likely to use email than the telephone,* or even face-to-face discussion, for that matter.[50]

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[48] Robbins-Tiscione, *supra* note 1, at 32.

[49] *Id.* (emphasis added).

[50] These results are consistent with results later obtained in an ethnographic study of working lawyers, which reported that "[e]ven in the smallest workplace, email exceeded face-to-face communication and phone calls as the means of communication, which meant that these attorneys were writing constantly." Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 LEGAL WRITING 63, 101 (2016); *see also* Fore, *supra* note 2, at 152 ("[E]mail is now the most popular way for lawyers to provide legal advice."); SHERRY TURKLE, RECLAIMING CONVERSATION: THE POWER OF TALK IN A DIGITAL AGE 251 (2015) (quoting a senior partner at a law firm saying,

Thus, the role of email in modern law practice should be considered not only in relation to the decline of the traditional legal memo,[51] but also in relation to other forms of communication it potentially displaces. As Professor Charles Calleros has observed, "[f]or decades, associates have communicated the fruits of their research in formats ranging from oral presentations to formal legal memoranda of varying length and complexity."[52] In his view, "[t]he growing practice of conveying legal analyses in e-mail correspondence is simply a technologically spurred extension of long-standing diversity in law office communications."[53] In short, "e-mail memos simply show up as additional points on this spectrum of formats."[54] Having pointed out this spectrum, Calleros then places email on a continuum *between* oral presentations and traditional office memoranda.[55] Yet even so, Calleros refers to email

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"Everyone—including clients—prefers to send emails rather than be on the phone, prefers to send emails rather than go out to lunch").

[51] As an aside, it may be useful to question whether the decline in the use of traditional legal memoranda would have happened, anyway, for reasons wholly independent of email (and the cost-savings it brings). Lawyers today are increasingly specialized. *Cf.* Miller, *supra* note 17, at 427 (describing UDSL law school alumni survey that indicated trend toward specialization). In addition, clients of large private firms, who are often in-house counsel, are arguably becoming more sophisticated consumers of legal advice. This specialization and sophistication combine to foster a deeper shared understanding of the basic legal principles and perhaps even key case law that may apply to a particular set of facts. As a result, many attorney-client communications today involve application of new facts to settled and well-known law, without the need for a full-length memo. This was the case in my own practice as an employment lawyer, because my clients were often in-house counsel who were themselves employment lawyers or directors of human resources. These clients were frequently already well aware of the key legal rules applicable to discrimination law cases, for example, so our conversations (and e-mail communications) were often focused exclusively on the endless variable fact patterns we faced, not redundant discussions of the legal standards that we both already knew.

[52] Calleros, *supra* note 5, at 106-07.

[53] *Id.* at 106.

[54] *Id.* at 107.

[55] *Id.* (listing a range of presentation formats in the following order: oral presentation, email memo, simplified office memo or formal client letter, and various formats of traditional office memo). As Calleros describes it, "If an assignment calls for more than an oral report but can be analyzed effectively in a memorandum of one or two pages, sending the analysis to an assigning attorney or client in the body of an e-mail makes it readily accessible." *Id.*

communications as "e-mail memos,"[56] thus retaining the implications of that semantical choice.

The fact that the "spectrum of formats" that Calleros identifies also includes oral presentations is important. It is useful to start from the oral end of the spectrum and consider how email may be encroaching on this format as well—and consequently, giving rise to a new body of legal writing consisting of material that was only spoken, not written, before.[57] If the use of substantive email to report research results has been expanding in both directions—replacing not only traditional legal memos, on the one hand, but also formerly oral communications, on the other—then some portion of the substantive emails classified as "e-memos" today may be more accurately described as "e-convos" instead. Simply put, not all substantive emails are sent in lieu of traditional legal memoranda.

For example, Professor Fore's procedural e-memo assignment imagines an exchange that could easily have taken the form of a telephone conversation or an office conference between lawyers in an earlier era.[58] When a supervising attorney needs information right away, and a local rule provides a clear answer, an associate could simply pick up the phone and tell the partner what she needs to know. And if email were not an option, that is likely what the associate would do, because the situation does not justify the time or expense of a traditional legal memorandum. But email is better than a phone call here, not only because the associate can send the answer without interrupting the partner, but also because an email can provide more detail than the partner could readily retain in memory or jot down in

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[56] *Id.*

[57] The oral presentation itself is an important skill that warrants attention in a curriculum designed to teach not only legal research and writing, but also lawyering skills more generally. *See generally* RICHARD K. NEUMANN ET AL., LEGAL REASONING AND LEGAL WRITING 177-182 (8th ed. 2017) (including a chapter dedicated to giving oral presentations to supervising attorneys). This Article, however, is concerned with how the same underlying research results may take shape when the researcher chooses to write the results down and send an email instead. The same considerations that make email a ready substitute for phone calls should apply with equal force to oral presentations, and my focus here is on what actually gets written instead of what might have been spoken, whether by phone, face-to-face discussion, oral presentation, or otherwise.

[58] *See supra* notes 31-34 and accompanying text.

notes. Moreover, the partner—or indeed, any future reader of the file—can refer back to the answer at any time, and even click through to the hyperlinked rule in its entirety, if provided.

As another example, Professor Calleros writes of an "e-memo" that could readily be recast as an "e-convo." Calleros describes a panel discussion at a legal writing conference, in which a transactional attorney "reported that she is constantly on the move, 'making deals,' and communicating with staff and associates through an iPhone or similar hand-held device. Her associates typically support her by sending e-mail messages conveying brief research findings in response to questions, limited in scope and requiring quick responses, which pop up during negotiations."[59] Professor Calleros offers this anecdote of the transactional attorney as evidence of the many forms an e-memo may take. But it is hard to imagine how, in the absence of email, a traditional legal memorandum—even an informal one—could or would be produced and transmitted under such conditions. The emails that the associates sent in this scenario did not replace any written legal memos that they would otherwise have sent. [60] More likely, if the supervising attorney were to be sitting at the bargaining table without access to email, she would step out of the room to place a call to her associates—or perhaps even proceed without the benefit of the clarifying research at all, if it were not essential to her work. That her associates can and do now send her emails in such exigent

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[59] Calleros, *supra* note 5, at 105-06.

[60] The fact that the associates' research results are committed to writing in the form of a substantive email does not thereby render the email a replacement for a memo that no one would ever have tried to write, had email not been an option. Legal writing authorities offer other examples of "e-memos" that could be readily recast as e-convos, if the alternate perspective I am suggesting were adopted. *See*, *e.g.*, LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK §19.3 (7th ed. 2018) (describing as a "short e-memo" a three-sentence response to a supervising attorney who asked to know what the statute of limitations was in Illinois for an action to recover damages for personal property). *See also* BRYAN A. GARNER, THE REDBOOK §16.7 (d) (LEG, Inc. d/b/a West Acad. Publ'g 4th ed. 2018) (hereinafter, "GARNER REDBOOK") (providing a procedural question about the timing of the refiling of an amended complaint as an illustration of an e-mail "in lieu of a research memo" that has a six-sentence, rule-based answer). I would argue that before the advent of email created a means of written communication that was cheaper and faster than before, such short, rule-based, and definitive answers would likely have been delivered orally to other lawyers or to clients, by phone or office conference, not via memorandum. Thus, "e-convos" may be a more precise term for many substantive emails that might otherwise be described as "e-memos."

circumstances, on the fly, in real time, is a testament to the new medium—and an indication that the emails in question represent new territory for legal writing. Lawyers can and do now communicate research results in writing that they likely never would or could have communicated in writing before.

This view—that e-convos stake out new ground for legal writing—is not at odds with that expressed by Professor Kirsten Davis, who opines that "'on screen' reading does not create a new legal memo category," and who "asserts that attempts to carve out 'substantive email' memos and 'informal' memos as separate types of documents are misguided."[61] Rather, this view pertains to a class of emails that contain material that would not otherwise be reduced to writing at all, in the absence of the digital medium, because the information or advice requested, by its nature, does not call for the kind of deliberation or predictive legal analysis that generally warrants a traditional legal memorandum.[62] E-convos distill to writing that which was oral before.

The question then becomes why content that could otherwise be communicated orally, and presumably more quickly, is ever transcribed in an email at all. But the reasons for email's ascendance are not hard to find, [63] and it is easy to see why lawyers use it so

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[61] Davis, *supra* note 1, at 477.

