

# PERSPECTIVES

## Teaching Legal Research and Writing

VOL. 12 NO. 3 SPRING 2004

### E-GRADING: THE PROS AND CONS OF PAPERLESS LEGAL WRITING PAPERS

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Over the past two years, we have experimented in our legal writing classes with “paperless” legal writing assignments; in other words, our students have submitted their assignments electronically, we have graded them electronically, and we have returned the graded assignments electronically. While there are some disadvantages to a “paperless” submission and grading system and a host of details that accompany such a system, its convenience, educational advantages, and parallels to trends in law practice far outweigh these concerns. This article does not focus on the mechanics of an e-grading system,<sup>1</sup> but instead describes our experience with the system’s benefits and suggests ways to overcome its drawbacks.

The basics of an electronic submission and grading system are simple. Students submit their papers electronically, either by e-mail (as one of us used) or on a floppy disk (as the other used). The legal writing professor then grades the papers on a computer, using mark-up features such as Microsoft® Word’s “track changes” and “comments” tools.<sup>2</sup> The professor then returns the papers electronically, either by e-mail or by returning the floppy disk.

<sup>1</sup> For excellent discussions of how to implement and use an e-grading system, see Thomas F. Blackwell, *E-Mail: Computer Technology That Makes Teaching Legal Writing Easier*, Second Draft, May 1999, at 12–13; Laurel Currie Oates, *The Paperless Writing Class*, Second Draft, June 2001, at 18–19; Hazel Weiser, *Using the Autotext Feature of Microsoft Word to Create a Catalog of Writing Comments*, Second Draft, Nov. 1999, at 17–18.

<sup>2</sup> WordPerfect® has similar commenting capabilities.

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*Perspectives: Teaching Legal Research and Writing* is published in the fall, winter, and spring of each year by West.

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## Pros

**Convenience and Efficiency.** Hands down, the most persuasive reason to move to a “paperless” grading system is for convenience and efficiency. Instead of stumbling groggily into our offices at 8:30 or 9 a.m. after a night of frantic writing, printing, and copying, our students can spend that time focusing on their writing. When they are ready, they simply attach their papers to an e-mail and send the e-mail. (With floppy disk submissions, the students still stumble in, but at least they have not had to do battle with finicky printers.) Because we receive the papers electronically—and because we use laptop computers—we can take the papers home or to our favorite off-campus grading spots without having to carry around a heavy stack of papers. Finally, when we are done grading, we return the papers without having to make copies for our records and without having to stuff student mailboxes or envelopes for students to retrieve outside our offices.

Each of these three stages—submission,<sup>3</sup> grading, and return—deserves a little more attention. Traditionally, we received numerous extension requests from students who could not get their printers (or printers in the school’s computer labs) to work, who had unsuccessfully battled throngs of peers for printer access minutes before the deadline, or who became stuck in traffic on the way to submit a paper. E-mail submission eliminated these difficulties entirely.<sup>4</sup> It also injected a welcome measure of flexibility. We usually have required students to submit papers in the morning so that they would not be tempted to miss classes to finish papers. In the past, students sometimes finished working late at night, knowing that they still had to get up early and worry about getting to our offices on time with a completed paper. Exhausted from the effort, many of these students still missed classes.<sup>5</sup> With e-mail submission, students

<sup>3</sup> The submission benefits discussed here apply exclusively to an e-mail system. Because floppy disk submission requires a student’s physical presence at the school, it maintains some inconveniences that accompany a paper system.

<sup>4</sup> Laurel Currie Oates reports similar advantages from her e-grading system. Oates, *supra* note 1, at 19.

<sup>5</sup> E-submission’s greater flexibility has an institutional upside. Improved class attendance should strengthen the often delicate relationship between legal writing professors and other first-year faculty.

can send their papers as soon as they are ready.<sup>6</sup> (The author using e-mail submission typically receives the first papers the morning before a deadline and typically gets the bulk of the papers from about 8 p.m. to 1 a.m. the night before the deadline, with a final burst from 7 a.m. the next morning to the deadline itself.)

Students are not the only beneficiaries of the e-submission process. A legal writing professor using e-mail submission need not manage the logistics that accompany paper submissions—creating an “in box” for the papers, imploring her faculty assistant to bring the box into her office at the precise deadline, and traveling to the office to retrieve the elephantine paper stack.

Grading electronically is also easier. We typically grade papers in concentrated bursts so that we can return papers to students as soon as possible. During these bursts, we frequently work at home or somewhere else off-campus where we will not be disturbed. By grading electronically, we can easily carry a class’s worth of papers on a laptop hard drive. For those who type faster (or more legibly) than they write, electronic grading goes faster than our traditional grading style, which involved handwritten comments in margins and significant typed or handwritten comments at the end of a paper. Using Word’s “autotext” feature, we have become even more efficient by creating a set of uniform comments—both margin and end—for recurring student problems.<sup>7</sup> Instead of courting writer’s cramp by repeatedly writing

<sup>6</sup> Laurel Currie Oates builds even more flexibility into the e-submission process: She receives student submissions on a rolling basis, then critiques and returns each paper as she completes it; for graded papers, she modifies the system, waiting to begin returning papers until after the assignment’s final due date. Oates, *supra* note 1, at 18. She reports that students greatly appreciate the quick feedback, and that she benefits by avoiding a daunting pile of papers. *Id.* at 18, 19.

