

## Brutal Choices in Curricular Design ...

# Games in the Law School Classroom: Enhancing the Learning Experience

*Brutal Choices in Curricular Design ... is a regular feature of Perspectives, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other “brutal choices” that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, e-mail: h-shapo@law.northwestern.edu, or Kathryn Mercer, Case Western Reserve University School of Law, e-mail: klm7@case.edu.*

**By Karin Mika**

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Much has been written about how best to educate the millennial generation—a generation of students that has grown up with multitasking, instant access to information, technology as an integral part of moment-to-moment existence, and a need to be perpetually entertained or otherwise mentally stimulated.<sup>1</sup> This type of mind set seems diametrically opposed to what the practice of law and legal education is about. Certainly technology has its place in the

practice of law and legal education, but the practice of law, and some would certainly say legal education itself, requires developing tolerance for large stretches of time spent being bored or focusing solely on tedious matters.<sup>2</sup> Thus the challenge for the legal educator, especially during the last few years, has been how best to keep the students engaged while still accomplishing the task of teaching students the necessary skills for the practice of law.

### Games in the Classroom

Educators have always been concerned with devising ways to make education fun while engaging students in an activity that will be intellectually beneficial.<sup>3</sup> I’m sure all of us can remember our elementary school days and the “Reading Is Fun” campaigns, the vocabulary word crossword puzzles, and perhaps spelling bee baseball. One of my fondest memories was my sixth grade teacher’s use of “Simon Says,” which

<sup>1</sup> See generally Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?*, 9 *Legal Writing* 119 (2003); see also Douglas Kellner, *The Journal*, March 1, 2005.

<sup>2</sup> William R. Keates, *Proceed with Caution—A Diary of the First Year at One of America’s Largest, Most Prestigious Law Firms* 35–41 (1997).

<sup>3</sup> See, e.g., Katherine Albers, *These Teachers Are Golden: Six Collier Educators Honored with Special Apple*, *Naples Daily News*, May 5, 2009 (“I want all of my students to have fun while engaged in the academics of what they are doing. I strive for my students to become lifelong learners.”).

## In This Issue

### Brutal Choices in Curricular Design ...

- 1** Games in the Law School Classroom:  
Enhancing the Learning Experience

Karin Mika

- 7** Multitasking and Legal Writing

Anne Enquist

### Teachable Moments ...

- 11** Intro to Plagiarism

Jane Scott

- 16** Teaching Students to Harness the Power of  
Word Processing as They Write

Susan Liemer

- 18** E-Mail Etiquette in the Business World

Tracy Turner

- 24** A Recipe for Successful Student Conferences:  
One Part Time Sheets, One Part Student Conference  
Preparation Questionnaire, and a Dash of Partial  
Live Editing

Candace Mueller Centeno

### Writing Tips ...

- 30** Why Is It So Hard to Front-Load?

Stephen V. Armstrong and Timothy P. Terrell

- 34** An Annotated Bibliography on Law Teaching

Mary Olszewska and Thomas E. Baker

- 43** Legal Research and Writing Resources:  
Recent Publications

Barbara Bintliff

- 49** Index to *Perspectives: Teaching Legal Research  
and Writing*, Volumes 1–17 (1992–2009)

Mary A. Hotchkiss

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continued from page 1

helped the class remember the bones and muscles in the human body. However, my personal favorite was “Bottleneck,” a game developed by my middle school government teacher. The game demonstrated how bills moved through Congress before they became enacted legislation.

Teachers who played these games were regarded as the most popular, and I would guess that many of us learned quite a bit while being entertained. I would also guess that many of us, because of these games, became interested in subject matter that we otherwise would have considered boring and *unattainable*.<sup>4</sup>

Games such as those played in elementary and middle school disappeared for the most part as education progressed onward. I can’t say I remember playing any educational games in high school, college, and certainly not law school. As my education progressed, there seemed to be an expectation that entertainment (at least, not beyond filmstrips or slides) was not necessary to engage the student. It was simply a given that the student would learn the material in the traditional way—by reading, studying, immersing, and eventually mastering. Game playing as an educational technique seemed to have no place in higher education.<sup>5</sup>

Thus traditionalists might look at using games to teach legal concepts as an inappropriate coddling of an immature generation. After all, the practice of law is not always very exciting, and some legal educators believe that catering to limited attention spans will do more harm than good to both the student and to the profession of law in general.

Although I’ve always considered myself a fun and engaging legal writing professor, I have always been skeptical about using class time to play games during legal writing. Perhaps part of the reason for this is that I might be somewhat of a traditionalist.

I have always had an intellectual respect for the development of some of the games that have been created to supplement legal education.<sup>6</sup> But I did not see too many of them as able to complement my curriculum in a way that my teaching agenda was the central focus of playing the game as opposed to “fun.” Given that in recent years I have come to feel that I must cover more and more material with what is seemingly less and less time, I have also adopted the belief that a good, practical, active learning classroom exercise combining various skills was more appropriate to my goals (and to a graduate school teaching environment) than playing any games.

That is not to say that innovative educational games did not interest me. Both of my own children are part of the millennial generation, and what has struck me about their activities (other than their technologically oriented existences) is how much they enjoy playing games. Evenings spent with friends are spent playing board games, or games on the electronic console. Time alone is spent playing reality-based games such as the Sims, Zoo Tycoon, or Roller Coaster Tycoon. Those having Facebook pages are hooked on a reality-based game called Mafia Wars, and, as true multitaskers, they tend to pick up an iPod® touch in between rounds of electronic console games in order to play rounds of other games on their handheld devices.

I thought that if I could tap into this interest in a way that complemented what I hoped to be doing in legal writing, I could accomplish something beneficial for the students in my legal writing classes.

### Apples to Apples

I accomplished this by using a variation of the game Apples to Apples. Apples to Apples is both a popular party game and a game that has won awards for providing innovative education.<sup>7</sup>

“Although I’ve always considered myself a fun and engaging legal writing professor, I have always been skeptical about using class time to play games during legal writing.”

<sup>4</sup> See, e.g., *In Their Own Words, Teens Thank Educators Who Inspired*, <[www.azstarnet.com/sn/related/22360](http://www.azstarnet.com/sn/related/22360)>, May 17, 2004.

<sup>5</sup> Cf. Wylie Wong, *Gaming in Education*, <[www.edtechmag.com/higher/may-june-2007/gaming-in-education-2.html](http://www.edtechmag.com/higher/may-june-2007/gaming-in-education-2.html)>.

<sup>6</sup> For instance, I participated in various rounds of one of my colleague’s yearly Citation Jeopardy tournament.

<sup>7</sup> These awards are documented at <[www.fatbraintoy.com/toy\\_companies/mattel/apples\\_to\\_apples\\_kids.cfm](http://www.fatbraintoy.com/toy_companies/mattel/apples_to_apples_kids.cfm)>.

“I was first inspired to create a game based on Apples to Apples when I watched my 13-year-old and her friends play the game at a party.”

The concept of the game is a simple one. It involves one player per round being a judge, while the other players try to match noun cards to an adjective card in such a way that the judge for a round will choose a particular player's noun card as the best match. For example, a judge for a particular round might have the adjective card “scary,” and the players in the round might play the cards, “Haunted House,” “cave,” “Driver's Test,” and “Silence of the Lambs.” What the players play depends partially on their thought processes, their intuition about what the judge will think is the best match (strategy), and what is available in a particular hand (often involving some creative thinking). The judge for each round goes through the selections and then explains why a certain match was chosen. The “winner” of the round is the person whose “match” was selected, and then another person becomes judge.

The fun of the game is both in the unpredictability and in the explanations as to why the selections were made by either the judge for a round or a particular player. Participants are usually eager to explain exactly why a particular match was submitted, especially when the judge summarily discounts a match without much thought.

I was first inspired to create a game based on Apples to Apples when I watched my 13-year-old and her friends play the game at a party. What really struck me about the way they were playing was how much they were learning from each other, and how eager they were to learn. For instance, if a person played a particular card that was not chosen because the judge was unfamiliar with the term (e.g., a person who had never seen *Silence of the Lambs* would not select that to match with the term “scary”), the person who had played the card would explain to the others the word and its relation to the original adjective. The kids all listened to each other very intently and seemed to develop a collective and useful pool of knowledge. It occurred to me that this knowledge was not being developed for the sake of knowledge, but because the additional knowledge would be beneficial the next time any of them played the game with other people—the

learning provided them with a competitive advantage in future game playing.

I decided I would attempt to modify the game in order to achieve a similar result within the legal writing classroom.

### Apples to Apples—The Legal Version

The game I call Legal Apples to Apples is a bit different from the classic Apples to Apples game. Although I initially sought to have separate decks of adjective cards and noun cards, I could not develop a sufficient number of legal terms that separated themselves into those categories in a way that made the game a learning experience. I did not want to have a deck of adjective cards similar to the Apples to Apples deck (e.g., “scary,” “morbid,” “handsome,” “ostentatious”) because I wanted to develop a game in which the students would be matching only legal terms. Thus, I decided that one modification of the game would be only one deck and both the judge for the round and the other players would draw their cards from that one deck.

The object of the game was not merely for students to learn legal terminology, but to develop their thought processes, not only so that they would begin to start thinking more creatively, but also to understand that there were several ways in which a matter could be interpreted. The game deck is composed of typical legal terms combined with terminology that one might encounter in legal writing. For instance, the cards include such terms as “stare decisis,” “en banc,” and “common law,” and also include terms such as “topic sentence,” “client letter,” and “sub-argument.” I also included citation terminology such as “reverse chronological order,” “italicize or underline,” and “fifty words or more.” Finally, there is research terminology such as “pocket part,” “terms and connectors search,” and “table of jurisdictions represented.”

The object of the game, similar to the real Apples to Apples, is to assess what is in one's hand and determine the best match of terms that, at first glance, might not seem to be related at all.

Playing the game was truly an eye-opening experience for my students. At first, many of them

took on the task of playing in a very literal way attempting to “match” cards with the “right” answer. As an example, in one round I was looking over the shoulder of a student who confidently played the card “Legislative History” in order to match the phrase “United States Code.” In the end, the judge for that round chose the term “topic sentence” as his best match for “United States Code.” The rationale for the student opting to submit “topic sentence” was that it was merely a “throwaway” card because he felt he had no good matches. The rationale for the judge selecting the card as the best match was that he was thinking about how I had told the class that when writing a memo that focused on a statute (and at that time we were doing federal research), the first sentence of the discussion should introduce the statute.

Almost all of the rounds progressed in this fashion. Many students “believed” that they had the “correct” match, and not once did the judge for the round select that card. After a while, the students started to see that their thought processes could be expanded beyond an uncompromising belief in what was correct or certain to happen. They seemed then to start to get a feel for the “opposition viewpoint” and realize that there was no precise formula in the law that could be applied to achieve the desired result. All the while that this was going on, the students were also either learning new terms (*pocket part* was a new phrase for most) or reinforcing what they already knew.

### The Result

In the end, Legal Apples to Apples proved to be a tremendous success both for the students and for me. From my viewpoint, I had developed a game that enhanced the students’ analytical skills while reinforcing numerous concepts that we had covered in legal writing. It not only complemented my curriculum, but playing the game did not make me feel as though I was taking up classroom time on a game that did not join all of the elements of the bigger picture. It further accomplished something to which all teachers aspire—having his or her students walk out of the classroom still debating and discussing the material from class.

From the students’ perspective, the game proved not only to be fun, but provided a unique learning experience. Beyond the reinforcement of terminology, the students actually learned that they really had acquired an awful lot of knowledge in legal writing. The students also began to internalize that there really were numerous ways that every issue could be viewed, both from their perspective and from the perspective of an “opposing” counsel. Finally, after a few rounds of playing the game, it was evident that the confidence of the students had increased. They stopped being shy and defensive about their choices, and seemed to realize that they knew as much (or, in some cases, as little) as their peers.

### Game Show Presenter

During the summer of 2008, I received a summer teaching grant to develop electronic quiz materials to supplement the teaching of legal writing. Although various platforms are available to create multiple-choice quizzes (e.g., TWEN®, CALL, Blackboard), I did not find any of them to have all of the features I was looking for in a quiz creator—primarily, a way to make the exercise both educationally beneficial and entertaining in terms of my being able to integrate animation, sounds, and a variety of colors. Consequently, I searched for an appropriate platform, preferably shareware, that would suit my purposes and be easily accessible for the students. On my way to looking for this product, I happened upon a software package called Game Show Presenter.<sup>8</sup>

Game Show Presenter, available through Bodine Training Games, was similar to the various quiz-making packages, except that it was set up in the form of a game show, complete with an over-the-top host, Vanna White-type sidekick, music, and flashing lights. In some respects, the game was cheesy, but I thought I would test it out for purposes of putting together my multiple-choice quiz ideas in the form of a competitive end-of-semester game. I had attempted to do something

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<sup>8</sup> See Game Show Presenter by Bodine Training Games LLC at <[www.almorale.com](http://www.almorale.com)>.

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“The game enabled me to provide immediate feedback, which the students thought was terrific. They were also highly entertained by the game and asked that we play it again. ...”

like this in the past using manual methods (such as using cooking timers and various bells and clickers to “buzz in,” in addition to keeping score on a chalkboard) but I found that the physical logistics of such a game bogged down the learning experience.

Game Show Presenter handled the physical logistics. It provided for timers, computer buzz-in keys, and keeping track of the number of questions in the rounds. The game also kept score and did the appropriate deduction of points for incorrect answers. One feature I particularly enjoyed was that it also allowed for pauses and adjustments so that the game could be tailored to the class time allowed. It could also be stopped to discuss some of the questions when it appeared that the students needed a refresher about some of the material.

#### A Test Run

After I developed all of the questions that I would use for the game (focused on legal process, citation, and research sources), I took it for a test run at the end of first semester as a review of the material.<sup>9</sup>

Similar to what occurred with Legal Apples to Apples, playing the game was an eye-opening experience. Both the students and I discovered that they did not think well with a timer going. We also discovered that many students did not know a lot of the material as well as we had hoped. In fact, after a couple of timed rounds during which none of the student groups got the right answers for what I thought were basic questions, I turned off the timer. The percentage of correct answers increased only slightly, but I was then able to discuss the questions and answers and do a full curricular review in the process.

#### The Result

Had I not played my end-of-semester game, I would not have known right away exactly what the students did not know. Being able to correct misinformation on the spot was very much a

benefit. True enough, I could have given a midterm exam in order to find out what the students had not retained; however, I would not have been able to do any type of review until the second semester. I do not believe that this would have been as beneficial as being able to discuss the material while it was still fresh in the students’ minds. The game enabled me to provide immediate feedback, which the students thought was terrific. They were also highly entertained by the game and asked that we play it again once they did more study and preparation for it. This demonstrated the exact attitude that every teacher would like to see from her students.

#### Choices

In the past, I believed that choosing to play a game during class meant choosing between full coverage of a topic and entertaining students. Both Legal Apples to Apples and Game Show Presenter enabled me to feel comfortable that I was accomplishing the twofold goal of educating students and doing it in a fun and engaging fashion. Both activities provided the students with the immediate feedback seemingly required by millennial students and both games gave me an insight into what the students were absorbing. Another indirect benefit that was derived was being able to give the students sufficient confidence about what they had learned in the course, and use the group’s collective knowledge to enhance individual knowledge. This is not something that could have been accomplished as well using more traditional vehicles, or in the traditional one-on-one feedback mechanisms generally used in legal writing.

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<sup>9</sup> The legal version of Game Show Presenter is available at <[www.almorale.com/law/](http://www.almorale.com/law/)>.

# Multitasking and Legal Writing

By Anne Enquist<sup>1</sup>

Anne Enquist is Professor of Lawyering Skills and Associate Director of the Legal Writing Program at Seattle University School of Law in Washington.

One simple truth about lawyers, law students, and really everyone who uses technology these days is that we have all become multitaskers. We are on LexisNexis® or Westlaw® doing research with the TV tuned to the latest reality show in the background. We are struggling to organize our ideas into an outline, all while our favorite recording artist sings via earbud and MP3 player into our ears. We are drafting a memo to a senior partner when our cell phone chirps—we have a new text message. We are writing a brief to the court and those little boxes with new e-mails pop up at the bottom of our computer screen, begging for our attention. And on top of all these techno competitors for our attention, we may be instant messaging with a few friends and checking out what they are doing on Facebook or saying on Twitter.

Is this smart? Is this efficient? Like so much else in law and law school, the answer is “it depends.” For most of us, multitasking has become a habit (some say an addiction), but if we stop and take a little time to think about multitasking and how it works with our brains, we can figure out when the habit is helpful and when it undermines our productivity and effectiveness.

Recently there has been a fair amount of research about multitasking and its effect on various cognitive processes. The multitasking research builds on earlier research about the human brain, which showed that the typical brain has an estimated processing capacity of 126 bits per second

and a short-term memory of seven items at once.<sup>2</sup> Those biological facts haven’t changed. Brain researchers tell us that it does not matter how much information from various sources hits our brain at a time; there is a limit to what we can process simultaneously.

The multitasking research makes a second important point, which is that there is a difference between *parallel processing*, which is when a person tries to do more than one thing at a time, and *task switching*, which is toggling between mental tasks.

In parallel processing, a person does two or more things simultaneously, but only one of the tasks requires a high degree of cognition and attention. The other task or tasks are usually routine, highly practiced skills, or motor skills that can be done almost without thinking. A good example of parallel processing is reading a case while eating a sandwich or while riding an exercise bike. The brain focuses on reading the case, and the other tasks are completed more or less on autopilot.

According to the research, parallel processing may increase efficiency. You can do two or more things at once if only one of them requires your attention.

In contrast, a good example of task switching is reading a case while responding to e-mail or instant messages. Because both tasks require mental attention and focus, the brain cannot do them simultaneously. Instead, it switches back and forth.

Not surprisingly, then, task switching decreases efficiency.<sup>3</sup> Each time a person switches his or her

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<sup>2</sup> Urs Gasser & John Palfrey, *Mastering Multitasking*, 66 *Educ. Leadership* 14, 15 (2009), citing G.A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity to Process Information*, 63 *Psychol. Rev.* 81 (1956).

<sup>3</sup> The only efficiency advantage to task switching that the research has noted is that some students who find studying boring will stick with it longer if they have the pleasant distraction of social interventions (instant messaging, text messages, e-mail) to keep them motivated. Note, however, that the added time studying in this scenario may not mean more is learned because task switching itself adds to the total time required.

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<sup>1</sup> The material in this article will also appear in the fifth edition of *The Legal Writing Handbook* by Laurel Currie Oates and Anne M. Enquist, which is due out in spring 2010.

“One simple truth about lawyers, law students, and really everyone who uses technology these days is that we have all become multitaskers.”

“ [W]hen we are constantly juggling different mental tasks, do we make more mistakes and are we conditioning our brains to work less effectively? ”

attention from one mental task to another, the brain must activate different neural circuits.<sup>4</sup>

Unfortunately, time is lost at every step. Initially, the brain is focused on Task #1. Task #2 interrupts; now the brain must make a judgment call about which task to focus on. Researchers call this the “response selection bottleneck,” which is another way of saying time is lost as the brain decides which task to perform. If the brain switches to Task #2, this switch involves different circuits; once Task #2 is complete, the brain must switch back to Task #1, trying to remember where it left off. And all of this assumes a disciplined task switch and not that Task #2 completely diverted the person to a third, fourth, or fifth distraction.

So, despite the myth that multitaskers are somehow highly efficient and productive, study after study shows that task switching significantly increases the total amount of time needed to finish each task, sometimes even doubling the total time. In short, the harsh truth is that multitaskers are deceiving themselves when they believe they are accomplishing more by multitasking. Task switching slows you down.

Perhaps the more important points about task switching, though, are not the ones about decreased efficiency. There are also serious questions being asked by brain researchers about (1) the increase in errors caused by multitasking and (2) how task switching affects a person’s “cognitive style.” In other words, when we are constantly juggling different mental tasks, do we make more mistakes and are we conditioning our brains to work less effectively?

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<sup>4</sup> The switching of attention from one task to another—toggling—occurs in a region right behind the forehead called Brodmann’s Area 10 in the brain’s anterior prefrontal cortex, according to a functional magnetic resonance imaging (fMRI) study by Jordan Grafman’s team, chief of the cognitive neuroscience section at the National Institute of Neurological Disorders and Stroke, Bethesda, Md. Ingrid Wickelgren, *System Overload*, 92 *Current Sci.* 4, 5 (2006); Claudia Wallis, *The Multitasking Generation*, 167 *Time* 48, 52 (2006); see Etienne Koechlin et al., *The Role of the Anterior Prefrontal Cortex in Human Cognition*, 399 *Nature* 148 (1999). Activity in an area of the brain shows up on MRI as increased flow of blood to this area.

Research has confirmed the increase in errors in many areas, such as in the number of accidents that occur when someone talks on the phone or sends a text message while driving. While no one has yet studied lawyers, it is reasonable to assume that lawyers who engage in multitasking might make more errors than lawyers who do not. For example, a lawyer who answers the phone while reading a draft of a contract might be more likely to overlook an important provision than the lawyer who gives the contract his or her undivided attention.

As to the second point about how multitaskers are conditioning their brains, the studies that have focused on how multitasking affects cognitive style should raise concerns for lawyers and law students who want to enhance, not diminish, their capacity to do in-depth thinking and sophisticated legal work. For example, a study by Levine, Waite, and Bowman showed that “the amount of time that young people spent IMing was significantly related to higher ratings of distractibility for academic tasks. . . .”<sup>5</sup> Not surprisingly, the same study showed that the amount of time spent reading books was negatively related to distractibility. Another 2005 study concluded that “Workers distracted by e-mail and phone calls suffer a fall in IQ more than twice that found in marijuana smokers.”<sup>6</sup> Donald Roberts, a Stanford professor of communications commenting on the Kaiser Family Foundation 2005 survey of Americans, says that “habitual multitasking may condition their brain to an overexcited state, making it difficult to focus even when they want to.”<sup>7</sup> Roberts notes that Stanford students “can’t go the few minutes between . . . classes without talking on their cell phones. . . . [T]here’s almost a discomfort with not being stimulated—a kind of ‘I can’t stand the silence.’”<sup>8</sup>

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<sup>5</sup> Laura E. Levine et al., *Electronic Media Use, Reading, and Academic Distractibility in College Youth*, 10 *CyberPsychology & Behav.* 560, 560 (2007).

<sup>6</sup> Christine Rosen, *The Myth of Multitasking*, 20 *New Atlantis* 105, 106 (2008).

<sup>7</sup> Wallis, *supra* note 4, at 54, *quoted in* Levine et al., *supra* note 5, at 561; see Victoria Rideout et al., *Generation M: Media in the Lives of 8–18 Year Olds* (Kaiser Family Foundation 2005).

<sup>8</sup> Wallis, *supra* note 4, at 52.

Another researcher, David E. Meyer, director of the Brain, Cognition and Action Laboratory at the University of Michigan, agrees. His research suggests that habitual multitaskers “lose the skill and the will to maintain concentration. . . . [T]hey get mental antsiness.”<sup>9</sup>

While more research needs to be done on how multitasking and specifically task switching affects a person’s cognitive style, the early findings suggest that habitual uncontrolled multitasking, especially in the form of task switching, can lead to what we might regard as a self-induced form of attention deficit disorder. Acquiring such a cognitive style would undoubtedly hamper the kind of in-depth thought and sophisticated analysis lawyers need to do.

Unfortunately, that is not all the bad news about multitasking and task switching. A related area of concern being explored by brain researchers is *how* task switching affects how we learn, specifically where in the brain we store new learning and how that affects our ability to use what we learned. One study showed that students could learn new information while distracted by a second task, but the distraction decreased the degree to which the participants used declarative memory (which relies on a medial temporal lobe system), as opposed to habit learning (which relies on the striatum).<sup>10</sup> Both types of memory systems support learning, but learning stored in the habit learning areas of the brain is “less flexible and more specialized, so you cannot retrieve the information as easily.”<sup>11</sup> Declarative memory is more flexible, so knowledge stored there (which is what happens when one

studies in a focused, uninterrupted way) is more useful and transferable to new situations.

So what do we do with all this new information about multitasking, and how do we use it to ensure that our legal research, analysis, and writing processes are efficient and effective?

First, we have to be realistic. Most of us are unlikely to give up our multitasking habit completely. Instead, the better approach may be to use the research findings to shape and manage our multitasking habit to our best advantage. If we know, for example, that some forms of parallel processing work for us, such as experiencing the calming effect of listening to background music while we research online, then we should continue to use those forms of multitasking. If, on the other hand, we suspect that our task switching habits are making us inefficient or distracted or more prone to make mistakes, we should consider monitoring our task switching to determine how best to reshape those habits so that we can be more effective.

How are a few ideas you may want to consider as you think about how to develop effective research, analysis, and writing processes.

1. Be intentional about your own attention:
  - cultivate the art of paying attention
  - monitor your ability to shift attention
  - exercise judgment about what is worthy of your attention
2. Consider adopting some simple strategies for managing distractions and maintaining focus:
  - when you know you need to focus, close your e-mail or turn off the e-mail alert function, close the instant message window, turn off the Internet, close your laptop, and turn off your phone
  - to avoid other distractions coming over your computer, print out online materials before reading them
  - limit the number of Web sites you visit
  - create stronger divisions between your “work time” and your “social time”

“[H]abitual uncontrolled multitasking, especially in the form of task switching, can lead to what we might regard as a self-induced form of attention deficit disorder.”

<sup>9</sup> Meyers is somewhat optimistic that the human brain can learn to task switch more effectively, but his research uncovers still another negative finding: Multitasking contributes to the release of stress hormones and adrenaline, which can cause long-term health problems if not controlled, and contribute to loss of short-term memory. *Id.* at 54.

<sup>10</sup> Karin Foerde et al., *Modulation of Competing Memory Systems by Distraction*, 103 *Proceedings of the Nat’l Acad. of Sci. of the U.S.* 11778 (2006).

<sup>11</sup> Rosen, *supra* note 6, at 107, quoting Professor Russell Poldrack, UCLA.

“Sir Isaac Newton, for example, attributed his genius ‘to patient attention more than any other skill.’”

3. Recognize that your readers may also be multitaskers suffering from information overload and, when appropriate, adapt your written communications to them accordingly:
  - simplify messages
  - shorten messages
  - use “reply all” with care

Finally, we may want to consider the virtues of “single tasking.” We know that geniuses in many fields are often known for their ability to focus their attention in order to acquire a deep understanding of a problem or issue. Sir Isaac Newton, for example, attributed his genius “to patient attention more than any other skill.” Rather than secretly congratulating ourselves when we try to do three things at once, perhaps we should pat ourselves on the back when we, at least occasionally, make one important person, project, or legal problem the sole focus of our attention.

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### Another Perspective

“The law is the foundation upon which all arguments are built; legal research requires finding the foundation for those arguments. In the ever growing movement to integrate ‘skills and values’ across the curriculum, a critical component to this curriculum redesign is research instruction. Research serves as the fulcrum upon which ‘skills and values,’ such as ethics and practical application of doctrinal studies, rests.

And for the most part, other courses in the law school curriculum omit discussion of research skills. ‘No research’ is the norm because the students purchase casebooks that already contain the cases the students will be assigned to read, exams for the most part are closed book (and if they are open-book, the students are using the casebook, rule book, outlines, or other notes, and not researching in terms of searching the library), and the bar examination is closed book, even for the states that have the multistate performance test exam (MPT). Legal education is ‘no research’ education because “a first-year law student [can] navigate through the common law courses that make up the first year of law school without doing any real research at all.” ...

Given the ‘no research’ environment of legal education, the road of research instruction, which begins in the first-year legal research and writing courses, must continue across the curriculum in order for the research skills learned by students in the first year to be further developed, refined, and reinforced, and in order to adequately prepare law students for their future careers as attorneys. Building the road of research instruction across the curriculum will bridge the gap between the ‘no research’ environment of law school education and the ‘research environment’ of real world legal practice.”

—Brooke J. Bowman, *Researching Across the Curriculum: The Road Must Continue Beyond the First Year*, 61 Okla. L. Rev. 503, 504–508 (2008).

## Intro to Plagiarism

*Teachable Moments ... is a regular feature of Perspectives designed to give teachers an opportunity to describe techniques or strategies for presenting a particular research or writing topic to their students. Readers are invited to submit their own “teachable moments” to the editors of the column: Elizabeth Edinger, The Catholic University of America, e-mail: [edinger@law.edu](mailto:edinger@law.edu), or Craig T. Smith, Vanderbilt University, e-mail: [craig.smith@law.vanderbilt.edu](mailto:craig.smith@law.vanderbilt.edu).*

**By Jane Scott**

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The solution to the problem of law student plagiarism, in the view of many legal educators, is to improve our teaching of what plagiarism is and how to avoid it.<sup>1</sup> Not surprisingly, the effort to address our students' understanding of plagiarism has been concentrated in the legal writing field.<sup>2</sup> The Legal Writing Institute publishes a policy brochure for law schools to adapt and use, offering a clear definition of plagiarism, hypotheticals for class discussion, student acknowledgement forms, and other resources.<sup>3</sup> Many legal writing textbooks now include sections on plagiarism.<sup>4</sup> These materials candidly address potential sources of confusion for students, such as the disparity between law school and law practice, where

unattributed copying is a time-honored tradition, and cultural differences in attitudes toward plagiarism.<sup>5</sup>

Despite these resources, I suspect that many legal writing teachers continue to give the topic of plagiarism short shrift. Part of the reason, perhaps, is that most teaching materials focus on the kind of plagiarism that arises in seminars and research courses, where a student uses text or ideas from a published source without proper attribution. In a typical first-year legal writing course, however, published sources do not provide the ready-made solution that a plagiarist seeks. Instead, plagiarism in first-year legal writing courses commonly takes the “peer-to-peer” form, in which one student copies another student's paper and submits it to the professor as his or her own.<sup>6</sup> No amount of attribution and citation can convert this insidious practice into correct and honest writing.

If we seek to prevent plagiarism in our first-year legal writing courses, we should instruct our students directly about peer-to-peer plagiarism. We might do well to focus solely on this form of misconduct at the start of the legal writing course, leaving until later a consideration of proper attribution of sources, the correct handling of quotations, and other topics. A more narrowly tailored discussion of plagiarism might be more effective at conveying what first-year legal writing students need to know: that copying from a fellow student is plagiarism, that it is relatively easy for the professor to detect, and that its consequences can be disastrous.

My own brush with peer-to-peer plagiarism was so unsettling that I resolved to do whatever I could to prevent another occurrence. The result was the lesson described below, which I now use on the first

“If we seek to prevent plagiarism in our first-year legal writing courses, we should instruct our students directly about peer-to-peer plagiarism.”

<sup>1</sup> See, e.g., Robert D. Bills, *Plagiarism in Law Schools: Close Resemblance of the Worst Kind?* 31 Santa Clara L. Rev. 103 (1990–1991); Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236 (1999).

<sup>2</sup> See, e.g., LeClercq, *supra* note 1; Kristin Gerdy, *Law Student Plagiarism: Why It Happens, Where It's Found, and How to Find It*, 2004 BYU Educ. & L.J. 431; Patsy W. Thomley, *In Search of a Plagiarism Policy*, 16 N. Ky. L. Rev. 501 (1989); see also Darby Dickerson, *Facilitated Plagiarism: The Saga of Term-Paper Mills and the Failure of Legislation and Litigation to Control Them*, 52 Vill. L. Rev. 21 (2007).

<sup>3</sup> Legal Writing Institute, *Law School Plagiarism v. Proper Attribution* (2003), available at <[lwionline.org/plagiarism\\_resources.html](http://lwionline.org/plagiarism_resources.html)>.

<sup>4</sup> See, e.g., Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook* 856–857 (4th ed. 2006); Linda H. Edwards, *Legal Writing and Analysis* 12–13 (2d ed. 2007).

<sup>5</sup> See, e.g., Legal Writing Institute, *supra* note 3; Oates & Enquist, *supra* note 4, at 857.

<sup>6</sup> Gerdy, *supra* note 2, at 432.

“How does one bring up the topic of plagiarism without casting a pall over the entire class? One way is to tell a story.”

day of class. The approach combines narrative, a research exercise, class discussion, and concrete illustrations of how plagiarism reveals itself to the legal writing professor. It also gives students a preview of a typical legal writing assignment and the professor’s commenting style.

### Introduction

How does one bring up the topic of plagiarism without casting a pall over the entire class? One way is to tell a story. I tell my students that one spring semester, while I was grading a stack of briefs, I encountered a paper that immediately raised my suspicions. By the time I reached the bottom of the first page, there was no mistaking that the paper had been copied from another student’s. I describe the way the hair on the back of my neck began to rise as I realized what I was seeing. I also describe the way the student looked the next time we saw each other: pale, disheveled, avoiding eye contact. Of course, I strip the story of any identifying details, including the student’s gender and the year in which the incident occurred.

In this story, events unfold from the professor’s perspective, which is not a familiar one to the students.<sup>7</sup> The central conflict appears to be the student’s act of plagiarism, but that conflict remains unresolved because I never relate what happened to the student. The real conflict is the professor’s loss of innocence about plagiarism. I explain that the incident made me determined to talk to my students from the outset of the course about plagiarism, no matter how uncomfortable it might be. Thus, the resolution of the conflict serves to introduce the discussion that follows.<sup>8</sup>

Those who are fortunate enough to lack a “plagiarism narrative” of their own should have no difficulty finding one to adapt. A colleague’s experience with peer-to-peer plagiarism can be used for this purpose (stripped of identifying

details, of course). Whether the story is told in the first person or in the third person is less important, I believe, than that it be told from the professor’s perspective.

### Legal Research and Analysis

Next, I tell the students to go to the law school’s Web site and locate the code of student professional responsibility.<sup>9</sup> I ask them to find and read the code’s provisions on plagiarism.<sup>10</sup> Then I ask them whether plagiarism, as defined in the code, includes copying from another student’s paper and submitting it as one’s own writing. When students volunteer answers, I ask them to state their reasoning explicitly. Finally, I direct them to the grievance procedures that apply when a student is charged with unprofessional conduct<sup>11</sup> and ask them to identify the sanctions that may be imposed through the disciplinary process.<sup>12</sup>

Students seem to welcome this activity. It provides a break from the tension created by the story; searching for information online is a familiar activity for them. The code and its plagiarism chapter are not difficult to find, and the interpretation is reasonably clear.<sup>13</sup> Since finding and applying code provisions is something students expect to do in law school, they approach the exercise with interest.

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<sup>9</sup> The Code of Student Professional Responsibility of St. John’s University School of Law is available at <[www.stjohns.edu/academics/graduate/law/current/handbook/appendices/b.stj](http://www.stjohns.edu/academics/graduate/law/current/handbook/appendices/b.stj)>.

<sup>10</sup> The provisions read in part: “Plagiarism is the misappropriation or theft of another’s work and ideas. Students seeking admission to the legal profession must always take great care to distinguish their own ideas and knowledge from information, thoughts and ideas appropriated from other sources and to avoid even the appearance of impropriety in their oral or written submissions.” *Id.* at IV.

<sup>11</sup> *Id.* at IX.

<sup>12</sup> These include, but are not limited to, loss of course credit, reprimand, an act of reparation, suspension, or expulsion. *Id.*

<sup>13</sup> The Code explicitly states:

Except as specifically authorized by the professor or person in charge of the course or activity, all work submitted in law school, whether produced as part of academic or extracurricular activities, must be the work of the individual student. Each student has the responsibility to credit and cite appropriately any material prepared by others, or ideas obtained from others, contained in the student’s written or oral presentations. A student must not submit work that is not the student’s own without clear attribution for all sources. *Id.*

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<sup>7</sup> On the role of perspective in storytelling, see generally Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 467–68 (2001).

<sup>8</sup> See Foley & Robbins, *supra* note 7, at 466–470.

## Public Policy

Then I project on the screen the application form used by our state’s appellate committees on character and fitness.<sup>14</sup> I explain to the students that they will fill out this form, or one like it for another state, after they have finished law school and taken the bar exam. I point out the question that asks, “Have you ever been placed on probation, dropped, suspended, expelled or otherwise been subjected to discipline by any institution of learning?”<sup>15</sup> Then I ask the class, “Why would the state be concerned about licensing someone to practice law who had tried to deceive a professor in order to get a better grade?”

Students can easily see the parallel between lying to a professor and lying to a court. With a little nudging, they can identify other parallels, such as misappropriation of a client’s funds. The discussion allows students to play the role of rule enforcer rather than rule violator, and they seem eager to embrace it.