[62] *Cf.* NEUMANN ET AL., *supra* note 57, at 177 (observing that "the modern practice of law increasingly requires junior lawyers to report their research results orally" and that "[f]or many issues, a full, formal memorandum would not be efficient or necessary"). Oral presentations remain valuable for issues that require back-and-forth questions and answers. *Id.* But for other issues—the simple issues with definitive answers—an email can often take the place of an oral presentation entirely, in which case the email, while communicating substantive research results, is still no more a substitute for a traditional legal memorandum than the oral presentation was in the first place.

[63] *See* Fershee, *supra* note 22, at 9 ("E-mail can make difficult conversations a little easier by avoiding potentially volatile person-to-person contact that can make achieving client goals difficult. E-mail can make file sharing easier, late-night communication possible, and help lawyers check ministerial tasks off their to do lists more quickly by providing a quick and easy medium to ask neutral questions of opposing counsel. In short, e-mail has created huge advantages for many people in the legal profession and is likely here to stay."); *see also* FAJANS, *supra* note 39, at 259 ("Communication by email is simple, cost effective, and fast. Because typing and sending an email message

frequently. Like the telephone, email is instantaneous, dispensing with the need for a letter or memo to travel by mail.[64] But unlike the telephone, email is also asynchronous, thus dispensing with the need for two persons to be in the same place, at the same time, in the same room, or on the same line. Moreover, email is scaleable: "Even more so than telephones, e-mail gives us instant access to anyone, anywhere . . . , and unlike telephones, countless numbers of people can be contacted at exactly the same time."[65] Email also creates efficiencies in many other ways, [66] allowing lawyers to avoid the non-billable drain of "phone tag," the interruptions and disruptive impacts of scheduled conference calls, and the necessity of billing multiple lawyers' time for meetings and office conferences, which clients understandably frown upon.[67] These numerous advantages of email[68]

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is easy, however, people send many more messages, especially in-house messages, than they would send by paper or by telephone.").

[64] *See* Tiscione, *supra* note 22, at 529. This instantaneous quality stands in stark contrast to postal letters sent by "snail mail." Because emails resemble letters in other ways, legal writing authorities sometimes discuss the two forms together under the general topic of correspondence. *See*, *e.g.*, FAJANS, *supra* note 39, at 229 ("By 'letters,' we mean e-mail and other electronic communication as well as communication by postal mail, and our suggestions apply to both."). *But see* NEUMANN ET AL. *supra* note 57 (treating email and client advice letters in separate chapters of legal writing textbook, without equating the two). However, the immediacy of email lends it a conversational quality that formal correspondence does not possess. It is this very immediacy that enables email to replace what would otherwise be an oral conversation—not a memo *or* a letter. *Cf. id.* at 186 (describing client advice letters—but not emails—as "about halfway between a conversation with a client and an office memo"). Again, by my definition, an "e-convo" is an email sent in lieu of an oral communication that, before the advent of email, would not have been reduced to a written communication, whether by memo, letter, or otherwise.

[65] Tiscione, *supra* note 22, at 529; *see also* Fershee, *supra* note 22, at 2 ("E-mail made the transmission of the written word practically instantaneous, paperless, and virtually limitless.").

[66] Gerald Lebovits, *E-Mail Netiquette for Lawyers*, N.Y. ST. B. ASS'N J., Nov.-Dec. 2009, at 64 (noting that email is "cheaper and faster than a letter, less intrusive than a phone call, [and] less hassle than a fax" and it "eliminates location and time zone obstacles").

[67] *See* Robbins-Tiscione, *supra* note 1, at 34 ("[A]ttorneys are using e-mail to practice law in new ways that reflect their clients' growing demands for quick response time and simple, straightforward advice.").

[68] In fact, these advantages of email are so powerful that they not only displace the telephone, they potentially enable communication that may not otherwise have taken place *at all* before—whether by phone, memo, or

could explain why lawyers prefer it,[69] and why the telephone may be less and less useful as a tool by comparison.[70] Finally, in my experience substantive emails also hold the important possibility of documenting notes and research that would otherwise be handwritten (or typed in fragmented notes on a keyboard), and formally memorializing content that might otherwise be delivered orally, as explained more fully below.

B. When Emails Replace Oral Communications, They Represent a New Body of Legal Writing That Invites Much More Extensive Analysis Than an Oral Delivery and Warrants Independent Attention in the Legal Writing Curriculum

When viewed as enhanced conversations reduced to writing, e-convos arguably require more extensive analysis and greater detail than a phone call or other oral communication. Reframing email communications as replacing conversations rather than replacing

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otherwise—because constraints of place and time used to be prohibitive, before email provided another way. The predicament of Calleros' transactional lawyer, *supra* note 5 at 13, is a great example. The fact that an attorney sitting at the bargaining table can now communicate seamlessly and confidentially in the midst of real-time negotiations, without ever interrupting the process by leaving the room, creates the distinct possibility that she also now enjoys the luxury of asking questions she would never have bothered to ask before, when the hope of a timely and private response would have been futile.

[69] *See* Fershee, *supra* note 22, at 2 ("The reasons for the newly emerging preference for e-mail are multilayered and driven by client demands for cost-savings and efficiency; e-mail is getting a workout at most law firms.").

[70] Evidence suggests that "telephone culture is disappearing." Alexis C. Madrigal, *Why No One Answers Their Phone Anymore*, THE ATLANTIC, May 31, 2018, https://www.theatlantic.com/technology/archive/2018/05/ring-ring-ring-ring/561545/. Phones have lost their value as synchronous communication, because "[n]o one picks up the phone anymore." *Id*. None of this is to suggest that e-convos necessarily *should* replace oral conversations, at least not in every case. There is plenty of evidence to suggest that many aspects of human interaction are lost in written communications. *See generally* TURKLE, *supra* note 50. Moreover, despite the numerous advantages of email, many subjects are still best addressed by oral exchange. *See infra* notes 139-141 and accompanying text.

legal memoranda thus has important pedagogical implications. The reason is that if some substantive emails are replacing oral conversations rather than replacing written legal memos, then those emails represent information that was, by definition, not committed to writing before, except as a set of notes on both sides. The written record that results from an e-convo is not only more detailed and coherent than the handwritten notes that preceded it, it also essentially represents a new body of legal writing, born of a new medium that encourages lawyers to write things that were only spoken or captured in notetaking fragments before. By "new" I do not mean to imply that e-convos give lawyers a new way of writing emails, but rather that emails give lawyers a new way of conversing: in writing. E-convos are an expansion of what lawyers write, as substantive emails replace not only traditional legal memoranda but conversations, too. Keeping this alternative use in mind may help move email to the prominent place in the legal writing curriculum that it deserves, both by alleviating any lingering concerns that email communications, as a class, are merely watered-down memos, and also by elevating the need to instruct students on the conversational function of email, which plays a much more pervasive role in the practice of law than the term "e-memo" alone suggests.

A persistent concern about email communications, when framed as e-memos, has been a fear that the informality of the medium may encourage sloppy thinking[71] and a fear that when legal writers abandon the familiar, formal structure of a traditional legal memorandum, they compromise the analysis. Professor Davis has advocated for the retention of the traditional legal memo in legal writing programs for this very reason,[72] arguing that the process of drafting a formal legal research memorandum serves an important "forcing function" that encourages the kind of careful, objective deliberation essential to giving competent legal advice.[73] She warns

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[71] *See* Kristen K. Robbins-Tiscione, *Ding Dong! The Memo Is Dead. Which Old Memo? The Traditional Memo*, SECOND DRAFT (Legal Writing Inst., Macon, Ga.), Spring 2011, at 7 [*hereinafter* Robbins-Tiscione, *Ding-Dong!*].

[72] Although not the focus of this article, I strongly agree with Davis that legal writing courses should continue to teach students how to draft a formal memorandum, for the sake of the analytical skills and thought processes that it requires students to develop.

[73] Davis, *supra* note 1, at 505 ("Writing legal memoranda using the comprehensive form (i.e., question presented, brief answer, facts, discussion, conclusion) is the implementation of a forcing function; it is a disciplining structure that can be the cure for the biases of intuitive decision making."); *see also id.* at 487 ("[M]emo writing provides a structure that can force improved deliberative decision making."); *id.* at 504 ("Structures, like

against the simplicity of an e-memo, arguing that "simply because readers might want 'simple' or 'summary' answers to a legal question in a document that will be read on a screen does not mean that writers should be any less rigorous in the process of constructing memoranda."[74] In short, her concern is that emails, in their simplicity, may short-circuit competent legal analysis.