<sup>7</sup> In their respective writings, Laurel Currie Oates and Hazel Weiser describe how they use the autotext feature. See Oates, *supra* note 1, at 19; Weiser, *supra* note 1, at 17–18. Hazel Weiser aptly points out that autotext does not necessarily save time because electronic comments tend to be more detailed and developed than their handwritten counterparts. Weiser, *supra* note 1, at 18. Nevertheless, autotext does promote more efficient use of time because the grader’s effort is directed toward typing a single, more informative comment for use on many papers instead of repeatedly hand-writing the same, less effective comment. See Lucia Ann Silecchia, *Of Painters, Sculptors, Quill Pens, and Microchips: Teaching Legal Writers in the Electronic Age*, 75 Neb. L. Rev. 802, 830 (1996) (observing the benefits of efficiency, consistency, and neatness that accompany e-comments). Of course, given e-grading’s endless commenting potential, self-discipline is paramount in retaining its efficiencies.

out the same comment on how rules differ from holdings, for example, we use autotext to produce full-blown explanations from just a few typed characters. This feature also eliminates the need to sift through previous papers to recall exactly how we phrased similar comments to other students.

Even policing paper formatting is a simpler task with electronic grading; it eliminates the guesswork. The electronic file leaves no doubt about whether a student has engaged in such mischief as narrowing the line spacing to 1.5, exceeding word limits, or tightening the letter spacing.

Electronic delivery of graded papers to students is also more convenient. With an e-mail system, returning papers is as easy as replying to the e-mails students originally used to submit their papers, attaching the graded papers to the replies, and writing a brief e-mail containing the grades. (The author who uses e-mail pastes a standard e-mail message into each reply, varying only the grade itself. The author who uses floppy disks usually e-mails papers back to students via her course Web page, returning the disks themselves when students come to office conferences.) Even with a floppy disk system, we do not need to copy graded papers for our files. We have thus reclaimed, as additional grading or planning time, the typical day needed to copy the graded papers and check the copies.<sup>8</sup> Students likewise recoup the time they would have spent traveling to the school and traipsing up to our offices or their mailboxes to get their papers.

**Longer, More Precise Comments That Maximize Student Learning.** With paper grading, we always felt limited in our ability to write intelligent comments in the margins of papers.<sup>9</sup> As a result, we often wrote short comments in the margins and tried to elaborate on those comments in notes at the ends of papers, with pages separating important explanations from corresponding writing problems. Electronic “margin notes” present our comments with more context and

<sup>8</sup> For cash-strapped legal writing departments, the copy costs eliminated by an electronic grading system can be substantial. E-grading is also a more ecologically sound approach, perhaps reducing the likelihood of students’ guilt-inducing inquiry into how many trees have been destroyed in furtherance of the course.

<sup>9</sup> See Weiser, *supra* note 1, at 18 (reporting that with e-grading, “my intelligence does not get twisted into shorthanding what should be a more comprehensive response to a student’s effort. Instead I get to use my intelligence to craft effective analysis and concise explanations.”).

precision, because the computer associates each electronic margin note (written as Microsoft Word “comments”) with a precise place in the document.<sup>10</sup>

These electronic margin notes are also more extensive and easier to comprehend. Scrawled quickly and cramped, our handwritten margin comments could be, at worst, cryptic, illegible, or both, especially near the end of a full day’s grading. At best, our handwritten comments were incomplete.<sup>11</sup> Unfettered by poor handwriting or scarce margins, our electronic margin notes can neatly provide more detailed illustrations and clarify the “why” behind our comments.<sup>12</sup> In conferences,

<sup>10</sup> Scholarship on the rhetoric of teacher commenting stresses the importance of clear, particularized marginal comments to maximize student learning. See, e.g., Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher As Reader and Writer*, 6 J. Legal Writing 57, 83–84 & nn.114–17 (2000). For example, marginal comments placed at the site of the problem can “pry open” the student text by challenging its completeness and asking for clarification, amplification, and investigation,” *id.* at 84 & n.115 (quoting Janet Gebhart Auten, *A Rhetoric of Teacher Commentary: The Complexity of Response to Student Writing*, 4 Focuses 3, 8–9 (1991)), and can target more precisely areas that are particularly effective, *id.* at 84 & n.116 (citing Chris M. Anson, *Response Styles & Ways of Knowing, in Writing and Response: Theory, Practice, and Research* 353–54 (Chris M. Anson ed., 1989)), or that are confusing or unsubstantiated, *id.* at 83–84.