Showing the bar application forms on the screen also encourages students to visualize themselves filling out those same forms in a few short years, making the issue more personal and real. Before we leave the topic, I show them another important form on the bar admission Web site: the Form Law School Certificate, in which the law school itself must disclose any charges of misconduct or disciplinary actions that have occurred during the applicant’s law school career.<sup>16</sup>

## Grading and Commenting

My next objective is to show the students how plagiarism reveals itself to a legal writing professor. I begin by explaining the nature of the writing assignments they will be working on during the semester, and the process I use for the submission

and return of papers. I explain that I will be using electronic commenting when I grade their papers, and I project on the screen a page from a “sample” graded student memo, to show what it will look like.

The memo shows comments written in the margins of the page, some positive and others noting areas for improvement. In a couple of places, portions of the text have been highlighted in yellow. I explain that I use yellow highlighting to indicate typographical, citation, and spelling errors. Then I call the students’ attention to one of the highlighted areas. It is a simple editorial oversight, such as “The plaintiff took took an overdose of medication.” I note that such errors are easy to make, which is why it is critical to proofread.

Then I open another student memo on the screen, this time a clean, unmarked paper. “Now I’m grading another student’s memo for this same assignment,” I explain. “And at first I’m just reading straight through from beginning to end, to get a general sense of it.” Scrolling through to the last page, I continue: “OK, it looks like this student has formatted the memo correctly, and all the required sections are included. So now I’m going back to the beginning, and I’ll start reading more closely.”

There on the first page, in the Facts section, is the same sentence: “The plaintiff took took an overdose of medication.” I go back to the first paper and look at the paragraph as a whole. Sure enough, the paragraph in the second paper is almost identical, with only a few minor differences.

“At this point I know that one of these two papers was copied from the other,” I explain. “I don’t yet know which one is the original and which is the copy. For all I know, there may be other papers in the stack that contain this same language. What I do know is that someone has committed plagiarism. And that’s all it takes to start an investigation into academic misconduct.”

The point can be illustrated in many ways. For example, one can show a graded paper in which a student has mischaracterized the holding of a case

“Then I project on the screen the application form used by our state’s appellate committees on character and fitness.”

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<sup>14</sup> New York Supreme Court Appellate Division, *Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York*, available at <[www.nybarexam.org/Docs/AdmissionsPackage.pdf](http://www.nybarexam.org/Docs/AdmissionsPackage.pdf)>.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 22–23.

“It is important to reassure students that mere coincidence will not be mistaken for plagiarism: some wording choices will naturally show up in more than one paper. ...”

and the professor has written a comment explaining the correct holding. In another paper, the same mischaracterization appears, written in identical language. Or the graded paper might include a quote from which several words have been dropped, resulting in a mangled sentence. The professor's comment reads, "Check the accuracy of this quote." The same quotation, with the same omission, appears in an ungraded paper.

Good writing, as well as bad, can be used in the demonstration. For example, in the graded paper, the professor may have written "Good, clear thesis sentence" at the beginning of a paragraph; an identical thesis sentence in the next paper leads to the discovery of extensive copying. A well-composed Question Presented may have attracted a positive comment in the graded paper, with particular praise for the student's choice of key facts. In the ungraded paper, the professor finds the same Question Presented, word for word.

Students seem to get the point: In the process of grading and commenting on a paper, the legal writing professor gets to know its language well, and is likely to recognize that language if it shows up in another paper. The repeated examples on the screen illustrate this point effectively, and the professor's "live grading" in front of the class gives the demonstration immediacy.

Students can also see from these examples that copying another student's work means copying that student's mistakes. Although some mistakes can be cleaned up by spell-checking (if the plagiarizer has budgeted adequate time), others may simply be unrecognizable to the beginning legal writer. Even copying an "A" paper can lead to detection: the very quality of the writing can be so distinctive that the professor wonders, on seeing it again, "Where have I read this before?"

It is important to reassure students that mere coincidence will not be mistaken for plagiarism: some wording choices will naturally show up in more than one paper, and many students make the same spelling and citation errors. I explain that

something more is required than the random overlap of a few words, and that the initial discovery of identical language is just the beginning of a thorough comparison of the two papers. At the same time, I make it clear that a paper need not be copied in its entirety in order to be plagiarized. Even if only a portion of the paper has been lifted from another student's and all the rest is original, the student has committed plagiarism.

Showing examples of graded papers also introduces the students to the professor's commenting style and prepares them for the kinds of comments they will see when their own papers are returned. That preview can be useful in reducing students' discomfort upon receiving a heavily marked-up paper.

### Clarification

I end the lesson by going over the course rules on collaboration. I encourage the students to discuss their research and analysis with one another, but emphasize that they may not collaborate in the writing of their assignments. The distinction can be expressed through a simple rule: they may not show a draft of their written work to another student, or look at another student's draft.

### Repetition

At several points during the semester, it is useful to return briefly to the subject of peer-to-peer plagiarism. For example, as the due date for a graded assignment approaches, students should be reminded to keep their belongings secure and not to leave their laptops unattended. I urge them to keep their electronic files clearly labeled and organized, so they do not inadvertently send someone a draft of their paper when they meant to send some other document. Students are well-advised to regularly print out hard copies of their drafts as insurance against computer casualties, but they should do so at home. Suggestions like these help students avoid becoming victims of plagiarism, but at the same time serve as a general reminder of the plagiarism discussion, conveying an "eyes on the street" message.

## Conclusion

There is no way of knowing whether talking to students directly about peer-to-peer plagiarism actually reduces its incidence. Indeed, one can be reasonably sure that some students will plagiarize no matter what the professor does.<sup>17</sup> Like other forms of high-risk behavior, plagiarism involves some factors that are beyond the reach of reason.

Nevertheless, devoting class time to the subject is essential. First-year legal writing students need to understand that copying from another student's paper is a form of plagiarism that will not go unnoticed and that could end their law school careers. Peer-to-peer plagiarism can be addressed more effectively if we unbundle it from other, equally important instruction about plagiarism. The approaches described above, such as active learning, role-playing, repetition, and storytelling, can be helpful in conveying the message so that students take heed.

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“Peer-to-peer plagiarism can be addressed more effectively if we unbundle it from other, equally important instruction about plagiarism.”

## Another Perspective

“Legal scholarship is an extraordinary conversation that influences the evolution of the laws that shape our lives. It defies space. Normally, my thoughts about plagiarism, copyright and trademark law are heard only by the students who attend my lectures. However, if I publish these thoughts in an article, my voice may be heard by colleagues and students at many other schools. Publication also defies time. Articles with powerful resonant arguments written years ago are still read, discussed, and cited. The idea that our thoughts and words will last for some time is a frightening proposition. We expose our thoughts, not just to the immediate audience, but to an infinitely broader group, amongst whom there are bound to be unforgiving critics. Published writings are one of the only places where the great ideas of our democracy are created, examined in detail and tested. Writing and editing legal scholarship is our chance to participate in this conversation.

How can we participate? First, we can listen to the voices that came before ours and honor their contributions to legal scholarship. Then, empowered with this knowledge, we can find our own voices. Separating one's own voice from those of our teachers is an active process we must always maintain with vigilance. However, the vigilance need not use much energy if we habitually incorporate careful practices for identifying the voice behind each idea. Like the playwright who creates different voices in a drama by identifying separate characters in the script, we must strive to identify each voice in legal writing just as clearly.”

—Deborah R. Gerhardt, *Plagiarism in Cyberspace: Learning the Rules of Recycling Content with a View Towards Nurturing Academic Trust in an Electronic World*, 12 Rich. J.L. & Tech. 10, 59–60 (2006).

<sup>17</sup> See Bills, *supra* note 1, at 133.

# Teaching Students to Harness the Power of Word Processing as They Write

By Susan Liemer

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When I started teaching legal research and writing in 1990, I had to show students how to turn on the computer. Fast forward 15 years, and I found I had to persuade students that a natural language search on Google was not thorough legal research. More recently though, I have realized that this generation, who grew up using keyboards, needs direct instruction on how to use its computers as effective writing tools. Today's law students need to learn to harness the power of basic word-processing features to improve their writing process—and their writing product.

Identifying this need was a gradual process. In a writing conference one day, I reminded a student that changing a particular word throughout the paper would be a quick edit: “just click on edit-find-replace.” The student's reply was a blank stare. I described how to accomplish this edit in more detail, and the student thanked me for the tip.

Then I tried a little experiment. Whenever appropriate in future conferences, I asked if the student knew how to edit-find-replace. Most assured me quickly that they did. But for about a quarter of my students, this simple editing feature of their word processing was welcome news.

So our students are not always as savvy about word processing as we assume they are. Our students may be able to share MP3 files *sub rosa* or Twitter with *élan*. But they do not necessarily know how best to use their primary writing tool, their word-processing software.

Now I find myself in the classroom giving specific word-processing advice for the initial writing process. I acknowledge that the most angst-ridden part of the writing process is that window of time

when students have done significant research but have not yet started writing. They have a lot of information and ideas ricocheting around in their heads. And they have nothing on paper. The process of taking thoughts, zinging mentally around, and capturing them in text requires time and effort on task, wrestling with the material.

Here I introduce the concept of the “brain dump” draft.<sup>1</sup> I tell my students, “give yourself psychological permission to just dump whatever is in your head into the computer as you type.” Think of it as a freewrite (a technique we will have already tried in class).<sup>2</sup> Set a specific time, say half an hour, in which you will write down everything you are thinking about your research topic. Keep typing for the allotted time. Then see what you have. But if you are on roll, do not stop.

Here the students need some more guidance: Print out the brain-dump draft. Read it over. Look for points that coalesce into subtopics that can be pulled together for an IRAC. Develop those IRACs (or CREACs or whatever acronym you use for reporting and applying the law on an issue).

Already got IRAC? Cut and paste that errant, off-topic paragraph into the IRAC it really belongs in. Do the same for any “A” that wandered in “R.” If a few lines of “A” have wandered into “R,” just cut and paste them at the end of “R.” Cutting and pasting takes only seconds. Then reprint, reread, and modify the language for better flow.

<sup>1</sup> Anne Lamott has a slightly less polite term for it, in her iconic book on writing, *Bird by Bird* 21 (1995).

<sup>2</sup> On freewriting in the legal writing teaching context, see Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Legal Educ. 155, 174–175 (1999); Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. Legal Educ. 342, 349–352 (1996).

“Our students may be able to share MP3 files ... [b]ut they do not necessarily know how best to use their primary writing tool, their word-processing software.”

If the brain-dump draft contains material for which you cannot find the right location, do not delete it. Never waste perfectly good text. It takes a lot of time and energy to hammer out good text. It takes seconds to cut and paste. So open a new document and dump in there any miscellaneous paragraphs, sentences, and phrases that are not fitting in well elsewhere. You can always pick up those lines of text again later, when you identify the right location(s) for them in your paper. (Some text you may even end up saving for the next paper or one you do not even know yet you will write.)

In addition to guidance on using word processing to ease the angst of the initial writing process, students need a gentle warning: That first brain-dump draft pulled off the printer? It is not the draft to bring to a writing conference with the professor. It is the draft in which you create raw material, the rough text. This raw material needs polishing, through several more drafts, before it is ready to bring to a conference with the writing professor. It is your job to wrestle with the text and shape it to its task to the best of your understanding and ability.

Working through several drafts, however, should be easier now, because you have something to work with. The paper is no longer just ideas ricocheting around in your head; there is actual text on the paper, raw material to work with now.

And it is so much easier to work with something than nothing. A brain dump, followed by cutting and pasting, adding and subtracting, and, yes, edit-find-replace, is a much more productive process than staring anxiously at a blank computer screen or painstakingly perfecting each line before moving on.

There are many computer applications with specialized features that may help law students create specific documents. For example, some word-processing software has a shortcut to assemble a table of authorities in an appellate brief. Compiling a complete catalogue of all such features, though, would likely require writing an entire book. Here I mean to focus only on the most basic features common to all word-processing software: the cut, save, paste, find, and replace features that changed the way those of us who grew up with typewriters compose. Our tech-savvy students, too, need instruction in using these core word-processing features to make the most basic parts of the writing process efficient and effective. Permission to brain dump, generous cutting and pasting, and saving extraneous text in a separate document are parts of the core writing process that will help students harness the power of their word processing.

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“Our tech-savvy students, too, need instruction in using these core word-processing features to make the most basic parts of the writing process efficient and effective.”

## Another Perspective

“The brain’s two halves emphasize different tasks. Although individuals vary in how these hemispheres function, the left brain generally focuses on linear, sequential ideas, while the right brain concentrates on patterns and connections. The left brain, for example, helps an individual predict the next symbol in a series of letters or numbers. The right brain enables that person to quickly choose two identical graphic designs out of a larger collection. The left brain analyzes the pieces, while the right brain synthesizes the big picture.

In learning, these two processes complement one another. The left brain grabs bits of potentially useful data from the environment, while the right brain relates them to one another. The left brain captures ‘text,’ whether composed of words, numbers, or other isolated pieces of information, while the right brain interprets the context of those data. The best learning draws on both parts of the brain, pursuing both the forest and the trees.”

—Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. Sci. & Tech. L. 39, 42–43 (2008).

# E-Mail Etiquette in the Business World

**By Tracy Turner**

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## The Beauty of E-Mail

E-mail can be an efficient and effective tool in the business world. E-mail allows us to communicate with multiple individuals simultaneously. It provides a permanent record of our message in an easily searchable database. It enables us to carefully word, organize, and edit our message to maximize its effectiveness. However, misuse of e-mail can strain interpersonal relationships and negatively affect your professional image. Therefore, this article aims to provide practical tips on the proper use of e-mail so that your e-mail communications will foster good relationships with your colleagues and clients and advance rather than hinder your reputation as a competent professional.

## Why Does E-Mail Etiquette Matter?

In this age of text messaging, the iPod®, and the BlackBerry® phone, many of us have become used to cryptic messages with incomplete sentences, abbreviations, and no punctuation. This method of communication is not ineffective. We do understand each other. However, it leaves no room for the nuances of language.

In a professional setting, the content of our message becomes more important than in our personal e-mails. We are not e-mailing about where we just saw Paris Hilton or what we ate for lunch. In a professional setting, we are communicating information that has the power to alter decisions and affect people's lives. We are also communicating information that is often too complex to be conveyed without the nuances of language. Moreover, we must occasionally communicate with people who became professionals before the advent of e-mail. Even if these folks have learned to use

e-mail, they expect to see a more formal, deliberate, and composed message.

The form of our business e-mails is also more important than the form of our personal e-mails. Everything we do as professionals sends a message to others about our trustworthiness, reliability, intelligence, and work ethic. As you will see as you read on, drafting a professional e-mail is easy. Take advantage of these little opportunities to advance your career by portraying yourself as a competent attorney.

## When Not to Use E-Mail

The first step toward drafting a professional e-mail is to consider whether you should even draft it in the first place. Some golden rules about the limits of e-mail are listed below.

### 1. Avoid using e-mail to convey sensitive, confidential, or confrontational information.

If you are conveying bad news or information that may upset the recipient, do not use e-mail unless it is the only way to reach the recipient within whatever time frame is required. Otherwise, convey bad news in person or by telephone. Even a professionally drafted e-mail is too blunt an instrument with which to communicate sensitive information. When you are conveying bad news, you need to be able to respond to the cues of your audience so that you can offer sympathy, explanation, hope, proof, or whatever else is needed to soften the blow.

Similarly, if you are conveying highly confidential information, e-mail may not be the best choice. One of the useful aspects of e-mail is that its content is recorded in your computer and can be retrieved at any time. However, sometimes this can be a double-edged sword. If you can retrieve your e-mail at any time, then an opposing party in a legal proceeding can require you to produce it. Although the attorney-client privilege often protects the information in our confidential e-mails, there are exceptions to the

“Everything we do as professionals sends a message to others about our trustworthiness, reliability, intelligence, and work ethic.”

privilege that may require disclosure.<sup>1</sup> And, sometimes confidential e-mails are inadvertently disclosed and may, as a result, arm your opponent with inside information about your client or your legal strategy. In fact, inadvertently disclosed e-mails that would ordinarily be protected by the attorney-client privilege are sometimes admitted into evidence under a theory of waiver.<sup>2</sup> If the information you need to convey could damage your client's interests if disclosed and the information does not need to be in writing, consider conveying the information in a telephone call or in person instead.

Finally, e-mail is often the wrong choice when the purpose of your communication is to disagree with or convey displeasure with the recipient. The most important e-mail rule as a professional is to never, under any circumstances, send an e-mail while you are still angry. Allow yourself to cool down before you start drafting. Moreover, avoid e-mail altogether in these circumstances if possible.

A barrage of e-mails back and forth between two people who have different views on an issue can be unproductive and damaging to the relationship. Call up the person or visit her office to have the discussion. You will likely be more considerate of one another's views when you are face-to-face and the conversation will be more positive and productive as a result.

## **2. Never use e-mail for important information if you know your recipient would prefer a phone call or in-person discussion.**

The core rule of effective communication is to consider the needs of your audience. Your message

is meaningless if it does not reach the recipient. If you have a friend who is on Facebook but does not check it very often, you are not going to use Facebook to ask her if she wants to see a movie tonight. The same applies to e-mail. You may be used to people who check their e-mail constantly—on the bus, at Starbucks, during a meal, in the bathroom, etc. However, in your career, you will encounter people who do not use e-mail at all or use it but do not check it daily. Or, you may encounter people who do check their e-mail frequently but do not know how to organize their e-mails well and, therefore, may miss your important message. Yet another possibility is that your recipient views e-mail-reliant “youngsters” negatively. You will never connect professionally or personally with these folks if you constantly rely on e-mail as your main mode of communication. As a result, you will miss important career-advancement opportunities.

So, if you know your recipient's communication preferences, follow them religiously. And, if you do not yet know the recipient's preferences, investigate them. Ask the person directly. Or, ask her secretary. Or, ask a more seasoned attorney in the office.

## **3. Never rely solely on e-mail for urgent matters. For urgent matters, always call in addition to sending an e-mail.**

If you have an urgent matter, it is your duty to make sure that your message is heard within whatever time frame is applicable. Do not rely solely on e-mail, even if the recipient prefers e-mail. The recipient may be busy working on something and may not check her e-mail for a while. The recipient may be at lunch without her BlackBerry. The recipient's e-mail system may be down. Always follow the e-mail with a phone call. In fact, for urgent matters, if you have not been able to reach the recipient, it is usually best to talk to her secretary or someone else in the office who can either help you with the urgent matter or knows how to reach someone who can. Again, your duty

“The core rule of effective communication is to consider the needs of your audience. Your message is meaningless if it does not reach the recipient.”

<sup>1</sup> For an overview of the law on attorney-client privilege and its exceptions, see 2 Witkin, *California Evidence* §§ 98–168 (4th ed. 2000).

<sup>2</sup> For thorough coverage of when an inadvertently disclosed document can be admitted into evidence despite its otherwise-privileged nature, see John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—State Law*, 51 A.L.R. 5th 603 (1997) and John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—Federal Law*, 159 A.L.R. Fed. 153 (2000).

“Before you compose your e-mail, think about all the different players and how they might react if they are excluded.”

in this situation is not just to attempt to contact the person; your duty is to successfully contact the person.

### To, Cc, and Your E-Mail Address

In a professional e-mail, everything requires thought, starting with your e-mail address. If you are sending an e-mail within your office, you will not need to give this any thought. Your employer will have provided an acceptable e-mail address. However, if you are sending an e-mail from your personal account, you should think about the message that your e-mail address sends. And, yes, even your e-mail address sends a message. Please, do not send your resume to a prospective employer using your partyonron@aol.com e-mail account. You do have alternatives. Set up a new personal account that includes only your name or some part thereof. Or, use your law school account.

As a lawyer, you must learn to view the To, Cc, and Bcc lines as critical components of your e-mail. Imagine what would happen if you sent a confidential attorney-client privileged e-mail to opposing counsel at mdelaney@opposingcounsel.com, instead of to the client at mdelaney@company.com. The automatic complete functions of e-mail systems like Outlook can be deadly to your career. Double-check the To, Cc, and Bcc lines carefully. Get into the practice of double-checking these lines before you hit Send.

You should also devote some thought to your choice of recipients. E-mails are easily forwarded. Your e-mail to Jane Doe, the vice president of Company B, attaching proposed employment policies might be forwarded to Joe Schmoie, the human resources director of Company B and your main day-to-day contact person at the company. Joe Schmoie might have a number of reactions to his exclusion from your original e-mail. Maybe he knows the vice president needs to see these policies first, and, therefore, does not feel slighted. However, maybe he thinks you should have had him glance over the policies before you sent them to the vice president. Or, maybe he thinks you did not respect him enough to include him on an e-mail that obviously affects his sphere of control at the

company. Before you compose your e-mail, think about all the different players and how they might react if they are excluded. If there is no reason to exclude someone who might be interested in the content of your e-mail, you should consider including them as a Cc or Bcc recipient.

You should also think about whether to use Cc or Bcc for your recipients. The benefits of using Cc are: (1) all recipients know who you copied in; and (2) they can include those individuals using reply to all. However, with respect to the first benefit, sometimes you do not want your other recipients to know you copied the person at issue. Another problem with using Cc is that it discloses the e-mail address of the person at issue to all other recipients. Recipients often want their e-mail addresses kept confidential. The only way to keep the identities and e-mail addresses of all recipients confidential is to use the Bcc field instead of the Cc field. If, for example, you are sending an e-mail to all of your clients with some general information about a new case that was just decided, you would want to use the Bcc field so that the identities and e-mail addresses of your clients are protected.

Although Bcc protects the identities and e-mail addresses of your recipients, it is not always the best choice. If you use Bcc, the recipients will not be able to include the person at issue in their replies. The person at issue will not see the replies unless you forward them to her. Moreover, the choice of Bcc can have political ramifications. In some circumstances, the main recipient may feel insulted that you have secretly copied someone else. They may view your use of Bcc as passive-aggressive or even dishonest. If, for example, you are sending an e-mail to the human resources director of Company B offering some constructive criticism about the new employment policies he drafted and you Bcc rather than Cc the vice president of Company B, the human resources director might be upset if he later learns that you secretly included the vice president on the e-mail. It may seem like you are trying to undermine him. Moreover, the vice president may notice your lack of good judgment even if the human resources director never finds out.

You also need to think carefully about the recipients of your replies to someone else's e-mail. You should not automatically use Reply to All. Think about who should receive your reply. Delete recipients who do not need to know your reply or should not know your reply. And add recipients who may not have been on the original e-mail but may be interested in your reply.

In sum, who you include as recipients and your use of the To, Cc, and Bcc fields has important political ramifications in the business world. Think about your choices carefully. And when in doubt, ask someone you trust in the office for advice.

### The Subject Line and Flags

Sometimes the only part of your e-mail that a recipient will read will be your subject line. But that is OK. In fact, it can be a good thing. One of the purposes of the subject line is to enable the recipient to assess whether and when to read the e-mail. A good subject line conveys enough information about the content of the e-mail to enable the recipient to know where in her list of priorities it falls.

In order for a subject line to do its job, it needs to include more than a case name. A case name does not convey the content of the e-mail. Instead, the subject line needs to convey the specific subject matter of the e-mail. For example, instead of writing "Re Doe v. Schmoe," you could write "Re Research on Respondeat Superior for Doe v. Schmoe." But you could do even better. The recipient now knows this is about respondeat superior. But are you writing just to update the recipient or do you have a question? This could make a difference in how your recipient prioritizes the e-mail. If it is a summary of your research, she'll probably table it for a while. If, however, it is a question you need answered to keep going on the research project, she may put it higher on her priority list. So, an even better subject line would be, "Question re Research on Respondeat Superior for Doe v. Schmoe."

Now, a word about flags. The Urgent flag is a tempting evil. If you use a good, specific, clear subject line, you do not need to use flags at all.

However, if you just cannot resist the urge, then at least think carefully before you flag your e-mail as urgent. The fable "The Boy Who Cried Wolf," comes to mind.<sup>3</sup> Only use the Urgent flag when the consequences of the recipient failing to immediately respond to the e-mail are dire. And, as advised earlier, in the "When Not to Use E-mail" section of this article, you should always follow up an urgent e-mail with a phone call. Consider the following examples:

**Example 1:** You are conducting research on a case. Your supervisor told you to complete the project in two weeks, but there is no pending action in the case that is awaiting the results of your research. On day 10, you are stuck and need your supervisor to answer a question before you can proceed. You feel the e-mail is urgent because you only have four more days left before the project is due and you know your supervisor is leaving for vacation tomorrow. This is not an urgent e-mail. Because your supervisor is leaving on vacation tomorrow, it would be a good idea to follow up your e-mail with a phone call so that your supervisor knows to look for the e-mail. However, this does not warrant an Urgent flag. The results of your supervisor's failure to respond to the e-mail may have negative consequences for you because you will miss your deadline, but the client's case will not be affected if your project is a few days late.

**Example 2:** You are drafting a motion to dismiss that needs to be filed tomorrow. If you miss the deadline, your client will lose its chance to have the case dismissed before trial. You have an important question about the motion. Now it is appropriate to use the Urgent flag because your supervisor's failure to respond to your e-mail may directly impact your client. But, remember to follow up with a phone call.

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<sup>3</sup> In Aesop's fable, "The Boy Who Cried Wolf," a shepherd boy calls out "wolf" repeatedly only to laugh when his neighbors come to help. Finally, a real wolf comes and no one responds to his cries. Heather Forest, *The Boy Who Cried Wolf* (Story Library 2000), available online at <[www.storyarts.org/library/aesops/stories/boy.html](http://www.storyarts.org/library/aesops/stories/boy.html)>.

“A good subject line conveys enough information about the content of the e-mail to enable the recipient to know where in her list of priorities it falls.”

“When including an attachment, double-check the attachment icon on the e-mail before you hit Send.”

### The Salutation, Closing, and Signature

The salutation in your e-mail sets the tone for whatever follows. It deserves close attention. “Hi, Joe,” “Hello,” or just “Joe,” do not convey professionalism. “Dear Mr. \_\_\_\_\_” should be your default greeting. Last names are always safest. Only if you are confident that either office culture or prior contacts with the recipient make it safe to use “Hi, Joe,” should you deviate from the “Dear Mr. \_\_\_\_\_” model.

Consider what designation to use before the last name. “Mrs.” is not politically correct these days, even for married women. Instead, use “Ms.” And, if you are unsure of the gender from the name, ask someone who will know whether the recipient is a “Mr.” or a “Ms.” Finally, be sure to use “Dr.” if the recipient is an M.D. or Ph.D.

Just as you close a letter, you should close an e-mail. Use something standard like “Regards,” “Best,” or “Sincerely.”

Last, but not least, consider your signature. For external e-mails, i.e., e-mails that are reaching recipients outside of your office, include your title and contact information. And, for heaven’s sake, delete any cutesy quotes, smiley faces, factoids, and the like from your signature line. They will portray you as naive and unprofessional. They may even offend the recipient.

### Drafting an E-Mail with Attachments

If the purpose of your e-mail is merely to provide an attachment, it does not need to say much. However, it should say more than “See Attachment” and should certainly not be blank. Describe what the attachment is and indicate the action that is required by the recipient. For example, write “Attached for your review are my notes from my May 6 meeting with Mr. Jones regarding whether to file a motion for summary judgment. Please contact me after you have had a chance to review the notes so that we can discuss our next steps. The deadline for filing the motion is May 25.” Or, if the attachment is just for the recipient’s information, you could at least indicate the subject matter of the attachment and preview any follow-up: “Attached

for your information is a letter I just sent to opposing counsel requesting a stipulation to continue the trial date in the Joe v. Schmoe case. I will let you know her response.”

When including an attachment, double-check the attachment icon on the e-mail before you hit Send. You may notice that you neglected to include the attachment. And, open the attachment and review it before you send the e-mail. You may find that you have included the wrong attachment or that the formatting does not look right.

Another important consideration in sending an attachment is to make sure that if the attachment is confidential, you have indicated its confidentiality on the document. In the header, indicate “Attorney-Client Privileged Information.” You may also want to use the header to indicate that the document is a draft and the date of the draft, e.g., “Draft June 6, 2009.” This will avoid confusion as you generate subsequent drafts. Without a dated draft header, it is easy to confuse an earlier draft for a later draft. Confusion about which printout is the latest draft could delay the revision process. If your supervisor mistakenly looks at the wrong draft and spends three hours making edits that seem to her frustratingly familiar, she will not be much happier when she realizes she was looking at the wrong draft.

You also should consider the form in which you are sending the attachment. You need to make sure your recipient will be able to open the attachment. If this is the first time you have sent a document to the recipient, check with her about what programs she has on her computer. It may be tempting to skip this step and just send multiple copies of the attachment using every possible word-processing program. However, the recipient may not want her e-mail space consumed with unnecessary copies of the attachment. Also, think about whether you want the recipient to be able to edit the document. Putting a document in PDF precludes the recipient from making edits. Often, this is how you want to send a document. However, other times the reason for sending the document is to receive feedback on it. In those cases, you would want to use Microsoft®

Word or Corel® WordPerfect® so that the recipient can make changes to the document.

### Drafting a Substantive E-Mail

If you are not merely sending an attachment, but have content to convey in the body of the e-mail, you should usually draft the text in a word-processing program before putting it in the e-mail. A word-processing program will allow you to spell-check the text. Moreover, nothing is more frustrating than spending 20 minutes drafting an e-mail and then losing it all when your connection goes bad. Drafting the text in a word-processing program with an auto-save feature and saving the text periodically will avoid such disasters.

Treat the text of an e-mail like a brief you would submit in court. Write in a concise, to-the-point style. Carefully proofread for punctuation, spelling, and grammar. If the text is more than a paragraph long, print it out and carefully proofread it before sending it. Be sure that you have not treated punctuation casually or used informal language. The tone of the e-mail should be as professional as a court document.

The format for text in e-mails is usually single spaced with an extra line between each paragraph.

Finally, be sure to include a statement regarding attorney-client privilege if it is applicable. Most law firms have a standard attorney-client privilege statement that goes on all outgoing e-mails. If your office does not have a generic statement, however, you will need to create your own.

### Summary

Of all the challenges you will face in your career as a lawyer, following good e-mail etiquette is easy. And, yet, it will carry significant benefits including easing your relationships with your colleagues and clients, advancing your reputation in the legal community, avoiding conflicts, increasing the efficiency of your office, and ensuring that your e-mails will be read and understood.

### Additional Resources

Anne Enquist & Laurel Oates, *You've Sent Mail: Ten Tips to Take with You to Practice*, 15 Perspectives: Teaching Legal Res. & Writing 127 (2007).

Gil Feder & Sabrina Franconeri, *E-Mail Etiquette Matters*, N.Y.L.J., June 2008, at 24.

Lisa H. Healy & Julie A. Baker, *Casual Writing Has No Place in Business E-Mails*, Mich. L. Wkly., Dec. 15, 2008.

Douglas S. Malan, *The Emerging Etiquette of E-Mailing: Lawyers Say It's Important to Know When to Hit Send*, Conn. L. Trib., Nov. 5, 2007, at 18.

Sharon D. Nelson & John W. Simek, *Commentary: The Dumb Things Lawyers Do with E-Mail*, Va. L. Wkly., June 30, 2007.

Katheryn Hayes Tucker, *GCS to Employees: Think Before You Send*, Fulton County Daily Rep., Oct. 31, 2007, at 4.

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“Treat the text of an e-mail like a brief you would submit in court. Write in a concise, to-the-point style.”

# A Recipe for Successful Student Conferences: One Part Time Sheets, One Part Student Conference Preparation Questionnaire, and a Dash of Partial Live Editing

By Candace Mueller Centeno

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Individual student conferences provide valuable teaching moments if a student is prepared for and engaged during the conference. During an individual conference, a student has the opportunity to have a one-on-one discussion with the professor and to ask specific, focused questions about what the student has been learning, the written assignment, and areas of uncertainty. An individual conference also allows the professor to focus on a particular student's strengths and weaknesses, rather than the generalizations that are discussed in class and addressed to an entire classroom of unique learners.

Unfortunately, busy law students can be unprepared for or not invested in the conferencing process. It is difficult to use this teaching moment effectively and fully if a student has not reviewed the relevant materials prior to the conference or if the student comes to the conference without questions. In addition, it is challenging to get insight into how individual students are using their time during the new writing process that they are learning. When faced with these dilemmas, I changed my approach to conferences to expect more of my students and to better prepare myself and my students for more focused, student-driven conferences. In order to have “well-done” conferences, I implemented three strategies.<sup>1</sup>

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<sup>1</sup> I implemented these three strategies during conferences that were held in the fall semester of my legal writing and analysis class after the students had spent two weeks researching and writing an eight- to 10-page objective memorandum. After the individual conferences, the students then rewrote the memorandum within one week of the conference date.

This article discusses my pedagogical goals, the three strategies I used for “well-done” student conferences, and the pros and cons of each strategy. The first ingredient I dished out to the students was a weekly time sheet requirement so that I could review and assess my students' time management. The second ingredient I added to the mix was a mandatory student conference preparation questionnaire to help students better prepare for the conference. The final ingredient I stirred into the pot was a dash of partial live editing to get students more involved during the conference. Despite a few minor drawbacks, these three strategies dramatically improved the level of student preparation for and engagement during the conference, and the strategies also helped me to better meet the individual needs of my students.

## First Ingredient: Weekly Time Sheets to Assess Student Time Management and Provide Individual Feedback

Getting inside the head of a law student and gaining any insight into how the student is using time for a writing assignment is not an easy task. Asking a student to tell me how much time was spent on the various writing and analysis steps during a conference—which was often held a week or more after the student had written and handed in the assignment—was not likely to result in an accurate recollection. I wanted to have a more concrete idea about how much time students spent on their writing assignments and whether the students used time effectively. Therefore, I required weekly time sheets to gain some insight into how my students were spending their time.

### A. The Mechanics of Weekly Time Sheets

When my students received their writing assignment—in my case an ungraded open objective memorandum assignment—they were also given a blank time sheet for recording all time spent

“ Getting inside the head of a law student and gaining any insight into how the student is using time for a writing assignment is not an easy task. ”

on the assignment. I provided separate written instructions that explained why they had to keep time sheets and the requirements for keeping them, and I also gave the students a sample time sheet with sample entries. The instructions set forth the following requirements for recording time:

- You are being asked to keep time sheets so that I can review how you are spending your time on the assignment, provide feedback on more effective time management, and identify areas of sufficient/insufficient focus.
- Your time sheets are due *each week* in class.
- Your time should be recorded *each day* that you work on the assignment or your time will not be accurate.
- Your entries can be typed or handwritten (as long as they are legible).
- Your time is to be entered in 15-minute increments (round up when at 10 minutes and down if less than 10 minutes).
- Your time sheet must describe each specific “task” in a separate entry even if it is done on the same day (examples provided on sample time sheet).

Examples of the required descriptive “tasks” for the assignment were included in the written instructions and at the top of the blank time sheet.<sup>2</sup>

I also considered how to encourage timely submission. In the instructions, I informed the students that there were two consequences for a late/missing time sheet. First, the student received a check minus for a late/missing time sheet; a check minus was significant to students because professors at Villanova Law School can decrease a grade by one increment for numerous late/missing assignments. Second, I stressed that I would be unable to provide helpful feedback if I did not know how they were allocating their time.

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<sup>2</sup> The “task” key at the top of the time sheet included the following descriptions that students used for the entries: reviewed and analyzed facts, reviewed and analyzed issues, legal research re: (delineate), read statutes/cases, analyzed and synthesized the law, drafted discussion, continued drafting discussion, first rewrite of discussion, drafted issue, drafted conclusion, drafted facts, revised (or continued revising/rewriting), proofread memorandum of law, checked and proofread citations.

I specifically told them that the amount of time—either a little or a lot—would not result in a check minus or, alternatively, a check plus. Students only had to complete and hand in the time sheets each week to avoid a check minus and get credit for completing the time sheets.

Once all time sheets were submitted, I reviewed them prior to the beginning of the conference period. I added up the total time spent by each student, calculated the average time spent by all students, and made notes regarding low and high total times. In addition, I reviewed and calculated the time spent by all students on specific tasks (researching, reading, analyzing, and writing). Then, immediately prior to a student’s conference, I reviewed the specific time entered by the individual student so that areas of question or concern could be discussed during the conference.<sup>3</sup>

#### **B. The Pros and Cons of Time Sheet Requirements**

Requiring time sheets allowed me to get a glimpse into a student’s use of time for the writing assignment and allowed me to provide individualized feedback. For example, if a student spent an insufficient amount of time on an assignment, which was generally an amount of time well below the average, and turned in a memorandum of poor quality, I discussed with the student that perhaps he or she did not spend enough time on the assignment. As another example, if the student’s time sheet recorded that the student did not start writing until the day or so before the assignment was due, I addressed time management issues with the student and the importance of rewrites.