Other scholars echo this concern. Professor Robbins-Tiscione, who perhaps has most forcefully predicted the demise of the traditional legal memo, herself concedes that e-memos may be "more conclusory than full length memoranda and fail to preserve the writer's detailed thought process."[75] Professor Calleros warns that "[a]n associate might risk oversimplification if an assigning attorney is frequently on the move, is overly fond of her iPhone, and requests a short and pithy e-mail memo on a complex matter that merits much fuller analysis in a 15-page traditional office memorandum."[76] Legal writing expert Bryan Garner has observed that the formal legal memo "has become much less pervasive in law practice," lamenting that "[i]nstead, questions are answered more quickly (and, truth be told, less reflectively) in emails. A senior lawyer poses a query by email and asks for a quick-and-dirty answer. 'Don't prepare a formal legal memo!' the common refrain goes. 'Just email the answer.'"[77] With all of these scholars in agreement, Professor Davis is clearly not alone with her concerns.

Notably, however, such concerns may be largely academic. In a three-year ethnographic study of seven attorneys working in various law office settings, the researchers who conducted the study observed the attorneys writing hundreds of emails.[78] In the face of this enormous volume of written material, the researchers further observed that email comprised a large portion of the lawyers' reading and writing, but even so, noted that "their composing process for

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the structure provided in a comprehensive, objective memoranda, encourages deliberative thinking and, accordingly, competence. A particular structure for writing can have a 'forcing function' that encourages deliberative thinking.").

[74] *Id.* at 489.

[75] Robbins-Tiscione, *Ding-Dong!*, *supra* note 71, at 7.

[76] Calleros, *supra* note 5, at 108.

[77] Garner, *supra* note 41, at 1.

[78] Sinsheimer & Herring, *supra* note 50, at 100 ("Over the course of our observations, we saw the seven attorneys write hundreds of emails.").

email exhibited meticulousness and a high degree of concern for word choice and tone."[79] Further, "[w]hen the attorneys responded to partners' queries by email instead of drafting a formal memorandum, the emails they composed were carefully drafted."[80] One associate was observed in the study investing substantial time composing an email: "She spent two hours researching the question and referred to this research and her handwritten notes as she wrote."[81] This observation reveals a high degree of care and attention. Thus, there is data to suggest that lawyers in fact draft emails far more carefully than one might speculate based solely on the speed and informality of the medium.[82]

This very careful and considered approach to drafting emails becomes all the more salient in the context of e-convos – that is, in the context of email communications that replace conversational exchange, whether with clients or other attorneys. Again, the ethnographic study provides anecdotal data to bear this out. The same associate who spent two hours on her email "was sensitive to the fact that her emails replaced face-to-face meetings or phone calls, communication styles that would have allowed more give and take or more opportunity to clarify. Thus, she wanted to be as precise as possible."[83] The authors of the study noted: "This tremendous care in responding to email was a recurring theme for all of our informants."[84]

These observations should not be surprising. An e-convo, which by my definition conveys information that would not otherwise have been composed as a written communication in the first place, necessarily does far *more* to preserve the writer's detailed thought process than whatever notes he or she may have scribbled on a note pad to prepare for a client call or an internal meeting. When legal questions are answered via an oral exchange and memorialized with handwritten notes by both parties, documentation exists, but it is disjointed and partial. Research notes are likely fragmented insofar as they are composed of mere phrases, abbreviations, key words, and

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[79] *Id.* at 73.
[80] *Id.* at 101.
[81] *Id.* This same associate also used a legal pad to write out her notes longhand, which "forced reflection and slowed down the pace of email correspondence in an attempt to prevent errors." *Id.* at 102.
[82] This detailed, meticulous, and time-intensive approach to drafting email is consistent with what I know of my own practice and what I observed in my colleagues.
[83] *Id.* at 103.
[84] *Id.*

outlines. Such fragmented notes are generally sufficient "breadcrumbs" to help a lawyer memorialize and reconstruct her own research. Such notes are likely also sufficient as a reference aid for the lawyer when she reports her research results orally to a client or supervising attorney. But the constraints of an oral delivery will generally force her to simplify and streamline what she learned, making it readily digestible to her audience aurally. However detailed her delivery may ultimately be, her listeners, in turn, will transcribe a set of fragmented, phrasal notes of their own. This sequence results in a documented conversation, but hardly a detailed one. And neither side has the whole picture in its possession.

By contrast, e-convos, even if informal, generally include, at a minimum, complete sentences, forcing the writer to fill in gaps and draft a coherent analysis and explanation. Thus a "forcing function" similar to that which Professor Davis observed to be inherent in the process of writing a traditional legal memorandum also operates to some extent in the process of writing an e-convo, when what would otherwise be an oral expression is distilled to the written word. As Professor Davis observed, "writing allows for the kind of complex logic and reasoning that oral expression does not."[85] Moreover, "[b]y allowing the writer to explore problems in depth and preserve them on paper, writing allows for new identifications and linkages at a level of precision that oral expression cannot approximate."[86] In the same way, the act of writing an e-convo crystalizes the lawyer's thinking and results in a communication that is more clear and complete than an oral exchange allows, even with attendant notes.

Not only does the act of committing thoughts to writing impose structure on those thoughts, the email medium carries with it many other advantages, too, by its very nature. Although an email exchange still retains the disjointed a nature of notes-and-conversation exchange to some extent,[87] both parties typically have access to the entire email thread. Communication by email is often more efficient than communication by phone or in person, because it is asynchronous, freeing up both parties to participate at a time and place that is most convenient. Moreover, and importantly, as discussed in Part III, the digital medium permits lawyers to enrich

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[85] Davis, *supra* note 1, at 502.
[86] *Id.*
[87] See Part III for ways to ameliorate this.

their communications with searchable subject lines, hyperlinks to sources, and other embellishments not possible in face-to-face or phone-to-phone communications. In many ways, far from lacking depth, e-convos actually offer more content with more support than what previously existed in a more organic and amorphous form. These attributes all add up to a form of communication that is both different from and, for certain purposes, superior to the nondigital one it replaces.

For all these reasons, I posit that e-convos are a new body of legal writing,[88] in the sense that they have no immediate predecessor in print. At the same time, e-convos take the form of substantive emails, just as e-memos do; and I recognize that the distinction between e-memos and e-convos is concededly somewhat artificial. The e-convo, as transmitted on screen, will differ in appearance from the e-memo only in its length and complexity, with a border between the two that is blurred at best.[89] As Professor Davis observed, "[I]t is the complexity of the question presented, and not the type of media that should dictate the structure of the memo."[90] Similarly, it is the substitution of text for the spoken word that drives the distinction I draw, not the form that the text ultimately takes. Thus, what I am suggesting may be merely semantics, insofar as I give different names to substantive emails that may appear on their face to be the same, and which are composed in the much same manner of drafting.

But this slight shift in semantics, from e-memos to e-convos, gives us as legal educators a new lens with which to view email within the legal writing curriculum. The modest reframing that I propose relieves us of the mindset that all substantive emails are replacements for traditional legal memos. It frees us as legal educators from the consternation that comes when we doubt the rigor of the e-memo, if we are armed with the idea that the email may not be replacing a memo at all. It frees us to conceive of new structures and paradigms for drafting in a new vein, as we write what was not written before.

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[88] The new technology has opened a new way of communicating a certain category of discrete, time-sensitive, uncomplicated ideas. As Tiscione observed, commenting on how typewriters revolutionized the process of writing, "typing on a keyboard also changed the nature of what people write—what they say and how they say it." Tiscione, *supra* note 22, at 527. In the case of email, the new technology has changed what people *say* and how they *say* it so significantly that it has become a matter of what people *write* and how they *write* it.

[89] The precise delineation does not concern me here; my focus is on the point at which a conversation becomes an email, rather than the point at which an e-convo becomes an e-memo.

[90] Davis, *supra* note 1, at 508.

And it also points out the significance of the gap in any legal writing curriculum that does not fully explore email for all its uses, including not only the e-memo, but also specifically the e-convo, with its substitution for and documentation of oral exchange.[91] These are the ideas to which I turn in Part III.

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[91] This is not to say that email currently goes unaddressed in legal writing courses; only that its significance as a substitute for oral conversations and research notes warrants emphasis. There can be no doubt that email in general is by now well established in the legal writing curriculum. *See, e.g.*, LINDA H. EDWARDS, LEGAL WRITING 193-203 (7th ed. 2018) (including both electronic and paper communication in a textbook chapter on professional letter writing); FAJANS, *supra* note 39 at 229-263 (discussing emails and letters at length in a chapter devoted to general correspondence); GARNER REDBOOK, *supra* note 60, at § 17 (including a section on drafting emails); NEUMANN ET AL., *supra* note 57 (including chapter devoted to predictive emails); OATES ET AL., *supra* note 60, at § 19 (providing tips on drafting e-memos); MARY BARNARD RAY, THE BASICS OF LEGAL WRITING 267-271 (2006) (adding email drafting tips to the end of a chapter on correspondence); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 310-315 (LEG, Inc. d/b/a West Acad. Publ'g 7th ed. 2018)(including a section on email and instant messaging within a chapter on letter writing).