<sup>11</sup> See Weiser, *supra* note 1, at 17–18 (explaining that e-comments are “fuller,” allowing the author to “provide context, draw inferences, and refer to cases, lectures, or reading to fully inform the student,” and ultimately to “model good writing. ...”). Hazel Weiser mentions that she “might show [students] how to analyze one element of a three element proof so that they can see, by way of a present illustration, how to construct a logical argument.” *Id.* at 18. But see Suzanne Ehrenberg, *Legal Writing Unplugged: Evaluating the Role of Computer Technology in Legal Writing Pedagogy*, 4 J. Legal Writing 1, 4 & nn.6–7, 9 (1998) (noting that although many legal writing professors who have used e-grading believe that it saves time, enhances feedback, and is “indispensable” for those “whose handwriting is virtually illegible,” it could become more time-consuming because it indulges limitless comments).

<sup>12</sup> This is especially important since the students we are encountering now, i.e., those from Generations X and Y (the latter also called “Millennials”), are increasingly concerned with gleanung more intricate information about their performance and the rationale driving our comments and edits. See Tracey L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?*, 8 J. Legal Writing (forthcoming 2003) (manuscript at 30, on file with author) (Generation X students respond best to generous, detailed, specific feedback because it recognizes “that their effort was substantial and worthwhile”). To maximize student interest and improvement, Tracy McGaugh urges professors to explain to Generation X students *why* they are being asked or taught to perform a given skill, and to tailor written feedback on assignments as closely as possible to concrete, previously defined goals. *Id.* (manuscript at 26–27); see also Bruce Tulgan, *Managing Generation X: How to Bring out the Best in Young Talent* 125–34, 145–51, 207–27 (2000) (Generation Xers place high value on feedback that is frequent, accurate, specific, and timely, and “need abundant information to learn effectively”). This level of detail and explanation is far easier to achieve with e-comments.

“With paper grading, we always felt limited in our ability to write intelligent comments in the margins of papers.”

“With e-mail return, students receive their graded papers in the privacy of their homes, dorm rooms, or study carrels, without other students hovering.”

we notice that students understand our comments better; instead of spending time deciphering them, we are able to focus conference time on devising strategies for addressing the comments.

*Matching Student Learning Styles.* Much more so than when we went to law school (which we like to think was not that long ago), our students today are used to sending and receiving information electronically.<sup>13</sup> Feedback from students on the electronic submission and grading system has been overwhelmingly positive, with many students asking why all of their professors do not grade electronically. Students process the electronic comments differently: some students print out the graded papers they receive, while others simply read our edits and comments on their computer screens. Either way, the vast majority of students seem to prefer typed comments presented electronically to handwritten comments scrawled in the margins of papers.<sup>14</sup> As a result, we suspect that, to a modest degree, electronic grading makes it more likely that students attend to our comments, rather than simply reading the grade at the bottom of the paper and paying little attention to the comments.<sup>15</sup>

Electronic grading also dovetails nicely with our students' drafting practices. In the weeks before a paper is due, students often e-mail us short (usually limited to one page) excerpts, using electronic margin comments to pose focused questions.<sup>16</sup> We are able to respond to those questions in the same manner. On collaborative

<sup>13</sup> See, e.g., McGaugh, *supra* note 12 (manuscript at 9, 35) (discussing the computer-infused environment in which Generations X and Y are accustomed to operating, and the implications for law teaching); Silecchia, *supra* note 7, at 808, 841 & nn.23–27, 190 (discussing the proliferation of computer technology at all levels of education and incoming law students' resulting sophistication); see also Tulgan, *supra* note 12, at 68 (“Xers are the children of ... computers,” having long relied on them for word processing, communication, and research).

<sup>14</sup> Oates, *supra* note 1, at 19 (noting that although a handful of her students opted for written feedback, “the rest of my students have given electronic critiquing and grading high marks” because it is more convenient and produces higher-quality comments); Weiser, *supra* note 1, at 18 (reporting that her students value electronic grading because they perceive a greater appreciation for their work from more developed, detailed, and legible comments).

<sup>15</sup> Hazel Weiser reports that her students “all agree that they use these [electronic] comments to help rewrite portions [of a paper], and some students even use [them] to help them prepare future assignments.” Weiser, *supra* note 1, at 18.

<sup>16</sup> Similarly, Laurel Currie Oates observes that “on drafts, [students] have begun inserting their own comments, asking me questions or explaining why they did what they did.” Oates, *supra* note 1, at 19.

writing assignments, we see many students modeling our e-commenting process: they pass electronic drafts back and forth with their partners using Word's “track changes” function to line-edit and its “comments” function to engage in ongoing dialog about ways to improve the paper.<sup>17</sup>

*More Privacy for Students.* When we graded on paper, we often met a crowd of apprehensive students waiting at their mailboxes or huddled outside our offices for papers to be returned. Students grabbed papers from mailboxes or from the return boxes outside our offices as soon as they were available, opening them up to read their grades. With e-mail return, students receive their graded papers in the privacy of their homes, dorm rooms, or study carrels, without other students hovering. When students view their grades free of these public, anxiety-inducing circumstances, they tend to approach the grades in a more professional manner, “cooling off” before discussing them with us.

*Convenient Storage.* With electronic grading, we now have a year's worth of assignments—both graded and ungraded—on a single CD or Zip drive. We can also put all of our other materials from the year (such as the original assignments and our lecture notes) in the same place.