In addition, reviewing the individual entries in the time sheets helped me to assess the steps in the analysis and writing process that a student needed to spend more or less time on or that a student may have missed. For example, if a student recorded less than two to four hours for the reading of relevant

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<sup>3</sup> Students also submitted a time sheet for their rewrite of this open memorandum. In addition, they submitted weekly time sheets when they wrote their graded open memorandum, which I reviewed weekly so that I could make a general announcement to the class about progress or so that I could contact a student if he or she was not managing time effectively.

“Requiring time sheets allowed me to get a glimpse into a student’s use of time for the writing assignment and allowed me to provide individualized feedback.”

“During my first and second years as a legal writing professor, I was disappointed by the lack of preparation by some students for their individual conferences.”

cases prior to beginning the writing steps (approximately seven to eight cases for my assignment), I discussed with the student that the amount of time spent reading and studying the cases was not sufficient for a full analysis, particularly at this stage of law school. On the other hand, if a student spent more than eight to 10 hours reading the relevant cases, I discussed reading and synthesis strategies with the student, particularly if the analysis in the memorandum was of poor quality. The time sheets also provided an opportunity for positive feedback. If a student used time wisely, I commented on the student's positive use of time, discussed the importance of the skill, and emphasized that time management will become even more important as the assignments become more complex.

Furthermore, the time sheets served as a reminder to the students of the writing and analysis steps that they should have followed when undertaking the assignment. The “tasks” listed on the time sheet mirrored the analysis steps and writing steps that I discussed with students during the first few weeks of class.

Finally, requiring time sheets also provided two teachable moments regarding the real-world practice of law and ethics. First, since many students will need to keep track of their time once they are employed, keeping time sheets in class gave them some practice (and likely made them begin to dread the habit). Second, the need to record time provided a teachable moment about how important it is to be a complete and honest recorder of time in the practice of law. I specifically told students that they must be honest and complete in the recording of both the time spent *and* the description of the work done. They were not to “add” time if they thought their hours were too low or “subtract” time if they thought they spent too much time on a task or tasks.<sup>4</sup>

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<sup>4</sup> The time sheet instructions warned as follows: Ethics start right now! If you are tempted to be less than honest now and record inaccurate time, you are not being responsible and ethical. “Adding” time (or, as a young associate, not recording all your time because it looks like you are spending too much time on something) will only be more tempting—yet still unethical—in practice. Start being an ethical lawyer right now!

Admittedly, it is likely that some students did not accurately account for all time. As an example, when I raised a concern with students who did not enter sufficient time for reading the cases, a couple of students responded by telling me that they thought they had spent more time reading cases but that they did not record the time. In this situation, it is likely that the students either did not carefully record time or they were embarrassed to admit that they actually did not spend enough time reading. As my goal was not to embarrass students, I used this situation as a friendly teaching moment, reminding them that it is very important to record all time in practice. I felt that, even if they had actually not spent sufficient time reading, I sent the message to the students that more reading time was needed when I discussed the needed amount of time for this task during the review of the time sheets.

In order to obtain a more accurate recording of time, I did require the submission of time sheets on a weekly basis, rather than at the end of the writing process. Although submitting daily time sheets probably would have resulted in a more accurate accounting of time, daily time sheets would not have made the recording of time sufficiently more accurate for my purposes. I also concluded that daily time sheets involved too much paperwork (even if submitted electronically) for both the student and myself. In many respects, students were surprisingly candid, even if an entry did not make them look particularly stellar. For example, several students reported on their time sheets that they did not start the writing steps until the day before the memorandum was due.

### **Second Ingredient: Student Conference Preparation Questionnaire to Obtain Better Student Preparation for Conferences**

During my first and second years as a legal writing professor, I was disappointed by the lack of preparation by some students for their individual conferences. These students came to the conferences with no questions, other than perhaps a general “what could I do better?” My goal was to figure out how to get a busy student to be more prepared for the conference and how to understand the student's individual questions and areas of concern. The next

year, I created and used a student conference preparation questionnaire, and my conferences changed dramatically from a professor-dominated conference to a student-driven conversation.

#### **A. The Mechanics of the Student Conference Preparation Questionnaire**

I scheduled my individual student conferences (between 38 to 43 conferences) over a two-week period of time, with approximately four to five conferences per day. In years past, the students completed a one-page evaluation of what they thought they did well and what they struggled with in the writing assignment and submitted this evaluation with their memorandum. Although this one-page evaluation did help me analyze the students' preliminary assessment of their strengths and weaknesses, it did not prepare them for a discussion of my comments on their papers. Thus, I designed a student conference preparation questionnaire that students answered *after* they received my written comments and before the scheduled conferences.

I provided my comments on the student's memorandum and the questionnaire the day before the scheduled conference (usually at noon). The student prepared written responses to the questions and then presented the completed conference questionnaire to me at the beginning of the conference. If a student came to the conference without a completed questionnaire, I cancelled the conference and rescheduled a makeup conference on the last day of the conferencing period.<sup>5</sup>

Part I of the questionnaire involved a series of questions directed to my typed comments. I instructed students to first read and study my comments. Then, they provided written responses to the following questions:

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<sup>5</sup> The following warning was provided to students: You must do the following or you will receive a check minus *and* your conference will be rescheduled to the end of the conference period: 1. You must review and study my typed comments *prior* to your conference so we can have a meaningful discussion during your conference. Be prepared! 2. After you study my comments, you *must* handwrite or type specific written responses to the questions in the student conference preparation questionnaire. These written responses must be handed in to me at the beginning of your conference.

**What questions do you have, if any, with regard to my comments on the following introductory parts?**

Heading:

Issue:

Conclusion

Facts:

**Identify your strengths and weaknesses and any questions you have with regard to my comments on the following:**

1. Macro Organization

Strengths/Weaknesses:

Questions:

2. Thesis paragraph

Strengths/Weaknesses:

Questions:

3. Implementation of CREAC and development of each part

Strengths/Weaknesses:

Questions:

4. Writing (including clarity, conciseness, punctuation, sentence structure, etc.)

Strengths/Weaknesses:

Questions:

5. Analysis of relevant law and focus on issue presented

Strengths/Weaknesses:

Questions:

The questionnaire was designed to be answered after the students read and studied my comments so that the students would reflect on their strengths and weaknesses after they had additional input from me.

Because part of the conference involved a live edit, one subsection in the discussion section of the memorandum had no comments. Part II of the questionnaire contained questions to prepare the students for the partial live edit and some information about the live edit.

“I designed a student conference preparation questionnaire that students answered *after* they received my written comments and before the scheduled conferences.”

“ Unlike the years when I did not use this questionnaire, all my students came prepared with specific questions.”

### **B. The Pros and Cons of the Student Conference Preparation Questionnaire**

Unlike the years when I did not use this questionnaire, all my students came prepared with specific questions. In fact, I did not have one student who came to the conference without written responses, perhaps because I clearly spelled out the consequences if the questionnaire was not completed. In addition, most had done a very thorough job. As a result, the conference was a dialogue driven by the student.

The questionnaire provided students with an outline to guide them as they reviewed my comments and reflected on their writing. It also helped my quieter students feel more comfortable communicating their questions and concerns because the dialogue could begin through written communication. Finally, because the students had to answer specific questions regarding each part of the writing assignment, the questionnaire required them to closely read my comments rather than “avoid” reading my comments because of lack of time or the desire to avoid potentially negative feedback.

The only drawback was that the questionnaire required the students to do more written work; however, the work required in this formal written manner was something that they should have been doing to prepare for the conference. I expected more from my students and most benefited from the extra work.

### **Third Ingredient: A Dash of Partial Live Editing to Further Engage Students and to Assess Whether an Individual Student Understood Relevant Concepts**

Although the questionnaire did provide a stepping-stone for student-driven questions and reflection regarding my comments on the writing assignment, I wanted to further engage my students during the conferences with regard to the critical analysis needed in rewriting and editing. To do this, I decided to allocate at least 20 minutes of the conference to a live edit of a portion of the writing assignment.

### **A. The Mechanics of Partial Live Editing**

First, I felt it was important to provide some written feedback to the students, rather than to have a complete live edit of the entire memorandum during the conference. Before this writing assignment, my students had written only one short closed memorandum that was under four pages. I was concerned that they did not have enough individual feedback to fully understand the new legal writing and analysis concepts they were learning; similarly, I concluded that many students may not have enough experience to critically and completely evaluate and edit their own writing. Accordingly, as I wanted to incorporate live editing, I decided to provide some typed comments on a portion of the memorandum so students could get more written feedback from me and then leave a portion without comments for a live edit.

My writing assignment, an eight- to 10-page open memorandum, was specifically designed so that the students had to discuss a multiple element test that required at least two subheadings in the discussion section. Under each subheading, the student had to prove a conclusion for each element using CREAC organization (the organizational paradigm that I teach). Because I wanted to provide written comments on at least one subheading in the discussion section and leave at least one subheading for the live edit, it was necessary to have a problem with a multiple part analysis.

Based upon class discussion and the questionnaire, students were aware that the conference would involve live editing. For the subsection without comments, the students were asked in part II of the questionnaire to provide written responses to the following questions: (1) C [conclusion]: was it present and effective? (2) R [rule]: was it present and properly synthesized? (3) E [explanation of the rule]: was it present and fully developed with assertive topic sentences? (4) A [application to client's facts]: was it present and fully developed with explicit analogies and distinctions and a complete discussion of the relevant facts? (5) C [conclusion]: was it present? and (6) Was the writing clear, concise, and easy for the busy lawyer to read?

During the conference, I first discussed questions and concerns regarding my typed comments. After I answered these questions, the remaining time focused on the live edit of the uncommented subheading in the discussion section. I used the student's answers to part II of the questionnaire as a springboard for the discussion.

Importantly, the live edit did not involve a line-by-line, word-by-word edit. Rather, the live edit focused on discussing general concepts with the students, including implementation of CREAC and clarity/conciseness of writing. I devoted particular focus to the development and depth of the legal analysis in the explanation and application parts of the discussion. If a student was struggling with an area, I would work with the student on a specific sentence or two—either by having the student edit what was in the writing or by rewriting a few sentences completely. However, much of the discussion was more general, as the student was required to rewrite the memorandum after the conference. Finally, the discussion during the live edit varied from student to student because the strengths and weakness of each student differed.

#### **B. The Pros and Cons of Partial Live Editing**

Almost all my students were very engaged in the process because they were part of the editing process. In addition, the questionnaire provided several added benefits. First, it gave the students some guidance so they could start thinking about the live edit prior to arriving at the conference. It also provided a tool for me to engage a student who was quieter and needed prompting to get more involved. For example, if the student responded in the questionnaire that the initial conclusion was not clear or fact specific, this response was the springboard for discussing what needed to change.

In addition to getting the students more engaged, I found that the live edit had one additional benefit. It allowed to me to assess whether a student was beginning to understand the legal writing and analysis concepts that were being taught in class. It also allowed me to tailor the discussion to the needs of the individual student. Moreover, because I gave

the students some written feedback on their writing prior to the conference, the live edit allowed me to see if the student studied the comments closely and learned what was done correctly or incorrectly based upon the written comments in prior subheadings of the discussion section.

For example, I taught my students that they need to make explicit analogies and distinctions when applying the facts of their case to the case law. In my typed comments, I noted if a student did not make an explicit analogy (or distinction) and also often provided an example of an explicit analogy. If a student, in the questionnaire or during the live edit, recognized that an explicit analogy (or distinction) was missing from the section we were editing, I knew that the student studied my comments carefully and was beginning to grasp this concept. I would then work with the student to rewrite at least one explicit analogy and then ask the student to further revise this concept in the rewrite that was due one week later. On the other hand, if a student did not recognize that an explicit analogy was missing, particularly if I had commented on this previously in my written comments, I would spend additional time explaining the concept itself and its importance.

The one potential drawback to live editing is that it is time-consuming. All my conferences lasted at least 45 minutes, and most were one hour. As I generally have around 42 students and because I do not teach during the two weeks I hold conferences, one-hour conferences were manageable. Even if time-consuming, because students were so involved in the process, the conferences were enjoyable and went by very quickly.

Although other ingredients can be added to this mixture of strategies, the combined use of these three suggested strategies resulted in interactive, student-driven conferences. At the same time, it also allowed me to better tailor each conference to the unique needs of the individual student.

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“If a student was struggling with an area, I would work with the student on a specific sentence or two. ...”

## Why Is It So Hard to Front-Load?

By Stephen V. Armstrong and Timothy P. Terrell

*Tim Terrell is Professor of Law at Emory University School of Law. Steve Armstrong is the principal of Armstrong Talent Development, which provides consulting services and training programs to law firms. Both have conducted many programs on legal writing for law firms, bar associations, and federal and state judges. Together, they are the authors of Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing (3d ed. 2008) and regular contributors to the Writing Tips column.*

We will bet whatever is left of our 401(k) plans that every law school graduate in the country—at least, all of them who have been taught by readers of this journal—believes that he or she “gets” the concept that goes under such labels as “point-first writing,” “front-loading,” or “beefing up introductions.”

Most legal writing books and instructors spend a lot of time on the concept, as has the *Writing Tips* column over the years.<sup>1</sup> Yet, in our work with associates around the country, no problem shows up more often, or with more damaging effects, than the failure to apply this concept effectively, especially after the writer gets beyond the opening introduction.

This sad fact has led us to investigate why so many smart lawyers—lawyers who are, by most other criteria, very good writers—have such difficulties front-loading their writing. Here is our diagnosis. We offer it because we are convinced that we will never cure this problem simply by raising the idea again and again, in an increasingly frustrated tone of voice. We have to understand the problem's causes so we can address them head-on. A quick

warning, however, before we get to our diagnosis.

Unlike most *Writing Tips* columns, this one will not include a lot of examples. We suspect you have all you need, and we plan to focus instead on why writers fail to front-load enough, not what it would look like if they succeeded all the time.

Judging by our experience as writing teachers and coaches, the problem has three primary causes.

### 1. Failing to Understand the Concept

Most legal writers don't “get” the concept as well as they think. This is the case for two reasons.

First, it is a complex concept—or, at least, a multipart one. To front-load effectively, a writer has to keep in mind the several kinds of information a reader may need at the start:

- The conclusion or “bottom line.” To complicate matters, in letters or memos to clients, or in documents that will result in advice for a client, the bottom line should often include a practical, action-oriented component, not only a legal conclusion.<sup>2</sup>
- A focus for the reader's attention. That can be a conclusion, but it can also be a question or a thread to follow through the maze. (For example, “At the core of this dispute are the actions Mr. Smith took after learning of the discrepancy in the accounts.”)
- A map of the structure that lies ahead.
- A “label” or “frame” that allows readers to locate the topic within their mental universe, and to bring immediately to bear what they already know about it. (“The hearsay exclusion simply does not apply in this case.”)

These ingredients overlap, of course. And not every introduction—especially not every smaller-scale introduction within the document—requires all of them, or even most of them. But a skillful “front-

<sup>1</sup> Stephen V. Armstrong & Timothy P. Terrell, *Just One Damned Thing After Another: The Challenge of Making Legal Writing “Spatial,”* 7 Perspectives: Teaching Legal Res. & Writing 119 (1999); Stephen V. Armstrong & Timothy P. Terrell, *To Get to the “Point,” You Must First Understand It*, 13 Perspectives: Teaching Legal Res. & Writing 158 (2005) (hereinafter *To Get to the Point*); Gregory G. Colomb & Joseph M. Williams, *Well Begun Is Half Done: The First Principle of Coherent Prose*, 8 Perspectives: Teaching Legal Res. & Writing 129 (2000).

<sup>2</sup> *To Get to the Point*, supra note 1.

“We will bet whatever is left of our 401(k) plans that every law school graduate in the country ... believes that he or she ‘gets’ the concept ... [of] ... ‘point-first writing!’ ... ”

loader” has to be familiar with them all, not only with the amorphous concept of “introduction.”

Second, properly understood, “front-loading” is not a task to be performed here and there, in a few places in a document. It is a cast of mind that applies everywhere, because it has to do with how we insert new chunks of information—whatever the size of the chunk—into the flow of information streaming through a reader’s mind. Thus, the concept applies all the way down to paragraphs and sentences. They too should begin, for example, by focusing readers on their topic—even if, in a sentence, that means no more than naming the topic in the grammatical subject and placing the subject relatively close to the sentence’s start. Most writers are initially baffled if they are told they should be doing similar work when they “introduce” a sentence as when they introduce a document, even though the “introductions” will look very different. But, once they grasp this expansion of the front-loading concept, there is often an “ah ha” that turns them into much better editors.

## 2. Failing to Understand the Resistance

To identify the problem’s second cause, we need to look at ourselves rather than our students. Those of us who teach legal writing often give too short shrift to the qualms writers have about front-loading, and especially about front-loading conclusions. Not all of these qualms are rational, but some are, and even those that are not need to be taken seriously.

- Even if lawyers had not been trained in the IRAC form of analysis, they would feel, as would most analytically inclined problem solvers, that the appropriate place for a conclusion is—well, at the conclusion. That’s the natural order of things, unless you are an ideologue or a genius who can dispense with all the usual steps between question and answer. Placing the conclusion at the beginning is a perversion of the normal thinking process, an unnatural act forced on us by the need to communicate with impatient readers. It feels especially unnatural to many lawyers, an introverted group often more interested in their own thinking than in their audience.

- Whether to state a full, firm conclusion at the start is a judgment call, and sometimes one that novices find difficult. The call will often depend on the audience: We would give different advice to a lawyer writing for a judge than to an associate writing about a complex tax issue for a partner. In that situation, some partners will prefer to test every link in the analytical chain before they are presented with a conclusion. The call may also depend on how unpleasant or unexpected the conclusion will be. If it will seem to come out of left field, or is such bad news that readers will want to reject it out of hand, then the “conclusion-first” approach may not work. But the “conclusion-last” approach should always be considered an exception rather than the rule. The “default” position should be “conclusion first.”

- When we encounter a section or subsection that lacks an adequate “map” at its start, we often hear from its author something like this: “I know I added a couple of points later in the section. But they’re not nearly as important as the main point, and I didn’t want to give them too much emphasis. So I didn’t mention them in the introduction.” This argument is usually wrong, but it is not wholly wrongheaded. The most common solution, of course, is to create a map that signals, as most maps should, the relative importance of its pieces. Sometimes, the solution is to drop the other points altogether, if they are in fact so unimportant.

- Although we don’t recall ever having seen the first draft of a complex legal document that overdid the front-loading, novices sometimes go too far in the second draft, because their judgment is still inexperienced. Here again, audience and circumstance matter a great deal. Most judges appreciate a lot of front-loading throughout a brief. Some partners, once they get past the initial introduction to an internal memo, prefer only enough “mapping” and “focusing” to keep them on track as they read, because they want to digest the analysis for themselves.

## 3. Failing to Understand Why the Work Is So Hard

Front-loading effectively is hard work, for several reasons.

“Those of us who teach legal writing often give too short shrift to the qualms writers have about front-loading, and especially about front-loading conclusions.”

“ [E]ven when the work of front-loading is not intellectually strenuous, doing that work throughout a document requires persistence and stamina. ”

First, some of the work is intellectually demanding. For example, if you are writing the introduction to a knotty, complex analysis, it is usually difficult enough to sum up your conclusion; it may be even more difficult to map the analysis by which you reached it. Similarly, if you are tackling a messy issue, it is often difficult to focus on the precise, end-of-the-road question, after the initial broad and vague issue has been peeled down to its core. But these are reasons, not justifications, for failing to respond to these challenges in an edit.

Second, even when the work of front-loading is not intellectually strenuous, doing that work throughout a document requires persistence and stamina. At some point in a draft, even the best writers tend to flag. The following example comes from a section of a memorandum of law in support of a preliminary injunction motion. The section begins many pages into the brief, and the writer—who usually front-loads rigorously—has begun to tire. Here is the section’s original introduction, along with the opening sentences of two paragraphs toward its end:

Plaintiffs are likely to succeed on the merits because Defendants have not paid Plaintiffs their lawful wages. As a plain reading of the relevant statutes makes apparent, Defendants are liable for Plaintiffs’ overtime, spread of hours, and minimum-wage pay.

[Six paragraphs omitted]

Plaintiffs also offer strong evidence of Defendants’ history of impulsive retaliation. . . .

Plaintiffs have also raised claims of age and ethnicity discrimination. Here, as well, Plaintiffs have a probability of success on the merits. . . .

Here is the revised introduction, with a complete map:

Plaintiffs are likely to succeed on the merits of their wage claims because Defendants have not paid Plaintiffs their lawful wages. In addition, Plaintiffs offer strong evidence that creates a probability of success on two other claims: Defendants’ unlawful retaliation against them,

and Defendants’ discrimination against them on the basis of age and ethnicity.

And here is a paragraph from within the section, first in its original form:

Both federal and state statutes impose strict recordkeeping requirements on employers to ensure compliance with the minimum wage and overtime laws. *See* [ ]. Failure to comply with these requirements results in an evidentiary presumption in favor of employees. *See* [ ]. Therefore, if the employer fails to keep accurate records and the employee seeking damages can provide credible testimony—even of a general nature—of the number of hours worked and the wages paid, the burden will shift to the employer to provide the exact number of hours worked. *See* [ ]. As there is reason to believe that Defendants failed to maintain accurate records, *see* [ ], and will be subject to an evidentiary presumption against them, Plaintiffs are even more likely to succeed on the merits of their wage claims.

Here is the revised, front-loaded version:

Plaintiffs are even more likely to succeed on the merits of their claim because, if an employer fails to keep accurate time records, the burden of proving the number of hours an employee worked shifts to the employer. Both federal and state statutes impose strict recordkeeping requirements on employers to ensure compliance with the minimum wage and overtime laws. *See* [ ]. If an employer fails to comply with these requirements, the failure results in an evidentiary presumption in favor of employees. *See* [ ]. In that circumstance, if the employee seeking damages can provide credible testimony—even of a general nature—of the number of hours worked and the wages paid, the burden will shift to the employer to provide the exact number of hours worked. *See* [ ]. As there is reason to believe that Defendants failed to maintain accurate records, *see* [ ], they are likely to be subject to an evidentiary presumption against them when the Plaintiffs’ wage claims are considered.

Third, front-loading is actually an act of intellectual courage, not only of intellectual labor, and many inexperienced writers are simply nervous about their professional status and circumstances. One of the hallmark features of a new legal writer, for example, is the frequency with which paragraphs begin with citations of authority. As natural as this opening seems—we are lawyers, after all, working through legal material to a conclusion—the initial reference to a case or a statute fails to tell readers why the authority matters or how it fits into the analysis. Instead, the citation requires them to take the authority “on faith” until the writer, having now worked through the authority, finally feels it is safe to venture an opinion about its point and relevance. Here is a passage that illustrates this problem:

**Before:**

To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an “indispensable instrument” to the pledgee. *Id.* at 562; see *Peoples Nat’l Bank of Washington v. United States*, 777 F.2d 459, 461 (9th Cir. 1985).

Restatement of the Law, Security § 1 comment (e) defines an indispensable instrument as “formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument.” See also ... [continuing analysis and citations omitted] Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. [citation omitted]. In *Miller v. Wells Fargo*, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ...

In *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ...

In the revision, there are two changes: a minor but useful one at the beginning of the second paragraph, and, more significantly, entirely new

sentences to introduce each of the *Miller* and *Duncan Box* cases.

**After:**

To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an “indispensable instrument” to the pledgee. *Id.* at 562; see *Peoples Nat’l Bank of Washington v. United States*, 777 F.2d 459, 461 (9th Cir. 1985).

An indispensable instrument is a “formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument.” Restatement of the Law, Security § 1 comment (e). See also ... [continuing analysis and citations omitted] Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. [citation omitted] On the other hand, they have been held not to include a telex key code. In *Miller v. Wells Fargo*, ...

The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor’s obligations. In *Duncan Box & Lumber Co. v. Applied Energies, Inc.*, 270 S.E.2d 140 (W. Va. 1980), ...

Most legal writers will work hard on a document’s initial introduction. Many will also work almost as hard on the introductions to major sections. But far fewer have the stamina to front-load effectively all the way through the document. That is why we teach lawyers that, to front-load consistently, they should develop the habit of taking at least one editorial pass through a draft to focus on nothing but front-loading, especially in the document’s interior. The revisions above resulted from a good writer adopting that editing technique, with no need for anyone else to guide her.

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“ [F]ront-loading is actually an act of intellectual courage, not only of intellectual labor, and many inexperienced writers are simply nervous about their professional status. ... ”

# An Annotated Bibliography on Law Teaching

By Mary Olszewska and Thomas E. Baker

Mary Olszewska is a May 2009 graduate of Florida International University College of Law and Thomas E. Baker is Professor of Law and member of the founding faculty at Florida International University College of Law in Miami.

This annotated bibliography<sup>1</sup> is offered as a resource to law teachers. It self-consciously and selectively surveys books and more recent articles with an emphasis on teaching qua teaching. It does not include articles specific to particular courses or subjects. Each entry appears only once. The categories and assignments are somewhat subjective but helpful for canvassing a rich literature. The online resources themselves include still more bibliographies.

## Books on University Teaching

Ken Bain, *What the Best College Teachers Do* (2004): Based on research and observation of selected outstanding teachers; includes the latest research and studies on learning; organized around six questions: what do the best teachers know about how students learn?, how do they prepare to teach?, what do they expect from their students?, how do they conduct class?, how do they treat their students?, and how do they evaluate their students and themselves? If you read this book you will be a better teacher next semester.

Donald A. Bligh, *What's the Use of Lectures?* (2000): Answers the questions “what can lectures be used for?,” “how should they be used?,” “what can lectures achieve?,” “what factors affect the

acquisition of information?,” “what lecture techniques apply these factors most effectively?,” “how can other methods, particularly discussion methods, be combined with lecturing?,” and “what is needed in preparation?”; provides suggestions in light of psychological and experimental evidence on ways of organizing information, teaching a single idea, using handouts and feedback techniques, and overcoming common difficulties in learning.

L. Dee Fink, *Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses* (2003): “[Lays] out a new vision of what teaching and learning can be, based on three major ideas: significant learning, integrated course design, and better organizational support”; urges teachers to shift from a “content-centered approach” to a “learning-centered approach”; describes a taxonomy of significant learning; presents the key ideas of integrated course design “for achieving a more challenging set of learning goals”; provides conceptual and procedural tools to create significant learning experiences and change one’s teaching.

Donald L. Finkel, *Teaching with Your Mouth Shut* (2000): Premised on Dewey’s principle “that no thought, no idea, can possibly be conveyed as an idea from one person to another”; undermines the notion of “teaching as telling” by arguing that learning comes only from experience, not words; illustrates, chapter by chapter, different ways to create *experiences* out of the abstract, verbal concepts in books, including allowing the books and students to do the talking, teaching through writing, and designing a course that provides experience and provokes reflection; aims “to provoke reflection on the many ways teaching can be organized” and “to provoke fruitful dialogue about teaching and learning among people who have a stake in education: teachers, students, parents, school administrators, policymakers, graduate students, and citizens who care about the quality of education in their nation.”

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<sup>1</sup> This bibliography was prepared for the panel on “Diverse Teaching Methods Designed to Improve the Education of Law Students” at the 62nd Annual Meeting of the Southeastern Association of Law Schools (Aug. 3, 2009).

Stanley Fish, *Save the World on Your Own Time* (2008): Poses the question what should—and shouldn't—college and university professors and teachers do; responds that the job of a university teacher is to “(1) introduce students to bodies of knowledge and traditions of inquiry that had not previously been part of their experience; and (2) equip those same students with the analytical skills ... that will enable them to move confidently within those traditions and to engage in independent research after a course is over”; argues that “preaching or urging a political agenda” or attempting the “moral improvement” of one’s students is not an appropriate academic enterprise.

*Inspiring Teaching: Carnegie Professors of the Year Speak* (John K. Roth ed., 1997): Compiles 19 essays contributed by winners of the Carnegie Professor of the Year award that include personal, practical, and philosophical reflections on the exemplary practices that characterize the award winners’ teaching successes; “identifies characteristics, practices, and philosophies that inspire teaching” and “highlights teaching that inspires valuable characteristics, practices, and philosophies.”

Joseph Katz & Mildred Henry, *Turning Professors into Teachers: A New Approach to Faculty Development and Student Learning* (1993): Based on two research projects involving faculty members from 15 U.S. institutions; written for faculty and administrators in all disciplines; counters “the notion that teaching is a static art and the even more passive idea that good teachers are born”; broadly surveys the present state of “knowledge of faculty development and student learning and the need for a different approach” and reviews the basic foundational principles of their research; seeks to promote “the transformation of student passivity into active learning”; emphasizes the importance of learning through a process of personal discovery and presents “an inquiry-oriented approach” to faculty development; recommends some tools for understanding student learning; provides reports, critiques, and detailed accounts of faculty carrying out the authors’ inquiry-based approach to student learning and faculty development.

Linda B. Nelson, *Teaching at Its Best: A Research-Based Resource for College Instructors* (1998): A concise summary of teaching options and innovations that evolved out of an instructional handbook originally written for faculty and teaching assistants at Vanderbilt University; addresses the tasks that need to be done before the semester or quarter begins; describes not only “what to say and do on the first day of class” but also “how to set policies, tones, and a productive learning environment for the entire term from that first day on”; “presents an extensive and varied menu of the most effective teaching techniques and formats available at the college level”; describes discipline-specific methods (e.g., writing, math, foreign language, and science); offers guidance on evaluating student learning and assessing instructor effectiveness.

Judith Grunert O’Brien et al., *The Course Syllabus: A Learning-Centered Approach* (2d ed. 2008): Addresses student learning and responds to the question “what do students need to know to derive maximum benefit from their educational experience?”; designed to help plan, compose, and use a learning-centered course syllabus; provides descriptions and examples of content to include in a course syllabus.

Maryellen Weimer, *Learner-Centered Teaching: Five Key Changes to Practice* (2002): Addresses the question “[w]hat do we know about learning that implicates teaching?”; “shows how to tie teaching and curriculum to the process and objectives of learning rather than to the content delivery alone”; provides ideas and examples of concrete instructional policies and practices that promote learning; describes in detail five areas of instructional practice that need to be changed to make teaching learner-centered (divide power in the classroom between teacher and students, use content instead of *covering* it, establish the role of the teacher as facilitator and guide not as performer, place the responsibility of learning on the student, and involve students in the evaluation process); explores issues of implementation and offers advice on instructional improvement.

### Books on Law Teaching

Stacy Alexander et al., *Legal Education for the 21st Century* (Donald B. King ed., 1999): Addresses a wide range of legal education issues for a broad audience including law students, pre-law students, teachers, administrators, and lawyers; compiles essays from 34 authors about major issues facing legal education as it enters the 21st century; posits that if legal educators and legal professionals consider legal education as a field or a subject of study and undertake action to reconceptualize law schools, then 21st-century law schools will remain “centers of excellence” and “provide the best possible lawyers and leaders”; each chapter focuses on an aspect of legal education including change, diversity, transition to practice, technological developments and issues, teaching, scholarship, ethics, constituent (faculty, student, administration) concerns, comparative and international perspectives, and law schools and organizations.

Gerald F. Hess, *Monographs on Teaching and Learning for Legal Educators*, 35 *Gonz. L. Rev.* 63 (2000): Strictly speaking this is an article, not a book, on law teaching, but this article reviews and annotates 17 books on the subject and its footnotes contain citations to many more books.

Howard E. Katz & Kevin Francis O’Neill, *Strategies and Techniques of Law School Teaching* (2009): Begins with the preliminary stage of planning a course and takes the reader all the way to writing and grading the final examination; emphasis is on the new teacher but contains day-to-day suggestions for new and veteran teachers alike.

Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (2004): “Proposes a radical egalitarian alternative vision of what legal education should become, and a strategy, starting from the anarchist idea of workplace organizing, for struggle in that direction”; attacks legal education by arguing that “law schools are intensely *political* places, in spite of the fact that they seem *intellectually unpretentious*, barren of theoretical ambition or practical vision of what social life might be”; maintains that legal education “contributes to the reproduction of

illegitimate hierarchy in the bar and in society” and encourages first-year law students to resist the ideological training and indoctrination of their law professors for service in the hierarchies of corporate capitalism.

Elizabeth Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* (2007): Applies an anthropologist’s analysis to the linguistic patterns of the first-year law school classroom; argues that the case dialogue persists because it fits and reenacts an autonomous legal epistemology resulting in the suppression of alternative perspectives and analyses of reality.

Madeleine Schachter, *The Law Professor’s Handbook: A Practical Guide to Teaching Law* (2004): Designed to aid the transition from practitioner to professor or assist current professors in reflecting on their teaching techniques; begins with the stated premise that even though “you’ve mastered a high level of substantive expertise, refined your advocacy and negotiation skills, and have extensive experience in analytical thinking, writing, and other scholarly pursuits, that doesn’t necessarily mean that you’re prepared to educate others”; provides resources and practical knowledge on how to educate others through chapters about deciding to teach, designing a course, conducting class, evaluating and interacting with students, and assessment; offers a general guide designed to encourage and facilitate teachers in creating and refining their own unique way of teaching.

Patricia L. Smith & Tillman J. Ragan, *Instructional Design* (3d ed. 2005): Intended to assist those who are interested in facilitating learning through instructional design; provides “mainstream” instructional design and alternatives, innovations, and enrichments; emphasizes the foundations and first principles of instructional design, which can be adapted to fit one’s unique perspectives.

William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (2007): One of a series of reports on professional education issued by The Carnegie Foundation for the Advancement of Teaching. This two-year study of teaching and

learning in contemporary American and Canadian law schools relies on intensive field work conducted at 16 law schools during the 1999–2000 academic year; seeks to foster in the legal academy more focused attention on the actual and potential effects of the law school experience on the formation of future legal professionals; explores intellectual cognitive training, preparation for practice, and formation of professional responsibility that law school provides; recognizes the priority of analytical thinking in preparing lawyers, but also endorses curricular and pedagogical teaching centered on law practice; proposes an integration of student learning of theoretical and practical legal knowledge and professional identity; promises to rethink the educational cliché of “thinking like a lawyer.”

*Teaching the Law School Curriculum* (Steven Friedland & Gerald F. Hess eds., 2004): compiles the wisdom of hundreds of legal educators into one resource that provides approaches, materials, exercises, “brief gems,” and feedback and evaluation tips for 15 of the most common law school courses; offers tons of ready-to-use and practical ideas, suggestions, alternatives, and new and interesting perspectives provided by law teachers for law teachers and “pre-tested” by the contributors; belongs on the shelf of every teacher of a first-year subject; succeeds a first edition published in 1999 that also is worth tracking down.

### Articles on the Student Perspective

Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the “MTV/Google” Generation*, 54 *Loy. L. Rev.* 775 (2008): Explores the characteristics of the current generation of law students; focuses on their technological experience and habits; suggests strategies for integrating that experience and those habits into a holistic classroom experience.

Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 *Alb. L. Rev.* 213 (1998): “[S]urveys the literature criticizing the traditional methods of law school teaching and explores the growing movement

advocating that law schools should experiment with research on learning styles”; “shows the results of . . . testing of the St. John’s law students and recommends instructional strategies that are complementary to the learning styles identified by the assessment . . . used”; “explains the usefulness of ‘homework prescriptions.’”

Robin Boyle, Jeffrey Minneti & Andrea Honigsfeld, *Law Students Are Different from the General Population: Empirical Findings Regarding Learning Styles*, 17 *Perspectives: Teaching Legal Res. & Writing* 153 (2009): An empirical study of how law students have diverse learning styles from each other and from students in other fields of study; draws some inferences about how teachers ought to teach law students.

Diana R. Donahoe, *Bridging the Digital Divide Between Law Professor and Law Student*, 5 *Va. J.L. & Tech.* 13 (2000): An article online and in print about that divide; examines the gap between the generations of teachers and students regarding the use and the influence of technology in learning.

Alice K. Dueker, *Diversity and Learning: Imagining a Pedagogy of Difference*, 19 *N.Y.U. Rev. L. & Soc. Change* 101 (1991–1992): Proposes a “pedagogy of difference” to meet the needs of diverse students and to take advantage of the diversity among law students; advocates a law school curriculum for “connected teaching,” based on learning theory and the diverse styles of learning among students.

Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 *U.S.F. L. Rev.* 941 (1997): “[C]ombines current findings from higher education literature with real life experiences of diverse students in law school today”; argues that “law teachers can improve their teaching and increase the learning of all students by listening to students’ perceptions of the teaching/learning environment in law school”; describes “two branches of higher education literature that illustrate the importance of teachers listening to their students’ views of teaching and learning”—adult education and the classroom assessment movement; “reports the observations

and suggestions of diverse students describing their learning experiences in law school.”

Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. Legal Educ. 112 (2002): Describes “recent psychological research on the components of happiness and life satisfaction, which “provides an objective framework for understanding the pervasive problems in legal settings and thus can lead to constructive discussion and intervention”; “review[s] empirical and anecdotal evidence of the dark side of law school, the process of denial among faculty, and failing paradigms at the heart of legal education”; discusses the “helpful recent research” and concludes “by suggesting individual and collective faculty approaches based on this research.”

James B. Levy, *As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 Me. L. Rev. 49 (2006): “[G]oes right to the source by asking ‘the patients’ what they think” to describe the results of a student survey conducted at two law schools “that asked students to give their opinions about what makes someone an effective, and conversely an ineffective, law school teacher”; “discusses the interdisciplinary research on the effect of socio-emotional considerations on learning”; argues that “law professors need to redefine their notion of teaching competence to include not only mastery of instructional techniques like the Socratic method and use of classroom technology, but also an appreciation of the importance of, and facility with, the skills needed to foster an effective classroom socio-emotional climate.”

Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 Legal Writing 229 (2002): Emphasizes the self-efficacy theory of human behavior from social psychology; examines the traditional law school environment; identifies some possible reforms of legal education; offers concrete examples of lesson plans, course policies,

and teacher behaviors that will encourage students to set appropriate goals and then help them work toward achieving those goals.

Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 Ariz. L. Rev. 667 (1994): Explores the problem of student isolation in law school, particularly how it affects minority and nontraditional students; examines learning theories to cope with and overcome isolation; criticizes the “methodolatry” of traditional legal education.

Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 Behav. Sci. & L. 261 (2004): Provides a brief overview of the self-determination theory (SDT) of optimal motivation; applies measures from SDT “to assess whether students evidence negative changes in their motives or values during their first year of law school”; describes the hypotheses, methods, and results of two studies they conducted, which found that law students experience declining happiness and well-being during their first year in law school.

### Articles on Teaching Methods and Learning Theory

James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 Gonz. L. Rev. 389 (1996–1997): Examines the pedagogical tools available to law teachers; seeks to increase instructors’ awareness of how and when to rely on particular teaching methods.

Jay M. Feinman, *Simulations: An Introduction*, 45 J. Legal Educ. 469 (1995): “[P]resent[s] a general framework for developing and using simulations, in the hope that doing so will improve our thinking about the topic and help teachers who wish to use simulations”; discusses the attributes of effective simulations; “identifies and discusses the issues involved in the design of a simulation”; facilitates the planning process of a simulation “by providing a check list of key issues to consider.”

Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 Geo. L.J. 875 (1985): Begins with “some stories about . . . dissatisfaction with traditional legal education”; believes that “only by constructing a new consciousness of law, lawyering, and learning can law schools perform their most basic task: the training of competent lawyers”; asserts that an alternative conceptual framework to the current approach is needed “for understanding legal education in relation to legal theory and lawyers’ practice”; describes an unconventional alternative approach the authors used to teach “Contorts,” which combines legal research and writing with the substantive courses of contracts and torts.

Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. Legal Educ. 401 (1999): Explains what active learning is and why it is important; identifies the barriers to active learning and provides ways to overcome them; explains several active learning methods common in legal education and suggests ways to implement them.

Jacqueline D. Lipton, “*Ph.D. Lite*”: *A New Approach to Teaching Scholarly Legal Writing*, 2009 Cardozo L. Rev. de novo 20, available at <<http://www.cardozolawreview.com>>: Sets out a “Ph.D. lite” methodology for teaching law school seminars, patterned after graduate education; argues that the proposed model will be popular with students and professors alike.

Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. Legal Educ. 51 (2001): Argues that (1) “passion and context are central to effective legal education” and (2) “for many students experiential learning is a superior method for generating passion and providing important types of context”; provides a range of concrete suggestions for how to integrate experiential learning into the traditional curriculum; suggests “that experiential learning methods can provide useful opportunities for feedback to both teachers and students.”

Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 Cumb. L. Rev. 63 (1995–1996): “[E]xplore[s] the relationship between learning style and performance;” utilizes the Myers-Briggs Type Indicator (MBTI) to classify students into four learning preferences (extraversion v. introversion, sensing v. intuitive, thinking v. feeling, judgment v. perception) and discusses how and why a person’s learning preference affects learning and performance in law school; argues that “student anxiety can be lessened with improved legal instruction and with a legal pedagogy” that “includes understanding how students learn and helping students to develop strategies for learning that are consistent with their learning styles.”

Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347 (2001): “[E]xamines the law school Vicarious Learning/Self-Teaching Model in light of learning theory and instructional design”; “identifies and explores three factors that have caused law school teaching to remain stagnant;” “explores learning theory, focusing on the three major schools of learning theory—behaviorism, cognitivism, and constructivism—and on the aspects of these theories most relevant to designing law school instruction”; “describes the processes involved in instructional design, comparing how law professors design instructions with how professional instructional designers practice in their field”; “offers a dramatically different approach to law school instruction, an approach more likely than current law teaching methodologies to produce effective, efficient, and appealing law school instruction”; includes an illustrative sample lesson plan.

Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 Mich. St. DCL L. Rev. 447 (2003): “[A]rgues that we should teach our students to be self-regulated learners;” “addresses the rationales for the creation of a self-regulated learning curriculum for law students;”

“describes the design of such a curriculum, and reports the results of [the author’s] law school’s trial offering (on a pilot basis) of an introductory program designed to teach new law students to be self-regulated learners.”

Paul T. Wangerin, *Learning Strategies for Law Students*, 52 Alb. L. Rev. 471 (1988): Defines and discusses “metacognition”; “discusses several studying and learning strategies, including strategies for teacher study, time management, efficient reading, note taking, review, and problem solving”; “concentrates on studying strategies principally useful to law school students, including ‘component’ legal analysis and case briefing”; concludes with a reiteration that “the studying strategies discussed are in fact adaptable to law school learning processes and law school students can benefit from the use of these strategies.”

#### Articles on Cooperative Learning

Carole J. Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity” — Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. Rev. 877 (2004): “[E]xamines the Supreme Court’s rhetoric in *Grutter* regarding the educational benefits of diversity, including the evidence submitted in *Grutter* indicating that the benefits derive from full participation by students of diverse backgrounds in the law school classroom”; “contextualizes the analysis further by examining the wealth of evidence regarding the experiences of minority law students”; “provides a race-conscious analysis of the cultures and learning styles of Hispanic, African American, Asian American and Native American students”; “discusses a multiculturalist approach to creating a more relational, student-centered cooperative learning environment, and includes student assessments of classroom environments in which these procedures were implemented.”

Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. Cooley L. Rev. 201 (1999): Describes “the philosophical and educational differences between traditional legal pedagogy and Cooperative

Learning”; defines Cooperative Learning as “a structured, systematic instructional strategy in which small groups work together toward a common goal”; discusses “why we should use it in law schools, and review[s] the components of effective Cooperative Learning”; discusses the “problems of using Cooperative Learning in an adversarial educational environment such as law”; “describe[s] the response of both the students and the faculty to Cooperative Learning”; “recommend[s] strategies for using Cooperative Learning in a competitive, adversarial environment, including discussing the role of faculty.”

#### Articles on Classroom Environment and Professor Behavior

Bryan Adamson, Lisa Brodoff, Marilyn Berger, Anne Enquist, Paula Lustbader & John B. Mitchell, *Can the Professor Come Out and Play?—Scholarship, Teaching, and Theories of Play*, 58 J. Legal Educ. 481 (2008): An extensive analysis of the literature on childhood play as it relates to cognitive activity; relates the theory to creative problem solving and innovations; links scholarship and teaching.

B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 Gonz. L. Rev. 89 (2002–2003): “[E]xplores the research on expectation effects in education and offers suggestions for putting the research into practice”; “describes two forms of expectation effect,” the self-fulfilling prophesy and the self-sustaining expectation effect; “suggests that faculty can improve legal education by critically examining their assumptions and attitudes”; examines “biases relating to groups of students”; “addresses high-expectation teaching methodologies”; “concludes by addressing concerns about institutional resistance to raising expectations.”

Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. Legal Educ. 75 (2002): “[E]xplores the question [w]hy is the teaching and learning environment so important?”; “addresses the negative effects of the law school experience on students and the role of the teaching and learning environment in inhibiting and enhancing student learning”;

“reviews models of effective teaching and learning environments”; “addresses the question *[h]ow can law teachers and their students create and maintain an effective teaching and learning environment?*”; “articulate[s] eight components of an optimal classroom environment for legal education: respect, expectations, support, collaboration, inclusion, engagement, delight, and feedback.”

Gerald F. Hess, *Learning to Think Like a Teacher: Reflective Journals for Legal Educators*, 38 *Gonz. L. Rev.* 129 (2002–2003): “[A]ddresses the role of reflection in the education of professionals, including teachers”; “focuses on reflective journals as devices for the professional development of teachers”; “contains recommendations for law teachers who want to enhance their teaching by keeping a reflective journal.”

Paula Lustbader, *Principle 7: Good Practice Respects Diverse Talents and Ways of Learning*, 49 *J. Legal Educ.* 448 (1999): “The seventh principle asks educators to respect all forms of diversity—not only differences in ethnicity, race, gender, age, sexual orientation, and cultural and socioeconomic background, but also diverse learning styles, forms of intelligence, previous experiences, levels of preparation for learning, external environments, values, and goals”; focuses on the issues that flow from the latter set of diversities; argues that “[r]especting diversity does not require us to lower standards and compromise the profession,” but it does “require us to expand our definition of excellence to include a more comprehensive range of skills and abilities.”

### Articles on Student Assessment

Lynn M. Daggett, *All of the Above: Computerized Exam Scoring of Multiple Choice Items Helps to: (A) Show How Exam Items Worked Technically, (B) Maximize Exam Fairness, (C) Justly Assign Letter Grades, and (D) Provide Feedback on Student Learning*, 57 *J. Legal Educ.* 391 (2007): “[R]eviews a few core psychometric concepts: validity and reliability (two properties of all good exams), formative and summative evaluation

(two different purposes of exams), and the specific norm-referenced and criterion-referenced categories of exams”; “describes the typical sorts of data available from computerized scoring of multiple choice exams and the uses of this data for law faculty”; provides “concrete examples”; “does not review the pros and cons of multiple choice formats.”

Philip C. Kissam, *Law School Examinations*, 42 *Vand. L. Rev.* 433 (1989): “[E]xplores the values, limits, and adverse effects of our system of law school examinations”; “provides a ‘systemic analysis’ and a ‘total critique’ by assessing the structure, contextual relationships, values, and adverse effects of law school examinations”; “describes the nature of law school examinations and the reading, interpretation, and grading”; examines the social and personal context and positive and negative aspects of blue book exams; describes changes that could mitigate the adverse effects of the blue book system. Read any article you can find by this teacher’s teacher.

Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 *J. Legal Educ.* 418 (1999): Begins with the notion that “[k]nowing what you know and don’t know focuses learning” and that “[w]ithout feedback, none of us could know whether we clearly understood what we thought we understood”; provides several methods for offering feedback that are not burdensome for the teacher; discusses the different types of feedback and their pros and cons; discusses other sources of student feedback (self, peers, professionals, computers) and feedback for faculty and institutions.

Greg Sergienko, *New Modes of Assessment*, 38 *San Diego L. Rev.* 463 (2001): “[D]iscuss[es] ways in which the quality of assessment can be evaluated”; explores the strengths and weaknesses of essay exams because they “are the predominant mode of examination in law school”; “deals with non-instructor assessment and multiple-choice questions as alternatives to essay exams.”

Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading*

*Criteria*, 2004 Mich. St. L. Rev. 1 (2004):  
“[A]dvocates using rubrics to change grading practices on an individual, as opposed to an institutional level”; defines rubrics as “detailed written grading criteria, which describe both what students should learn and how they will be evaluated”; “shows how rubrics enhance learning and teaching”; “discusses how professors ease their grading burden when they adopt rubrics”; “describe[s] a method of developing rubrics.”

### Online Resources

American Bar Association, Section of Legal Education and Admissions to the Bar,  
<http://www.abanet.org/legaled/home.html>

Association of American Law Schools,  
<http://www.aals.org>

Barbara Glesner Fines, Teaching and Learning Law Resources for Legal Education,  
<http://www.law.umkc.edu/faculty/profiles/glesnerfines/bgf-edu.htm>

Best Practices for Legal Education blog,  
<http://bestpracticeslegaled.albanylawblogs.org>

CALI, The Center for Computer-Assisted Legal Instruction,  
<http://www.cali.org>

The Cooperative Learning Center at the University of Minnesota,  
<http://www.co-operation.org>

Elon University, CELL Blog, Center for Engaged Learning in the Law,  
<http://idd.elon.edu/blogs/CELLblog>

Institute for Law Teaching and Learning, sponsored by Gonzaga University School of Law and Washburn University School of Law,  
<http://lawteaching.org>

Online Academic Support Program for Law Students, Learning Styles and Law Students,  
<http://www.onlineasp.org/study/study00b.htm>

Research Academy for University Learning, Montclair State University,  
<http://www.montclair.edu/academy/bibs.html>

Shreyer Institute for Teaching Excellence, Pennsylvania State University,  
<http://www.schreyerinstitution.psu.edu>

University of Minnesota Law School Library Teaching Tools for Law School Faculty,  
<http://local.law.umn.edu/library/teaching.html>

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## Legal Research and Writing Resources: Recent Publications

### Compiled by Barbara Bintliff

Barbara Bintliff is the Nicolas Rosenbaum Professor of Law and Director of the William A. Wise Law Library at the University of Colorado Law School in Boulder. She is a member of the Perspectives Editorial Board. This bibliography includes references to books, articles, bibliographies, symposia, and research guides that could prove useful to instructors of legal research and writing and their students. Also included are citations to related resources that may be of interest to those who teach legal research and legal writing. It includes sources noted since the previous issue of Perspectives, but does not include articles in Perspectives itself.

E. Joan Blum & Kathleen Elliott Vinson, *Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms*, 60 Mercer L. Rev. 761–790 (2009).

The authors explain the benefits of legal writing faculty serving as writing consultants to law firms, and describe the “nuts and bolts” of a consulting practice. Challenges and ethical issues that may arise during a consultant’s service are addressed.

Patricia A. Broussard, *Now You See It Now You Don’t: Addressing the Issue of Websites Which Are “Lost in Space,”* 35 Ohio N.U. L. Rev. 155–170 (2009).

This article tackles the problem of the lack of permanent availability of some Internet resources. It asks whether the “average law professor, who works mightily to churn out a large journal article every two years or so, [should] be penalized for relying heavily on Internet citations provided full and accurate credit is given to all sources?” *Id.* at 157. The author proposes guidelines for the use of Internet resources not included in stable databases (for example, HeinOnline and FindLaw®), given the common occurrence of those resources “disappearing” from time to time.

Susan M. Case & Beth E. Donahue, *Developing High-Quality Multiple-Choice Questions for Assessment in Legal Education*, 58 J. Legal Educ. 372–387 (2008).

“This paper begins with a brief summary of the relative merits of multiple-choice

questions as opposed to essay questions, and then focuses on how to construct multiple-choice questions to ensure that they will assess the competencies that are intended.” *Id.* at 372. The authors break down multiple-choice questions into pieces (the stem or scenario, the lead-in question, and the options) and give examples of how to write effective multiple-choice questions. A “Checklist for Writing Multiple-Choice Questions” is included in an appendix.

Charles A. Cox Sr. & Maury S. Landsman, *Learning the Law by Avoiding It in the Process: And Learning from the Students What They Don’t Get in Law School*, 58 J. Legal Educ. 341–350 (2008).

Description of a seminar at the University of Minnesota that is designed to “help students learn that they can resolve what the law should be, and usually is, just by ‘thinking it through.’ The technique is simple: focus on the facts of the case and remember that the law is only answers to human problems—and that those answers come from logic, instinct, judgment, experience, imagination, impulse, anger, common sense, and every other human mental activity.” *Id.* at 341. The authors state that the course teaches a thinking process applicable to every kind of legal thinking, and is intended to be used before students begin researching their issues.

James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 Stetson L. Rev. 75–105 (2008).

This article is intended to assist law students, and especially first-year law students, prepare and deliver an appellate oral argument. It covers preparation, including outlining, delivering the argument, answering questions from the bench, rebuttal, and miscellaneous advice (including tips relating to appearance and demeanor).

Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 Emory L.J. 207–248 (2008).

This comment examines a conception of law and precedent that provides an alternative to the traditional “command model” of precedent “in which lower courts are required to follow only unified-majority rules that were necessary to the result of a particular judgment.” *Id.* at 211. The alternative model, labeled the “prediction model,” is one in which lower courts would “conform their decisions to expectations of how a higher court, if any, would rule on an issue.” *Id.* The author also posits that, based on the prediction model, “lower courts should treat cross-cutting majorities as maximally persuasive, albeit nonbinding, authority.” *Id.* at 212.

Robert C. Farrell, *Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions*, 40 Loy. U. Chi. L.J. 1–47 (2008).

In answering the question “does grammar matter to the courts?” in the affirmative, the author illustrates his point with instances in which cases have “turned on the person, number, tense, voice, or mood of a verb, and on the use of a gerund, infinitive, or participle.” *Id.* at 43. Examples of problematic grammar are included.

Bernadette T. Feeley, *Training Field Supervisors to Be Efficient and Effective Critics of Student Writing*, 15 Clinical L. Rev. 211–237 (2009).

“This article discusses how law student externs can benefit if their field supervisors use legal writing pedagogical techniques to provide feedback on student writing. The goal of the article is to provide ten concrete techniques for legal writing critique that externship clinicians can pass along to their field supervisors to help them provide effective yet efficient critique of student writing projects.” *Id.* at 211.

Ian Gallacher, “*Aux Armes, Citoyens!*”: *Time for Law Schools to Lead the Movement for Free and Open Access to the Law*, 40 U. Tol. L. Rev. 1–51 (2008).

Gallacher describes the problems with the present computer-assisted legal research

environment, in which two large companies have significant control and gaining access to legal information is difficult for low-income and pro se clients and scholars outside the law school. He discusses the potential benefits of an open-access law, considers the existing alternatives to the large commercial databases, and concludes that law schools have both an opportunity and an obligation to provide some form of access to legal information. The goal of the article is to begin a dialog on this issue.

Wes Henricksen, *Making Law Review: The Expert’s Guide to Mastering the Write-On Competition*, 2008 [Durham, N.C.: Carolina Academic Press, 118 p.]

Written by a former law review editor, this brief work offers chapters on the benefits and drawbacks of law review membership and how membership is determined, with an overview of the write-on competition. Chapter 6 offers 12 steps to success in writing the write-on paper. Also included are tips on the editing exercise and preparing personal statements.

Robert J. Hume, *The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents*, 43 Law & Soc’y Rev. 127–149 (2009).

The author studied why some federal appellate court precedents are adopted in other circuits and others are not through an examination of “opinion language.” The primary hypothesis was that “precedents are more likely to transmit to other circuits when opinion writers communicate the importance of their decisions using opinion language such as the legal grounding, the amount of supporting evidence, and the decision to file a per curiam opinion.” *Id.* at 129.

Julie M. Jones, *Not Just Key Numbers and Keywords Anymore: How User Interface Design Affects Legal Research*, 101 Law Libr. J. 7–30 (2009).

The author applies information-foraging theory and current standards for optimal Web design to analyze whether and how LexisNexis® and Westlaw® may be affecting the research skills of law students and new attorneys, especially as more and more

secondary materials are available online. She concludes that, while Westlaw and LexisNexis have become indispensable for legal research, their search and browsing mechanisms, in particular, make them cumbersome to navigate and discourage effective use.

Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. Empirical Legal Stud. 213–239 (2009).

Based on opinions of the federal judiciary, this study used the attitudinal model of behavior to “empirically test whether published judicial opinions are representative of all opinions. . . .” *Id.* at 213. Opinions challenging the U.S. Forest Service were studied. The authors conclude that appellate judges generally followed their ideological preferences in published opinions, but not in unpublished opinions, whereas district court judges did not follow their ideological preferences in either. The conclusion notes that scholars should use both published and unpublished opinions in research on judicial decision making.

Jess M. Krannich, James R. Holbrook & Julie J. McAdams, *Beyond “Thinking Like a Lawyer” and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 Denv. U. L. Rev. 381–404 (2009).

The authors advocate a legal education that has a balanced focus between the “practical and humanistic” and the theoretical. They offer a critique of today’s legal education process, concluding that “the narrow perspective of traditional legal education has become antiquated.” *Id.* at 404. Their approach, they state, would result in new attorneys prepared to solve problems creatively, not just analytically.

The Law School Librarian’s Role as an Educator: Leading Librarians on Adapting to New Technologies, Maximizing Research Skills, and Helping Students Transition from Law School to Law Firm, 2008 [Boston, MA: Aspatore Books, 180 p.]

This book includes chapters on “Teaching Effective Legal Research,” “Teaching the

Questions, Not the Answers,” “Training the Next Generation of Lawyers: Teaching Essential Research Skills,” and “Working with Students and Faculty in the Research Process.”

Linus E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 Penn St. L. Rev. 899–921 (2009).

The author begins by asking if “an opinion signed onto by only a single [U.S. Supreme Court] Justice can be binding precedent” (*id.* at 900) and answers the question in the affirmative. The article examines the problems caused by the evolution of concurring opinions and their relation to plurality opinions, and reviews several existing proposals to solve the problem. The author concludes with his own solution that proposes a new Court rule that would eliminate concurring opinions entirely and require a single, majority opinion.

Cheri Wyron Levin, *The Doctor Is In: Prescriptions for Teaching Writing in a Live-Client In-House Clinic*, 15 Clinical L. Rev. 157–186 (2008).

The author describes her experiences in incorporating advanced legal writing into the clinical program. While writing is a part of the clinical experience, integrating the formal teaching of writing into clinical teaching combines the benefits of both. She notes that the student’s responsibility of representing a live client and the “fear of failure” result in powerful motivation to do well in all aspects of the clinical experience, and thereby increase the attention paid to the writing instruction.

Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad—Or Is It?* 45 Idaho L. Rev. 171–189 (2008).

The authors explain that “[a]lthough scholars have generally found that overusing intensifiers (words such as ‘clearly,’ ‘obviously,’ and ‘very’) negatively affects the persuasiveness or credibility of a legal argument, no one has studied actual appellate briefs to determine whether there is a relationship between intensifier use and the outcome of an appeal. This article describes two empirical studies of appellate

briefs, which show that the frequent use of intensifiers in appellate briefs (particularly by an appellant) is usually associated with a statistically significant increase in adverse outcomes for an ‘offending’ party. But—and this was an unexpected result—if an appellate opinion uses a high rate of intensifiers, an appellant’s brief written for that appeal that also uses a high rate of intensifiers is associated with a statistically significant increase in favorable outcomes.” *Id.* at 171. Also included is a discussion of the use of intensifiers in judicial opinion writing, and a call for further research into the question before clear causal relationships are identified.

Amanda Martinsek, *Legal Writing: How to Write Legal Briefs, Memos, and Other Legal Documents in a Clear and Concise Style*, 2009 [New York, NY: Kaplan Publishing, 263 p.]

As noted in the preface, despite the glamour of TV law, “most courtroom battles are fought, won, and lost on paper. Writing a coherent, persuasive legal argument is an advocate’s most powerful weapon.” *Id.* at v. The author moves from basic writing skills, including organization, style, mechanics, demonstrative aids, and citation form, to applying these tools to specific writing types, including memos, pleadings, discovery documents, letters, and appellate writing.

Elisa Mason, *Internally Displaced Persons: Guide to Legal Information Resources on the Web*, LLRX.com, April 8, 2009 (available online at <[www.llrx.com/features/internaldisplacement.htm](http://www.llrx.com/features/internaldisplacement.htm)>).

Research guide to resources and organizations focused on the legal framework for dealing with displaced person, based on human rights and humanitarian law norms.

Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education’s Signature Pedagogy*, 84 *Ind. L.J.* 589–636 (2009).

“In proposing that law professors regularly use simulated oral argument exercises to supplement traditional Socratic dialogue, [this article] meets head on the concerns

expressed by Best Practices and Carnegie that over-reliance on the Langdell method neither mimics law practice nor nurtures student learning.” *Id.* at 589. The author argues that “for experienced advocates and law students alike, practice oral argument may be a starting point, rather than a mere end point, for teaching, learning, and executing the fundamentals of legal analysis.” *Id.* The examples given use precedent based on children’s fairy tales, which give a familiar and nonthreatening context for the exercise.

Diane Murley, *What Second Life Taught Me About Learning*, 100 *Law Libr. J.* 787–792 (2008).

The author, an experienced legal research instructor, describes her experiences in learning to use the “virtual world” Second Life. She concludes with a recommendation that teachers understand their own learning preferences to help them better prepare for class and more effectively teach their students.

Michael D. Murray & Christy H. DeSanctis, *Legal Research Methods*, 2009 [New York, NY: Thomson/Reuters/Foundation Press, 247 p.]

This book addresses “the process of legal research and will examine in detail the sources of the law available on-line, through web-based research services, and in print form.” *Id.* at 1. The text is process-based, focusing on legal research from a practitioner’s perspective. Part of the “Interactive Texts for Legal Research and Writing” series, purchasers also receive access to an electronic version of the book with links to numerous online resources.

Michael D. Murray & Christy H. DeSanctis, *Legal Writing and Analysis*, 2009 [New York, NY: Thomson Reuters/Foundation Press, 377 p.]

This book provides a process-oriented approach to legal writing and analysis in objective and adversarial contexts. The authors describe how to use TREAT (thesis, rule, explanation, application, thesis restated as a conclusion), which they consider a more sophisticated tool than the more-common IRAC model for teaching writing and analysis.

Richard K. Neumann Jr. & Sheila Simon, *Legal Writing*, 2008 [New York, NY: Aspen Publishers, 314 p.]

The goal of this book is “to explain analytical writing in ways that are concise, accessible, and occasionally conducive to provoking the type of smile that enhances learning.” *Id.* at xxiii. Special coverage is included on the process of writing, storytelling, and the CREAC formula. The final chapters cover appellate briefs and oral arguments. Appendixes include sample office and motion memoranda, and appellants and appellee’s briefs.

Nicholas Pengelley & Sue Milne, *Researching Australian Law*, LLRX.com, March 21, 2009 (available online at <[www.llrx.com/features/researchingaustralianlaw.htm](http://www.llrx.com/features/researchingaustralianlaw.htm)>).

A research guide to Australian law, including explanations of the organization of the legal system, with a brief history and background of the development of the Australian Constitution. Sections include coverage of Parliament and statutory resources, courts and judgments, treaties, secondary sources, and general reference sources. Major texts are identified.

Katherine Pratt, Jennifer Kowal & Daniel Martin, *The Virtual Tax Library: A Comparison of Five Electronic Tax Research Platforms*, 8 Fla. Tax Rev. 931–1009 (2008).

This article evaluates and compares the electronic tax library platforms of BNA, CCH, LexisNexis, RIA®, and Westlaw, and includes comparisons of the primary and secondary source content of the subscription services to free information available on the Internet. Detailed “search pathways” are provided to enable tax researchers to navigate better through the resources.

Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. Cooley L. Rev. 267–302 (2008).

This article states that effective, persuasive legal writing should employ storytelling, in addition to IRAC, and that legal writing

instructors should assign a novel as part of their course to make this point. Included are examples from the author’s experience and a diagram developed to assist students in learning.

Sheila Rodriguez, *Using Feedback Theory to Help Novice Legal Writers Develop Expertise*, 86 U. Det. Mercy L. Rev. 207–244 (2009).

This article examines how integrating structured feedback into a first-year legal writing course can help students develop legal writing expertise by reinforcing students’ feeling of autonomy and confidence and minimizing students’ perception of the imbalance of power between students and instructors. Numerous examples of instructor/student dialog are presented, including how the proposed six-step feedback model can avert “feedback failure.”

Jennifer Sheppard, *The “Write” Way: A Judicial Clerk’s Guide to Writing for the Court*, 38 U. Balt. L. Rev. 73–163 (2008).

This article examines the types of documents judicial clerks are most commonly asked to draft for a judge—opinions, bench memoranda, jury instructions, and orders—and then provides detailed information about them and guidance on writing each document. Numerous examples are included. The author concludes with several important writing tips that can apply to all written work.

David M. Sollors, *The War on Error: The Scrivener’s Error Doctrine and Textual Criticism: Confronting Errors in Statutes and Literary Text*, 49 Santa Clara L. Rev. 459–493 (2009).

“The scrivener’s error doctrine, broadly speaking, is a common law doctrine allowing courts encountering legal documents they believe to be in error due to a vitium scriptoris—literally ‘the mistake of a scribe,’ or any ‘clerical error in writing’—to ignore the error and apply instead what they believe to be the correct law.” *Id.* at 461. It allows courts to exercise discretion similar to that of literary translators, who must decipher writings and results of the publication process in one language and translate them

into another. “This article compares the ways that judges and textual critics address these errors, and looks to the history of textual criticism for guidance in determining the scope of discretion that should be afforded to judges applying the scrivener’s error doctrine.” *Id.*

Sabrina Sondhi, *Should We Care if the Case Digest Disappears?: A Retrospective Analysis and the Future of Legal Research Instruction*, Legal Reference Services Q., No. 4, 2008, 263–281.

After reviewing briefly the development of the West key number digest system, the author examines how the shift from case digests to electronic full-text searching has affected library collections and legal research instruction. She concludes with four lessons for legal research instruction and a call for more study of first-year law student research instruction to better understand the impact of the changing research environment and, consequently, to improve research instruction.

David I. C. Thomson, *Law School 2.0: Legal Education for a Digital Age*, 2009 [Newark, NJ]: LexisNexis/Matthew Bender, 158 p.]

In response to the extraordinary changes brought about by technology, the author “envisions a new sort of law school that will be more supportive of its students and embraces the pedagogical gifts that

technology has brought and will continue to bring us.” *Id.* at x. After tracing the changes in legal education since the early 1990s and describing the culture and learning preferences of the millennial generation, Thomson turns his attention to the practice of law and its changes, criticisms of legal education, and technology’s impact. He discusses the future of legal education in light of the changed circumstances, and concludes with a call for deliberate consideration of the role technology can play in changing legal education for the better.

Nolan L. Wright, *Standing at the Gates: A New Law Librarian Wonders About the Future Role of the Profession in Legal Research Education*, Legal Reference Services Q., No. 4, 2008, 305–345.

The author asserts that, “if librarians want to participate more fully in and make more of a difference in the state of legal research education, then we will need to reconsider some aspects of our professional culture.” He offers specific comments on the decline of legal research instruction and recommendations for change.

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## Another **Perspective**

Please note that beginning with volume 1, all issues of Perspectives are available in the Perspectives database (PERSPEC) on Westlaw and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. Perspectives is also available in PDF at [west.thomson.com/signup/newsletters/perspectives](http://west.thomson.com/signup/newsletters/perspectives).