Often, however, these textbooks embrace the familiar emphasis on the email as a memo or even a letter, rather than as a replacement for oral conversation. *See, e.g.*, EDWARDS, *supra*, at 193 n. 1 ("For easier reference, we'll include both electronic and paper communications in the term 'letters.'"); FAJANS, *supra* note 39, at 229 (legal writing textbook treating email and postal mail interchangeably as written correspondence); GARNER REDBOOK, *supra* note 60, at §17.7 (in a chapter dedicated to email that discusses best practices in style and format, providing advice about "reporting research in an e-mail message—in lieu of a research memo"); NEUMANN ET AL., *supra* note 57, at 172-174 (legal writing textbook that places the chapter about emails within a section devoted to predictive analysis and includes a subsection contrasting email memos with full-length research memoranda); OATES, *supra* note 60, at §19.3 (discussing emails as e-memos, while noting that "[a]t one end of the spectrum are e-memos for which there is an easy answer"); RAY, *supra* note 91 at 267 ("E-mail is fundamentally a letter or inter-office memo sent through a different media.").

III. Teaching E-Convos: Writing Down Conversations with Intention

What has thus far gone largely unexamined in the ongoing scholarly dialogue about legal email is a pointed assessment of email itself as dialogue. A study of email *as conversation* is due. Accordingly, I propose that the point at which a substantive email delivers legal information that could just as readily be delivered orally, with minimal legal analysis, is the point at which it may be more helpful to conceive of it as an "e-convo" rather than an "e-memo;"[92] and further, that conceiving of certain emails as a conversation rather than a memorandum has important scholarly and pedagogical implications for understanding digital communication and using it well.[93]

As a previously unwritten communication, the e-convo not only calls for more rigor than the notes and conversation that it replaces, it also cries out for heuristics and best practices of its own. Certain best practices are well-established and well-accepted for drafting substantive emails generally, and they apply with equal force to e-convos as to e-memos. [94] Teaching these best practices is becoming

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[92] Or perhaps we should instead call an e-convo a "v-call" for "virtual," given that technology continues to evolve, and email is perhaps already poised to be replaced by other digital tools. Whatever new means of communication new technology brings, the basis for my observation remains the same: The underlying constant is the substitution of text for oral communication, with the additional inherent benefit of simultaneous recordkeeping and retrieval.

[93] It also, incidentally, should help alleviate the longstanding concern that e-memos skimp on legal analysis. If an email is not properly conceived as a predictive memo in the first place, because no predictive analysis is required, then the lack of predictive analysis in the email is, as they say of software, "a feature, not a bug."

[94] The legal scholarship to date does not employ a specific, uniform definition of "e-memo," but instead uses the term loosely, generally in reference to any substantive email that appears to serve in place of a traditional legal research memorandum. *See supra* note 19. Now that I have offered my own definition of "e-convos" as distinct from "e-memos," I will for the remainder of this Article refer to "e-memos" as those substantive emails that do in fact replace traditional legal research memoranda (whether formal or informal, and whether those memoranda are directed internally to colleagues or externally to clients), and as distinct from e-convos, which replace oral communications. To confirm, I consider both e-convos and e-memos to be substantive emails, insofar as they both "contain legal analysis and/or advice in the body of the message," *see supra* note 13 and accompanying text, instead of in an attached memo or a set of notes.

commonplace in the legal writing curriculum[95] and should continue. But some of these best practices become even more valuable for reaping the benefits of the e-convo. Because e-convos can offer more detail, greater precision, and better documentation than mere notes of oral conversations, legal writing instructors should introduce students to the concept of e-convos when teaching email drafting skills. When students recognize that some substantive emails replace conversations and document dialogue, students can then draft their emails with that awareness. Keeping in mind the advantages of an email over an oral exchange promotes the *best use* of best practices for their intended purpose—and may incidentally help students decide whether to send an email at all, instead of simply picking up the phone.

A. Legal Writing Instructors Should Continue to Teach Established Best Practices for Drafting Substantive Emails, Because These Best Practices Apply to E-Convos and E-Memos Alike

Considering the somewhat gradual acceptance of email into the legal writing curriculum,[96] there is remarkable consensus around what constitutes good drafting, especially as it pertains to readers' needs. Basic rules of email etiquette and sound drafting tips should be the core of any email drafting curriculum. Today's best practices place strong emphasis on readability, both as to form and style. Many such best practices are rooted in the recognition that email recipients may read emails on tablets, phones, and other devices with a small screen.[97] To make information easier to digest in small snippets,

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[95] *See infra* notes 97-111 and accompanying text.

[96] *See* Fore, *supra* note 2, at 152.

[97] *See, e.g.,* Davis, *supra* note 1, at 514 ("[W]riters must pay particular attention to [the] structuring [of] the text of a memo so that an on-screen reader can easily navigate the document."); FAJANS, *supra* note 39, at 291 ("Memos to be sent by email should be as short as possible so that the reader does not have to scroll up and down excessively as she runs to the airport check in counter."); Ellie Margolis, *Incorporating Electronic Communication in the LRW Classroom*, 19 PERSPS: TEACHING LEGAL RES. & WRITING 121, 123 (2011) [*hereinafter*, Margolis, *Incorporating*] (observing "the need for a clear, up-front answer and succinct analysis as well as the importance of organization, bearing in mind that the message may be viewed

numerous sources recommend drafting emails with informative subject lines;[98] keeping subject lines up to date as topics shift with successive emails;[99] organizing the content using thesis and topic sentences, roadmap paragraphs, and descriptive headings;[100] deploying structural tools such as bullet points and scientific numbering;[101] and using visual aids such as white space, legible fonts, italics, and boldface type to improve the reader's ability to navigate the text easily on various digital devices.[102]

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on a variety of different electronic devices."). *See generally* Margolis, *supra* note 19, at 18-21 (describing general differences and difficulties reading on screens instead of print).

[98] *See, e.g.,* Fore, *supra* note 2, at 174 ("Use informative—but concise—subject lines to allow readers to quickly determine the relevance and importance of the information."); Lebovits, *supra* note 66, at 56 ("Use the subject line to its full potential."); Wayne Schiess, *E-Mail Like a Lawyer*, 89 MICH. B. J. 48, 49 (2010) ("Using a clear and accurate subject line allows a reader to easily skim the inbox and read messages by priority of importance.").

[99] Schiess, *supra* note 98, at 49 ("The subject line, which busy readers use to sort and prioritize their messages, loses its value when the sender doesn't bother to update it.").

[100] *See* Davis, *supra* note 1, at 521 ("Thesis sentences, roadmap paragraphs, and headings can help a reader, particularly an on-screen one, navigate more easily through the document and see the logical connections between [the] ideas in the text."); FAJANS, *supra* note 39, at 291 ("Use headings and bullet points to organize the discussion and make for easy reading.").

[101] *See, e.g.*, Fore, *supra* note 2, at 176 (recommending "[l]iberal use of headings, bulletpoints, and numbering"); Margolis, *supra* note 19, at 18-19 (with respect to legal documents generally, advocating use of "more-frequent headings, use of lists and bullet points, and using white space and text proximity to communicate points that are related to each other" as well as the use of scientific numbering).

[102] *See, e.g.*, Fore, *supra* note 2, at 176-77 (recommending "spacing between paragraphs to create 'cushions' of white space" and "[s]trategic use of bolding, italics, and typography to emphasize key points"); Davis, *supra* note 1, at 521 ("Finally, online writers should pay extra attention to the use of boldface type and bullet points for emphasis of important points, to text structure signals that show the relationship between ideas, and in using well-constructed, concise paragraphs to aid the reader who might be using a small screen."). *Cf.* Margolis, *supra* note 19, at 16 (advocating changes in typography and document design in traditional memoranda and briefs, including such features as "changing fonts, making use of alternate typefaces such as bold and italics" and "altering line spacing").

Moreover, legal email readers—whether clients or other attorneys—are likely busy. So, emails should be brief.[103] Paragraphs should be short.[104] Drafters should use clear, concise language.[105] They should put their conclusions up front,[106] so readers don't have to scroll down to get the point. Longer explanations should be sent as attachments.[107] And as with any written communication, readers will form an impression, so emails should be subject to careful editing and proofreading.[108] In short, essential rules of email etiquette and sound drafting principles are becoming well-established in the legal writing community and curriculum at this point, as they should be.