*Matching Current Law Firm Practice.* The pedagogical benefits of adopting an electronic submission and grading system extend outside the classroom and translate directly into vital law practice skills. Collaboration on documents is a hallmark of modern law firm (and corporate) practice, and most lawyers are increasingly comfortable exchanging drafts of important documents by e-mail and marking up electronic documents. Indeed, lawyer proficiency in the commenting and editing functions of a variety of software programs, including Word, WordPerfect, and Adobe Acrobat, is integral to communications with both clients and adversaries.<sup>18</sup> Corporate

<sup>17</sup> Each of us learned this when, separately, we had the experience of opening a collaboratively submitted paper to find a few stray e-comments obviously written from one student to another. This, of course, is a risk of e-grading: students should be reminded to remove all e-comments—either their own or the professor's—before submitting papers electronically.

<sup>18</sup> See David Kiefer & Marc Lauritsen, *Recent Developments in Automating Legal Documents*, 52 *Syracuse L. Rev.* 1091, 1096 (2002) (detailing common e-commenting use in law practice); Rebecca Porter, *Easy Chair Rider*, *Trial*, Jan. 2003, at 24, 25–28 (same); Janet Sylanski, *Top Five Word Processing Training and Help Desk Questions (and Their Answers)*, *Law. J.*, Aug. 23, 2002, at 6 (same).

clients, many of whom have been “Gateded,”<sup>19</sup> expect their attorneys to comment electronically on documents such as draft pleadings, agreements, and corporate policies, usually using Word. In transactions, parties are using electronic commenting functions to conduct negotiations and shape agreements.<sup>20</sup>

The undeniable trend in many courts and administrative agencies is toward a paperless system.<sup>21</sup> A growing number of federal district, bankruptcy, and appellate courts are allowing electronic submission of court filings, as well as electronic service of process.<sup>22</sup> These are major advancements in law practice, hailed by many bar members as “a change in the basic infrastructure used by citizens and the government to deal with

one another,”<sup>23</sup> and “a paradigm shift equivalent to court rules that required all filings to be typewritten or printed.”<sup>24</sup> We serve students well by preparing them for this procedural sea change<sup>25</sup>—just as lawyers are becoming accustomed to sending documents electronically to a court to arrive by a firm deadline, it makes sense to train law students to do the same. Conversely, we risk losing credibility if we require students to follow procedures that are, or soon will be, outmoded in law practice.

### Cons

Despite all of these advantages, we both quickly thought of potential drawbacks when we first considered switching to electronic submission and grading. Fortunately, most of these disadvantages failed to materialize or were manageable.

Nonetheless, any professor considering electronic submission and grading should keep them in mind.

“*Didn’t You Get My E-Mail?*” While electronic submission ends extension requests based on printers and traffic, we worried it would cause no end of claims that students had e-mailed papers we had not received (or had not received on time). For that matter, some students initially had concerns about how they would know that we had received their e-mails. In practice, we observed few problems. E-mail applications such as Microsoft Outlook can request delivery receipts to verify that we received our students’ e-mails. We have yet to hear a student claim that he or she really did send an e-mail we had not received, perhaps in part because students and faculty at our school share a small group of e-mail servers and it is easy to tell when a server is down.

“The undeniable trend in many courts and administrative agencies is toward a paperless system.”

<sup>19</sup> This term refers to widespread corporate reliance on Microsoft products. Sylanski, *supra* note 18, at 6 (discussing the importance clients place on electronic attorney-client document exchange, particularly in Word format); see Maria Perez Crist, *Technology in the LRW Curriculum—High Tech, Low Tech, or No Tech*, 5 J. Legal Writing 93, 96 (1999) (“The pervasiveness of information technology has ‘raised the bar’ on the level of technological competence clients expect from their attorneys.”).

<sup>20</sup> Kiefer & Lauritsen, *supra* note 18, at 1096.

<sup>21</sup> William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What Is It? What Are Its Implications?*, 19 Santa Clara Computer & High Tech L.J. 181, 186 (2002) (noting that the “trend line” of e-filing in courts and government agencies has inclined steeply, and predicting that e-filing “will be pervasive ... by the end of this decade.”); *id.* at 191–201 (cataloguing federal and state courts and administrative agencies that have adopted e-filing procedures); David L. Masters, *Electronic Filing: Beyond the Basics*, 31 Colo. Law., June 2002, at 61.