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# Index to *Perspectives:* *Teaching Legal Research and Writing* Volumes 1–17 (1992–2009)

Prepared by **Mary A. Hotchkiss**

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## AUTHOR INDEX

- Aamot, Kari and Suzanne Ehrenberg  
*Integrating Print and Online Research Training: A Guide for the Wary* . . . . . **15**: 119–126
- Adams, Kenneth A.  
*Teaching Contract Drafting: The Two Elephants in the Room* . . . . . **14**: 92–94
- Adelman, Elizabeth G.  
*Technology for Teaching ... CALI Lessons in Legal Research Courses: Alternatives to Reading About Research* . . . . . **15**: 25–30
- Allee, Jacqueline  
*ABA Legal Writing Committee* . . . . . **1**: 61
- Anderson, Helen A.  
*Generation X Goes to Law School: Are We Too Nice to Our Students?* . . . . . **10**: 73–75  
*Insights from Clinical Teaching: Learning About Teaching Legal Writing from Working on Real Cases* . . . . . **16**: 106–108
- Anzalone, Filippa Marullo  
*Advanced Legal Research: A Master Class* . . . . . **5**: 5–11
- Aranas, Pauline M.  
*Who Should Teach CALR—Vendors, Librarians, or Both?* . . . . . **8**: 89–92
- Armstrong, Nancy A.  
*Why “Walk and Talk”? The Role of a Practical Skills Exam in Advanced Legal Research Courses* . . . . . **15**: 112–118
- Armstrong, Stephen V. and Timothy P. Terrell  
*Writing Tips ... Conjugosis and Declensia* . . . . . **4**: 8–9  
*Writing Tips ... Editing: Overcoming the Dr. Strangelove Syndrome* . . . . . **5**: 77–78  
*Writing Tips ... Fighting “Tippism”* . . . . . **6**: 71–73
- Writing Tips ... Just One Damned Thing After Another: The Challenge of Making Legal Writing “Spatial”* . . . . . **7**: 119–122
- Writing Tips ... Organizing Facts to Tell Stories* . . . . . **9**: 90–94
- Writing Tips ... Resisting the Devil’s Voice: Write Short, Simple Sentences* . . . . . **3**: 46–48
- Writing Tips ... Sweating the Small Stuff* . . . . . **11**: 128–131
- Writing Tips ... The Dangers of Defaults* . . . . . **10**: 126–131
- Writing Tips ... The Perils of E-Mail* . . . . . **14**: 166–168
- Writing Tips ... The Rhetoric of Persuasive Writing* . . . . . **15**: 189–191
- Writing Tips ... The Subtlety of Rhythm* . . . . . **12**: 174–176
- Writing Tips ... To Get to the “Point,” You Must First Understand It* . . . . . **13**: 158–161
- Writing Tips ... Understanding “Style” in Legal Writing* . . . . . **17**: 43–47
- Arndt, Don  
*The Benefits of Hands-On Exercises for Initial Lexis and Westlaw Training* . . . . . **12**: 19–23
- Arrigo-Ward, Maureen J.  
*Analogization: Lost Art or Teachable Skill?* . . . . . **1**: 36–41  
*Book Review: Thinking Like a Writer* . . . . . **2**: 61–62  
*Caring for Your Apostrophes* . . . . . **4**: 14–15  
*Warning the Prospective Legal Writing Instructor, or “So You Really Want to Teach?”* . . . . . **4**: 64–67

- Artz, Donna E.  
*Tips on Writing and Related Advice* . . . . . **5:** 113–114
- Bach, Tracy  
*Teachable Moments for Teachers ... Teaching the Poetry of the Question Presented* . . . . **9:** 142–144
- Baker, Brook K.  
*Incorporating Diversity and Social Justice Issues in Legal Writing Programs* . . . . . **9:** 51–57
- Baker, Jan M.  
*Teaching Legal Writing in the 17th Grade: Tips for Teaching Career Students Who Fly Nonstop from First Grade to First Year* . . . . . **16:** 19–21
- Ballard-Thrower, Rhea  
*Law Students Performing at a Class Near You* . . . . . **14:** 5–6
- Barkan, Steven M.  
*From the Editor: Introducing Perspectives* . . **1:** 1  
*From the Editor: Perspectives on the First Volume* . . . . . **2:** 1
- Bassett, Pegeen G., Virginia C. Thomas, and Gail Munden  
*Teaching Federal Legislative History: Notes from the Field* . . . . . **5:** 96–100
- Baum, Marsha L.  
*Teachable Moments for Students ... Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process* . . . . . **10:** 20–22
- Behles, Deborah N. and Bradley G. Clary  
*Roadmapping and Legal Writing* . . . . **8:** 134–136
- Beneke, Paul  
*Brutal Choices in Curricular Design ... Give Students Full CALR Access Immediately* . . . . . **8:** 114–117  
*Brutal Choices in Curricular Design ... Start with Enacted Law, Not Common Law* . . . . . **10:** 76–80
- Bennett, Edward B., III  
*Tools of the Trade: Using Software to Conduct Legal Research with a Disability* . . . . . **4:** 1–4
- Berch, Rebecca White  
*Observations from the Legal Writing Institute Conference: Thinking About Writing Introductions* . . . . . **3:** 41–43
- Berens, Maurine J. and Kathleen Dillon Narko  
*Teaching Research a New Way* . . . . **16:** 118–121
- Berring, Robert C.  
*A Sort of Response: Brutal Non-Choices* . . . . . **4:** 81–82
- Twenty Years On: The Debate Over Legal Research Instruction* . . . . . **17:** 1–4
- Bintliff, Barbara  
*Legal Research and Writing Resources: Recent Publications* . . . . . **16:** 47–50; . . . . . **16:** 139–146; **16:** 187–190; . . . . . **17:** 48–53; **17:** 142–148; **17:** 192–198  
*Teachable Moments for Students ... Electronic Sources or Print Resources: Some Observations on Where to Search* . . . . . **14:** 23–25  
*Teachable Moments for Students ... “How Can I Tell the Effective Date of a Federal Statute?”* . . . . . **8:** 93–94  
*Teachable Moments for Students ... Mandatory v. Persuasive Cases* . . . . . **9:** 83–85  
*Teachable Moments ... “Shepardizing Cases”* . . . . . **4:** 19  
*Why Is Web Searching So Unpredictable?* . . . . . **7:** 84–86
- Blaustein, Albert P.  
*On Legal Writing* . . . . . **2:** 57–60
- Blevins, Timothy D.  
*Technology for Teaching ... Using Technology to Fill the Gap: Neither Paper nor Live Clients* . . . . . **12:** 171–173  
*Writing “It” Is a Start; Getting “It” Read Is the Goal* . . . . . **17:** 188–191
- Bloch, Beate  
*Brief-Writing Skills* . . . . . **2:** 4–5
- Blum, Joan  
*Brutal Choices in Curricular Design ... Why You Should Use a Course Web Page* . . . . . **10:** 15–17
- Blumenfeld, Barbara  
*A Photographer’s Guide to Legal Writing* . . . . . **4:** 41–43
- Bogdanski, John A. and Samuel A. Donaldson  
*Teaching Tax and Other Tedious Topics* . . . . . **17:** 102–106
- Boris, Edna Zwick  
*Writing Tips ... Sentence Sense: “It” Problems* . . . . . **4:** 96–98  
*Writing Tips ... Sentence Sense: “We,” “Our,” “Us” Problems* . . . . . **5:** 125–127  
*Writing Tips ... Sentence Structure and Sentence Sense: “And” Problems* . . . . . **3:** 85–86

- Bowman, Brooke J.  
*Writing Tips ... Learning the Art of Rewriting and Editing—A Perspective* . . . . . **15:** 54–57
- Boyle, Robin A.  
*Contract Drafting Courses for Upper-Level Students: Teaching Tips* . . . . . **14:** 87–91
- Boyle, Robin and Joanne Ingham  
*Suggestions on How to Conduct Empirical Research: A Behind-the-Scenes View* . . . . . **15:** 176–179
- Boyle, Robin, Jeffrey Minneti, and Andrea Honigsfeld  
*Law Students Are Different from the General Population: Empirical Findings Regarding Learning Styles* . . . . . **17:** 153–160
- Bratman, Ben  
*“Reality Legal Writing”: Using a Client Interview for Establishing the Facts in a Memo Assignment* . . . . . **12:** 87–90
- Brendel, Jennifer  
*Tools for Teaching the Rewriting Process* . . . . . **12:** 123–126
- Bresler, Kenneth  
*On the Lighter Side ... Pursuant to Partners’ Directive, Lawyer Learns to Obfuscate* . . . . . **3:** 18
- Bridy, Annemarie  
*A New Direction in Writing Assessment for the LSAT* . . . . . **11:** 61–65
- Brill, Ralph L.  
*ABA Adopts New Standards Relating to Legal Research and Writing* . . . . . **5:** 71–72
- Broida, Mark A.  
*Can Legal Skills Become Legal Thrills? Knowing and Working Your Audience* . . . . . **4:** 44–47  
*A Tale of Two Programs* . . . . . **5:** 65–68
- Browne, Kelly  
*The Top 10 Answers, Please* . . . . . **9:** 18–19  
*The Top 10 Things Firm Librarians Wish Summer Associates Knew* . . . . . **8:** 140–142
- Browne, Kelly and Joan Shear  
*Which Legal Research Text Is Right for You?* . . . . . **10:** 23–29
- Brunner, Karen B.  
*National Library Week: A Law Firm Teaching Opportunity* . . . . . **1:** 68–69  
*1993 Teach-In Events* . . . . . **2:** 13–17
- Buckingham, Rick and Samantha A. Moppett  
*Library Research Labs: A Hands-On Approach to Taking the First Step with Your Students to Reflect Good Practice in Legal Education* . . . . . **14:** 73–80
- Burgess, Hillary  
*Brutal Choices in Curricular Design ... Little Red Schoolhouse Goes to Law School: How Joe Williams’ Teaching Style Can Inform Us About Teaching Law Students* . . . . . **17:** 180–184
- Bushbaum, Michael J. and Steven R. Probst  
*“They’re Practically Learning”: Pointers on Practical Legal Research Exams* . . . . . **15:** 105–111
- ButlerRitchie, David T. and Susan Hanley Kosse  
*Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research* . . . . . **9:** 69–72
- Calleros, Charles  
*Brutal Choices in Curricular Design ... Using Both Nonlegal Contexts and Assigned Doctrinal Course Material to Improve Students’ Outlining and Exam-Taking Skills* . . . . . **12:** 91–101  
*Teachable Moments for Teachers ... Demonstrations and Bilingual Teaching Techniques at the University of Paris: Introducing Civil Law Students to Common Law Legal Method* . . . . . **12:** 6–12
- Callinan, Ellen M.  
*Legal Research and the Summer Job ... Advice from the Law Firm* . . . . . **7:** 110–115  
*Legal Research in Practice: How a Labor Lawyer Does Legal Research* . . . . . **5:** 11–13  
*The National Legal Research Teach-In* . . . . . **1:** 65–66  
*Recite Right: Recitation Preparation and the Law School Library* . . . . . **1:** 42–46  
*Research Instruction Caucus: News and Views* . . . . . **1:** 16–17; **1:** 58–60; . . . . . **2:** 17–18  
*Simulated Research: A Teaching Model for Academic and Private Law Librarians* . . . . . **1:** 6–13  
*Take Charge of Your Training Room* . . . . . **3:** 8–9
- Callinan, Ellen M. and Dianne T. Lewis  
*How to ... Orient Foreign Lawyers in a Law Firm Library* . . . . . **5:** 21–22
- Cameron, Catherine and Jeffrey Minneti  
*Teaching Every Student: A Demonstration Lesson That Adapts Instruction to Students’ Learning Styles* . . . . . **17:** 161–170

- Campos, Martha  
*Teachable Moments for Students ... An Idiom, a Catch Phrase, an Aphorism: A Reference Question* . . . . . **13:** 29–31
- Cane, Paul  
*Ten Commandments of Memo Writing ... Advice for the Summer Associate* . . . . . **4:** 83–84
- Caputo, Angela  
*Technology for Teaching ... Four Pointers to Effective Use of PowerPoint in Teaching* . . . . . **10:** 132–136
- Centeno, Candace Mueller  
*Connecting the Dots: Using Connected Legal Writing Assignments to Help Students Think Outside of the Assignment and About the Bigger Picture* . . . . . **16:** 22–25
- Cerjan, Martin  
*Teachable Moments ... How Can I Find the Current Status of a Treaty Called the “Convention on the Rights of the Child”?* . . . . . **5:** 79–80
- Charles, Patrick J.  
*Teachable Moments ... How Do You Update the Code of Federal Regulations Using GPO Access?* . . . . . **17:** 119–127
- Cherry, Anna M.  
*Using Electronic Research to Detect Sources of Plagiarized Materials* . . . . . **9:** 133–135
- Chin, William Y.  
*The “Relay” Team-Teach Approach: Combining Collaboration and the Division of Labor to Teach a Third Semester of Legal Writing* . . . . . **13:** 94–97
- Ching, Bruce  
*Nonlegal Analogies in the LRW Classroom* . . . . . **8:** 26–29
- Christensen, Leah M.  
*Teachable Moments for Teachers ... Show Me, Don’t Tell Me! Teaching Case Analysis by “Thinking Aloud”* . . . . . **15:** 142–145
- Clark, Jessica L.  
*Beyond Course Evaluations: Yay/Nay Sheets* . . . . . **16:** 149–155
- Clary, Bradley G.  
*“To Note or Not to Note”* . . . . . **10:** 84–86
- Clary, Bradley G. and Deborah N. Behles  
*Roadmapping and Legal Writing* . . . . . **8:** 134–136
- Clayton, Mary  
*Legal Research for Blind Law Students: Speech Technologies and the World Wide Web* . . . . . **6:** 100–102
- Clough, Spencer E.  
*The Chalkboard* . . . . . **3:** 78–79
- Cobb, Tom  
*Public Interest Research, Collaboration, and the Promise of Wikis* . . . . . **16:** 1–11
- Coggins, Timothy L.  
*Bringing the “Real World” to Advanced Legal Research* . . . . . **6:** 19–23
- Cohen, Beth D.  
*Instilling an Appreciation of Legal Ethics and Professional Responsibility in First-Year Legal Research and Writing Courses* . . . . . **4:** 5–7
- Cohen, Eileen B.  
*Using Cognitive Learning Theories in Teaching Legal Research* . . . . . **1:** 79–82
- Coleman, Brady  
*Book Review ... Hierarchy, Respect, and Flying Sandwiches: A Review of Teacher Man* . . . . . **15:** 150–153
- Collins, Lauren M.  
*Technology for Teaching ... Creating Online Tutorials: Five Lessons Learned* . . . . . **16:** 33–36
- Collins, Maureen B.  
*Writing Tips ... A Time of Transition: Logical Links to Move the Reader Forward* . . . . . **17:** 185–187
- Colomb, Gregory G.  
*Writing Tips ... Framing Pleadings to Advance Your Case* . . . . . **10:** 92–97
- Colomb, Gregory G. and Joseph M. Williams  
*Writing Tips ... Client Communications: Delivering a Clear Message* . . . . . **12:** 127–131  
*Writing Tips ... Client Communications: Designing Readable Documents* . . . . . **13:** 106–112  
*Writing Tips ... Delivering a Persuasive Case: Organizing the Body of a Pleading* . . . . . **11:** 84–89  
*Writing Tips ... Framing Academic Articles* . . . . . **16:** 178–185  
*Writing Tips ... Le Mot Juste* . . . . . **15:** 134–141  
*Writing Tips ... Shaping Stories: Managing the Appearance of Responsibility* . . . . . **6:** 16–18  
*Writing Tips ... So What? Why Should I Care? And Other Questions Writers Must Answer* . . . . . **9:** 136–141

- Writing Tips ... *Telling Clear Stories: A Principle of Revision That Demands a Good Character* . . . . . **5:** 14–16
- Writing Tips ... *The Right Deal in the Right Words: Effective Legal Drafting* . . . . . **14:** 98–106
- Writing Tips ... *The Writer's Golden Rule* . . . . . **7:** 78–81
- Writing Tips ... *Well Begun Is Half Done: The First Principle of Coherent Prose* . . . . . **8:** 129–133
- Cooney, Leslie Larkin and Judith Karp  
*Ten Magic Tricks for an Interactive Classroom* . . . . . **8:** 1–3
- Craig, Alison  
*Teachable Moments for Teachers ... Failing My ESL Students: My Plagiarism Epiphany* . . . . . **12:** 102–104
- Craig, Brian  
*Beyond Black's and Webster's: The Persuasive Value of Thesauri in Legal Research and Writing* . . . . . **16:** 169–177
- Legal Briefs: Helpful but Also Hazardous* . . . . . **13:** 132–135
- Curry, Luellen and Miki Felsenburg  
*Brutal Choices in Curricular Design ... Incorporating Social Justice Issues into the LRW Classroom* . . . . . **11:** 75–79
- Daniel, Neil  
*Managing Metadiscourse* . . . . . **2:** 23–24
- Writing Tips* ... . . . . . **1:** 50–51; **1:** 87–90; . . . . . **2:** 23–24; **2:** 63–65
- Davis, Wendy B.  
*Consequences of Ineffective Writing* . . . . . **8:** 97–99
- DeGeorges, Patricia A.  
*Teach-In Programs in Corporate Law Libraries* . . . . . **1:** 72–73
- Dent, Marian  
*Brutal Choices in Curricular Design ... Designing an LL.M. Curriculum for Non-Western-Trained Lawyers* . . . . . **13:** 87–90
- DeSanctis, Christy and Kristen Murray  
*The Art of the Writing Conference: Letting Students Set the Agenda Without Ceding Control* . . . . . **17:** 35–40
- Dimitri, James D.  
*Brutal Choices in Curricular Design ... Reusing Writing Assignments* . . . . . **12:** 27–31
- Writing Engaging, Realistic, and Balanced Appellate Advocacy Problems* . . . . . **16:** 93–99
- Donaldson, Samuel A. and John A. Bogdanski  
*Teaching Tax and Other Tedious Topics* . . . . . **17:** 102–106
- Dugan, Joanne  
*Teachable Moments for Students ... Choosing the Right Tool for Internet Searching: Search Engines vs. Directories* . . . . . **14:** 111–113
- Duggan, James E.  
*Book Review ... Net Law: How Lawyers Use the Internet* . . . . . **6:** 32
- Technology for Teaching ... Using CALI Lessons to Review (or Teach) Legal Research and Writing Concepts* . . . . . **9:** 86–89
- Dunn, Donald J.  
*Are Legal Research Skills Essential? "It Can Hardly Be Doubted ..."* . . . . . **1:** 33–36
- Brutal Choices in Curricular Design ... Why We Should Teach Primary Materials First* . . . . . **8:** 10–12
- Legal Research: A Fundamental Lawyering Skill* . . . . . **1:** 2–3
- Legal Research and Writing Resources: Recent Publications* . . . . . **1:** 56–58; . . . . . **1:** 91–92; **2:** 25–26; . . . . . **2:** 68–69; **3:** 10–12; **3:** 49–50; . . . . . **3:** 87–88; **4:** 24–26; **4:** 68–70; . . . . . **4:** 100–102; **5:** 31–34; **5:** 81–83; . . . . . **5:** 130–131; **6:** 37–39; **6:** 124–125; . . . . . **7:** 34–36; **7:** 94–96; **7:** 127–128; . . . . . **8:** 34–36; **8:** 100–101; **9:** 20–23; . . . . . **9:** 99–100; **9:** 153–154; **10:** 30–35; . . . . . **10:** 98–100; **10:** 139–141; **11:** 23–27; . . . . . **11:** 90–93; **11:** 134–136; **12:** 38–45; . . . . . **12:** 132–135; **12:** 177–179; **13:** 35–39; . . . . . **13:** 116–117; **13:** 162–163; **14:** 34–38; . . . . . **14:** 122–125; **14:** 172–174; **15:** 62–67
- Dunnewold, Mary  
*Common First-Year Student Writing Errors* . . . . . **9:** 14–15
- Establishing and Maintaining Good Working Relationships with 1L Writing Students* . . . . . **8:** 4–7
- "Feed-Forward" Tutorials, Not "Feedback" Reviews* . . . . . **6:** 105–107
- How Many Cases Do I Need?* . . . . . **10:** 10–11
- Long-Term Job Satisfaction as a Legal Writing Professional* . . . . . **13:** 10–14

- A Tale of Two Issues: “Applying Law to Facts” Versus “Deciding What the Rule Should Be”* . . . . . **11:** 12–13
- Using the Idea of Mathematical Proof to Teach Argument Structure* . . . . . **15:** 50–53
- Durako, Jo Anne  
*Brutal Choices in Curricular Design ... Peer Editing: It’s Worth the Effort.* . . . . . **7:** 73–76
- Building Confidence and Competence in Legal Research Skills: Step by Step* . . . . . **5:** 87–91
- Edelman, Diane Penneys  
*How They Write: Our Students’ Reflections on Writing* . . . . . **6:** 24–28
- Opening Our Doors to the World: Introducing International Law in Legal Writing and Legal Research Courses* . . . . . **5:** 1–4
- Edwards, Linda H.  
*Certificate Program in Advanced Legal Writing: Mercer’s Advanced Writing Curriculum* . . . . . **9:** 116–119
- Edwards, Linda and Paula Lustbadder  
*Teaching Legal Analysis* . . . . . **2:** 52–53
- Egler, Peter J.  
*Teachable Moments for Students ... What Gives Cities and Counties the Authority to Create Charters, Ordinances, and Codes?* . . . **9:** 145–147
- Ehrenberg, Suzanne and Kari Aamot  
*Integrating Print and Online Research Training: A Guide for the Wary* . . . . . **15:** 119–126
- Elliott, Jessica  
*Teaching Outlining for Exam Preparation as Part of the First-Year Legal Research and Writing Curriculum* . . . . . **11:** 66–71
- Elson, John S.  
*Brutal Choices in Curricular Design ... The Case Against Collaborative Learning in the First-Year Legal Research, Writing, and Analysis Course* . . . . . **13:** 136–144
- Enquist, Anne  
*Writers’ Toolbox ... Defeating the Writer’s Archenemy.* . . . . . **13:** 145–148
- Writers’ Toolbox ... Fixing the “Awk”* . . . . . **14:** 107–110
- Writers’ Toolbox ... Should I Teach My Students Not to Write in Passive Voice?.* . . . . . **12:** 35–37
- Writers’ Toolbox ... Talking to Students About the Differences Between Undergraduate Writing and Legal Writing.* . . . . . **13:** 104–105
- Writers’ Toolbox ... Teaching Students to Make Explicit Factual Comparisons* . . . . . **12:** 147–150
- Writers’ Toolbox ... That Old Friend, the Tree-Branching Diagram.* . . . . . **13:** 24–26
- Writers’ Toolbox ... The Semicolon’s Undeserved Mystique.* . . . . . **12:** 105–107
- Writers’ Toolbox ... Topic Sentences: Potentially Brilliant Moments of Synthesis* . . . . . **14:** 139–141
- Writers’ Toolbox ... To Quote or Not to Quote* . . . . . **14:** 16–20
- Enquist, Anne and Laurel Oates  
*You’ve Sent Mail: Ten Tips to Take with You to Practice* . . . . . **15:** 127–129
- Esposito, Shaun  
*Our Question—Your Answers* . . . . . **4:** 12–13
- Evangelist, Susan S. and Roy M. Mersky  
*Guidelines for Writing Book Reviews* . . . . . **1:** 15
- Eyster, James Parry  
*College Reunion: An Exercise That Reduces Student Anxiety and Improves Case Analysis.* . . . . . **11:** 14–16
- Fajans, Elizabeth and Mary R. Falk  
*Writing Tips ... The Art of Indirection.* . . . . . **14:** 21–22
- Falk, Mary R. and Elizabeth Fajans  
*Writing Tips ... The Art of Indirection* . . . . . **14:** 21–22
- Faulk, Martha  
*Writing Tips ... “However” Is Not a FANBOYS* . . . . . **11:** 21–22
- Writing Tips ... Matters of Punctuation: Open or Close* . . . . . **16:** 44–46
- Writing Tips ... Much Ado About That ... Or Is It Which?.* . . . . . **6:** 112–114
- Writing Tips ... Never Use a Preposition to End a Sentence With.* . . . . . **8:** 24–25
- Writing Tips ... Punctuation Matters.* . . . . . **12:** 32–34
- Writing Tips ... Sounding Like a Lawyer* . . . . . **10:** 5–7
- Writing Tips ... The Best Sentence* . . . . . **9:** 3–4
- Writing Tips ... The Matter of Mistakes.* . . . . . **13:** 27–28

- Feeley, Kelly M. and Stephanie A. Vaughan  
*Yes, You Will Really Use Algebra When You Grow Up: Providing Law Students with Proof That Legal Research and Writing Is Essential in the Real World.* . . . . . **10:** 105–108
- Felsenburg, Miki and Luellen Curry  
*Brutal Choices in Curricular Design ... Incorporating Social Justice Issues into the LRW Classroom* . . . . . **11:** 75–79
- Fine, Toni M.  
*Legal Research in Practice: How a FERC Lawyer Does Research.* . . . . . **2:** 46–51
- Finet, Scott  
*Advanced Legal Research and the World Wide Web* . . . . . **5:** 52–54
- Fischer, Judith D.  
*Book Review ... Texts, Lies, and Changed Positions: A Review of The Little Book of Plagiarism.* . . . . . **16:** 26–28
- Ford, Kristin  
*Teachable Moments for Students ... Researching Uniform and Model Laws.* . . . . . **10:** 114–116
- Fox, James P.  
*On the Lighter Side ... Eine Kleine Legalresearchmusik.* . . . . . **11:** 132–133
- Friedman, Peter B.  
*Brutal Choices in Curricular Design ... The Class Listserv: Professor's Podium or Students' Forum?* . . . . . **8:** 75–78
- Fritchel, Barbara L.  
*How to ... "Make Reviewing Fun"—Legal Research Scavenger Hunts.* . . . . . **4:** 63–64
- Frost, Philip M.  
*Using Ethical Problems in First-Year Skills Courses.* . . . . . **14:** 7–9
- Gannage, Mark  
*How to ... Structure Your Legal Memorandum.* . . . . . **8:** 30–33
- Gearin, Michael and Barbara Cornwall Holt  
*How a Bankruptcy Lawyer Does Legal Research.* . . . . . **5:** 101–105
- George, Paul and Marcia J. Koslov  
*Introducing the AALL Uniform Citation Guide* . . . . . **8:** 60–64
- Gerdy, Kristin B.  
*Teachable Moments for Students ... What Is the Difference Between Substantive and Procedural Law? And How Do I Research Procedure?* . . . . . **9:** 5–8
- Giers, Judith  
*Providing Procedural Context: A Brief Outline of the Civil Trial Process* . . . . . **12:** 151–155  
*Teachable Moments for Teachers ... Betty Boop Goes to Law School* . . . . . **11:** 17–18
- Glashausser, Alex  
*From the Electoral College to Law School: Research and Writing Lessons from the Recount.* . . . . **10:** 1–4  
*What Is "Lecturing," Alex?* . . . . . **8:** 73–74
- Gleason, Diana  
*Technology for Teaching ... "Introduction to the Internet": A Training Script* . . . . . **8:** 124–128
- Gonzalez, L. Monique  
*A Timely Seminar: The Clerkship Crash Course in Legal Research* . . . . . **15:** 186–188
- Goodno, Naomi Harlin and Marci L. Smith  
*Bluebook Madness: How to Have Fun Teaching Citation* . . . . . **16:** 40–43
- Gotham, Michael R. and Cheryl Rae Nyberg  
*Joining Hands to Build Bridges* . . . . . **7:** 60–64
- Green, Sonia Bychkov  
*A Montessori Journey: Lessons for the Legal Writing Classroom* . . . . . **13:** 82–86
- Grosek, Edward  
*Teachable Moments ... "How Can I Find a United States Treaty?"* . . . . . **7:** 29–30
- Haigh, Richard  
*Pulp Fiction and the Reason of Law* . . . . . **6:** 96–99
- Harris, Catherine K.  
*Pathfinder to U.S. Copyright Law* . . . . . **2:** 32–38
- Harris, Catherine and Kay Schlueter  
*Legal Research and Raising Revenue at the Texas State Law Library* . . . . . **7:** 88–89
- Hartung, Stephanie  
*Teachable Moments for Teachers ... From the Courtroom to the Classroom: Reflections of a New Teacher* . . . . . **13:** 101–103
- Hayford, Jill Koch  
*What I Learned from My Fourth-Grader About Teaching Legal Reasoning* . . . . . **15:** 174–175
- Hazelton, Penny A.  
*Advanced Legal Research Courses: An Update.* . . . . . **1:** 52–53  
*Book Review: Using Computers in Legal Research: A Guide to LEXIS and WESTLAW* . . . . . **3:** 44–45

- Brutal Choices in Curricular Design ... Why Don't We Teach Secondary Materials First?* . . . . . **8:** 8–10
- Our Question—Your Answers* . . . . . **6:** 29–31
- Surveys on How Attorneys Do Legal Research* . . . . . **1:** 53
- Hazelton, Penny A. and Frank G. Houdek  
*Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–5 (1992–1997)* . . . . . **6:** 40–55
- Hazelton, Penny A., Peggy Roebuck Jarrett, Nancy McMurrer, and Mary Whisner  
*Develop the Habit: Note-Taking in Legal Research* . . . . . **4:** 48–52
- Hemmens, Ann  
*Obtaining Copyright Permissions: Online Resources* . . . . . **9:** 129–132
- Teachable Moments ... Library Lifesavers: Bite-Sized Research Instruction* . . . . . **17:** 41–42
- Henle, Alea  
*Training Users on Internet Publications Evolved From (And Still In) Print* . . . . . **10:** 89–91
- Hensiak, Kathryn  
*Evaluating the Financial Impact of Legal Research Materials: A Legal Research Classroom Exercise* . . . . . **13:** 128–131
- Heyde, Christina R. and Susan E. Provenzano  
*E-Grading: The Pros and Cons of Paperless Legal Writing Papers* . . . . . **12:** 139–146
- Higdon, Michael J.  
*From Simon Cowell to Tim Gunn: What Reality Television Can Tell Us About How to Critique Our Students' Work Effectively* . . . . . **15:** 169–173
- It's a Small World: Using the Classic Disney Ride to Teach Document Coherence* . . . . . **17:** 111–114
- Using DVD Covers to Teach Weight of Authority* . . . . . **15:** 8–11
- Hogan, Jessica R.  
*Teachable Moments ... "Why Won't My Westlaw Search Work on Lycos?"* . . . . . **7:** 123–126
- Holt, Barbara  
*Our Question—Your Answers* . . . . . **5:** 73–78
- Holt, Barbara Cornwall and Michael Gearin  
*How a Bankruptcy Lawyer Does Legal Research* . . . . . **5:** 101–105
- Honigsberg, Peter Jan  
*Organizing the Fruits of Your Research: The Honigsberg Grid* . . . . . **4:** 94–95
- Honigsfeld, Andrea, Robin Boyle, and Jeffrey Minneti  
*Law Students Are Different from the General Population: Empirical Findings Regarding Learning Styles* . . . . . **17:** 153–160
- Hotchkiss, Mary A.  
*Centers for Teaching Effectiveness: A Resource Guide* . . . . . **17:** 179
- From the Editor: A Fresh Perspective* . . . . . **9:** 1–2
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–9 (1992–2001)* . . . . . **10:** 36–64
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–10 (1992–2002)* . . . . . **11:** 28–58
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–11 (1992–2003)* . . . . . **12:** 46–83
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–12 (1992–2004)* . . . . . **13:** 40–72
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–13 (1992–2005)* . . . . . **14:** 39–71
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–14 (1992–2006)* . . . . . **15:** 68–103
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–15 (1992–2007)* . . . . . **16:** 51–89
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–16 (1992–2008)* . . . . . **17:** 54–94
- Legal Research and Writing Resources: Recent Publications* . . . . . **15:** 201–202
- Houdek, Frank G.  
*From the Editor: A New Perspective* . . . . . **3:** 1–2
- From the Editor: Coming Attractions* . . . . . **3:** 27–28
- Index to Perspectives: Teaching Legal Research and Writing, Volume 1 (1992–1993)* . . . . . **2:** 39–43
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–2 (1992–1994)* . . . . . **3:** 19–26
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–3 (1992–1995)* . . . . . **4:** 27–36

- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–4 (1992–1996)* . . . . . **5:** 35–47
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–6 (1992–1998)* . . . . . **7:** 37–55
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–7 (1992–1999)* . . . . . **8:** 37–57
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–8 (1992–2000)* . . . . . **9:** 24–48
- Our Question—Your Answers* . . . . . **1:** 14; **1:** 86; . . . . . **1:** 49–50; **2:** 20–23; . . . . . **2:** 66–67; **3:** 6–7; . . . . . **4:** 90–91; **5:** 23–25; **6:** 81–83
- Houdek, Frank G. and Penny A. Hazelton  
*Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–5 (1992–1997)* . . . . . **6:** 40–55
- Houston, Barbara Bevis  
*Practice Pointer: A Checklist for Evaluating Online Searching Skills; Or, When to Take Off the Training Wheels* . . . . . **3:** 13–15
- Howland, Joan S.  
*Principles of Power Research: Integrating Manual and Online Legal Research to Maximize Results and Minimize Costs* . . . . . **1:** 93–97
- Huddleston, Brian  
*Trial by Fire ... Creating a Practical Application Research Exam* . . . . . **7:** 99–104
- Ingham, Joanne and Robin A. Boyle  
*Suggestions on How to Conduct Empirical Research: A Behind-the-Scenes View* . . . . . **15:** 176–179
- Inglehart, Elizabeth L.  
*Brutal Choices in Curricular Design ... Teaching U.S. Legal Research Skills to International LL.M. Students: What and How* . . . . . **15:** 180–185
- Inglehart, Elizabeth L. and Martha Kanter  
*Brutal Choices in Curricular Design ... “The Real World”: Creating a Compelling Appellate Brief Assignment Based on a Real-World Case* . . . . . **17:** 128–134
- Jacobson, M.H. Sam  
*Determining the Scope of a Court’s Holding* . . . . . **11:** 120–122
- Jamar, Steven D.  
*The ALWD Citation Manual—A Professional Citation System for the Law* . . . . . **8:** 65–67  
*Asking Questions* . . . . . **6:** 69–70  
*Using the Multistate Performance Test in an LRW Course* . . . . . **8:** 118–123
- Jarret, Peggy Roebuck and Mary Whisner  
*“Here There Be Dragons”: How to Do Research in an Area You Know Nothing About* . . . . . **6:** 74–76
- Jarret, Peggy Roebuck, Nancy McMurrer, Penny A. Hazelton, and Mary Whisner  
*Develop the Habit: Note-Taking in Legal Research* . . . . . **4:** 48–52
- Jensen, Mary Brandt  
*“Breaking the Code” for a Timely Method of Grading Legal Research Essay Exams* . . . . . **4:** 85–89
- Johansen, Steve J.  
*Brutal Choices in Curricular Design ... Life Without Grades: Creating a Successful Pass/Fail Legal Writing Program* . . . . . **6:** 119–121
- Johnson, Greg  
*Brutal Choices in Curricular Design ... Controversial Issues in the Legal Writing Classroom: Risks and Rewards* . . . . . **16:** 12–18
- Johnson, Phill and Travis McDade  
*Print Shepard’s Is Obsolete: Coming to Terms with What You Already Know* . . . . . **12:** 160–162
- Jones, Julie  
*Teachable Moments for Students ... Just the Facts, Your Honor: Finding Judicial Statistics* . . . . . **15:** 31–35
- Jones, Lesliediana  
*Our Question—Your Answers* . . . . . **5:** 120–124
- Jones, Nancy L.  
*Extending the Classroom: The Writing Resource Center and the Teaching of Legal Writing at the University of Iowa* . . . . . **1:** 83–85
- Jones, Rachel W.  
*Teachable Moments for Students ... Mandatory v. Persuasive Cases* . . . . . **9:** 83–85
- Kanter, Martha and Elizabeth L. Inglehart  
*Brutal Choices in Curricular Design ... “The Real World”: Creating a Compelling Appellate Brief Assignment Based on a Real-World Case* . . . . . **17:** 128–134

- Karp, Judith and Leslie Larkin Cooney  
*Ten Magic Tricks for an Interactive Classroom* . . . . . **8:** 1–3
- Kaufman, Billie Jo  
*Teachable Moments for Students ... Finding and Using Statistics in Legal Research and Writing* . . . . . **14:** 150–152
- Kearley, Timothy  
*Book Review ... An Australian Perspective on Legal Research and Writing: A Review of Researching and Writing in Law* . . . **15:** 192–193
- Keefe, Thomas  
*Teaching Taxonomies* . . . . . **14:** 153–156
- Kelley, Sally J.  
*How to ... Use the Internet to Find and Update the United States Code* . . . . . **7:** 23–26
- Kennedy, Bruce  
*Finding Recent Legislative Developments & Documents* . . . . . **1:** 26–27  
*U.S. Congressional Materials: 1970–Present* . . . . . **1:** 28–29
- Kimble, Joseph  
*On Legal-Writing Programs* . . . . . **2:** 43–46
- Kimbrough, Tom  
*In-Class Online Legal Research Exercises: A Valuable Educational Tool* . . . . . **16:** 112–117
- King, Susan and Ruth Anne Robbins  
*Creating New Learning Experiences Through Collaborations Between Law Librarians and Legal Writing Faculty* . . . . . **11:** 110–112
- Klein, Diane J.  
*Legal Research? And Writing? In a Property Class?* . . . . . **14:** 1–4
- Kleinschmidt, Bruce  
*Taping: It's Not Just for Grand Juries Anymore* . . . . . **7:** 87
- Klugh, Druet Cameron  
*Teachable Moments for Students ... Are You Positive About "Positive Law"?* . . . . . **10:** 81–83
- Koshollek, Mary  
*A Plan for In-House Training: One Firm's Experience* . . . . . **5:** 106–112
- Koslov, Marcia J. and Paul George  
*Introducing the AALL Uniform Citation Guide* . . . . . **8:** 60–64
- Kosse, Susan Hanley and David T. ButleRitchie  
*Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research* . . . . . **9:** 69–72
- Kunsch, Kelly  
*Teachable Moments ... "What Is the Standard of Review?"* . . . . . **6:** 84–85
- Kunz, Christina L.  
*Terminating Research* . . . . . **2:** 2–3
- Kunz, Christina L. and Helene S. Shapo  
*Brutal Choices in Curricular Design ... Making the Most of Reading Assignments* . . . . . **5:** 61–62  
*Brutal Choices in Curricular Design ... Standardized Assignments in First-Year Legal Writing* . . . . . **3:** 65–66  
*Brutal Choices in Curricular Design ... Teaching Citation Form and Technical Editing: Who, When, and What* . . . . . **3:** 4–5  
*Brutal Choices in Curricular Design ... Winning the Font Game: Limiting the Length of Students' Papers* . . . . . **4:** 10–11  
*Brutal Choices: Should the First-Year Legal Writing Course Be Graded in the Same Way As Other First-Year Courses?* . . . . . **2:** 6–8
- Laughlin, Angela M.  
*Getting Them While They're Young: Two Experiences Using Traditional Legal Practice Skills to Interest High School Students in Attending Law School* . . . . . **16:** 125–130
- Lawrence, Mary S. and Helene S. Shapo  
*Brutal Choices in Curricular Design ... Designing the First Writing Assignment* . . . . . **5:** 94–95  
*Brutal Choices in Curricular Design ... Surviving Sample Memos* . . . . . **6:** 90–91
- LeClercq, Terri  
*Brutal Choices in Curricular Design ... Teaching Student Editors to Edit* . . . . . **9:** 124–128  
*An English Professor's Perspective: "Writing Like a Lawyer"* . . . . . **1:** 47–48  
*U.S. News & World Report "Notices" Legal Writing Programs* . . . . . **3:** 77
- Levine, Jan M.  
*Designing Assignments for Teaching Legal Analysis, Research, and Writing* . . . . . **3:** 58–64  
*Some Concerns About Legal Writing Scholarship* . . . . . **7:** 69–70