Given the pervasive use of email in modern law practice, such best practices play an invaluable role in legal writing courses. This Article does not purport to restate such practices in full, because they are amply addressed elsewhere,[109] but only to acknowledge their

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[103] *See, e.g.*, Fore, *supra* note 2, at 175 ("Keep the overall length of the email short—being mindful that many readers will be reading emails on smartphones.") (footnote omitted); Schiess, *supra* note 98, at 49 ("Readers are probably more likely to give up on reading a long e-mail message than any other type of writing.").

[104] *See, e.g.*, Fore, *supra* note 2, at 176 (suggesting use of "[s]horter sentences and paragraphs"); Lebovits, *supra* note 66, at 64 ("Compose short sentences, short paragraphs, and short e-mails."); Schiess, *supra* note 98, at 50 ("A short message with short paragraphs is more likely to be read and understood.").

[105] *See* Lebovits, *supra* note 66, at 64 ("Be concise.").

[106] *See, e.g.*, Fore, *supra* note 2, at 175 ("Put the takeaway point or conclusion of the email at the beginning."); Lebovits, *supra* note 66, at 56 ("Front load and summarize questions and answers.").

[107] *Cf.* FAJANS, *supra* note 39, at 291 ("Longer, full memos can, of course, be sent as an attachment to an e-mail cover letter.").

[108] *See* FAJANS, *supra* note 39, at 291 ("Resist the temptation to use casual language[,] and make sure you proofread for typos and misspellings that spell check will not catch. Your informal e-mail memo should be as clear and error-free as a more formal one."); Fore, *supra* note 2, at 177 (calling for students to learn to write a "polished, error-free email that reflects the lawyer's obligation to communicate in a professional manner").

[109] In addition to the sources identified above, *supra* notes 97-108, Professor Fore recently developed a comprehensive checklist for what he calls procedural e-memos, a list that assembles a wide range of important best practices for drafting in the general areas of organization, formatting, and tone and professionalism. Fore, *supra* note 2, at app. D.

importance for drafting substantive emails of all kinds.[110] Drafting emails professionally is an essential career skill that should hold a prominent place in legal writing courses, vying for attention alongside the traditional legal memorandum.[111]

B. Legal Writing Instructors Should Teach Students to Identify E-convos by Asking a Single, Simple Question: What If Email Were Not an Option?

We should teach legal writing students to recognize e-convos. The reason is that when an email replaces conversation, the digital medium becomes the difference, and presumably therefore the impetus for sending an email instead. And if the purpose of using email in any particular case is to capture the advantages of the digital medium, that can best be done with intention. Accordingly, legal writing instructors should explain the concept of an e-convo, to help students use existing best practices to their best advantage. With awareness of the e-convo construct, students can deliberately deploy the same substantive email drafting tips discussed above with intention, and this deliberate use is likely more effective use.

Students obviously cannot use an e-convo intentionally unless they recognize when they are sending one. As discussed above, e-convos in their final written form will look very much like shorter, simpler e-memos.[112] Solely on their face, these two types of substantive emails will defy precise delineation, because it is the nature and complexity of the underlying inquiry that will dictate the length and depth of the answer.[113] What drives the distinction is the feasibility of responding to the inquiry with an oral communication, and the decision to send an email instead.

Accordingly, I propose that students should be taught to ask themselves a simple question, as they sit down to type a substantive email: *"What if email were not an option?"* Assuming that sending an email were not an option, students should decide whether they would draft a traditional legal memorandum or letter to deliver the advice or

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[110] *See* Fershee, *supra* note 22, at 3 ("Using e-mail in a professional setting is a wholly separate skill from using e-mail for personal purposes . . . .").

[111] *See id.* ("Law schools must make teaching students how to write e-mail in a professional setting as high a priority as teaching students how to write a basic legal memorandum has been since the inception of legal writing programs.").

[112] Indeed, in this Article I have offered numerous examples of e-memos that could easily pass as e-convos. *See supra* notes 58-60 and accompanying text.

[113] *See supra* note 90 and accompanying text.

analysis requested, or whether they could pick up the phone or walk down the hall instead, and still give a good answer. If the decision is the phone or office conference, the email is an e-convo.[114]

To show this test in action, I offer my own experience as an employment lawyer in Minnesota. I was often called to answer questions from employers about how to comply with the law, sometimes in the midst of situations unfolding in real time. Imagine, for example, that I received a voice mail message one morning from a member of my client's personnel department, telling me that a difficult employee with a long history of performance problems had stopped by her office, demanding to review his personnel file. The employee threatened legal action if there was any delay and indicated that he would stop by again over the lunch hour to retrieve the file. The client is concerned that she will not have time to make a copy of the file by then, and she wonders what her obligations are under Minnesota law. Her question may sound straightforward. But under Minnesota's personnel records statute, the employer's obligation to provide the employee with an opportunity to review his file—and where, and when, and how—depends on such factors as whether the request was made in writing, where the record is maintained, whether the employee is a current or former employee, and when the employee most recently reviewed the record.[115] The answer, as is so often the case, is contingent on a number of factors.

So, if email were not an option, would I write a memo here? Or place a phone call instead? Despite the existence of contingencies, the client's question requires application of the law, not interpretation of it, so no lengthy memo would be required or welcomed here. And in any case, by the time I prepared a traditional legal memorandum, the time when my answer would be useful will have passed. The choice is clear: If email were not an option, I would try to call the client back and talk her through the application of the statute.

But the modern reality is that I could send an email instead (or in addition). By composing an email instead of merely returning the call, I garner extra benefits for both the client and me. I can restate the

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[114] Learning to answer this question will likely require some experience—but for getting started, not much. Learning to draft a traditional legal research memorandum that requires rule synthesis and predictive analysis may suffice as a starting point, by giving students a touchstone for making their decision.

[115] *See* MINN. STAT. § 181.961 (2019).

question and commit the facts to writing, as described to me, noting my understanding that the request was made orally by a current employee, and noting any missing information, such as the last time he reviewed his file. I can provide much more detail than the client is likely to be able to absorb in the moment by phone, outlining alternative scenarios with links to the statute itself. And importantly, I can make explicit reference to the fact that I am providing a specific answer on the facts as I understand them that morning. It may later turn out that the client neglected to mention certain facts—perhaps the employee dropped off a written request when he stopped by, or he had already reviewed his file earlier that week, or the records were normally maintained offsite. But by my sending an email that pins down all the particulars, in context, as they existed as that point in time, the client not only has more information in the moment, she also has it for future reference. At the same time, there is less risk that the information I provided could be misapplied or misconstrued at some later date. The e-convo is much better than a phone call here, but it is even better for both of us if it is done well, with conscious attention to the advantages of e-mail. I would send the e-convo every time.

C. Certain Established Best Practices for Drafting Substantive Emails of All Kinds Become Even More Important for Drafting E-Convos

Whether students consciously apply my simple test or not, when students choose to send e-convos, they are essentially choosing to communicate legal information in writing instead of the spoken word, and they are choosing the digital medium instead of the oral one. When students are fully aware that they are sending an e-convo, however, they can learn to draft the e-convo in such a way as to capitalize on the digital advantages they seek, while minimizing drawbacks. This requires special attention to certain well-established drafting tips for legal emails of all kinds, as follows:[116]

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[116] The recommendations in this Part III.C., taken together, also give rise to an intuitive structure that would make an excellent default organization for e-convos, which currently have no established paradigm of their own. *Cf.* Robbins-Tiscione, *supra* note 1, at 33 ("Whereas the elements of the traditional legal memorandum are static, the elements of the informal memorandum and substantive e-mail appear to be organic, determined by the nature of the question at issue, as opposed to a prescribed set of elements."). *See also id.* at 43 (describing how survey respondents indicated that emails give them "the flexibility to compose their messages based on the

1. Use the greeting to situate the email in its conversational context.

An email exchange is a conversation. Standard drafting advice recommends a personal greeting,[117]and this applies to e-memos and e-convos alike. For an e-convo, however, the reasons exceed those that underpin standard best practices. The personal greeting assumes greater meaning in an e-convo. Unlike a traditional legal research memorandum, which is addressed to an ambiguous, "invoked audience,"[118] an e-convo is addressed to a specific person or group, at a specific point in time, for a specific reason. This has two important implications for the e-convo, which students should be thinking about from the time they type the salutation.