<sup>22</sup> Most notably, Federal Rule of Appellate Procedure 25(a)(2)(D) provides that appellate courts can, by local rule, “permit papers to be filed, signed, or verified by electronic means . . .”, and allows service by electronic means “if the party being served consents in writing,” Fed. R. App. P. 25(c)(1)(D). To date, the First, Fifth, Eighth, and Eleventh Circuits permit some form of electronic filing by local rule. 1st Cir. R. 32.1; 5th Cir. R. 25.2; 8th Cir. R. 25A(a); 11th Cir. R. 31-5. A host of federal district courts and bankruptcy courts have also adopted rules permitting e-filing, see <[www.uscourts.gov/cmecf/cmecf\\_about.html](http://www.uscourts.gov/cmecf/cmecf_about.html)> (Sept. 2003) (federal courts Web page listing courts currently accepting electronic filings), as have several state appellate courts, see <[www.seidenlaw.com/courtcd/statecourtrules.html](http://www.seidenlaw.com/courtcd/statecourtrules.html)> (last visited Oct. 7, 2003) (providing link to chart with state court e-filing rules). The Northern District of Illinois’ electronic case filing system, originally slated for implementation in September 2003, will be up and running in the coming months. N.D. Ill. Notice of Proposed General Order on Electronic Case Filing (Apr. 24, 2003); see News Release, United States District Court for the Northern District of Illinois, Court Continues Work on Electronic Case Filing (Aug. 7, 2003), at <[www.ilnd.uscourts.gov/PRESS/prframe\\_page5.html](http://www.ilnd.uscourts.gov/PRESS/prframe_page5.html)>. And the U.S. Bankruptcy Court for the Southern District of Illinois has required electronic filing for many documents since March 1, 2002. Bankr. S.D. Ill. Standing Order 02-1 (Feb. 20, 2002).

<sup>23</sup> Fenwick & Brownstone, *supra* note 21, at 226–27.

<sup>24</sup> Masters, *supra* note 21, at 61.

<sup>25</sup> See Silecchia, *supra* note 7, at 825 (“[I]t behooves legal writing programs to be aggressive in teaching students how to recognize the benefits that can come with new technology and prepare them to use this technology advantageously both as students and in practice.”); see also Crist, *supra* note 19, at 97 (arguing that integrating technology into legal research and writing programs better prepares students for law practice); Richard A. Matasar & Rosemary Shiels, *Electronic Law Students: Repercussions on Legal Education*, 29 Val. U. L. Rev. 909, 910 (1995) (legal educators must teach and embrace up-and-coming technologies because “law schools will [not only] be pulled to change by the emerging technological changes within legal practice, they will be pushed to the same place by their students.”).

“To realize the convenience of an electronic grading system, a professor has to standardize the software in which students submit their papers.”

One worry the author using e-mail submission had when she started was that students would cheat the deadline by resetting their computer clocks to show an earlier time, so that e-mails sent after the deadline would appear to have been sent before the deadline. In theory, this type of cheating was possible, as the deadline was based on the time an e-mail was sent, rather than the time it was received. However, she never saw a gap of more than a minute or two between the time an e-mail was sent and the time it was received, suggesting that no students reset their clocks to give themselves any significant extra period of time. Another alternative to prevent this kind of manipulation is to set the deadline as the time the professor receives the e-mailed paper. This has the additional advantage of mirroring the procedures of courts that allow exclusive e-filing.<sup>26</sup>

We did have isolated instances of students sending the wrong document (an earlier version), a corrupt or unreadable file,<sup>27</sup> or no document at all. In general, we had little sympathy for these problems. Lawyers who eventually will file papers electronically with courts or exchange draft agreements with opposing counsel need to learn to take care when they send important e-mails. Even so, we were able to minimize this problem by giving e-mails and disks a quick scan within a few hours of their arrival to see whether attachments were missing or obviously wrong. In the few cases where we encountered document problems, we worked with students to avoid giving unwarranted grading penalties. We did not feel that students took advantage of our flexibility.

*Maintaining Blind Grading.* Our school uses a blind grading system, and electronic submission does pose challenges for blind grading. The author using e-mail submission used a disinterested person to separate students' e-mails (which had their names on them) from the attached papers (which did not). Students had four-digit numbers to identify them, and were instructed to make sure their four-digit numbers were part of the names of their documents. Beyond this process, we both had to make sure that the papers themselves had

no identifying information. Microsoft Word creates a document summary for each document; the summary generally includes the name of the author. As a result, the author using e-mail submission asked her disinterested person to open the documents and remove the author's name from each document. The author using disk submission provided her students with instructions on how to remove identifying information from the document summary. (Alternatively, we might have tried simply not to look at any summary information, but this is hard to do in Windows XP, which shows author information when a user lets the mouse pointer hover over a document icon.) The need to have a third person's help was not ideal, but the overall convenience of the system far outweighed any hassle. Some schools, moreover, may employ technology that allows students to submit electronic documents anonymously, eliminating the need for a disinterested third person.

*Standardizing Software and Versions.* To realize the convenience of an electronic grading system, a professor has to standardize the software in which students submit their papers. We required Microsoft Word, because it has become the dominant word processor for Windows® computers, and nearly every computer manufacturer offers it.<sup>28</sup> (This is increasingly true even in the legal profession, which is one of the last bastions of significant WordPerfect use.<sup>29</sup>) We made clear to students up front that it was their responsibility to work with the school's information technology staff, if necessary, to ensure compatibility with a Windows computer using Word. Even with standardizing on Word, however, we did encounter a few glitches. One student used a Macintosh®, and it took him a few tries to learn how to send his papers in a form that a Windows-using professor could grade. Another glitch involved students using older version of Word, which did not display Word's track changes and comments features in the same way as Word 2000 or Word 2002. We advise professors to tell students clearly up front what they should look for in e-graded

<sup>26</sup> Although many courts allow simultaneous paper and e-filing, some permit attorneys to forgo paper copies entirely. These courts typically set the filing deadline as the time of e-mail receipt by the clerk's database. See, e.g., 5th Cir. R. 25.2; 8th Cir. R. 25A(a).