- Levine, Jan M. and Grace C. Tonner  
*Legal Writing Scholarship: Point/Counterpoint* . . . . . **7:** 68–70
- Levy, James B.  
*Be a Classroom Leader* . . . . . **10:** 12–14  
*Book Review ... A Neurologist Suggests Why Most People Can't Write—A Review of The Midnight Disease: The Drive to Write, Writer's Block, and the Creative Brain* . . . . . **13:** 32–34  
*Book Review ... What the Best College Teachers Do* . . . . . **15:** 58–61  
*Brutal Choices in Curricular Design ... A Schema Walks into a Bar ... How Humor Makes Us Better Teachers by Helping Our Students Learn* . . . . . **16:** 109–111  
*Dead Bodies and Dueling: Be Creative in Developing Ideas for Open Universe Memoranda* . . . . . **7:** 13–16  
*Legal Research and Writing Pedagogy—What Every New Teacher Needs to Know* . . . **8:** 103–107
- Lewis, Dianne T. and Ellen M. Callinan  
*How to ... Orient Foreign Lawyers in a Law Firm Library* . . . . . **5:** 21–22
- Liemer, Sue  
*Being a Beginner Again: A Teacher Training Exercise* . . . . . **10:** 87–88  
*Teachable Moments for Teachers ... Memo Structure for the Left and Right Brain* . . **8:** 95–96
- Liemer, Susan P., Melissa Shafer, and Sheila Simon  
*Teachable Moments for Teachers ... Not Ready for PowerPoint? Rediscovering an Easier Tool* . . . . . **11:** 82–83
- Lind, Douglas W.  
*Teaching Nonlegal Research to Law Students: A Discipline-Neutral Approach* . . . . **13:** 125–127
- Lustbadder, Paula and Linda Edwards  
*Teaching Legal Analysis* . . . . . **2:** 52–53
- Lynch, Michael J.  
*"Mistakes Were Made": A Brief Excursion into the Passive Voice* . . . . . **7:** 82–83
- Malcolm, Shannon L.  
*Teaching U.S. Legal Research to International Graduate Students: A Librarian's Perspective* . . . . . **14:** 145–149
- Malmud, Joan  
*Adding Method and Alleviating Madness: A Process for Teaching Citation* . . . . **12:** 117–119
- Margolis, Ellie  
*Teaching Students to Make Effective Policy Arguments in Appellate Briefs* . . . . . **9:** 73–79
- Markus, Karen  
*Putting Yourself in the Shoes of a Law Student with Dyslexia* . . . . . **15:** 19–24
- Martin, Allison  
*Lessons from the Other Side—What I Learned About Teaching Legal Writing by Teaching Professional Responsibility* . . . . . **15:** 157–161
- Martin, April  
*Book Review: Acing Your First Year of Law School: The Ten Steps to Success You Won't Learn in Class* . . . . . **9:** 155
- Matheson, Scott  
*Teachable Moments for Students ... Searching Case Digests in Print or Online: How to Find the "Thinkable Thoughts"* . . . . . **11:** 19–20
- McCarthy, Kathleen J.  
*1993 Teach-In Events* . . . . . **2:** 13–17  
*Teach-In Activities in Law Schools* . . . . . **1:** 67
- McDade, Travis and Phill Johnson  
*Print Shepard's Is Obsolete: Coming to Terms with What You Already Know* . . . . . **12:** 160–162
- McDavid, Wanda  
*Microsoft PowerPoint: A Powerful Training Tool* . . . . . **5:** 59–60
- McGaugh, Tracy  
*Teachable Moments for Teachers ... The Synthesis Chart: Swiss Army Knife of Legal Writing* . . . . . **9:** 80–82
- McGaugh, Tracy L.  
*Brutal Choices in Curricular Design ... Laptops in the Classroom: Pondering the Possibilities* . . . . . **14:** 163–165
- McIver, John P.  
*Teachable Moments for Students ... Advice on State Court Advisory Opinions* . . . . **13:** 98–100
- McMurrer, Nancy  
*Butterflies Are Free—But Should CALR Printing Be?* . . . . . **8:** 89–92  
*Researching Health Law Issues* . . . . . **5:** 115–119
- McMurrer, Nancy, Penny A. Hazelton, Peggy Roebuck Jarrett, and Mary Whisner  
*Develop the Habit: Note-Taking in Legal Research* . . . . . **4:** 48–52

- Meadows, Judy and Kay Todd  
*Our Question—Your Answers* . . . . . **9:** 16–17; **10:** 137–138; . . . . . **12:** 163–165; **13:** 113–115; **15:** 146–149
- Melton, Pamela Rogers  
*Teachable Moments ... Click to Refresh: Audience Response Systems in the Legal Research Classroom* . . . . . **17:** 175–178
- Mercer, Kathryn Lynn  
*“You Can Call Me Al, in Graceland”: Reflections on a Speech Entitled “We Have Diamonds on the Soles of Our Shoes”* . . . . . **3:** 38–40
- Mersky, Roy M. and Susan S. Evangelist  
*Guidelines for Writing Book Reviews* . . . . . **1:** 15
- Metteer, Christine  
*Introduction to Legal Writing: A Course for Pre-Law Students* . . . . . **3:** 28–30
- Meyer, Patrick  
*Think Before You Type: Observations of an Online Researcher* . . . . . **13:** 19–23
- Mika, Karin  
*Developing Internal Consistency in Writing Assignments by Involving Students in Problem Drafting* . . . . . **16:** 122–124  
*Teachable Moments for Teachers ... Life-Changing Moments: Learning to Accept Your Students’ Choices* . . . . . **13:** 15–18
- Miller, Kathleen  
*Teachable Moments for Teachers ... Making Practice Oral Arguments Interesting* . . . . . **14:** 26–27
- Miller, Kathleen Portuan  
*Creating an Appellate Brief Assignment: A Recipe for Success* . . . . . **16:** 165–168  
*Using Alternative Dispute Resolution in Legal Writing Courses* . . . . . **14:** 157–159
- Miller, Michael S.  
*Recognizing and Reading Legal Citations* . . . . . **2:** 70–72
- Miller, Michael S. and Dee Van Nest  
*Breaking Barriers—Access to Main Street: Pathfinder on the Americans with Disabilities Act* . . . . . **2:** 73–84
- Miller, Steven R.  
*Technology for Teaching ... Teaching Advanced Electronic Legal Research for the Modern Practice of Law* . . . . . **9:** 120–123
- Minneti, Jeffrey and Catherine Cameron  
*Teaching Every Student: A Demonstration Lesson That Adapts Instruction to Students’ Learning Styles* . . . . . **17:** 161–170
- Minneti, Jeffrey, Andrea Honigsfeld, and Robin Boyle  
*Law Students Are Different from the General Population: Empirical Findings Regarding Learning Styles* . . . . . **17:** 153–160
- Mirow, M. C.  
*Confronting Inadvertent Plagiarism* . . . . . **6:** 61–64
- Mitchell, Paul G.  
*From Black and White to Color* . . . . . **2:** 9  
*Teaching Research in a Corporate Setting* . . . . . **1:** 70–71
- Montana, Patricia Grande  
*Persuasion in a Familiar Activity: The Parallels Between Résumé Writing and Brief Writing* . . . . . **16:** 100–105
- Mooney, Christine G.  
*Don’t Judge a Course by Its Credits: Convincing Students That Legal Writing Is Critical to Their Success* . . . . . **12:** 120–122  
*When Does Help Become a Hindrance: How Much Should We Assist Students with Their Graded Legal Writing Assignments?* . . . . . **10:** 69–72
- Moppett, Samantha A. and Rick Buckingham  
*Library Research Labs: A Hands-On Approach to Taking the First Step with Your Students to Reflect Good Practice in Legal Education* . . . . . **14:** 73–80
- Mowrer, J. Reid  
*The Attorney’s Pursuit of Justice and Wisdom: Once More, with Feeling* . . . . . **5:** 92–93
- Munden, Gail, Pegeen G. Bassett, and Virginia C. Thomas  
*Teaching Federal Legislative History: Notes from the Field* . . . . . **5:** 96–100
- Murley, Diane  
*What’s the Matter with Kids Today? “Why can’t they be like we were, perfect in every way? What’s the matter with kids today?”* . . . . . **13:** 121–124
- Murray, Kristen E.  
*Technology for Teaching ... My E-Semester: New Uses for Technology in the Legal Research and Writing Classroom* . . . . . **15:** 194–200

- Murray, Kristen and Christy DeSanctis  
*The Art of the Writing Conference: Letting Students Set the Agenda Without Ceding Control* . . . . . **17**: 35–40
- Murray, Michael D.  
*Communicating Explanatory Synthesis* . . . . . **14**: 136–138
- Narko, Kathleen Dillon and Maurine J. Berens  
*Teaching Research a New Way* . . . . . **16**: 118–121
- Nathanson, Mitchell  
*Teachable Moments for Teachers ... Celebrating the Value of Practical Knowledge and Experience* . . . . . **11**: 104–105
- Neumann, Richard K., Jr.  
*Three Vignettes* . . . . . **17**: 107–110
- Nevers, Shawn G.  
*Research Matters ... Legal Research Readings to Inspire and Inform Students* . . . . . **17**: 6–10
- Newby, Thomas R.  
*Law School Writing Programs Shouldn't Teach Writing and Shouldn't Be Programs* . . . . . **7**: 1–7
- Novak, Jan Ryan  
*Plain English Makes Sense: A Research Guide* . . . . . **3**: 2–3
- Nyberg, Cheryl Rae  
*How to Master All You Survey* . . . . . **6**: 8–13
- Nyberg, Cheryl Rae and Michael R. Gotham  
*Joining Hands to Build Bridges* . . . . . **7**: 60–64
- Oates, Laurel  
*Legal Writing Institute Publishes Journal and Holds Fifth Biennial Conference* . . . . . **1**: 62
- Oates, Laurel and Anne Enquist  
*You've Sent Mail: Ten Tips to Take with You to Practice* . . . . . **15**: 127–129
- Oliver, Nancy  
*Teachable Moments for Teachers ... Coming Face-to-Face with a Legal Research and Writing Client* . . . . . **13**: 149–153
- Olson, Chris  
*Understanding Color As a Design Element* . . . . . **2**: 10–12
- Olson, Kent C.  
*Waiving a Red Flag: Teaching Counterintuitiveness in Citorator Use* . . . . . **9**: 58–60
- O'Neill, Kate  
*Brutal Choices in Curricular Design ... A Silk Purse from a Sow's Ear? Or, the Hidden Value of Being Short-Staffed* . . . . . **15**: 12–18
- Opipari, Benjamin R.  
*Writing Tips ... To Go Boldly Without the Bold (and Italics and Underlining and All Caps)* . . . . . **16**: 131–138
- Writing Tips ... What Attorneys Can Learn from Children's Literature, and Other Lessons in Style* . . . . . **17**: 135–141
- Orr-Waters, Laura J.  
*Teaching English Legal Research Using the Citation Method* . . . . . **6**: 108–111
- Pantaloni, Nazareth A., III and Louis J. Sirico Jr.  
*Legal Research and the Summer Job ... Advice from the Law School* . . . . . **7**: 110–112
- Partin, Gail A.  
*Teach-In Reflections: Past, Present, and Future* . . . . . **4**: 20–23
- Patrick, Thomas O.  
*Using Simplified Cases to Introduce Synthesis* . . . . . **3**: 67–73
- Penland, Lisa  
*Teaching Non-Litigation Drafting to First-Year Law Students* . . . . . **16**: 156–159
- Person, Debora  
*Teachable Moments for Students ... Using "Walking Tours" to Teach Research* . . . . . **13**: 154–155
- Persyn, Mary G.  
*The Willow Laptop TV* . . . . . **3**: 78–79
- Pether, Penelope  
*Book Reviews ... Legal Analysis: The Fundamental Skill and Professional Writing for Lawyers: Skills and Responsibilities* . . . . . **7**: 116–118
- Phillips, Kimberly D.  
*"Down with the Death Penalty!"—Using Hot Topics with a Twist to Introduce Persuasive Advocacy and Legal Ethics* . . . . . **17**: 97–101
- Piccard, Ann M.  
*Teaching to Different Levels of Experience: What I Learned from Working with Experienced Writers from Different Fields* . . . . . **17**: 115–118
- Platt, Ellen  
*How to ... Research Federal Court Rule Amendments: An Explanation of the Process and a List of Sources* . . . . . **6**: 115–118
- Jury Instructions: An Underutilized Resource* . . . . . **7**: 90–93

- Teachable Moments ... “How Do You Update a West Key Number?” ... Beyond the Digest . . . 4: 99*  
*Unpublished vs. Unreported: What’s the Difference? . . . . . 5: 26–27*
- Pocock, Sharon  
*Book Review ... My Freshman Year: What a Professor Learned by Becoming a Student. . . . . 14: 169–171*
- Podvia, Mark W.  
*The Use of Trivia as a Tool to Enhance the Teaching of Legal Research . . . . . 12: 156–159*
- Potthoff, Lydia  
*Teachable Moments ... “How Can I Find the Most Current Text of a Codified Federal Statute?” . . . . . 5: 128–129*  
*Teachable Moments ... “How Do You Update the Code of Federal Regulations?” . . . . . 5: 28–29*
- Pratt, Diana V.  
*Designing a Contract Drafting Assignment . . . . . 14: 95–97*
- Price, Jessica E.  
*Teachable Moments for Teachers ... Teaching Students About the Legal Reader: The Reader Who Won’t Be Taken for a Ride . . . . . 12: 168–170*
- Probst, Steven R. and Michael J. Bushbaum  
*“They’re Practically Learning”: Pointers on Practical Legal Research Exams . . . . . 15: 105–111*
- Provenzano, Susan E. and Christina R. Heyde  
*E-Grading: The Pros and Cons of Paperless Legal Writing Papers. . . . . 12: 139–146*
- Ramy, Herbert N.  
*Lessons from My First Year: Maintaining Perspective . . . . . 6: 103–104*  
*Two Programs Are Better Than One: Coordinating Efforts Between Academic Support and Legal Writing Departments . . . . . 9: 148–152*
- Regnier, Jim  
*Appellate Briefing: A Judicial Perspective . . . . . 11: 72–74*
- Ricks, Sarah E.  
*Brutal Choices in Curricular Design ... Teaching 1Ls to Think Like Lawyers by Assigning Memo Problems with No Clear Conclusions. . . 14: 10–15*  
*You Are in the Business of Selling Analogies and Distinctions . . . . . 11: 116–119*
- Rine, Nancy A.  
*Research in a Law Firm: How to Find (Quickly) What You Never Had to Look For in Law School. . . . . 2: 27–31*
- Robbins, Ruth Anne and Susan King  
*Creating New Learning Experiences Through Collaborations Between Law Librarians and Legal Writing Faculty . . . . . 11: 110–112*
- Romantz, David S. and Kathleen Elliott Vinson  
*Who Will Publish My Manuscript? . . . . . 7: 31–33*
- Romig, Jennifer Murphy  
*“Hooking” Them on Books: Introducing Print-Based Legal Research in a Stimulating, Memorable Way . . . . . 13: 77–81*
- Rosenbaum, Judith  
*Brutal Choices in Curricular Design ... Putting the Puzzle Together: Choices to Make When Creating a Closed-Universe Memorandum Assignment . . . . . 17: 11–24*  
*Brutal Choices in Curricular Design ... Using Read-Aloud Protocols As a Method of Instruction. . . . . 7: 105–109*  
*Brutal Choices in Curricular Design ... Why I Don’t Give a Research Exam. . . . . 11: 1–6*  
*Technology for Teaching ... CALR Training in a Networked Classroom . . . . . 8: 79–84*
- Rosenthal, Lawrence D.  
*Are We Teaching Our Students What They Need to Survive in the Real World? Results of a Survey . . . . . 9: 103–109*
- Rowe, Suzanne E.  
*The Brick: Teaching Legal Analysis Through the Case Method . . . . . 7: 21–22*
- Ryan, Linda M.  
*Designing a Program to Teach CALR to Law Students: A Selective and Annotated Bibliography of Resource Materials . . . . . 4: 53–58*  
*Seeing the Forest and the Trees: Introducing Students to the Law Library . . . . . 3: 31–35*
- Sampson, Kathryn A.  
*Teachable Moments for Teachers ... The Legal News Portfolio: Building Professionalism Through Student Engagement in “Off-Topic” Course Content. . . . . 15: 162–168*
- Sanderson, Rosalie M.  
*“Real World” Experience for Research Students . . . . . 7: 71–72*

- Schiess, Wayne  
*Common Student Citation Errors* . . . **10**: 119–123  
*What to Do When a Student Says “My Boss Won’t Let Me Write Like That”?* . . . . . **11**: 113–115
- Schlueter, Kay and Catherine Harris  
*Legal Research and Raising Revenue at the Texas State Law Library* . . . . . **7**: 88–89
- Schultz, Nancy L.  
*There’s a New Test in Town: Preparing Students for the MPT* . . . . . **8**: 14–17
- Schulze, Louis N., Jr.  
*Homer Simpson Meets the Rule Against Perpetuities: The Controversial Use of Pop Culture in Legal Writing Pedagogy* . . . . . **15**: 1–7
- Schunk, John D.  
*Reviewing Student Papers: Should the “Broken Windows” Theory Apply?* . . . . . **13**: 1–4  
*What Can Legal Writing Students Learn from Watching Emeril Live?* . . . . . **14**: 81–82
- Scott, Wendy and Kennard R. Strutin  
*The Legal Research Practicum: A Proposal for the Road Ahead* . . . . . **6**: 77–80
- Scully, Patrice  
*Library Needs of the Federal Government Attorney* . . . . . **5**: 17–20
- See, Brenda  
*Legal Writing Through the Eyes of First-Year Law Students: Their 25 Rules for Survival* . . . **6**: 92–93  
*Teachable Moments for Teachers ... Tying It All Together* . . . . . **10**: 18–19
- Selby, Barbie  
*Tips for Summer Associates* . . . . . **7**: 65–67
- Selden, David  
*Electronic Research Skills Assessment Survey As an Instructional Tool* . . . . . **9**: 95–98
- Seligmann, Terry Jean  
*Holding a Citation Carnival* . . . . . **8**: 18–20
- Seligmann, Terry Jean and Thomas H. Seymour  
*Choosing and Using Legal Authority: The Top 10 Tips* . . . . . **6**: 1–5
- Seymour, Thomas H. and Terry Jean Seligmann  
*Choosing and Using Legal Authority: The Top 10 Tips* . . . . . **6**: 1–5
- Shafer, Melissa  
*Shakespeare in the Law: How the Theater Department Can Enhance Lawyering Skills Instruction* . . . . . **8**: 108–113
- Shafer, Melissa, Sheila Simon, and Susan P. Liemer  
*Teachable Moments for Teachers ... Not Ready for PowerPoint? Rediscovering an Easier Tool* . . . . . **11**: 82–83
- Shapo, Helene S.  
*Implications of Cognitive Theory for Teaching* . . . . . **1**: 77–78  
*The MacCrate Report Conference: A Review* . . . . . **2**: 54–56  
*Notes from Legal Writing Organizations* . . . **2**: 19
- Shapo, Helene S. and Christina L. Kunz  
*Brutal Choices in Curricular Design ... Making the Most of Reading Assignments* . . . . . **5**: 61–62  
*Brutal Choices in Curricular Design ... Standardized Assignments in First-Year Legal Writing* . . . . . **3**: 65–66  
*Brutal Choices in Curricular Design ... Teaching Citation Form and Technical Editing: Who, When, and What* . . . . . **3**: 4–5  
*Brutal Choices in Curricular Design ... Teaching Research As Part of an Integrated LR&W Course* . . . . . **4**: 78–81  
*Brutal Choices in Curricular Design ... Winning the Font Game: Limiting the Length of Students’ Papers* . . . . . **4**: 10–11  
*Brutal Choices: Should the First-Year Legal Writing Course Be Graded in the Same Way As Other First-Year Courses?* . . . . . **2**: 6–8
- Shapo, Helene S. and Mary S. Lawrence  
*Brutal Choices in Curricular Design ... Designing the First Writing Assignment* . . . . . **5**: 94–95  
*Brutal Choices in Curricular Design ... Surviving Sample Memos* . . . . . **6**: 90–91
- Shaw, Lori  
*Technology for Teaching ... Lori Shaw and the Search for the Golden Snitch: Using Class Web Sites to Capture the Teachable Moment* . . . . . **11**: 101–103
- Shear, Joan and Kelly Browne  
*Which Legal Research Text Is Right for You?* . . . . . **10**: 23–29
- Shore, Deborah  
*A Revised Concept Chart: Helping Students Move Away from a Case-by-Case Analysis* . . . . . **11**: 123–124

- Shull, Janice K.  
*Teachable Moments for Students ... Where Do I Find Recent Legislation and Statutory Annotations Published After a Code Volume or Pocket Part?* . . . . . **11**: 80–81
- Siegel, Martha  
 “Seven Edits Make Perfect?” . . . . . **5**: 30
- Silverman, Marc B.  
*Advanced Legal Research: A Question of Value* . . . . . **6**: 33–36
- Simon, Sheila  
*Brutal Choices in Curricular Design ... Top 10 Ways to Use Humor in Teaching Legal Writing.* . . . . . **11**: 125–127  
*Order What Are Your Words In? How Foreign Languages Can Help You Teach the Structure of Legal Writing* . . . . . **10**: 124–125
- Simon, Sheila, Susan P. Liemer, and Melissa Shafer  
*Teachable Moments for Teachers ... Not Ready for PowerPoint? Rediscovering an Easier Tool* . . . . . **11**: 82–83
- Simoni, Christopher  
*Book Review: In Legal Research, It’s Déjà Vu All Over Again: A Review of Legal Research: Historical Foundations of the Electronic Age* . . . . . **3**: 83–84  
*Our Question—Your Answers* . . . . . **4**: 59–61  
*Writing About Research* . . . . . **3**: 51–55
- Sirico, Louis J., Jr.  
*Advanced Legal Writing Courses: Comparing Approaches.* . . . . . **5**: 63–64  
*Cardozo’s Statement of Facts in Palsgraf, Revisited.* . . . . . **6**: 122–123  
*Materials for Teaching Plain English: The Jury Instructions in Palsgraf, Revisited* . . . . . **8**: 137–139  
*Reading Out Loud in Class* . . . . . **10**: 8–9  
*Reining in Footnotes* . . . . . **13**: 91–93  
*Teachable Moments for Teachers ... Beyond Offering Examples of Good Writing: Let the Students Grade the Models.* . . . . . **14**: 160–162  
*Teachable Moments for Teachers ... Teaching Paragraphs* . . . . . **8**: 13  
*Teachable Moments for Teachers ... Why Law Review Students Write Poorly* . . . . . **10**: 117–118  
*Teaching Oral Argument* . . . . . **7**: 17–20  
*What the Legal Writing Faculty Can Learn from the Doctrinal Faculty.* . . . . . **11**: 97–100
- Sirico, Louis J., Jr. and Nazareth A. Pantaloni, III  
*Legal Research and the Summer Job ... Advice from the Law School* . . . . . **7**: 110–115
- Sloan, Amy E.  
*Creating Effective Legal Research Exercises* . . . . . **7**: 8–12
- Slotkin, Jacquelyn H.  
*Comma Abuse: A Comma Can Cause Trouble by Its Absence, Its Presence, Its Incorrect Placement* . . . . . **4**: 16–18
- Smith, Angela G.  
*Requiring Writing Courses Beyond the First Year: To Boldly Go Where Hardly Anyone Has Gone Before* . . . . . **1**: 54–55
- Smith, Craig T.  
*Minds and Levers: Reflections on Howard Gardner’s Changing Minds* . . . . . **14**: 116–121  
*Teaching Students How to Learn in Your Course: The “Learning-Centered” Course Manual* . . . . . **12**: 1–5  
*Teaching Synthesis in High-Tech Classrooms: Using Sophisticated Visual Tools Alongside Socratic Dialogue to Help Students Through the Labyrinth.* . . . . . **9**: 110–115
- Smith, Marci L. and Naomi Harlin Goodno  
*Bluebook Madness: How to Have Fun Teaching Citation* . . . . . **16**: 40–43
- Smith, Stephen E.  
*Teaching Practical Procedure in the Legal Writing Classroom* . . . . . **17**: 31–34
- Sneddon, Karen J.  
*Armed with More Than a Red Pen: A Novice Grader’s Journey to Success with Rubrics* . . . . . **14**: 28–33  
*Revising Revision in the Classroom* . . . . . **15**: 130–133
- Snyder, Fritz  
*High-Tech Law Students: When to Train Them on CALR.* . . . . . **8**: 21–23
- Speta, James  
*Book Review ... Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation* . . . . . **13**: 156–157
- Staheli, Kory D.  
*Evaluating Legal Research Skills: Giving Students the Motivation They Need* . . . . . **3**: 74–76

- Stanton, Teresa C.  
*Finding Foreign Law: It's Not Just for the Experts* . . . . . **16:** 37–39
- Stein, Amy R.  
*Teachable Moments for Teachers ... Helping Students Understand That Effective Organization Is a Prerequisite to Effective Legal Writing* . . . . . **15:** 36–40
- Straus, Karen  
*Tips for Using a Computer for Legal Research and Writing* . . . . . **6:** 86–87
- Stroup, Richard  
*Internet Lunch Breaks: A Low-Tech Solution to a High-Tech Demand* . . . . . **6:** 88–89
- Strutin, Kennard R. and Wendy Scott  
*The Legal Research Practicum: A Proposal for the Road Ahead* . . . . . **6:** 77–80
- Sullivan, Kathie J.  
*Letter to the Editor* . . . . . **4:** 62
- Telfeyan, Edward H.  
*The “Grammar Bee”—One Way to Take the Pain Out of Teaching the Mechanics of Writing* . . . . . **17:** 25–30
- Temple, Hollee S.  
*Teachable Moments for Teachers ... Tripped Up by Electronic Plagiarism* . . . . . **14:** 114–115  
*Using Formulas to Help Students Master the “R” and “A” of IRAC* . . . . . **14:** 129–135
- Terrell, Timothy P. and Stephen V. Armstrong  
*Writing Tips ... Conjugosis and Declensia* . . . . . **4:** 8–9  
*Writing Tips ... Editing: Overcoming the Dr. Strangelove Syndrome* . . . . . **5:** 77–78  
*Writing Tips ... Fighting “Tippism”* . . . . . **6:** 71–73  
*Writing Tips ... Just One Damned Thing After Another: The Challenge of Making Legal Writing “Spatial”* . . . . . **7:** 119–122  
*Writing Tips ... Organizing Facts to Tell Stories* . . . . . **9:** 90–94  
*Writing Tips ... Resisting the Devil’s Voice: Write Short, Simple Sentences* . . . . . **3:** 46–48  
*Writing Tips ... Sweating the Small Stuff* . . . . . **11:** 128–131  
*Writing Tips ... The Dangers of Defaults* . . . . . **10:** 126–131  
*Writing Tips ... The Perils of E-Mail* . . . . . **14:** 166–168  
*Writing Tips ... The Rhetoric of Persuasive Writing* . . . . . **15:** 189–191  
*Writing Tips ... The Subtlety of Rhythm* . . . . . **12:** 174–176  
*Writing Tips ... To Get to the “Point,” You Must First Understand It* . . . . . **13:** 158–161  
*Writing Tips ... Understanding “Style” in Legal Writing* . . . . . **17:** 43–47
- Thomas, Virginia C., Pegeen G. Bassett, and Gail Munden  
*Teaching Federal Legislative History: Notes from the Field* . . . . . **5:** 96–100
- Thomson, David I. C.  
*Book Review ... Teaching as Art Form—A Review of The Elements of Teaching* . . . . . **15:** 41–44
- Tiscione, Kristen Robbins  
*Aristotle’s Tried and True Recipe for Argument Casserole* . . . . . **15:** 45–49
- Todd, Kay M.  
*Principles of Power Research: Integrating Manual and Online Legal Research to Maximize Results and Minimize Costs* . . . . . **1:** 93–97  
*Teaching Statutory Research with the USA Patriot Act* . . . . . **12:** 17–18
- Todd, Kay and Judy Meadows  
*Our Question—Your Answers* . . . . . **9:** 16–17; **10:** 137–138; . . . . . **12:** 163–165; **13:** 113–115; **15:** 146–149
- Tonner, Grace C. and Jan M. Levine  
*Legal Writing Scholarship: Point/Counterpoint* . . . . . **7:** 68–70
- Tyler, Barbara  
*Active Learning Benefits All Learning Styles: 10 Easy Ways to Improve Your Teaching Today* . . . . . **11:** 106–109
- Vance, Ruth C.  
*The Use of Teaching Assistants in the Legal Writing Course* . . . . . **1:** 4–5
- Van Nest, Dee and Michael S. Miller  
*Breaking Barriers—Access to Main Street: Pathfinder on the Americans with Disabilities Act* . . . . . **2:** 73–84
- Vaughn, Lea and Mary Whisner  
*Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives* . . . . . **4:** 72–77

- Vaughan, Stephanie A. and Kelly M. Feeley  
*Yes, You Will Really Use Algebra When You Grow Up: Providing Law Students with Proof That Legal Research and Writing Is Essential in the Real World* . . . . . **10**: 105–108
- Vinson, Kathleen Elliott  
*New LR&W Teachers Alert! 14 Ways to Avoid Pitfalls in Your First Year of Teaching* . . . . . **6**: 6–7
- Vinson, Kathleen Elliott and David S. Romantz  
*Who Will Publish My Manuscript?* . . . . . **7**: 31–33
- Wallace, Marie  
*Finishing Touches* . . . . . **1**: 74–76  
*Practice Pointer: Looseleaf Services* . . . . . **1**: 63–64
- Watkins, H. Eric  
*Letter to the Editor* . . . . . **4**: 92
- Weston, Heidi J.  
*Speaking of “Teachable Moments”* . . . . .  
*Teaching the Ah Hahs!* . . . . . **4**: 93
- Whisner, Mary  
*Managing a Research Assignment* . . . . . **9**: 9–13
- Whisner, Mary and Lea Vaughn  
*Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives* . . . . . **4**: 72–77
- Whisner, Mary and Peggy Roebuck Jarrett  
*“Here There Be Dragons”: How to Do Research in an Area You Know Nothing About* . . . . . **6**: 74–76
- Whisner, Mary, Penny A. Hazelton, Peggy Roebuck Jarrett, and Nancy McMurrer  
*Develop the Habit: Note-Taking in Legal Research* . . . . . **4**: 48–52
- White, Libby A.  
*Brutal Choices in Curricular Design* . . . . .  
*Peering Down the Edit* . . . . . **16**: 160–164  
*Treating Students as Clients: Practical Tips for Acting as a Role Model in Client Relations* . . . . . **12**: 24–26
- Whiteman, Michael  
*The “Why” and “How” of Teaching the Internet in Legal Research* . . . . . **5**: 55–58
- Wigal, Grace  
*Brutal Choices in Curricular Design* . . . . .  
*Repeaters in LRW Programs* . . . . . **9**: 61–68
- Will, Linda  
*The Law Firm Librarian As Teacher: Slouching Toward 2000* . . . . . **6**: 14–15
- Williams, Brian S.  
*The Legal Writing Conference: A Rookie’s Perspective* . . . . . **3**: 36–37  
*Road Maps, Tour Guides, and Parking Lots: The Use of Context in Teaching Overview and Thesis Paragraphs* . . . . . **7**: 27–28
- Williams, Joseph M. and Gregory G. Colomb  
*Writing Tips* . . . *Client Communications: Delivering a Clear Message* . . . . . **12**: 127–131  
*Writing Tips* . . . *Client Communications: Designing Readable Documents* . . . . . **13**: 106–112  
*Writing Tips* . . . *Delivering a Persuasive Case: Organizing the Body of a Pleading* . . . . . **11**: 84–89  
*Writing Tips* . . . *Framing Academic Articles* . . . . . **16**: 178–185  
*Writing Tips* . . . *Le Mot Juste* . . . . . **15**: 134–141  
*Writing Tips* . . . *Shaping Stories: Managing the Appearance of Responsibility* . . . . . **6**: 16–18  
*Writing Tips* . . . *So What? Why Should I Care? And Other Questions Writers Must Answer* . . . . . **9**: 136–141  
*Writing Tips* . . . *Telling Clear Stories: A Principle of Revision That Demands a Good Character* . . . . . **5**: 14–16  
*Writing Tips* . . . *The Right Deal in the Right Words: Effective Legal Drafting* . . . . . **14**: 98–106  
*Writing Tips* . . . *The Writer’s Golden Rule* . . . . . **7**: 78–81  
*Writing Tips* . . . *Well Begun Is Half Done: The First Principle of Coherent Prose* . . . . . **8**: 129–133
- Wise, Virginia  
*“American Lawyers Don’t Get Paid Enough”—Some Musings on Teaching Foreign LL.M.s About American Legal Research* . . . . . **6**: 65–68
- Wojcik, Mark E.  
*Book Review: Legal Research* . . . . . **3**: 16–17  
*Brutal Choices in Curricular Design* . . . . .  
*Designing Writing and Research Courses for International Students* . . . . . **14**: 83–86
- Wolcott, Willa  
*Brutal Choices in Curricular Design* . . . . .  
*Holistic Scoring* . . . . . **13**: 5–9
- Woodside, Jackie  
*Research Matters* . . . *Introducing Students to Online Research Guides* . . . . . **17**: 171–174

- Wren, Christopher G.  
*Brutal Choices in Curricular Design ... Voice of the Future: Audio Legal Briefs* . . . . . **12:** 166–167
- Young, Stephen  
*Teachable Moments for Students ... Researching English Case Law* . . . . . **12:** 13–16  
*Teachable Moments ... Researching Legal Ethics* . . . . . **16:** 29–32
- Youngdale, Beth  
*Teachable Moments for Students ... Finding Low-Cost Supreme Court Materials on the Web* . . . . . **12:** 108–111
- Zappen, Edward F., Jr.  
*Gender-Fair Communication in the Judiciary—A Guide* . . . . . **1:** 98–103
- Zimmerman, Cliff  
*Book Review ... The Importance of Culture and Cognition—A Review of The Geography of Thought: How Asians and Westerners Think Differently ... and Why* . . . . . **14:** 142–144
- Zimmerman, Clifford S.  
*Creative Ideas and Techniques for Teaching Rule Synthesis* . . . . . **8:** 68–72
- Zimmerman, Emily  
*Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy* . . . . . **10:** 109–113  
*The Proverbial Tree Falling in the Legal Writing Forest: Ensuring That Students Receive and Read Our Feedback on Their Final Assignments* . . . . . **11:** 7–11  
*Toto, I Don't Think We're In Practice Anymore: Making the Transition from Editing as a Practitioner to Giving Feedback as a Legal Writing Professor* . . . . . **12:** 112–116

## SUBJECT INDEX

### ABA Legal Writing Committee

---

- Allee, Jacqueline  
*ABA Legal Writing Committee* . . . . . **1:** 61

### ABA Standards

---

- Brill, Ralph L.  
*ABA Adopts New Standards Relating to Legal Research and Writing* . . . . . **5:** 71–72

### Academic Support

---

- Calleros, Charles  
*Brutal Choices in Curricular Design ... Using Both Nonlegal Contexts and Assigned Doctrinal Course Material to Improve Students' Outlining and Exam-Taking Skills* . . . . . **12:** 91–101
- Elliott, Jessica  
*Teaching Outlining for Exam Preparation as Part of the First-Year Legal Research and Writing Curriculum* . . . . . **11:** 66–71
- Markus, Karen  
*Putting Yourself in the Shoes of a Law Student with Dyslexia* . . . . . **15:** 19–24
- Ramy, Herbert N.  
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- Regnier, Jim  
*Appellate Briefing: A Judicial Perspective* . . . . . **11**: 72–74
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*Teaching Contract Drafting: The Two Elephants in the Room* . . . . . **14**: 92–94
- Boyle, Robin A.  
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*"Feed-Forward" Tutorials, Not "Feedback" Reviews* . . . . . **6**: 105–107
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- Levine, Jan M.  
*Designing Assignments for Teaching Legal Analysis, Research, and Writing*. . . . . **3**: 58–64
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- Oliver, Nancy  
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*Designing a Contract Drafting Assignment* . . . . . **14**: 95–97
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*Using DVD Covers to Teach Weight of Authority* . . . . . **15:** 8–11
- Jacobson, M.H. Sam  
*Determining the Scope of a Court's Holding* . . . . . **11:** 120–122
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. . . . . **3:** 87–88; **4:** 24–26; **4:** 68–70;  
. . . . . **4:** 100–102; **5:** 31–34; **5:** 81–83;  
. . . . . **5:** 130–131; **6:** 37–39; **6:** 124–125;  
. . . . . **7:** 34–36; **7:** 94–96; **7:** 127–128;  
. . . . . **8:** 34–36; **8:** 100–101; **9:** 20–23;  
. . . . . **9:** 99–100; **9:** 153–154; **10:** 30–35;  
. . . . . **10:** 98–100; **10:** 139–141; **11:** 23–27;  
. . . . . **11:** 90–93; **11:** 134–136; **12:** 38–45;  
. . . . . **12:** 132–135; **12:** 177–179; **13:** 35–39;  
. . . . . **13:** 116–117; **13:** 162–163; **14:** 34–38;  
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Skills Courses* . . . . . **14:** 7–9

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Professional Responsibility* . . . . . **15:** 157–161
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Topics with a Twist to Introduce Persuasive  
Advocacy and Legal Ethics* . . . . . **17:** 97–101
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Researching Legal Ethics* . . . . . **16:** 29–32