First, an e-convo is part of an ongoing dialogue, typically with a client or another attorney. Accordingly, it builds relationship. As today's lawyers use phones and meetings less and less, email may

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particular issues presented and not some predetermined format."); Tiscione, *supra* note 22, at 532 (noting that in an email, "less time is devoted to conforming the facts, research, and analysis to a set format, leaving the writer free to create her own schema"); *id*. at 538 ("[E-mail is] distinguished from traditional memoranda by its lack of format and the subsequent liberation of the writer to respond creatively to the particular circumstances."); NEUMANN & TISCIONE*, supra* note 42, at 228 ("There [i]s no universal format for email in law practice, so it can take almost any form appropriate under the circumstances."). Notably, however, e-convos—with their short, definitive answers to discrete questions—may be more susceptible of standardization than more complex e-memos have proven to be, and an established framework might aid students in drafting e-convos. *See also* Ellie Margolis & Kristen Murray, *Using Information Literacy to Prepare Practice-Ready Graduates*, 39 U. HAW. L. REV. 1, 15 (2016) ("Because there is no established convention for these shorter means of writing legal analysis, lawyers who wish to use them have largely had to find their own way.").

[117] *See, e.g.*, Schiess, *supra* note 98, at 49 ("When you work in a law office and send e-mail messages to colleagues, professional etiquette requires that you begin with a salutation—a sign or expression of greeting."). Subsequent emails in the same chain may not require repetition of the greeting. *See* Lebovits, *supra* note 66, at 57 ("Sometimes official salutations and closings are unwarranted, as in a string of replies between peers or colleagues . . . .").

[118] *See* Tiscione, *supra* note 22, at 530 (observing that the "audience for the traditional memorandum is . . . more invoked than addressed" and includes "a multiplicity of known and unknown readers") (internal citations omitted).

become the primary or even sole point of contact with the recipient. Forging a personal connection is essential.[119] While a proper greeting is important in any email, including e-memos, students should be reminded that an e-convo sometimes entirely supplants a face-to-face exchange or in-person phone call. With this reminder, students may be more mindful of tone, beginning with the greeting.

Second, an e-convo is highly situation-specific—and students should be taught to keep it that way. To some extent, e-memos are situation-specific, too, because they are likewise directed to a particular audience, for a particular reason, at a particular point in time. This specificity stands in contrast to the rhetorical stance of the traditional legal memorandum, even though a good predictive legal memorandum will similarly be predicated on a particular statement of facts. The reason is that a predictive memo will often undertake rule synthesis to declare general principles that describe what the law is.[120] Addressed as it is to an "invoked audience," the traditional legal memorandum is designed to be a declaration that may have general application.[121] Notably, to the extent the e-memo mimics the purpose of the traditional legal memorandum, the e-memo, too, operates to some degree under the pretense of offering a declaration with general application. The e-convo offers no such pretense—and in fact, students should take care to avoid it.

Again, an e-convo is different from an e-memo in that it is responsive to questions calling for short, time-sensitive, rule-based, and definitive responses. The very circumstances that make an e-convo a viable option, in lieu of a longer memo, make it especially vulnerable to misapplication in another setting. It is imperative for lawyers to stay within the confines of the specific conversation when providing legal information and especially legal advice by email, and to make these parameters explicit on the face of the email. Legal writing students should learn this skill, and being mindful of the

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[119] *See* NEUMANN ET AL., *supra* note 57, at 168 ("Email is a cold medium. . . . To prevent misunderstanding, sometimes you'll need to express in words things that in conversation you would communicate by voice tone.").

[120] *See* Tiscione, *supra* note 22, at 536 ("In some traditional memoranda, the analysis could apply in the future to any similar legal question."). In fact, in some cases a traditional legal memorandum may even be addressed "To the file" instead of to a named recipient.

[121] *See* Tiscione, *supra* note 22, at 530 ("E-mail, on the other hand, is usually written to a specific person or small group of people. . . . The writer, focused on the present and her specific audience, experiences very little of that same demand to compose a text [needed for a formal memorandum] that stands independent of its context for an indeterminate period of time.").

intended, specific audience is a good place to start. The following additional steps should also help.

2. Repeat the question.

The first phrase after a friendly greeting should be, "You asked me the following question ["in your email dated [date]," or "in our meeting yesterday," or "when we spoke this morning"], followed by a clear, concise, succinct restatement of the request.[122] Repeating the question is common advice for email drafting, and a good idea for e-memos, too; but this approach is especially important in the context of an e-convo, when the exchange is nearly contemporaneous, and repeating the question may seem redundant. In a live conversation, it is only in the most careful face-to-face exchange that speakers will repeat aloud the question they think they just heard. Thus when the legal writer is immersed in the conversational milieu of an e-convo exchange, repeating the question may seem redundant, and the writer may be tempted to dispense with this simple step.[123] I would urge them not to do so.

The simple and somewhat obvious approach of repeating the question serves several useful functions. First, it starts the e-convo with a clear purpose. Second, it harkens back to an earlier communication and places the responsive e-convo clearly in the specific context of that communication.[124] Because the e-convo is so highly sensitive to context, this consideration takes on greater importance than it would for an e-memo, which is more likely to

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[122] *See* Schiess, *supra* note 98, at 50 ("Another helpful technique, recommended by Stephen Stark, is to summarize the question you were asked when you reply.") (citation omitted).

[123] *See* GARNER REDBOOK, *supra* note 60, at § 17.7(d) ("Sometimes the cryptic nature of an email exchange results from [the] unstated premises that the correspondents have exchanged conversationally. In other words, the e-mail messages are mystifying to an outsider—and may well mystify even the correspondents after a short time has passed.").

[124] *See* GARNER, *supra* note 41, at 26 (urging writers to repeat the question in an email to provide context and noting "[t]here's a widespread problem in the way junior lawyers answer questions by email. They tend to respond to moderately complex legal questions merely with answers—without explicitly repeating the question.").

contain a predictive analysis with broader application.[125] Third, it forces the writer to articulate the specific question clearly, which may require using the writer's own words. The process of framing the question not only sharpens the writer's thinking, but also reduces the risk of miscommunication that may occur in a purely oral exchange—one of the chief advantages of drafted text over the spoken word. Finally, repeating the question (or, when necessary, restating it) aids future readers in reconstructing the communication without necessarily scrolling through every earlier message on the same subject. It helps to consolidate the essence of a long email string, where the original question might otherwise be buried several emails back. It is a simple and intuitive approach that students should be explicitly encouraged to use in every e-convo.

3. Give the short answer, subject to further explanation.

Conventional email drafting advice recommends putting the key takeaways up front, and that advice applies equally to emails of all kinds. Right after the question should come an answer.[126] But with a substantive legal email, whether an e-convo or an e-memo, there is greater risk if the reader stops reading at that point. The short answer to a legal question is rarely complete without some further qualification. It is therefore important for the drafter to be clear from the beginning that there may be some important nuance yet to come. Students should not only put the concise answers up front, they should also signal the potential limitations of those answers at the outset, too. They could be taught to introduce their answer with qualifying phrases such as "Generally speaking," or "Subject to certain exceptions." The idea is to communicate the concept of the "Brief Answer" in a traditional legal memo without the formality of the label. I have found it effective simply to say, "The short answer is_____, subject to the following facts and legal considerations."

Again, this is good advice for any substantive email. But when the email is an e-convo, it replaces conversation, and therefore it typically communicates information that is so limited in scope that it could otherwise be delivered in a phone call. The question is typically very discrete and time-sensitive; therefore, the research is typically tightly focused and the answer narrowly drawn. By definition, the e-convo

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[125] *See supra* note 121 and accompanying text.

[126] *See, e.g.*, Lebovits, *supra* note 66, at 56 ("Front load and summarize questions and answers."); Schiess, *supra* note 98, at 50 ("If you're not asking a question but making a point, use the first sentences of the e-mail message to summarize your point.").

does not address anything remotely extraneous to the question at hand, and it does not purport to explore even as many contingencies as an e-memo might. Thus couching the short answer with appropriate caveats is especially important for e-convos.