<sup>27</sup> Reliable antivirus software is a must for any professor who adopts an electronic grading system.

<sup>28</sup> We have had only a single student (a former paralegal) tell us that she prefers WordPerfect, and even she was also proficient in Word.

<sup>29</sup> Sylanski, *supra* note 18, at 6.

papers: (1) edited text, using track changes; (2) comments in the margins, using Word comments; and (3) typed notes at the end of the document.

*Addressing Reading Speed and Comprehension.*

Reading from a computer screen, as professors must and students may do with e-graded papers, can focus the reader more intently on small-scale problems to the neglect of larger-scale issues, and can hamper the visual sense needed to judge the paper's overall effectiveness.<sup>30</sup> In addition, research indicates that people process writing on a screen differently than writing in hard copy—generally, at a slower rate.<sup>31</sup> Although the e-grader must be aware of these potential drawbacks, we believe they are quite manageable.

A professor concerned that e-grading might mask global structural problems can require students to hand in hard copies at or shortly after the e-submission deadline. She also has the option of printing out any paper whose structure merits special attention, reading the hard copy, and then commenting electronically on the paper's structure. These alternatives allow a bird's-eye view of the paper, while retaining the clarity, precision, and legibility benefits of e-comments. The professor can also keep students focused on the big picture by spending class and conference time on outlining and large-scale organization, and by tailoring her e-comments to require global editing. Finally, the professor should encourage students periodically to print and edit their work in hard copy form to draw attention to large-scale structural and organizational issues.<sup>32</sup>

Having had experience with both paper and e-grading, we do not believe e-grading has compromised either our speed or our comprehension. To the contrary, we believe that zeroing in on sections of screen text enhances our ability to diagnose writing problems quickly and to write more perceptive comments. Moreover, screen reading speed and comprehension seem

more affected by the reader's familiarity with the material<sup>33</sup> and practice at screen reading.<sup>34</sup> These factors are of less concern for legal writing professors—especially as they become more adept at e-grading—because the professors are intimately familiar with the subject matter and concepts in the assignments they are grading. Likewise, from their readings, conferences, and classes, students should be familiar with the concepts and terminology in the professor's comments. Indeed, the students entering our classrooms are increasingly technology dependent, so they may be even more practiced and efficient at reading computer screens than they are at processing words on hard copy.<sup>35</sup> And students always have the option of printing out their graded papers if they can better process e-comments in hard copy form.

### The Devil Is in the Details

While an electronic grading system does have its challenges, we believe the advantages prevail. To get those advantages and surmount the challenges, we recommend that professors think through the details before starting electronic grading. Our recommendations, borne of good and bad experiences, follow.

*Don't Rewrite Student Papers.* When grading on paper, it is impossible to make every necessary change in the text. If a student makes the same mistake repeatedly, a professor does not usually correct it each time. The same should be true when grading electronically. Rather than fix repeated errors in the text each time they arise, we fix the error once to show the student the issue and comment that the student needs to correct it

<sup>33</sup> See Crist, *supra* note 19, at 106 (“[W]hen students are reading unfamiliar text with abstract concepts and perhaps new forms of reasoning, scanning the material [into the computer for screen reading] is not in their best interests and may have a negative effect on their comprehension. ... [W]hen they read new and difficult material, they are better off reading the material in hard copy first.”).

<sup>34</sup> Cf. Matasar & Shiels, *supra* note 25, at 928 (in experimenting with “e-booking,” which allows students to read and make notes in online textbooks, the authors found that students who had initially resisted screen reading reported later in the semester that they had mastered this skill, and even found it “easier to read small sections of dense material on a computer screen than on a book page”).

<sup>35</sup> McGaugh, *supra* note 12 (manuscript at 35) (Millennials, who will enter law schools in fall 2004, “will be far less accustomed than Generation X to print resources and non-computerized activities”).

“Having had experience with both paper and e-grading, we do not believe e-grading has compromised either our speed or our comprehension.”

<sup>30</sup> Ehrenberg, *supra* note 11, at 5, 7; Silecchia, *supra* note 7, at 817.

<sup>31</sup> Crist, *supra* note 19, at 106; Ehrenberg, *supra* note 11, at 7.

<sup>32</sup> Silecchia, *supra* note 7, at 817.

“After two years of using electronic grading, we would never go back to paper grading.”

throughout the paper. This makes grading more efficient and prevents students from blindly “accepting all changes” to their papers without focusing on what changes we made and why we made those changes. (Of course, even with electronic grading, a professor must still explain macro-problems in a paper in a more general fashion, leaving students to work on those issues, often after discussing them in student-professor conferences.)

*Tell Students What to Expect and When to Expect It.* As noted above, we tell students exactly which features of Word we use in grading papers so that students will not miss important comments. We also have explicit policies on deadlines, requests for extensions of time, and penalties for late submission. Finally, we try to reduce anxiety about graded papers by telling students when we expect to e-mail graded papers.