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Are We Too Nice to Our Students?* . . . . . **10:** 73–75
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Practical Skills Exam in Advanced  
Legal Research Courses* . . . . . **15:** 112–118
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Yay/Nay Sheets* . . . . . **16:** 149–155
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Students Set the Agenda Without  
Ceding Control* . . . . . **17:** 35–40
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Paperless Legal Writing Papers* . . . . . **12:** 139–146
- Higdon, Michael J.  
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Television Can Tell Us About How to Critique  
Our Students’ Work Effectively* . . . . . **15:** 169–173
- Huddleston, Brian  
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Research Exam* . . . . . **7:** 99–104
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Grades: Creating a Successful Pass/Fail Legal  
Writing Program* . . . . . **6:** 119–121

Klein, Diane J.  
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*In a Property Class?* . . . . . **14:** 1–4

Mooney, Christine G.  
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*Legal Writing Assignments?* . . . . . **10:** 69–72

Piccard, Ann M.  
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*from Different Fields.* . . . . . **17:** 115–118

Probst, Steven R. and Michael J. Bushbaum  
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*Practical Legal Research Exams* . . . . . **15:** 105–111

Rosenbaum, Judith  
*Brutal Choices in Curricular Design ...*  
*Why I Don’t Give a Research Exam* . . . . . **11:** 1–6

Shapo, Helene S. and Christina L. Kunz  
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*Writing Course Be Graded in the Same*  
*Way As Other First-Year Courses?* . . . . . **2:** 6–8

Sirico, Louis J., Jr.  
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*Offering Examples of Good Writing: Let the*  
*Students Grade the Models.* . . . . . **14:** 160–162

Sneddon, Karen J.  
*Armed with More Than a Red Pen:*  
*A Novice Grader’s Journey to Success*  
*with Rubrics* . . . . . **14:** 28–33

*Revising Revision in the*  
*Classroom* . . . . . **15:** 130–133

Staheli, Kory D.  
*Evaluating Legal Research Skills: Giving Students*  
*the Motivation They Need* . . . . . **3:** 74–76

Stein, Amy R.  
*Teachable Moments for Teachers ...*  
*Helping Students Understand That Effective*  
*Organization Is a Prerequisite to*  
*Effective Legal Writing* . . . . . **15:** 36–40

White, Libby A.  
*Brutal Choices in Curricular Design ...*  
*Peering Down the Edit* . . . . . **16:** 160–164

Wolcott, Willa  
*Brutal Choices in Curricular Design ...*  
*Holistic Scoring* . . . . . **13:** 5–9

Zimmerman, Emily  
*The Proverbial Tree Falling in the Legal Writing*  
*Forest: Ensuring That Students Receive*  
*and Read Our Feedback on Their*  
*Final Assignments* . . . . . **11:** 7–11

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McMurrer, Nancy  
*Researching Health Law Issues* . . . . . **5:** 115–119

## Humor

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Bresler, Kenneth  
*On the Lighter Side ... Pursuant to Partners’*  
*Directive, Lawyer Learns to Obfuscate.* . . . . **3:** 18

Fox, James P.  
*On the Lighter Side ... Eine Kleine*  
*Legalresearchmusik.* . . . . . **11:** 132–133

Levy, James B.  
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*A Schema Walks into a Bar ... How Humor*  
*Makes Us Better Teachers by Helping*  
*Our Students Learn* . . . . . **16:** 109–111

Podvia, Mark W.  
*The Use of Trivia as a Tool to Enhance*  
*the Teaching of Legal Research* . . . . . **12:** 156–159

Simon, Sheila  
*Brutal Choices in Curricular Design ...*  
*Top 10 Ways to Use Humor in*  
*Teaching Legal Writing.* . . . . . **11:** 125–127

## Internet

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*Announcements ...*  
*LR&W Internet Discussion Lists.* . . . . . **4:** 61

Bintliff, Barbara  
*Why Is Web Searching So*  
*Unpredictable?.* . . . . . **7:** 84–86

Duggan, James E.  
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Gleason, Diana  
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Hogan, Jessica R.  
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 How Is the Internet Incorporated  
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 Instructions in Palsgraf, Revisited . . . 8: 137–139*

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 for the Summer Associate . . . . . 4: 83–84*
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 For in Law School . . . . . 2: 27–31*
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 Need to Survive in the Real World?  
 Results of a Survey . . . . . 9: 103–109*
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 Slouching Toward 2000 . . . . . 6: 14–15*

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 Experiences Using Traditional Legal Practice  
 Skills to Interest High School Students in Attending  
 Law School . . . . . 16: 125–130*
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*Teach-In Activities in Law Schools . . . . . 1: 67*

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*Teachable Moments for Teachers ... Show Me,  
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 “Deciding What the Rule  
 Should Be” . . . . . 11: 12–13*  
*How Many Cases Do I Need? . . . . . 10: 10–11*  
*Using the Idea of Mathematical Proof to Teach  
 Argument Structure . . . . . 15: 50–53*
- Edwards, Linda and Paula Lustbader  
*Teaching Legal Analysis . . . . . 2: 52–53*
- Haigh, Richard  
*Pulp Fiction and the Reason of Law . . . 6: 96–99*

- Jacobson, M.H. Sam  
*Determining the Scope of a Court's Holding* . . . . . **11**: 120–122
- Murray, Michael D.  
*Communicating Explanatory Synthesis* . . . . . **14**: 136–138
- Patrick, Thomas O.  
*Using Simplified Cases to Introduce Synthesis* . . . . . **3**: 67–73
- Ricks, Sarah E.  
*Brutal Choices in Curricular Design ... Teaching 1Ls to Think Like Lawyers by Assigning Memo Problems with No Clear Conclusions* . . . . . **14**: 10–15
- Rowe, Suzanne E.  
*The Brick: Teaching Legal Analysis Through the Case Method* . . . . . **7**: 21–22
- Shore, Deborah  
*A Revised Concept Chart: Helping Students Move Away from a Case-by-Case Analysis* . . . . . **11**: 123–124
- Temple, Hollee S.  
*Using Formulas to Help Students Master the "R" and "A" of IRAC.* . . . . . **14**: 129–135
- Tiscione, Kristen Robbins  
*Aristotle's Tried and True Recipe for Argument Casserole* . . . . . **15**: 45–49
- Zimmerman, Clifford S.  
*Creative Ideas and Techniques for Teaching Rule Synthesis* . . . . . **8**: 68–72
- Charles, Patrick J.  
*Teachable Moments ... How Do You Update the Code of Federal Regulations Using GPO Access?* . . . . . **17**: 119–127
- Craig, Brian  
*Beyond Black's and Webster's: The Persuasive Value of Thesauri in Legal Research and Writing* . . . . . **16**: 169–177  
*Legal Briefs: Helpful but Also Hazardous* . . . . . **13**: 132–135
- Dunn, Donald J.  
*Are Legal Research Skills Essential? "It Can Hardly Be Doubted ..."* . . . . . **1**: 33–36  
*Legal Research: A Fundamental Lawyering Skill* . . . . . **1**: 2–3
- Ehrenberg, Suzanne and Kari Aamot  
*Integrating Print and Online Research Training: A Guide for the Wary* . . . . . **15**: 119–126
- Ford, Kristin  
*Teachable Moments for Students ... Researching Uniform and Model Laws.* . . . . . **10**: 114–116
- Gonzalez, L. Monique  
*A Timely Seminar: The Clerkship Crash Course in Legal Research.* . . . . . **15**: 186–188
- Hazelton, Penny A.  
*Our Question—Your Answers ... What Should a Legal Research Question on the Bar Exam Look Like?* . . . . . **6**: 29–31  
*Surveys on How Attorneys Do Legal Research.* . . . . . **1**: 53
- Henle, Alea  
*Training Users on Internet Publications Evolved From (And Still In) Print* . . . . . **10**: 89–91
- Hensiak, Kathryn  
*Evaluating the Financial Impact of Legal Research Materials: A Legal Research Classroom Exercise* . . . . . **13**: 128–131
- Howland, Joan S.  
*Principles of Power Research: Integrating Manual and Online Legal Research to Maximize Results and Minimize Costs* . . . . . **1**: 93–97
- Inglehart, Elizabeth L.  
*Brutal Choices in Curricular Design ... Teaching U.S. Legal Research Skills to International LL.M. Students: What and How* . . . . . **15**: 180–185

## Legal Research

[See also Advanced Legal Research; Computer-Assisted Legal Research; Teaching Methods—Research]

- Armstrong, Nancy A.  
*Why "Walk and Talk"?: The Role of a Practical Skills Exam in Advanced Legal Research Courses* . . . . . **15**: 112–118
- Baum, Marsha L.  
*Teachable Moments for Students ... Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process* . . . . . **10**: 20–22
- Berens, Maurine J. and Kathleen Dillon Narko  
*Teaching Research a New Way* . . . . . **16**: 118–121
- Callinan, Ellen M.  
*Legal Research and the Summer Job ... Advice from the Law Firm* . . . . . **7**: 110–115

- Jones, Julie  
*Teachable Moments for Students ... Just the Facts, Your Honor: Finding Judicial Statistics* . . . . . **15:** 31–35
- Jones, Lesliediana  
*Our Question—Your Answers ... What Is the Most Underused Resource in the Law Library?* . . . . . **5:** 120–124
- Kaufman, Billie Jo  
*Teachable Moments for Students ... Finding and Using Statistics in Legal Research and Writing* . . . . . **14:** 150–152
- Kearley, Timothy  
*Book Review ... An Australian Perspective on Legal Research and Writing: A Review of Researching and Writing in Law* . . . **15:** 192–193
- Keefe, Thomas  
*Teaching Taxonomies* . . . . . **14:** 153–156
- Klugh, Druet Cameron  
*Teachable Moments for Students ... Are You Positive About “Positive Law”?* . . . . . **10:** 81–83
- McIver, John P.  
*Teachable Moments for Students ... Advice on State Court Advisory Opinions* . . . . . **13:** 98–100
- Meadows, Judy and Kay Todd  
*Our Question—Your Answers ... Is the Use of Digests Changing?* . . . . **13:** 113–115  
*Our Question—Your Answers ... Searching for Legal Articles* . . . . . **15:** 146–149
- Meyer, Patrick  
*Think Before You Type: Observations of an Online Researcher* . . . . . **13:** 19–23
- Mowrer, J. Reid  
*The Attorney’s Pursuit of Justice and Wisdom: Once More, with Feeling* . . . . . **5:** 92–93
- Nevers, Shawn G.  
*Research Matters ... Legal Research Readings to Inspire and Inform Students* . . . . . **17:** 6–10
- Pantaloni, Nazareth A., III and Louis J. Sirico, Jr.  
*Legal Research and the Summer Job ... Advice from the Law School* . . . . . **7:** 110–112
- Platt, Ellen  
*Unpublished vs. Unreported: What’s the Difference?* . . . . . **5:** 26–27
- Probst, Steven R. and Michael J. Bushbaum  
*“They’re Practically Learning”: Pointers on Practical Legal Research Exams* . . . . **15:** 105–111
- Romig, Jennifer Murphy  
*“Hooking” Them on Books: Introducing Print-Based Legal Research in a Stimulating, Memorable Way* . . . . . **13:** 77–81
- Shear, Joan and Kelly Browne  
*Which Legal Research Text Is Right for You?* . . . . . **10:** 23–29
- Simoni, Christopher  
*In Legal Research, It’s Déjà Vu All Over Again: A Review of Legal Research: Historical Foundations of the Electronic Age* . . . **3:** 83–84  
*Writing About Research* . . . . . **3:** 51–55
- Wojcik, Mark E.  
*Book Review: Legal Research* . . . . . **3:** 16–17
- Woodside, Jackie  
*Research Matters ... Introducing Students to Online Research Guides* . . . . . **17:** 171–174

---

## Legal Research—Foreign and International

- Kimbrough, Tom  
*In-Class Online Legal Research Exercises: A Valuable Educational Tool* . . . . . **16:** 112–117
- Stanton, Teresa C.  
*Finding Foreign Law: It’s Not Just for the Experts* . . . . . **16:** 37–39

---

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[See also Teaching Methods—Writing]

- Armstrong, Stephen V. and Timothy P. Terrell  
*Writing Tips ... Fighting “Tippism”* . . . . **6:** 71–73  
*Writing Tips ... Understanding “Style” in Legal Writing* . . . . . **17:** 43–47
- Arrigo-Ward, Maureen J.  
*Warning the Prospective Legal Writing Instructor, or “So You Really Want to Teach?”* . . . . **4:** 64–67
- Baker, Brook K.  
*Incorporating Diversity and Social Justice Issues in Legal Writing Programs* . . . . . **9:** 51–57
- Berch, Rebecca White  
*Observations from the Legal Writing Institute Conference: Thinking About Writing Introductions* . . . . . **3:** 41–43
- Blaustein, Albert P.  
*On Legal Writing* . . . . . **2:** 57–60
- Blevins, Timothy D.  
*Writing “It” Is a Start; Getting “It” Read Is the Goal* . . . . . **17:** 188–191

- Bresler, Kenneth  
*On the Lighter Side: Pursuant to Partners’ Directive, Lawyer Learns to Obfuscate* . . . . 3: 18
- Cane, Paul  
*Ten Commandments of Memo Writing ... Advice for the Summer Associate* . . . . 4: 83–84
- Daniel, Neil  
*Managing Metadiscourse* . . . . . 2: 23–24
- Davis, Wendy B.  
*Consequences of Ineffective Writing* . . . . 8: 97–99
- Dunnewold, Mary  
*A Tale of Two Issues: “Applying Law to Facts” Versus “Deciding What the Rule Should Be”* . . . . . 11: 12–13
- Edelman, Diane Penneys  
*How They Write: Our Students’ Reflections on Writing* . . . . . 6: 24–28
- Gannage, Mark  
*How to ... Structure Your Legal Memorandum* . . . . . 8: 30–33
- Higdon, Michael J.  
*It’s a Small World: Using the Classic Disney Ride to Teach Document Coherence* . . . . 17: 111–114
- LeClercq, Terri  
*U.S. News & World Report “Notices” Legal Writing Programs* . . . . . 3: 77
- Levine, Jan M.  
*Some Concerns About Legal Writing Scholarship* . . . . . 7: 69–70
- Levine, Jan M. and Grace C. Tonner  
*Legal Writing Scholarship: Point/Counterpoint* . . . . . 7: 68–70
- Montana, Patricia Grande  
*Persuasion in a Familiar Activity: The Parallels Between Résumé Writing and Brief Writing* . . . . . 16: 100–105
- Neumann, Richard K., Jr.  
*Three Vignettes* . . . . . 17: 107–110
- Newby, Thomas R.  
*Law School Writing Programs Shouldn’t Teach Writing and Shouldn’t Be Programs* . . . . 7: 1–7
- See, Brenda  
*Legal Writing Through the Eyes of First-Year Law Students: Their 25 Rules for Survival* . . . 6: 92–93
- Siegel, Martha  
*“Seven Edits Make Perfect?”* . . . . . 5: 30
- Simon, Sheila  
*Order What Are Your Words In? How Foreign Languages Can Help You Teach the Structure of Legal Writing* . . . . . 10: 124–125
- Sirico, Louis J., Jr.  
*Reining in Footnotes* . . . . . 13: 91–93  
*Teachable Moments for Teachers ... Why Law Review Students Write Poorly* . . . . 10: 117–118
- Sneddon, Karen J.  
*Revising Revision in the Classroom* . . . . . 15: 130–133
- Zappen, Edward F., Jr.  
*Gender-Fair Communication in the Judiciary—A Guide* . . . . . 1: 98–103

---

### Legal Writing Institute

- Mercer, Kathryn Lynn  
*“You Can Call Me Al, in Graceland”: Reflections on a Speech Entitled “We Have Diamonds on the Soles of Our Shoes”* . . . . . 3: 38–40
- Oates, Laurel  
*Legal Writing Institute Publishes Journal and Holds Fifth Biennial Conference* . . . . 1: 62
- Williams, Brian S.  
*The Legal Writing Conference: A Rookie’s Perspective* . . . . . 3: 36–37

---

### Legislative Materials

- Beneke, Paul  
*Brutal Choices in Curricular Design ... Start with Enacted Law, Not Common Law* . . . . 10: 76–80
- Kelley, Sally J.  
*How to ... Use the Internet to Find and Update the United States Code* . . . . . 7: 23–26
- Kennedy, Bruce  
*Finding Recent Legislative Developments & Documents* . . . . . 1: 26–27  
*U.S. Congressional Materials: 1970–Present* . . . . . 1: 28–29
- Klugh, Druet Cameron  
*Teachable Moments for Students ... Are You Positive About “Positive Law”?* . . . . . 10: 81–83
- Todd, Kay M.  
*Teaching Statutory Research with the USA Patriot Act* . . . . . 12: 17–18

## Looseleaf Services

---

- Wallace, Marie  
*Practice Pointer: Looseleaf Services* . . . . 1: 63–64

## MacCrate Report

---

- Shapo, Helene S.  
*The MacCrate Report Conference:  
A Review* . . . . . 2: 54–56

## Multistate Performance Test

---

- Jamar, Steven D.  
*Using the Multistate Performance Test  
in an LRW Course* . . . . . 8: 118–123
- Schultz, Nancy L.  
*There's a New Test in Town: Preparing  
Students for the MPT* . . . . . 8: 14–17

## National Legal Research Teach-In

---

- Brunner, Karen B.  
*National Library Week: A Law Firm  
Teaching Opportunity* . . . . . 1: 68–69
- 1993 Teach-In Events . . . . . 2: 13–17
- Callinan, Ellen M.  
*The National Legal Research  
Teach-In* . . . . . 1: 65–66
- DeGeorges, Patricia A.  
*Teach-In Programs in Corporate  
Law Libraries* . . . . . 1: 72–73
- McCarthy, Kathleen J.  
*1993 Teach-In Events* . . . . . 2: 13–17
- Teach-In Activities in Law Schools* . . . . . 1: 67
- Partin, Gail A.  
*Teach-In Reflections: Past, Present,  
and Future* . . . . . 4: 20–23

## Oral Argument

---

- Miller, Kathleen  
*Teachable Moments for Teachers ...  
Making Practice Oral Arguments  
Interesting* . . . . . 14: 26–27
- Phillips, Kimberly D.  
*“Down with the Death Penalty!”—Using Hot  
Topics with a Twist to Introduce Persuasive  
Advocacy and Legal Ethics* . . . . . 17: 97–101
- Sirico, Louis J., Jr.  
*Teaching Oral Argument* . . . . . 7: 17–20

## Perspectives

---

- Barkan, Steven M.  
*From the Editor: Introducing Perspectives* . . 1: 1
- From the Editor: Perspectives on the  
First Volume* . . . . . 2: 1
- Hotchkiss, Mary A.  
*From the Editor: A Fresh Perspective* . . . . 9: 1–2
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–9  
(1992–2001)* . . . . . 10: 36–64
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–10  
(1992–2002)* . . . . . 11: 28–58
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–11  
(1992–2003)* . . . . . 12: 46–83
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–12  
(1992–2004)* . . . . . 13: 40–72
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–13  
(1992–2005)* . . . . . 14: 39–71
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–14  
(1992–2006)* . . . . . 15: 68–103
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–15  
(1992–2007)* . . . . . 16: 51–89
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–16  
(1992–2008)* . . . . . 17: 54–94
- Houdek, Frank G.  
*From the Editor: A New Perspective* . . . . . 3: 1–2
- From the Editor: Coming Attractions* . . . 3: 27–28
- Index to Perspectives: Teaching Legal Research  
and Writing, Volume 1  
(1992–1993)* . . . . . 2: 39–43
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–2  
(1992–1994)* . . . . . 3: 19–26
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–3  
(1992–1995)* . . . . . 4: 27–36
- Index to Perspectives: Teaching Legal Research  
and Writing, Volumes 1–4  
(1992–1996)* . . . . . 5: 35–47

- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–6 (1992–1998)* . . . . . **7:** 37–55
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–7 (1992–1999)* . . . . . **8:** 37–57
- Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–8 (1992–2000)* . . . . . **9:** 24–48
- Houdek, Frank G. and Penny A. Hazelton  
*Index to Perspectives: Teaching Legal Research and Writing, Volumes 1–5 (1992–1997)* . . . . . **6:** 40–55

### Plagiarism

- Cherry, Anna M.  
*Using Electronic Research to Detect Sources of Plagiarized Materials* . . . . . **9:** 133–135
- Craig, Alison  
*Teachable Moments for Teachers ... Failing My ESL Students: My Plagiarism Epiphany* . . . . . **12:** 102–104
- Fischer, Judith D.  
*Book Review ... Texts, Lies, and Changed Positions: A Review of The Little Book of Plagiarism* . . . . . **16:** 26–28
- Mirow, M. C.  
*Confronting Inadvertent Plagiarism* . . . **6:** 61–64
- Temple, Hollee S.  
*Teachable Moments for Teachers ... Tripped Up by Electronic Plagiarism* . . . . . **14:** 114–115

### Professional Scholarship

- Boyle, Robin A. and Joanne Ingham  
*Suggestions on How to Conduct Empirical Research: A Behind-the-Scenes View* . . . . . **15:** 176–179
- Levine, Jan M.  
*Some Concerns About Legal Writing Scholarship* . . . . . **7:** 69–70
- Levine, Jan M. and Grace C. Tonner  
*Legal Writing Scholarship: Point/Counterpoint* . . . . . **7:** 68–70
- Vinson, Kathleen Elliott and David S. Romantz  
*Who Will Publish My Manuscript?* . . . . **7:** 31–33

### Research Guides

- Fine, Toni M.  
*Legal Research in Practice: How a FERC Lawyer Does Research* . . . . . **2:** 46–51
- Harris, Catherine K.  
*Pathfinder to U.S. Copyright Law* . . . . **2:** 32–38
- Holt, Barbara Cornwall and Michael Gearin  
*How a Bankruptcy Lawyer Does Legal Research* . . . . . **5:** 101–105
- Kennedy, Bruce  
*Finding Recent Legislative Developments & Documents* . . . . . **1:** 26–27
- U.S. Congressional Materials: 1970–Present* . . . . . **1:** 28–29
- McMurrer, Nancy  
*Researching Health Law Issues* . . . . . **5:** 115–119
- Miller, Michael S. and Dee Van Nest  
*Breaking Barriers—Access to Main Street: Pathfinder on the Americans with Disabilities Act* . . . . . **2:** 73–84
- Novak, Jan Ryan  
*Plain English Makes Sense: A Research Guide* . . . . . **3:** 2–3
- Scully, Patrice  
*Library Needs of the Federal Government Attorney* . . . . . **5:** 17–20
- Woodside, Jackie  
*Research Matters ... Introducing Students to Online Research Guides* . . . . . **17:** 171–174

### Research Techniques

- Bennett, Edward B., III  
*Tools of the Trade: Using Software to Conduct Legal Research with a Disability* . . . . . **4:** 1–4
- Bintliff, Barbara  
*Teachable Moments ... “Shepardizing Cases”* . . . . . **4:** 19
- Teachable Moments for Students ... “How Can I Tell the Effective Date of a Federal Statute?”* . . . . . **8:** 93–94
- Cerjan, Martin  
*Teachable Moments ... How Can I Find the Current Status of a Treaty Called the “Convention on the Rights of the Child”?* . . . . . **5:** 79–80

- Clayton, Mary  
*Legal Research for Blind Law Students: Speech Technologies and the World Wide Web*. . . . . **6**: 100–102
- Ford, Kristin  
*Teachable Moments for Students ... Researching Uniform and Model Laws*. . . . . **10**: 114–116
- Gerdy, Kristin B.  
*Teachable Moments for Students ... What Is the Difference Between Substantive and Procedural Law? And How Do I Research Procedure?* . . . . . **9**: 5–8
- Grosek, Edward  
*Teachable Moments ... “How Can I Find a United States Treaty?”* . . . . . **7**: 29–30
- Hazelton, Penny A., Peggy Roebuck Jarrett, Nancy McMurrer, and Mary Whisner  
*Develop the Habit: Note-Taking in Legal Research*. . . . . **4**: 48–52
- Holt, Barbara  
*Our Question—Your Answers ... How Do Inexperienced Researchers Know When to Stop?*. . . . . **5**: 73–76
- Honigsberg, Peter Jan  
*Organizing the Fruits of Your Research: The Honigsberg Grid*. . . . . **4**: 94–95
- Houdek, Frank G.  
*Our Question—Your Answers ... What’s Your “Best Buy” in a Research Tool or Technique?* . . . . . **4**: 90–91  
*Our Question—Your Answers ... What Technique Works Best in Teaching?* . . . **5**: 23–25
- Jarret, Peggy Roebuck and Mary Whisner  
*“Here There Be Dragons”: How to Do Research in an Area You Know Nothing About* . . . . **6**: 74–76
- Kelley, Sally J.  
*How to ... Use the Internet to Find and Update the United States Code*. . . . . **7**: 23–26
- Kunz, Christina L.  
*Terminating Research* . . . . . **2**: 2–3
- Matheson, Scott  
*Teachable Moments for Students ... Searching Case Digests in Print or Online: How to Find the “Thinkable Thoughts”* . . . . . **11**: 19–20
- Platt, Ellen  
*How to ... Research Federal Court Rule Amendments: An Explanation of the Process and a List of Sources* . . . . . **6**: 115–118
- Jury Instructions: An Underutilized Resource*. . . . . **7**: 90–93  
*Teachable Moments ... “How Do You Update a West Key Number?” ... Beyond the Digest*. . . . . **4**: 99
- Potthoff, Lydia  
*Teachable Moments ... “How Can I Find the Most Current Text of a Codified Federal Statute?”*. . . . . **5**: 128–129  
*Teachable Moments ... “How Do You Update the Code of Federal Regulations?”* . . . . . **5**: 28–29
- Shull, Janice K.  
*Teachable Moments for Students ... Where Do I Find Recent Legislation and Statutory Annotations Published After a Code Volume or Pocket Part?* . . . . . **11**: 80–81
- Whisner, Mary  
*Managing a Research Assignment* . . . . . **9**: 9–13

---

## Simulations

- Callinan, Ellen M.  
*A Teaching Model for Academic and Private Law Librarians* . . . . . **1**: 6–13
- Shafer, Melissa  
*Shakespeare in the Law: How the Theater Department Can Enhance Lawyering Skills Instruction* . . . . . **8**: 108–113
- Zimmerman, Emily  
*Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy*. . . . . **10**: 109–113

---

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- Baker, Brook K.  
*Incorporating Diversity and Social Justice Issues in Legal Writing Programs* . . . . . **9**: 51–57
- Cobb, Tom  
*Public Interest Research, Collaboration, and the Promise of Wikis* . . . . . **16**: 1–11
- Felsenburg, Miki and Luellen Curry  
*Brutal Choices in Curricular Design ... Incorporating Social Justice Issues into the LRW Classroom* . . . . . **11**: 75–79
- Johnson, Greg  
*Brutal Choices in Curricular Design ... Controversial Issues in the Legal Writing Classroom: Risks and Rewards*. . . . . **16**: 12–18

## Surveys

---

- Browne, Kelly  
*The Top 10 Things Firm Librarians Wish  
Summer Associates Knew* . . . . . **8**: 140–142
- Hazelton, Penny A.  
*Surveys on How Attorneys Do  
Legal Research* . . . . . **1**: 53
- McMurrer, Nancy  
*Butterflies Are Free—But Should CALR  
Printing Be?* . . . . . **8**: 89–92
- Nyberg, Cheryl Rae  
*How to Master All You Survey* . . . . . **6**: 8–13
- Rosenthal, Lawrence D.  
*Are We Teaching Our Students What They  
Need to Survive in the Real World?  
Results of a Survey* . . . . . **9**: 103–109
- Selden, David  
*Electronic Research Skills Assessment Survey  
As an Instructional Tool* . . . . . **9**: 95–98

## Teaching Assistants

---

- Vance, Ruth C.  
*The Use of Teaching Assistants in the  
Legal Writing Course* . . . . . **1**: 4–5

## Teaching Materials

---

- Arrigo, Maureen J.  
*Book Review: Thinking Like a Writer* . . . **2**: 61–62
- Bintliff, Barbara  
*Teachable Moments ...  
“Shepardizing Cases”* . . . . . **4**: 19
- Gannage, Mark  
*How to ... Structure Your Legal  
Memorandum* . . . . . **8**: 30–33
- Gleason, Diana  
*Technology for Teaching ... “Introduction to the  
Internet”: A Training Script* . . . . . **8**: 124–128
- Hazelton, Penny A.  
*Book Review: Using Computers in  
Legal Research: A Guide to LEXIS  
and WESTLAW* . . . . . **3**: 44–45
- Miller, Michael S.  
*Recognizing and Reading Legal  
Citations* . . . . . **2**: 70–72

- Platt, Ellen  
*Teachable Moments ... “How Do You Update a  
West Key Number?” ... Beyond the Digest* . . **4**: 99
- Sirico, Louis J., Jr.  
*Materials for Teaching Plain English: The Jury  
Instructions in Palsgraf, Revisited* . . . **8**: 137–139
- Wallace, Marie  
*Finishing Touches* . . . . . **1**: 74–76
- Practice Pointer: Looseleaf Services* . . . . **1**: 63–64

## Teaching Methods

---

- Anderson, Helen A.  
*Generation X Goes to Law School: Are We Too  
Nice to Our Students?* . . . . . **10**: 73–75
- Beneke, Paul  
*Brutal Choices in Curricular Design ... Start with  
Enacted Law, Not Common Law* . . . . . **10**: 76–80
- Blum, Joan  
*Brutal Choices in Curricular Design ... Why You  
Should Use a Course Web Page* . . . . . **10**: 15–17
- Bogdanski, John A. and Samuel A. Donaldson  
*Teaching Tax and Other Tedious  
Topics* . . . . . **17**: 102–106
- Boyle, Robin, Jeffrey Minneti, and Andrea  
Honigsfeld  
*Law Students Are Different from the General  
Population: Empirical Findings Regarding  
Learning Styles* . . . . . **17**: 153–160
- Broida, Mark A.  
*Can Legal Skills Become Legal Thrills? Knowing  
and Working Your Audience* . . . . . **4**: 44–47
- A Tale of Two Programs* . . . . . **5**: 65–68
- Burgess, Hillary  
*Brutal Choices in Curricular Design ... Little Red  
Schoolhouse Goes to Law School: How Joe  
Williams’ Teaching Style Can Inform Us About  
Teaching Law Students* . . . . . **17**: 180–184
- Calleros, Charles  
*Brutal Choices in Curricular Design ... Using Both  
Nonlegal Contexts and Assigned Doctrinal Course  
Material to Improve Students’ Outlining and  
Exam-Taking Skills* . . . . . **12**: 91–101
- Christensen, Leah M.  
*Teachable Moments for Teachers ... Show Me,  
Don’t Tell Me! Teaching Case Analysis by  
“Thinking Aloud”* . . . . . **15**: 142–145

- Clark, Jessica L.  
*Beyond Course Evaluations:  
 Yay/Nay Sheets* ..... **16:** 149–155
- Clough, Spencer and Mary G. Persyn  
*How to Display Effectively in the Classroom:  
 Critiquing the Tools* ..... **3:** 78–79
- Cooney, Leslie Larkin and Judith Karp  
*Ten Magic Tricks for an Interactive  
 Classroom* ..... **8:** 1–3
- Edelman, Diane Penneys  
*Opening Our Doors to the World: Introducing  
 International Law in Legal Writing and  
 Legal Research Courses* ..... **5:** 1–4
- Elliott, Jessica  
*Teaching Outlining for Exam Preparation as  
 Part of the First-Year Legal Research and  
 Writing Curriculum* ..... **11:** 66–71
- Eyster, James Parry  
*College Reunion: An Exercise That Reduces  
 Student Anxiety and Improves  
 Case Analysis* ..... **11:** 14–16
- Feeley, Kelly M. and Stephanie A. Vaughan  
*Yes, You Will Really Use Algebra When You Grow  
 Up: Providing Law Students with Proof That  
 Legal Research and Writing Is Essential  
 in the Real World* ..... **10:** 105–108
- Friedman, Peter B.  
*Brutal Choices in Curricular Design ...  
 The Class Listserv: Professor’s Podium  
 or Students’ Forum?* ..... **8:** 75–78
- Giers, Judith  
*Providing Procedural Context: A Brief Outline of  
 the Civil Trial Process* ..... **12:** 151–155  
*Teachable Moments for Teachers ... Betty Boop  
 Goes to Law School* ..... **11:** 17–18
- Glashausser, Alex  
*What Is “Lecturing,” Alex?* ..... **8:** 73–74
- Higdon, Michael J.  
*Using DVD Covers to Teach Weight  
 of Authority* ..... **15:** 8–11
- Hotchkiss, Mary A.  
*Centers for Teaching Effectiveness: A Resource  
 Guide* ..... **17:** 179
- Jamar, Steven D.  
*Asking Questions* ..... **6:** 69–70
- Klein, Diane J.  
*Legal Research? And Writing? In a  
 Property Class?* ..... **14:** 1–4
- Kleinschmidt, Bruce  
*Taping: It’s Not Just for Grand  
 Juries Anymore* ..... **7:** 87
- Levy, James B.  
*Be a Classroom Leader* ..... **10:** 12–14  
*Book Review ... What the Best College  
 Teachers Do* ..... **15:** 58–61  
*Brutal Choices in Curricular Design ...  
 A Schema Walks into a Bar ... How Humor  
 Makes Us Better Teachers by Helping  
 Our Students Learn* ..... **16:** 109–111  
*Legal Research and Writing Pedagogy—What Every  
 New Teacher Needs to Know* ..... **8:** 103–107
- Liemer, Sue  
*Being a Beginner Again: A Teacher  
 Training Exercise* ..... **10:** 87–88
- McDavid, Wanda  
*Microsoft PowerPoint: A Powerful  
 Training Tool* ..... **5:** 59–60
- Melton, Pamela Rogers  
*Teachable Moments ... Click to Refresh:  
 Audience Response Systems in the Legal  
 Research Classroom* ..... **17:** 175–178
- Miller, Kathleen  
*Teachable Moments for Teachers ...  
 Making Practice Oral Arguments  
 Interesting* ..... **14:** 26–27
- Miller, Kathleen Portuan  
*Using Alternative Dispute Resolution in  
 Legal Writing Courses* ..... **14:** 157–159
- Minneti, Jeffrey and Catherine Cameron  
*Teaching Every Student: A Demonstration  
 Lesson That Adapts Instruction to Students’  
 Learning Styles* ..... **17:** 161–170
- Murray, Kristen E.  
*Technology for Teaching ... My E-Semester:  
 New Uses for Technology in the Legal Research  
 and Writing Classroom* ..... **15:** 194–200
- O’Neill, Kate  
*Brutal Choices in Curricular Design ... A Silk Purse  
 from a Sow’s Ear? Or, the Hidden Value  
 of Being Short-Staffed* ..... **15:** 12–18
- Sampson, Kathryn A.  
*Teachable Moments for Teachers ... The Legal News  
 Portfolio: Building Professionalism  
 Through Student Engagement in “Off-Topic”  
 Course Content* ..... **15:** 162–168

- Schulze, Louis N., Jr.  
*Homer Simpson Meets the Rule Against Perpetuities: The Controversial Use of Pop Culture in Legal Writing Pedagogy* . . . . . **15:** 1–7
- Schunk, John D.  
*Reviewing Student Papers: Should the “Broken Windows” Theory Apply?* . . . . . **13:** 1–4
- See, Brenda  
*Teachable Moments for Teachers ... Tying It All Together* . . . . . **10:** 18–19
- Shafer, Melissa  
*Shakespeare in the Law: How the Theater Department Can Enhance Lawyering Skills Instruction* . . . . . **8:** 108–113
- Shafer, Melissa, Sheila Simon, and Susan P. Liemer  
*Teachable Moments for Teachers ... Not Ready for PowerPoint? Rediscovering an Easier Tool* . . . . . **11:** 82–83
- Shapo, Helene S. and Christina L. Kunz  
*Brutal Choices in Curricular Design ... Making the Most of Reading Assignments* . . . . . **5:** 61–62
- Sirico, Louis J., Jr.  
*What the Legal Writing Faculty Can Learn from the Doctrinal Faculty* . . . . . **11:** 97–100
- Smith, Craig T.  
*Minds and Levers: Reflections on Howard Gardner’s Changing Minds* . . . . . **14:** 116–121  
*Teaching Students How to Learn in Your Course: The “Learning-Centered” Course Manual* . . . . . **12:** 1–5  
*Teaching Synthesis in High-Tech Classrooms: Using Sophisticated Visual Tools Alongside Socratic Dialogue to Help Guide Students Through the Labyrinth* . . . . . **9:** 110–115
- Thomson, David I. C.  
*Book Review ... Teaching as Art Form—A Review of The Elements of Teaching* . . . . . **15:** 41–44
- Tyler, Barbara  
*Active Learning Benefits All Learning Styles: 10 Easy Ways to Improve Your Teaching Today* . . . . . **11:** 106–109
- Vinson, Kathleen Elliott  
*New LR&W Teachers Alert! 14 Ways to Avoid Pitfalls in Your First Year of Teaching* . . . . . **6:** 6–7
- White, Libby A.  
*Treating Students as Clients: Practical Tips for Acting as a Role Model in Client Relations* . . . . . **12:** 24–26
- Wolcott, Willa  
*Brutal Choices in Curricular Design ... Holistic Scoring* . . . . . **13:** 5–9
- Wren, Christopher G.  
*Brutal Choices in Curricular Design ... Voice of the Future: Audio Legal Briefs* . . . . . **12:** 166–167
- Zimmerman, Emily  
*Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy* . . . . . **10:** 109–113