4. Pin down the facts, as you understand them.

Again, emails that are e-convos are highly situation specific, arguably even more so than e-memos. Because any email can be retrieved and forwarded so easily, and because e-convos are so specific to the occasion, e-convos are far more susceptible to being taken out of context. Students should be instructed to summarize any material facts, and specifically to state, "as I understand them." Or, as legal expert Bryan Garner recommends, to state, "*Here's the situation as I understand it*."[127]

The advantage of this approach is not only to collect and present the facts on which the answer or analysis is based, but to provide context for the answer within the four corners of the email itself. For an e-convo, a restatement of the facts often also importantly serves as a more coherent articulation of the facts than what may have actually been captured in the lawyer's contemporaneous notes. As with the restatement of the question, the writer of an e-convo may be tempted to dispense with a restatement of the facts, because the recipient already knows them. Skipping the facts may even seem more natural in the flow of an ongoing email conversation.[128] However, by skipping the facts, a lawyer sacrifices several advantages of the e-convo over an

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[127] GARNER, *supra* note 41, at 27. Garner recommends using this phrase to introduce both the question and the facts. *Id*. His reason is that the phrase "signals a summing-up. It requires some contextualizing of the question. It's the email equivalent of the memo heading "Question presented." *Id*. Either way, the phrase serves the same important function of putting the email into the place and time it was sent, so that future readers—the client, the lawyer, or third parties—will be able to reconstruct the circumstances under which the information was given. As Garner notes, "To make communications understandable to secondary readers, a little context is required. Context is vital to clarity." *Id*.

[128] For that reason, there is an opposing view that facts need not be repeated in an email exchange. *See* NEUMANN & TISCIONE, *supra* note 42, at 229 ("A full statement of the facts is probably not necessary because the recipient is likely to know or not need them.").

actual conversation. A restatement of the facts in an e-convo memorializes what the lawyer thinks he or she just heard. This creates an important opportunity for correction by the person who communicated the facts,[129] and at the very least, a more readily digestible summary for a future reader than what might be gleaned from a set of notes the lawyer scribbled down at the time.[130]

Finally, in situations when the exchange was first initiated by a phone call or in-person communication by a client or colleague, there may not be any other written record of the facts recounted. A thorough restatement of the facts in an e-convo provides one.[131] Moreover, in a fluid, real-time context, the drafting attorney may not even have all the facts. Indeed, the client or colleague who communicated the facts may not have had all the relevant information in the first place. If facts come to light later that would have changed the answer, the e-convo gives both parties a record of what was known or presumed at the time.[132] In short, the time-sensitive nature of an e-convo, as compared to an e-memo, means the facts are more likely to be unsettled or unknown at the time the e-convo is drafted. Thus, restating the facts becomes especially important when drafting e-convos, to best capture the recordkeeping advantages of communicating by email rather than in person or by phone.

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[129] *Cf.* NEUMANN ET AL., *supra* note 57, at 186 (offering similar advice, for similar reasons, to drafters of client advice letters).

[130] In *The Redbook*, legal writing expert Bryan Garner provides an example of two email exchanges, one with the facts and one without, which illustrates the superiority of an email that "take[s] the time to lay out the problem so clearly that anyone could follow [the problem]." GARNER REDBOOK, *supra* note 60, at §17.7(c). A similar advantage inheres in an e-convo, as compared to oral conversation—provided that the drafter restates the facts.

[131] Sometimes, for pure questions of law, no facts are provided, and in that case, it is equally important for the e-convo to say so. And if the drafter makes any assumptions, these should be explicitly stated, too, for posterity. Either way, it is important that any legal information or advice in the email be squarely preserved within the factual context in which it was given.

[132] *See* NEUMANN & TISCIONE, *supra* note 42, at 235 ("Since email is often written quickly as part of a larger conversation, it's helpful to articulate the assumptions being made at each point in time."). *Cf.* NEUMANN ET AL., *supra* note 57, at 186 ("[A] fact recitation [in a client advice letter] limits the advice to the facts recited, and that can be important in the future if the facts change.").

5. Explain the law, using digital enhancements.

After recapping the key facts, the e-convo should explain applicable law. A condensed sequence of rule/application/conclusion will usually suffice here, and students already familiar with IRAC should find this recommendation to be a natural way to start. Students could be taught to begin this section of the e-convo with phrases such as, "The controlling authority here is [hyperlink to source]," or, "The applicable rule is [state rule, with hyperlinked citation]." This section of the e-convo will necessarily be subject to greater variation than the other elements, as it will vary with the question presented. This section will also, upon completion, largely resemble the analysis in an e-memo, except for its length. Recall, however, that what makes an e-convo different is the feasibility of delivering the analysis orally instead. The very act of writing out the analysis will tend to give the answer in an e-convo more structure than an oral conversation would have, with more precision and fewer gaps. This is another one of the great advantages of an e-convo over the spoken word, [133] and it becomes especially valuable after the fact, when the e-convo is available as a future reference. A response conveyed by e-convo tends to be much more complete, coherent, and self-contained than a set of notes. For the same reason, careful word choice and utmost accuracy are crucial.

After drafting the legal explanation, students should be taught to review their draft e-convos with an eye toward digital enhancements. Here is where the email medium really shines as a tool for recordkeeping and retrieval. Best practices already commend the use

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[133] In my view, this is also why the ethnographic study by Sinsheimer and Herring, *supra* note 50, revealed lawyers spending so much time on emails, and why e-convos tend to be more carefully scripted than the oral conversations they replace, not less. I realize that the danger of thinking of emails as "conversations" is precisely what critics of the e-memo have feared: informality that borders on carelessness. But in my experience, to borrow a term from Davis, *supra* note 1, at 504, the "forcing function" of drafting an email produces precisely the opposite result. *Cf.* Tiscione, *supra* note 22, at 539 ("Email should . . . benefit from the same 'forcing function' that memoranda do.") (citing Davis for the term "forcing function"). But whether students are ever instructed to think of emails as "e-convos," I suggest that it is nevertheless a useful device for faculty to reframe what they are teaching and why.

of descriptive subject lines, searchable key terms, and hyperlinks for the benefit of the reader. But these tools benefit the legal writer, too, and students should also use them with their own recordkeeping objectives in mind.

First, using descriptive, concise subject lines is a well-accepted best practice for substantive emails of all kinds, because it helps the reader recognize the content and significance of the email at a glance. But legal writing students should adopt this practice for their own benefit, too. Using a subject line that is short but meaningful helps lawyers keep track of multiple clients' ongoing interactive threads in their own inboxes. It also helps lawyers quickly find relevant emails and reconstruct the dialogue weeks or months later, when new issues arise on a related matter. For the same reason, before sending a legal explanation, it is a good idea to scan the draft email and consider where and how to add key search terms to facilitate retrieval of relevant emails later. It is also helpful to repeat these key terms in subsequent emails that are part of the same conversation: using repetition, readily searchable terms, summaries, and other tools promote continuity and condense the disparate threads of conversation by email, making future searches more efficient.

All of these techniques are advisable for e-memos, too. But because these tools are not readily available for reconstructing oral conversations and parsing fragmented notes, their availability is a key reason why a lawyer might choose to send an email instead of placing a call. Keeping this purpose in mind while creating subject lines and key words for e-convos may help students to use these tools more frequently and effectively for e-convos in particular.

Finally, hyperlinks and carefully named attachments[134] can be very useful, as a way of incorporating all the relevant research, resources, and information in one place. Oral communications, of course, simply do not have this functionality. In my experience, recipients who are lawyers will expect such enhancements (and may even be annoyed or skeptical if links and attachments are not included). These supplements should never take the place of a thorough analysis on the face of the email, however. It is the lawyer's

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[134] *See* Schiess, *supra* note 98, at 51 ("[G]ive the file you're attaching a helpful name."). Hyperlinks and attachments offer a tremendous advantage over oral conversations and a paper file, but they are even more helpful to the sender and recipient when given a thoughtful name that tells the reader what to expect before even clicking on the link. For example, "Copy of Minn. Stat. § 181.961 (2019)" is far more informative for future reference than "Attachment A" or even, "Statute." Names and labels that may appear redundant in the moment can prove tremendously useful to a future reader.

job to sift through the relevant authorities, and email should not become a shortcut for dumping this task on the client or supervising attorney (nor would the working relationship likely last for very long if that were the case). The test should be whether the text of the email, standing alone, provides the needed information, without the linked resources. The links then become an added advantage, not only to give the recipient assurance of the lawyer's work,[135] but importantly, to provide the lawyer with a succinct, readily accessible record of sources consulted in support of the legal analysis. Again, because no such reference tool is conveniently available in a phone call, the ability to include research sources in an attachment for further reference is an important advantage of an e-convo as compared to the telephone.