*Make Your Life Simple by Resolving Administrative Issues Up Front.* Floppy disks, if used, must be uniform in color and appearance to avoid identifying the author.<sup>36</sup> We also insist that students follow a convention for naming their documents. In particular, document names should contain the student’s four-digit identifying number or other pseudonym and a standard description of the assignment (e.g., “Memo 1”). This is important because we store all of the papers to be graded in a single folder on our hard drives. In addition, we discipline ourselves to follow some simple rules in organizing documents on our computers. For instance, each assignment has its own folder; sub-folders within this folder separate graded and ungraded assignments. At the end of the year, we create folders for each student, with all of that student’s work in the appropriate folder.

*Back Up Files Religiously.* It goes without saying that computer hard drives can fail and laptops can be lost or stolen. If you grade electronically, a stolen laptop equates to a fire

in your office. Fortunately, it is easy to back up papers electronically. An entire year’s work can fit on a CD or a Zip drive. Other places to store backup copies include secure server space on a network (if available), external hard drives, or Web sites that offer secure, password-protected backup space. The important thing is to remember to back up frequently.

*Candidly Assess Your Preferences and the School’s Technological Capabilities.* While we firmly believe in the benefits of e-grading, it may not be the ideal system for everyone. Notwithstanding its many virtues, an e-grading system will not be effective if the professor personally dislikes it or finds it inconvenient. We realize that many legal writing professors may work with school technologies that do not support efficient e-grading, may enjoy handwriting comments and find them more personal, or may have mastered a paper-grading system that works well for them. Nonetheless, we encourage any professor who has become discouraged with paper grading to give serious thought to experimenting with an electronic system.

## Conclusion

After two years of using electronic grading, we would never go back to paper grading. The convenience makes students happier and gives us more time to focus on substance, rather than the logistics of getting papers, carrying them around, marking them up, and getting them back to students. While an electronic grading system takes planning and does raise some issues that paper grading does not, we find that the advantages far outweigh the challenges.

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<sup>36</sup> One student consistently submitted papers on a hot pink floppy disk, effectively revealing the student’s identity since no others submitted disks in that color. Since then, the author using disk submissions has required students to submit black disks, bearing in blue or black pen the student’s pseudonym and the assignment name.

## TEACHING STUDENTS TO MAKE EXPLICIT FACTUAL COMPARISONS

BY ANNE ENQUIST

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*Writers' Toolbox ... is a regular feature of Perspectives. In each issue, Anne Enquist will offer suggestions on how to teach specific writing skills, either in writing conferences or in class. Her articles will share tools and techniques used by writing specialists working with diverse audiences, such as J.D. students, ESL students, and practitioners. Readers are invited to contact Professor Enquist at ame@seattleu.edu.*

I particularly enjoy those moments in teaching legal writing when students see an intersection between writing and analysis. That's when students realize that the abilities to write well and think well are interwoven, like the warp and woof<sup>1</sup> of logical argument.

The interconnectedness of writing and analysis is well illustrated in the sentences students write comparing the facts of the analogous cases they discuss and their client's case. Students new to legal analysis often reveal their uncertainty about why they are discussing the facts of other cases by the tentative way they construct these sentences. Instead of making explicit factual comparisons, the novice legal writer is likely to start one of these sentences with something like "Like *Smith*, the defendant in the client's case ..."

This approach has at least three problems. First, merely mentioning *Smith* without more sends most readers scurrying back a page or two

to where *Smith* was discussed. The need to flip back is, at the very least, annoying to most readers, and it breaks up the line of thought the writer was developing. Second, the sentence has a basic precision problem. It is comparing a whole case, *Smith*, to a person, the defendant.<sup>2</sup> Third, and most importantly, "Like *Smith*, the defendant in the client's case ..." makes it the reader's responsibility to figure out what the factual similarity is between *Smith* and the instant case. What exactly is it in *Smith* that is analogous to the client's case?

Some students are fond of starting analogous case arguments with a sentence that begins "Like the defendant in *Smith*, the defendant in the client's case ..." or "Unlike the driver in *Lee*, the driver in the client's case ..." These beginnings are an improvement over the first "Like *Smith*" example because here at least the writer is comparing a defendant to a defendant and contrasting a driver with a driver. That lining up of one fact gives the reader a start at understanding the argument, but in most cases the writer has failed to state enough of the salient facts about the defendants or the drivers for the reader to see the similarities or differences.

Getting students to be explicit, to spell out exactly what is similar or different, is a crucial step toward getting them to realize whether the similarity or difference that they have identified is one that matters. Sometimes it helps if they make a parallel chart of the similarities or differences before they start writing sentences.

**analogous case**

defendants in *Smith*  
  
allowed daughter's boyfriend  
  
to use the family car to drive to a dance  
  
boyfriend used car for a prank  
  
and got into an accident

**the client's case**

defendants in the client's case (the Joneses)  
  
allowed family friend  
  
to use the family car to drive to work  
  
friend used car for work-related errand  
  
and got into an accident

“The interconnectedness of writing and analysis is well illustrated in the sentences students write comparing the facts of the analogous cases they discuss and their client’s case.”