### Teaching Methods—Foreign Students

- Calleros, Charles  
*Teachable Moments for Teachers ... Demonstrations and Bilingual Teaching Techniques at the University of Paris: Introducing Civil Law Students to Common Law Legal Method* . . . . . **12:** 6–12
- Craig, Alison  
*Teachable Moments for Teachers ... Failing My ESL Students: My Plagiarism Epiphany* . . . . . **12:** 102–104
- Dent, Marian  
*Brutal Choices in Curricular Design ... Designing an LL.M. Curriculum for Non-Western-Trained Lawyers* . . . . . **13:** 87–90
- Inglehart, Elizabeth L.  
*Brutal Choices in Curricular Design ... Teaching U.S. Legal Research Skills to International LL.M. Students: What and How* . . . . . **15:** 180–185
- Malcolm, Shannon L.  
*Teaching U.S. Legal Research to International Graduate Students: A Librarian’s Perspective* . . . . . **14:** 145–149
- Wojcik, Mark E.  
*Brutal Choices in Curricular Design ... Designing Writing and Research Courses for International Students* . . . . . **14:** 83–86
- Zimmerman, Cliff  
*Book Review ... The Importance of Culture and Cognition—A Review of The Geography of Thought: How Asians and Westerners Think Differently ... and Why* . . . . . **14:** 142–144

## Teaching Methods—Research

- Adelman, Elizabeth G.  
*Technology for Teaching ... CALI Lessons in Legal Research Courses: Alternatives to Reading About Research* . . . . . **15:** 25–30
- Anzalone, Filippa Marullo  
*Advanced Legal Research: A Master Class* . . . . . **5:** 5–11
- Ballard-Thrower, Rhea  
*Law Students Performing at a Class Near You* . . . . . **14:** 5–6
- Bassett, Pegeen G., Virginia C. Thomas, and Gail Munden  
*Teaching Federal Legislative History: Notes from the Field* . . . . . **5:** 96–100
- Baum, Marsha L.  
*Teachable Moments for Students ... Ten Tips for Moving Beyond the Brick Wall in the Legal Research Process* . . . . . **10:** 20–22
- Berens, Maurine J. and Kathleen Dillon Narko  
*Teaching Research a New Way* . . . . . **16:** 118–121
- Berring, Robert C.  
*A Sort of Response: Brutal Non-Choices* . . . . . **4:** 81–82  
*Twenty Years On: The Debate Over Legal Research Instruction* . . . . . **17:** 1–4
- Bintliff, Barbara  
*Teachable Moments for Students ... Electronic Resources or Print Resources: Some Observations on Where to Search* . . . . . **14:** 23–25
- Bintliff, Barbara and Rachel W. Jones  
*Teachable Moments for Students ... Mandatory v. Persuasive Cases* . . . . . **9:** 83–85
- Callinan, Ellen M.  
*Recite Right: Recitation Preparation and the Law School Library* . . . . . **1:** 42–46  
*Simulated Research: A Teaching Model for Academic and Private Law Librarians* . . . . . **1:** 6–13  
*Take Charge of Your Training Room* . . . . . **3:** 8–9
- Campos, Martha  
*Teachable Moments for Students ... An Idiom, a Catch Phrase, an Aphorism: A Reference Question* . . . . . **13:** 29–31
- Coggins, Timothy L.  
*Bringing the “Real World” to Advanced Legal Research* . . . . . **6:** 19–23
- Cohen, Eileen B.  
*Using Cognitive Learning Theories in Teaching Legal Research* . . . . . **1:** 79–82
- Collins, Lauren M.  
*Technology for Teaching ... Creating Online Tutorials: Five Lessons Learned* . . . . . **16:** 33–36
- Dugan, Joanne  
*Teachable Moments for Students ... Choosing the Right Tool for Internet Searching: Search Engines vs. Directories* . . . . . **14:** 111–113
- Dunn, Donald J.  
*Brutal Choices in Curricular Design ... Why We Should Teach Primary Materials First* . . . . . **8:** 10–12
- Durako, Jo Anne  
*Building Confidence and Competence in Legal Research Skills: Step by Step* . . . . . **5:** 87–91
- Egler, Peter J.  
*Teachable Moments for Students ... What Gives Cities and Counties the Authority to Create Charters, Ordinances, and Codes?* . . . . . **9:** 145–147
- Fox, James P.  
*On the Lighter Side ... Eine Kleine Legalresearchmusik* . . . . . **11:** 132–133
- Fritchel, Barbara L.  
*How to ... “Make Reviewing Fun”—Legal Research Scavenger Hunts* . . . . . **4:** 63–64
- Glashausser, Alex  
*From the Electoral College to Law School: Research and Writing Lessons from the Recount* . . . . . **10:** 1–4
- Gotham, Michael R. and Cheryl Rae Nyberg  
*Joining Hands to Build Bridges* . . . . . **7:** 60–64
- Harris, Catherine and Kay Schlueter  
*Legal Research and Raising Revenue at the Texas State Law Library* . . . . . **7:** 88–89
- Hazelton, Penny A.  
*Advanced Legal Research Courses: An Update* . . . . . **1:** 52–53  
*Brutal Choices in Curricular Design ... Why Don’t We Teach Secondary Materials First?* . . . . . **8:** 8–10
- Hemmens, Ann  
*Teachable Moments ... Library Lifesavers: Bite-Sized Research Instruction* . . . . . **17:** 41–42
- Hensiak, Kathryn  
*Evaluating the Financial Impact of Legal Research Materials: A Legal Research Classroom Exercise* . . . . . **13:** 128–131

- Houdek, Frank G.  
*Our Question—Your Answers ... How Can You Successfully Teach Legal Research to First-Year Law Students?* . . . . . **2**: 20–23  
*Our Question—Your Answers ... What Do You Identify as “Teachable Moments”?* . . . . . **1**: 86–87
- Jensen, Mary Brandt  
*“Breaking the Code” for a Timely Method of Grading Legal Research Essay Exams.* . . . **4**: 85–89
- Kaufman, Billie Jo  
*Teachable Moments for Students ... Finding and Using Statistics in Legal Research and Writing.* . . . . . **14**: 150–152
- Keefe, Thomas  
*Teaching Taxonomies* . . . . . **14**: 153–156
- King, Susan and Ruth Anne Robbins  
*Creating New Learning Experiences Through Collaborations Between Law Librarians and Legal Writing Faculty* . . . . . **11**: 110–112
- Kosse, Susan Hanley and David T. ButleRitchie  
*Putting One Foot in Front of the Other: The Importance of Teaching Text-Based Research Before Exposing Students to Computer-Assisted Legal Research* . . . . . **9**: 69–72
- Kunz, Christina L.  
*Terminating Research* . . . . . **2**: 2–3
- Lind, Douglas W.  
*Teaching Nonlegal Research to Law Students: A Discipline-Neutral Approach* . . . . . **13**: 125–127
- Malcolm, Shannon L.  
*Teaching U.S. Legal Research to International Graduate Students: A Librarian’s Perspective* . . . . . **14**: 145–149
- Matheson, Scott  
*Teachable Moments for Students ... Searching Case Digests in Print or Online: How to Find the “Thinkable Thoughts”* . . . . . **11**: 19–20
- McDade, Travis and Phill Johnson  
*Print Shepard’s Is Obsolete: Coming to Terms with What You Already Know.* . . . . . **12**: 160–162
- Meadows, Judy and Kay Todd  
*Our Question—Your Answers ... Do You Provide Access to Shepard’s in Print or Online?* . . . . . **12**: 163–165  
*Our Question—Your Answers ... How Do You Teach Regulatory Research?* . . . . . **10**: 137–138
- Our Question—Your Answers ... What Is the Most Underutilized Secondary Source in Your Library?* . . . . . **9**: 16–17
- Mitchell, Paul G.  
*Teaching Research in a Corporate Setting* . . . . . **1**: 70–71
- Murley, Diane  
*What’s the Matter with Kids Today? “Why can’t they be like we were, perfect in every way? What’s the matter with kids today?”* . . . . . **13**: 121–124
- Olson, Kent C.  
*Waiving a Red Flag: Teaching Counterintuitiveness in Citator Use.* . . . . **9**: 58–60
- Orr-Waters, Laura J.  
*Teaching English Legal Research Using the Citation Method* . . . . . **6**: 108–111
- Person, Debora  
*Teachable Moments for Students ... Using “Walking Tours” to Teach Research* . . . . . **13**: 154–155
- Podvia, Mark W.  
*The Use of Trivia as a Tool to Enhance the Teaching of Legal Research.* . . . . . **12**: 156–159
- Romig, Jennifer Murphy  
*“Hooking” Them on Books: Introducing Print-Based Legal Research in a Stimulating, Memorable Way* . . . . . **13**: 77–81
- Ryan, Linda M.  
*Designing a Program to Teach CALR to Law Students: A Selective and Annotated Bibliography of Resource Materials* . . . . . **4**: 53–58  
*Seeing the Forest and the Trees: Introducing Students to the Law Library* . . . . . **3**: 31–35
- Sanderson, Rosalie M.  
*“Real World” Experience for Research Students* . . . . . **7**: 71–72
- Shafer, Melissa, Sheila Simon, and Susan P. Liemer  
*Teachable Moments for Teachers ... Not Ready for PowerPoint? Rediscovering an Easier Tool.* . . . . . **11**: 82–83
- Shapo, Helene S. and Christina L. Kunz  
*Brutal Choices in Curricular Design ... Teaching Research As Part of an Integrated LR&W Course.* . . . . . **4**: 78–81
- Shear, Joan and Kelly Browne  
*Which Legal Research Text Is Right for You?* . . . . . **10**: 23–29

- Shull, Janice K.  
*Teachable Moments for Students ... Where Do I Find Recent Legislation and Statutory Annotations Published After a Code Volume or Pocket Part?* . . . . . **11:** 80–81
- Silverman, Marc B.  
*Advanced Legal Research: A Question of Value* . . . . . **6:** 33–36
- Simoni, Christopher  
*Our Question—Your Answers* . . . . . **4:** 59–61
- Staheli, Kory D.  
*Evaluating Legal Research Skills: Giving Students the Motivation They Need* . . . . . **3:** 74–76
- Stroup, Richard  
*Internet Lunch Breaks: A Low-Tech Solution to a High-Tech Demand* . . . . . **6:** 88–89
- Strutin, Kennard R. and Wendy Scott  
*The Legal Research Practicum: A Proposal for the Road Ahead* . . . . . **6:** 77–80
- Todd, Kay M.  
*Teaching Statutory Research with the USA Patriot Act.* . . . . . **12:** 17–18
- Wallace, Marie  
*Finishing Touches* . . . . . **1:** 74–76
- Weston, Heidi J.  
*Speaking of “Teachable Moments” ... Teaching the Ah Hahs!* . . . . . **4:** 93
- Whisner, Mary  
*Managing a Research Assignment* . . . . . **9:** 9–13
- Whisner, Mary and Lea Vaughn  
*Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives* . . . . . **4:** 72–77
- Whiteman, Michael  
*The “Why” and “How” of Teaching the Internet in Legal Research.* . . . . . **5:** 55–58
- Wise, Virginia  
*“American Lawyers Don’t Get Paid Enough”—Some Musings on Teaching Foreign LL.M.s About American Legal Research* . . . . . **6:** 65–68
- Young, Stephen  
*Teachable Moments for Students ... Researching English Case Law* . . . . . **12:** 13–16
- Youngdale, Beth  
*Teachable Moments for Students ... Finding Low-Cost Supreme Court Materials on the Web.* . . . . . **12:** 108–111

## Teaching Methods—Social Aspects

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- Dunnewold, Mary  
*Long-Term Job Satisfaction as a Legal Writing Professional* . . . . . **13:** 10–14
- Elson, John S.  
*Brutal Choices in Curricular Design ... The Case Against Collaborative Learning in the First-Year Legal Research, Writing, and Analysis Course* . . . . . **13:** 136–144
- Frost, Philip M.  
*Using Ethical Problems in First-Year Skills Courses.* . . . . . **14:** 7–9
- Green, Sonia Bychkov  
*A Montessori Journey: Lessons for the Legal Writing Classroom* . . . . . **13:** 82–86
- Higdon, Michael J.  
*From Simon Cowell to Tim Gunn: What Reality Television Can Tell Us About How to Critique Our Students’ Work Effectively* . . . . . **15:** 169–173
- Johnson, Greg  
*Brutal Choices in Curricular Design ... Controversial Issues in the Legal Writing Classroom: Risks and Rewards.* . . . . . **16:** 12–18
- McGaugh, Tracy L.  
*Brutal Choices in Curricular Design ... Laptops in the Classroom: Pondering the Possibilities* . . . . . **14:** 163–165
- Mika, Karin  
*Teachable Moments for Teachers ... Life-Changing Moments: Learning to Accept Your Students’ Choices* . . . . . **13:** 15–18
- Murley, Diane  
*What’s the Matter with Kids Today? “Why can’t they be like we were, perfect in every way? What’s the matter with kids today?”.* . . . . . **13:** 121–124
- Schulze, Louis N., Jr.  
*Homer Simpson Meets the Rule Against Perpetuities: The Controversial Use of Pop Culture in Legal Writing Pedagogy* . . . . . **15:** 1–7

## Teaching Methods—Writing

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- Adams, Kenneth A.  
*Teaching Contract Drafting: The Two Elephants in the Room.* . . . . . **14:** 92–94
- Anderson, Helen A.  
*Insights from Clinical Teaching: Learning About Teaching Legal Writing from Working on Real Cases.* . . . . . **16:** 106–108

Armstrong, Stephen V. and Timothy P. Terrell <i>Writing Tips ... Editing: Overcoming the Dr. Strangelove Syndrome</i> . . . . .	5: 77–78	<i>Establishing and Maintaining Good Working Relationships with 1L Writing Students</i> . . .	8: 4–7
Baker, Brook K. <i>Incorporating Diversity and Social Justice Issues in Legal Writing Programs</i> . . . . .	9: 51–57	<i>How Many Cases Do I Need?</i> . . . . .	10: 10–11
Baker, Jan M. <i>Teaching Legal Writing in the 17th Grade: Tips for Teaching Career Students Who Fly Nonstop from First Grade to First Year</i> . . . . .	16: 19–21	<i>Using the Idea of Mathematical Proof to Teach Argument Structure</i> . . . . .	15: 50–53
Bloch, Beate <i>Brief-Writing Skills</i> . . . . .	2: 4–5	Durako, Jo Anne <i>Brutal Choices in Curricular Design ... Peer Editing: It's Worth the Effort</i> . . . . .	7: 73–76
Boyle, Robin A. <i>Contract Drafting Courses for Upper-Level Students: Teaching Tips</i> . . . . .	14: 87–91	Edwards, Linda H. <i>Certificate Program in Advanced Legal Writing: Mercer's Advanced Writing Curriculum</i> . . . . .	9: 116–119
Blumenfeld, Barbara <i>A Photographer's Guide to Legal Writing</i> . . . . .	4: 41–43	Edwards, Linda and Paula Lustbadder <i>Teaching Legal Analysis</i> . . . . .	2: 52–53
Bratman, Ben <i>"Reality Legal Writing": Using a Client Interview for Establishing the Facts in a Memo Assignment</i> . . . . .	12: 87–90	Felsenburg, Miki and Luellen Curry <i>Brutal Choices in Curricular Design ... Incorporating Social Justice Issues into the LRW Classroom</i> . . . . .	11: 75–79
Brendel, Jennifer <i>Tools for Teaching the Rewriting Process</i> . . . . .	12: 123–126	Glashausser, Alex <i>From the Electoral College to Law School: Research and Writing Lessons from the Recount</i> . .	10: 1–4
Centeno, Candace Mueller <i>Connecting the Dots: Using Connected Legal Writing Assignments to Help Students Think Outside of the Assignment and About the Bigger Picture</i> . . . . .	16: 22–25	Green, Sonia Bychkov <i>A Montessori Journey: Lessons for the Legal Writing Classroom</i> . . . . .	13: 82–86
Chin, William Y. <i>The "Relay" Team-Teach Approach: Combining Collaboration and the Division of Labor to Teach a Third Semester of Legal Writing</i> . . . . .	13: 94–97	Hartung, Stephanie <i>Teachable Moments for Teachers ... From the Courtroom to the Classroom: Reflections of a New Teacher</i> . . . . .	13: 101–103
Clary, Bradley G. and Deborah N. Behles <i>Roadmapping and Legal Writing</i> . . . . .	8: 134–136	Jones, Nancy L. <i>Extending the Classroom: The Writing Resource Center and the Teaching of Legal Writing at the University of Iowa</i> . . . . .	1: 83–85
DeSanctis, Christy and Kristen Murray <i>The Art of the Writing Conference: Letting Students Set the Agenda Without Ceding Control</i> . . . . .	17: 35–40	Kimble, Joseph <i>On Legal-Writing Programs</i> . . . . .	2: 43–46
Dimitri, James D. <i>Brutal Choices in Curricular Design ... Reusing Writing Assignments</i> . . . . .	12: 27–31	King, Susan and Ruth Anne Robbins <i>Creating New Learning Experiences Through Collaborations Between Law Librarians and Legal Writing Faculty</i> . . . . .	11: 110–112
Dunnewold, Mary <i>Common First-Year Student Writing Errors</i> . . . . .	9: 14–15	LeClercq, Terri <i>An English Professor's Perspective: "Writing Like a Lawyer"</i> . . . . .	1: 47–48
		<i>Brutal Choices in Curricular Design ... Teaching Student Editors to Edit</i> . . . . .	9: 124–128
		Levy, James B. <i>Dead Bodies and Dueling: Be Creative in Developing Ideas for Open Universe Memoranda</i> . . . . .	7: 13–16

- Liemer, Sue  
*Teachable Moments for Teachers ... Memo Structure for the Left and Right Brain* . . . **8**: 95–96
- Margolis, Ellie  
*Teaching Students to Make Effective Policy Arguments in Appellate Briefs* . . . . . **9**: 73–79
- Martin, Allison  
*Lessons from the Other Side—What I Learned About Teaching Legal Writing by Teaching Professional Responsibility* . . . . . **15**: 157–161
- McGaugh, Tracy  
*Teachable Moments for Teachers ... The Synthesis Chart: Swiss Army Knife of Legal Writing* . . . . . **9**: 80–82
- Metteer, Christine  
*Introduction to Legal Writing: A Course for Pre-Law Students* . . . . . **3**: 28–30
- Mika, Karin  
*Developing Internal Consistency in Writing Assignments by Involving Students in Problem Drafting* . . . . . **16**: 122–124
- Mooney, Christine G.  
*Don't Judge a Course by Its Credits: Convincing Students That Legal Writing Is Critical to Their Success* . . . . . **12**: 120–122  
*When Does Help Become a Hindrance: How Much Should We Assist Students with Their Graded Legal Writing Assignments?* . . . . . **10**: 69–72
- Moppett, Samantha A. and Rick Buckingham  
*Library Research Labs: A Hands-On Approach to Taking the First Step with Your Students to Reflect Good Practice in Legal Education* . . . . **14**: 73–80
- Murray, Michael D.  
*Communicating Explanatory Synthesis* . . . . . **14**: 136–138
- Nathanson, Mitchell  
*Teachable Moments for Teachers ... Celebrating the Value of Practical Knowledge and Experience* . . . . . **11**: 104–105
- Oliver, Nancy  
*Teachable Moments for Teachers ... Coming Face-to-Face with a Legal Research and Writing Client* . . . . . **13**: 149–153
- Patrick, Thomas O.  
*Using Simplified Cases to Introduce Synthesis* . . . . . **3**: 67–73
- Penland, Lisa  
*Teaching Non-Litigation Drafting to First-Year Law Students* . . . . . **16**: 156–159
- Piccard, Ann M.  
*Teaching to Different Levels of Experience: What I Learned from Working with Experienced Writers from Different Fields* . . . . . **17**: 115–118
- Pratt, Diana V.  
*Designing a Contract Drafting Assignment* . . . . . **14**: 95–97
- Price, Jessica E.  
*Teachable Moments for Teachers ... Teaching Students About the Legal Reader: The Reader Who Won't Be Taken for a Ride* . . . . . **12**: 168–170
- Ramy, Herbert N.  
*Lessons from My First Year: Maintaining Perspective* . . . . . **6**: 103–104  
*Two Programs Are Better Than One: Coordinating Efforts Between Academic Support and Legal Writing Departments* . . . . . **9**: 148–152
- Ricks, Sarah E.  
*Brutal Choices in Curricular Design ... Teaching 1Ls to Think Like Lawyers by Assigning Memo Problems with No Clear Conclusions* . . . . . **14**: 10–15
- Rosenbaum, Judith  
*Brutal Choices in Curricular Design ... Putting the Puzzle Together: Choices to Make When Creating a Closed-Universe Memorandum Assignment* . . . . . **17**: 11–24  
*Brutal Choices in Curricular Design ... Using Read-Aloud Protocols As a Method of Instruction* . . . . . **7**: 105–109  
*Brutal Choices in Curricular Design ... Why I Don't Give a Research Exam* . . . . **11**: 1–6
- Schiess, Wayne  
*What to Do When a Student Says "My Boss Won't Let Me Write Like That"?* . . . . . **11**: 113–115
- Schunk, John D.  
*What Can Legal Writing Students Learn from Watching Emeril Live?* . . . . . **14**: 81–82
- Shapo, Helene S.  
*Implications of Cognitive Theory for Teaching* . . . . . **1**: 77–78
- Shapo, Helene S. and Christina L. Kunz  
*Brutal Choices in Curricular Design ... Teaching Citation Form and Technical Editing: Who, When, and What* . . . . . **3**: 4–5

- Brutal Choices in Curricular Design ... Winning the Font Game: Limiting the Length of Students' Papers* . . . . . **4:** 10–11
- Brutal Choices: Should the First-Year Legal Writing Course Be Graded in the Same Way As Other First-Year Courses?* . . . . . **2:** 6–8
- Shapo, Helene S. and Mary S. Lawrence  
*Brutal Choices in Curricular Design ... Designing the First Writing Assignment* . . . . . **5:** 94–95
- Brutal Choices in Curricular Design ... Surviving Sample Memos* . . . . . **6:** 90–91
- Simon, Sheila  
*Brutal Choices in Curricular Design ... Top 10 Ways to Use Humor in Teaching Legal Writing.* . . . . . **11:** 125–127
- Order What Are Your Words In? How Foreign Languages Can Help You Teach the Structure of Legal Writing.* . . . . . **10:** 124–125
- Sirico, Louis J., Jr.  
*Advanced Legal Writing Courses: Comparing Approaches.* . . . . . **5:** 63–64
- Reading Out Loud in Class* . . . . . **10:** 8–9
- Teachable Moments for Teachers ... Beyond Offering Examples of Good Writing: Let the Students Grade the Models.* . . . . . **14:** 160–162
- Teachable Moments for Teachers ... Teaching Paragraphs* . . . . . **8:** 13
- Smith, Angela G.  
*Requiring Writing Courses Beyond the First Year: To Boldly Go Where Hardly Anyone Has Gone Before* . . . . . **1:** 54–55
- Smith, Stephen E.  
*Teaching Practical Procedure in the Legal Writing Classroom* . . . . . **17:** 31–34
- Sneddon, Karen J.  
*Armed with More Than a Red Pen: A Novice Grader's Journey to Success with Rubrics* . . . . . **14:** 28–33
- Temple, Hollee S.  
*Using Formulas to Help Students Master the "R" and "A" of IRAC.* . . . . . **14:** 129–135
- Tiscione, Kristen Robbins  
*Aristotle's Tried and True Recipe for Argument Casserole* . . . . . **15:** 45–49
- Vance, Ruth C.  
*The Use of Teaching Assistants in the Legal Writing Course.* . . . . . **1:** 4–5
- Whisner, Mary and Lea Vaughn  
*Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives* . . . . . **4:** 72–77
- Wigal, Grace  
*Brutal Choices in Curricular Design ... Repeaters in LRW Programs.* . . . . . **9:** 61–68
- Williams, Brian S.  
*Road Maps, Tour Guides, and Parking Lots: The Use of Context in Teaching Overview and Thesis Paragraphs* . . . . . **7:** 27–28
- Williams, Joseph M. and Gregory G. Colomb  
*Writing Tips ... Telling Clear Stories: A Principle of Revision That Demands a Good Character* . . . . . **5:** 14–16
- Zimmerman, Clifford S.  
*Creative Ideas and Techniques for Teaching Rule Synthesis* . . . . . **8:** 68–72
- Zimmerman, Emily  
*The Proverbial Tree Falling in the Legal Writing Forest: Ensuring That Students Receive and Read Our Feedback on Their Final Assignments.* . . . . . **11:** 7–11
- Toto, I Don't Think We're In Practice Anymore: Making the Transition from Editing as a Practitioner to Giving Feedback as a Legal Writing Professor.* . . . . . **12:** 112–116

## Technology

- Blevins, Timothy D.  
*Technology for Teaching ... Using Technology to Fill the Gap: Neither Paper nor Live Clients.* . . . . . **12:** 171–173
- Blum, Joan  
*Brutal Choices in Curricular Design ... Why You Should Use a Course Web Page.* . . . . . **10:** 15–17
- Caputo, Angela  
*Technology for Teaching ... Four Pointers to Effective Use of PowerPoint in Teaching* . . . . . **10:** 132–136
- Cobb, Tom  
*Public Interest Research, Collaboration, and the Promise of Wikis* . . . . . **16:** 1–11
- Collins, Lauren M.  
*Technology for Teaching ... Creating Online Tutorials: Five Lessons Learned* . . . . . **16:** 33–36

Duggan, James E.  
*Technology for Teaching ... Using CALI Lessons to Review (or Teach) Legal Research and Writing Concepts* . . . . . **9:** 86–89

Friedman, Peter B.  
*Brutal Choices in Curricular Design ... The Class Listserv: Professor’s Podium or Students’ Forum?* . . . . . **8:** 75–78

Henle, Alea  
*Training Users on Internet Publications Evolved From (And Still In) Print* . . . . **10:** 89–91

Houdek, Frank G.  
*Our Question—Your Answers ... What Is Your Number One Method for Keeping Abreast of Changes in Technology?* . . . . . **6:** 81–83

Kimbrough, Tom  
*In-Class Online Legal Research Exercises: A Valuable Educational Tool* . . . . . **16:** 112–117

McGaugh, Tracy L.  
*Brutal Choices in Curricular Design ... Laptops in the Classroom: Pondering the Possibilities* . . . . . **14:** 163–165

Melton, Pamela Rogers  
*Teachable Moments ... Click to Refresh: Audience Response Systems in the Legal Research Classroom* . . . . . **17:** 175–178

Miller, Steven R.  
*Technology for Teaching ... Teaching Advanced Electronic Legal Research for the Modern Practice of Law* . . . . . **9:** 120–123

Murray, Kristen E.  
*Technology for Teaching ... My E-Semester: New Uses for Technology in the Legal Research and Writing Classroom* . . . . . **15:** 194–200

Rosenbaum, Judith  
*Technology for Teaching ... CALR Training in a Networked Classroom* . . . . . **8:** 79–84

Shaw, Lori  
*Technology for Teaching ... Lori Shaw and the Search for the Golden Snitch: Using Class Web Sites to Capture the Teachable Moment* . . . . . **11:** 101–103

Smith, Craig T.  
*Teaching Synthesis in High-Tech Classrooms: Using Sophisticated Visual Tools Alongside Socratic Dialogue to Help Guide Students Through the Labyrinth* . . . . . **9:** 110–115

Straus, Karen  
*Tips for Using a Computer for Legal Research and Writing* . . . . . **6:** 86–87

Will, Linda  
*The Law Firm Librarian As Teacher: Slouching Toward 2000* . . . . . **6:** 14–15

**Tributes**

*In Memoriam: Donald J. Dunn* . . . . . **16:** 147

*In Memoriam: Joseph M. Williams* . . . . . **16:** 186

*In Memoriam: Roy M. Mersky* . . . . . **17:** 5

**Writing Techniques**

Armstrong, Stephen V. and Timothy P. Terrell  
*Writing Tips ... Conjugosis and Declensia* . . . . . **4:** 8–9

*Writing Tips ... Editing: Overcoming the Dr. Strangelove Syndrome* . . . . . **5:** 77–78

*Writing Tips ... Just One Damned Thing After Another: The Challenge of Making Legal Writing “Spatial”* . . . . . **7:** 119–122

*Writing Tips ... Organizing Facts to Tell Stories* . . . . . **9:** 90–94

*Writing Tips ... Resisting the Devil’s Voice: Write Short, Simple Sentences* . . . . . **3:** 46–48

*Writing Tips ... Sweating the Small Stuff* . . . . . **11:** 128–131

*Writing Tips ... The Dangers of Defaults* . . . . . **10:** 126–131

*Writing Tips ... The Perils of E-Mail* . . . . . **14:** 166–168

*Writing Tips ... The Rhetoric of Persuasive Writing* . . . . . **15:** 189–191

*Writing Tips ... The Subtlety of Rhythm* . . . . . **12:** 174–176

*Writing Tips ... To Get to the “Point,” You Must First Understand It* . . . . . **13:** 158–161

Arrigo-Ward, Maureen J.  
*Caring for Your Apostrophes* . . . . . **4:** 14–15

Artz, Donna E.  
*Tips on Writing and Related Advice* . . . . . **5:** 113–114

- Bach, Tracy  
*Teachable Moments for Teachers ... Teaching the Poetry of the Question Presented . . . .* **9**: 142–144
- Berch, Rebecca White  
*Observations from the Legal Writing Institute Conference: Thinking About Writing Introductions . . . . .* **3**: 41–43
- Boris, Edna Zwick  
*Writing Tips ... Sentence Sense: “It” Problems . . . . .* **4**: 96–98  
*Writing Tips ... Sentence Sense: “We,” “Our,” “Us” Problems . . . . .* **5**: 125–127  
*Writing Tips ... Sentence Structure and Sentence Sense: “And” Problems . . .* **3**: 85–86
- Bowman, Brooke J.  
*Writing Tips ... Learning the Art of Rewriting and Editing—A Perspective . . . . .* **15**: 54–57
- Collins, Maureen B.  
*Writing Tips ... A Time of Transition: Logical Links to Move the Reader Forward . . . . .* **17**: 185–187
- Colomb, Gregory G.  
*Writing Tips ... Framing Pleadings to Advance Your Case . . . . .* **10**: 92–97
- Colomb, Gregory G. and Joseph M. Williams  
*Writing Tips ... Client Communications: Designing Readable Documents . . .* **13**: 106–112  
*Writing Tips ... Delivering a Persuasive Case: Organizing the Body of a Pleading . . .* **11**: 84–89  
*Writing Tips ... Framing Academic Articles . . . . .* **16**: 178–185  
*Writing Tips ... Le Mot Juste . . . . .* **15**: 134–141  
*Writing Tips ... Shaping Stories: Managing the Appearance of Responsibility . . . . .* **6**: 16–18  
*Writing Tips ... So What? Why Should I Care? And Other Questions Writers Must Answer . . . . .* **9**: 136–141  
*Writing Tips ... Telling Clear Stories: A Principle of Revision That Demands a Good Character . . . . .* **5**: 14–16  
*Writing Tips ... The Right Deal in the Right Words: Effective Legal Drafting . . . . .* **14**: 98–106  
*Writing Tips ... The Writer’s Golden Rule . . . . .* **7**: 78–81  
*Writing Tips ... Well Begun Is Half Done: The First Principle of Coherent Prose . . .* **8**: 129–133
- Daniel, Neil  
*Writing Tips ... . . . . .* **1**: 50–51; **1**: 87–90; . . . . . **2**: 23–24; **2**: 63–65
- Enquist, Anne  
*Writers’ Toolbox ... Defeating the Writer’s Archenemy . . . . .* **13**: 145–148  
*Writers’ Toolbox ... Fixing the “Awk” . . . . .* **14**: 107–110  
*Writers’ Toolbox ... Should I Teach My Students Not to Write in Passive Voice? . . . . .* **12**: 35–37  
*Writers’ Toolbox ... Talking to Students About the Differences Between Undergraduate Writing and Legal Writing . . . . .* **13**: 104–105  
*Writers’ Toolbox ... Teaching Students to Make Explicit Factual Comparisons . . . . .* **12**: 147–150  
*Writers’ Toolbox ... That Old Friend, the Tree-Branching Diagram . . . . .* **13**: 24–26  
*Writers’ Toolbox ... The Semicolon’s Undeserved Mystique . . . . .* **12**: 105–107  
*Writers’ Toolbox ... Topic Sentences: Potentially Brilliant Moments of Synthesis . . . . .* **14**: 139–141  
*Writers’ Toolbox ... To Quote or Not to Quote . . . . .* **14**: 16–20
- Enquist, Anne and Laurel Oates  
*You’ve Sent Mail: Ten Tips to Take with You to Practice . . . . .* **15**: 127–129
- Fajans, Elizabeth and Mary R. Falk  
*Writing Tips ... The Art of Indirection . . . . .* **14**: 21–22
- Faulk, Martha  
*Writing Tips ... “However” Is Not a FANBOYS . . . . .* **11**: 21–22  
*Writing Tips ... Matters of Punctuation: Open or Close . . . . .* **16**: 44–46  
*Writing Tips ... Much Ado About That ... Or Is It Which? . . . . .* **6**: 112–114  
*Writing Tips ... Never Use a Preposition to End a Sentence With . . . . .* **8**: 24–25  
*Writing Tips ... Punctuation Matters . . .* **12**: 32–34  
*Writing Tips ... Sounding Like a Lawyer . . . . .* **10**: 5–7  
*Writing Tips ... The Best Sentence . . . . .* **9**: 3–4  
*Writing Tips ... The Matter of Mistakes . . . . .* **13**: 27–28

- Houdek, Frank G.  
*Our Question—Your Answers ... What Technique Works Best in Teaching? . . . . .* **5:** 23–25
- Levy, James B.  
*Book Review ... A Neurologist Suggests Why Most People Can't Write—A Review of The Midnight Disease: The Drive to Write, Writer's Block, and the Creative Brain. . . . .* **13:** 32–34
- Lynch, Michael J.  
*"Mistakes Were Made": A Brief Excursion into the Passive Voice. . . . .* **7:** 82–83
- Montana, Patricia Grande  
*Persuasion in a Familiar Activity: The Parallels Between Résumé Writing and Brief Writing. . . . .* **16:** 100–105
- Novak, Jan Ryan  
*Plain English Makes Sense: A Research Guide . . . . .* **3:** 2–3
- Opipari, Benjamin R.  
*Writing Tips ... To Go Boldly Without the Bold (and Italics and Underlining and All Caps) . . . . .* **16:** 131–138  
*Writing Tips ... What Attorneys Can Learn from Children's Literature, and Other Lessons in Style. . . . .* **17:** 135–141
- Slotkin, Jacquelyn H.  
*Comma Abuse: A Comma Can Cause Trouble by Its Absence, Its Presence, Its Incorrect Placement . . . . .* **4:** 16–18
- Speta, James  
*Book Review: Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation . . . . .* **13:** 156–157
- Stein, Amy R.  
*Teachable Moments for Teachers ... Helping Students Understand That Effective Organization Is a Prerequisite to Effective Legal Writing. . . . .* **15:** 36–40
- Telfeyan, Edward H.  
*The "Grammar Bee"—One Way to Take the Pain Out of Teaching the Mechanics of Writing . . . . .* **17:** 25–30
- White, Libby A.  
*Brutal Choices in Curricular Design ... Peering Down the Edit . . . . .* **16:** 160–164
- Williams, Joseph M. and Gregory G. Colomb  
*Writing Tips ... Client Communications: Delivering a Clear Message. . . . .* **12:** 127–131







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