6. Note constraints and contingencies.

Because e-convos take the place of what would otherwise be conversations, they tend to be composed on short-notice, with a quick turnaround, under fast-moving and fluid conditions, based only on information available at the time. However, because e-convos are written documents, they tend to take on a definitive quality and an aura of permanence that does not necessarily reflect the circumstances under which they were requested and delivered. Accordingly, it is extremely important to flag any constraints and contingencies in the text of the email, so as to memorialize working conditions that might limit application of the answer. Disclaimers such as, "I recommend additional research on the following points," or, "In the time available, I did not look beyond the foregoing sources," or, "If my understanding of the facts is incomplete or incorrect, please let me know," should be routine. This may be the most important drafting tip to emphasize to students. Adding such disclaimers is always good practice, but in the context of time-sensitive e-convos, which are nearly always circumscribed in the issues they address, and in the research undertaken to address them, they become an imperative. Constraints and contingencies are always wise to note, but in case of the highly situation-specific and evolving e-convo, they are paramount.

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[135] *See, e.g.,* Fore, *supra* note 2, at 175-76 ("Use quotes, hyperlinks, attachments, and citations to deliver high-confidence answers that a reader can immediately trust.").

7. Close with a connection, and a note about confidentiality.

Finally, the closing of the e-convo should circle back to the notion of the e-convo as dialogue, and close with a personal connection. With business done, the end of the e-convo is a good place to build relationship, but no more than a sentence or two is generally appropriate. At a minimum, the closing should recommend next steps, as warranted, and invite ongoing dialogue on evolving issues.[136] The end of the e-convo is also a good place to address the all-important issue of confidentiality. It is widely accepted practice to modify the signature block to include a note, when applicable, that an email is a privileged and confidential attorney-client communication intended only for the recipient and should not be forwarded. Students should be taught to think carefully about protecting confidentiality and privilege when sending any emails, which are so easily forwarded to unintended recipients.[137] Moreover, by definition, e-convos offer the opportunity to make a phone call instead. For especially sensitive matters, a phone call may be preferable, as discussed in more detail in Part III.D.

In sum, as explained above, the same email drafting tips that are already well-established as best practices are particularly useful when the substantive email replaces a conversation, rather than replacing a research memorandum. Legal educators can help students harness the advantages of e-convos over conversation simply by highlighting these respective advantages in the ordinary course of teaching email drafting. It is not that the tools and tips for drafting e-convos are significantly different from the techniques for drafting other substantive emails. Instead, e-convos are different *from conversations*, and simply being aware of that difference should help

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[136] Students should also be taught to consider making a follow-up phone call. In my experience, many e-convos start with a call from the client or assigning attorney, are followed by an e-convo exchange, and finally end with a quick face-to-face follow up or phone call.

[137] The dangers of misdirected legal emails cannot be overstated, whether the cause is forwarding, using the wrong address, or failing to use features such as "bcc" and "reply all" properly. The focus here is on form and framework, not function. Students should follow a template that includes a confidentiality disclaimer, when appropriate. In addition, they should receive intensive instruction on email best practices, which should always include a thoughtful discussion of privileged communication, inadvertent disclosure, common email mistakes, and preventative practices, all of which go well beyond the scope of this Article.

students use the advantages of e-convos more intentionally and effectively. Awareness may also help students avoid the pitfalls, by helping them recognize when a phone call might be preferable.

D. Legal Writing Instructors Should Remind Students to Pick Up the Phone When Appropriate

Finally, even as legal writing instructors point out the special advantages of e-convos, they should explain that the choice to use the medium of email carries both risks and rewards. E-convos memorialize information in a form that is readily accessible for future reference, and this may be for better or worse. E-convos can be accessed not only by the intended recipient, but also by a host of other, unintended recipients who were never part of the conversation to begin with. When the information communicated could easily be delivered orally instead, the choice to use an e-convo offers the opportunity to provide a more detailed answer and preserve it with its own documentation, while still maintaining a personal dialogue. But this documentation has its downsides. Unlike an oral delivery, which is fleeting, and becomes malleable in the memory of both the speaker and the audience, an e-convo lasts forever, and it can be repurposed or misconstrued. Accordingly, for emails that replace conversation, students should be mindful of the reasons why they are sending an email in the first place, instead of simply placing the call.

Therefore, at every point in the drafting process, but certainly before ever sending the e-convo, students should consider whether to send an email at all. E-convos work best for questions that are time-sensitive, discrete, and susceptible of objective, definitive answers. But often, a phone call is faster, because composing any email, even an e-convo, takes time. And for highly sensitive issues, or any time when back-and-forth exchange is helpful, a phone call or face-to-face conversation may still be best.[138] Just as there are occasions when a lawyer would be well-advised to draft a full-blown legal research

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[138] *See* NEUMANN & TISCIONE, *supra* note 42, at 227 ("[I]f a lawyer plans to discuss sensitive matters, such as embarrassing facts, bad news, or confidential information, it may be better to pick up the phone or talk in person."); RAY, *supra* note 91, at 268 ("[T]he first question to consider when composing e-mail is whether the content should be put in writing at all. Perhaps the information is best left uncommunicated, or saved for a time when you talk to your reader face to face.").

memorandum rather than an email, by the same token, there are occasions when a lawyer should not send an email, but should simply pick up the phone instead.[139] Good judgment in such cases requires experience and sometimes years of practice.[140] But students in legal writing courses should at least be taught to ask themselves which medium may be best suited to the occasion.[141] Highlighting the function of the e-convo may help lead them more quickly to the best answer.

Notably, most of today's legal writing students are digital natives who are very comfortable communicating by email, text, or instant messaging.[142] As a result, they may be far less comfortable with a face-to-face conversation. They may slow to realize when an oral exchange would be the better medium, or even worse, they may be tempted to use an e-convo to avoid difficult conversations. As much as today's students need to learn to converse by email, they also need to learn to *talk*—out loud and audibly.

In sum, to truly equip our legal writing students for all the e-mails they will draft in practice, we should arm them with the notion that sometimes, an email is essentially a conversation, written down. But it is also so much more than a conversation, by virtue of all the enhancements the medium allows. Email creates a near-permanent record that can be both a boon and a bane, so the choice to use it in lieu of oral communication should be undertaken with intention.

Teaching our students to think of e-convos as a transcription of an oral communication and to follow prescribed conventions for that format will strengthen their ability to communicate legal information effectively with both colleagues and clients. The conventions I suggest

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[139] *See* Schiess, *supra* note 98, at 48 ("Think about whether you should send an e-mail message at all. Often, a real letter is better than an e-mail message. . . . Sometimes[,] a phone call is a better option. Use the phone when you need an immediate response, when you need to ask questions and negotiate, or when you have concerns about privacy.").

[140] *See* Tiscione, *supra* note 22, at 540 ("I am concerned that the skill required to synthesize information in a fluid, readable, efficient e-mail is that of an expert, not a novice.").

[141] See FAJANS, *supra* note 39, at 261 (advising students to "[f]inally and always, reread your message before you hit send" and to consider whether to send the content as an email message or by postal mail).

[142] *See* Margolis & Murray, *supra* note 116, at 14 ("This generation has grown up writing digital text in a variety of media. They have spent their lives emailing, texting, tweeting—in other words, writing in short formats."). *See generally*, Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, 37 J. LEGAL PROF. 199 (2013).

are simple and perhaps somewhat self-evident. All the same, there is benefit in making them explicit and highlighting their special importance for e-convos. Their primary function is to raise student awareness of what they are writing, and why. Legal writing students can use substantive email in place of conversations more effectively if they understand its advantages and disadvantages as compared to oral communications, and draft (or pick up the phone) accordingly.

Conclusion

As of this moment, email is how lawyers work. It is also largely how they talk. Communicating by e-mail "is not as simple as taking traditional written forms and sending them electronically. [143] Rather, "the change in the medium necessitates changes in the form of communication,"[144] not only because emails are replacing traditional legal research memoranda, but because they are replacing historically oral communications, too. The consequence of this development is, in sum, the emergence of a new body of legal writing—not so much "new" in the sense that e-convos look markedly different from other substantive legal e-mails today, but because they are fundamentally different in both form and functionality from the formerly oral communications that they replace.

This observation has both theoretical and practical implications. From a theoretical perspective, the possibility that a large number of legal emails are actually replacing conversations, not traditional legal research memos—and thereby injecting more structure and support, not less, to the underlying communication—should go a long way to assuaging the concerns of those scholars who fear a dumbing down of the profession by the sheer increase in email traffic. From a practical and pedagogical perspective, the observation that some emails take the place of an oral conversation allows for more careful and deliberate drafting.

When emails replace conversations, we should call the emails what they are: e-convos. Drafters with greater awareness of *why* they are sending an e-convo instead of having a conversation can deploy established best practices more strategically to create the written

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[143] Margolis, *Incorporating, supra* note 97, at 125.
[144] *Id.*

record they seek. Alternatively, with their heightened awareness, the drafters can exercise their best judgment and pick up the phone instead.