<sup>1</sup> For those who have forgotten what "warp and woof" refer to, they are the intersecting yarns in cloth made on a loom. The warp refers to the lengthwise threads that are crossed by the filler woof, or weft, threads.

<sup>2</sup> Some authorities refer to this error as a faulty comparison. See, e.g., Morton S. Freeman, *The Grammatical Lawyer* 314 (1979).

“The main point to convey to students, though, is that the reader will readily see the comparison if the writer matches the sentence structure in the first and second parts of the sentence.”

*holding*

family car doctrine does not apply  
because  
defendants’ permission limited to  
driving to and from dance, not  
prank  
driver acted beyond the scope  
of permission  
defendants not liable

*argument*

family car doctrine should not apply  
because  
defendants’ permission limited to  
driving to and from work, not  
work-related errands  
driver acted beyond the scope  
of permission  
defendants should not be liable

Now the trick is to translate the chart into sentences. Conventional wisdom recommends starting the sentence with the analogous case; after all, it is the precedent that the current case will be compared to or contrasted with, and it occurred first—literally—so starting with it follows chronological order.

The main point to convey to students, though, is that the reader will readily see the comparison if the writer matches the sentence structure in the first and second parts of the sentence. In the following example, the parallel parts are labeled A and A<sup>1</sup>, B and B<sup>1</sup>, and so on.

Of course students should not get the idea that they have to rigidly and mindlessly repeat the exact sentence structure in the second part that they used in the first part, but they should see that *some* repetition makes the comparison easier for the reader to follow. Moreover, the conscious use of the chart with parallel lists and repeated sentence structures should help students and their readers see further into the analysis. In fact, they might see some differences they had not noticed before. Once the facts in the example above are lined up, it doesn’t take a genius to see that driving a car as part of a prank is, arguably, not a natural extension of permission to drive to and from a dance and therefore not something the owners of the car should have anticipated when granting permission; but a work-related errand is, arguably, a natural extension of permission to drive to and from work and something the owners of the car may have anticipated when granting permission. (Yes, that last sentence used repeated sentence structure to help make its point, and it also demonstrates that the repetition can lead to overly long sentences, which is a problem we’ll address in a minute.)

Showing students multiple examples of how factual similarities and differences can be laid out in sentences underscores how sentence structure can be used to support meaning without suggesting

“Like the defendant in *Smith*, who allowed his daughter’s boyfriend to use the family car  
A B  
to drive to a dance, the defendants in the clients’ case allowed their family friend to use the  
C A<sup>1</sup> B<sup>1</sup>  
family car to drive to work. The *Smith* court held that the defendants were not liable  
C<sup>1</sup> D  
because the driver acted beyond the scope of their permission. (cite) Their permission  
E  
was limited to driving to and from the dance; it did not extend to using the  
F  
car for a prank. (cite) Similarly, the Joneses should not be held liable because  
G D<sup>1</sup>  
the driver acted beyond the scope of their permission. Their permission was limited to  
E<sup>1</sup>  
driving to and from work; it did not extend to work-related errands.  
F<sup>1</sup> G<sup>1</sup>

to students that legal writing is merely a matter of plugging information into set formats. Below are a few more examples of comparing or contrasting charts and using “like” or “unlike” sentences.

**Example:**

defendant in *Sheldon* = Ms. Olsen (the defendant in this case)

used parents’ house ≠ used halfway house

for many activities ≠ for only a few activities

therefore house was center of domestic activity ≠ therefore halfway house was not center of domestic activity

“Unlike the defendant in *Sheldon*, who used her parents’ home for many activities, Ms. Olsen used the halfway house for only a few activities. Therefore, unlike the parents’ home in *Sheldon*, which was a center of domestic activity, the halfway house in the instant case was not a center of domestic activity.”

**Example:**

driver in *Cook*, Whitner, = Ms. Foster (the driver in this case)

paid room and board = paid room and board

family’s adult daughter ≠ family friend

lived with parents ≠ lived with Nguyens

since death of husband ≠ while attending university

“Like the driver in *Cook* who paid for room and board, Ms. Foster also paid for room and board; however, unlike Whitner, who was the family’s adult daughter who had lived with her parents since the death of her husband, Ms. Foster was only a family friend who was living with the Nguyens while she attended the university.”

In the example above, the facts in both the analogous and instant case are virtually identical on one or two points but distinguishable on other points. In situations in which some facts are analogous and others are distinguishable, students can also use the sentence structure below.

“As in *Cook*, the driver in the present case paid for room and board; however, unlike Whitner, who was the family’s adult daughter who had lived with her parents since the death of her husband, Ms. Foster was only a family friend who was living with the Nguyens while she attended the university.”

The “As in *case name*,” structure should be used with some care. Consider the example below.

**Example:**

**analogous case** = **the client’s case**  
*Chea* employee’s stress = Officer Wu’s stress (the employee in this case)

resulted from a series of incidents = resulted from three different incidents

**Incorrect:**

“As in *Chea*, Officer Wu’s stress resulted from three different incidents: the Aurora Bridge accident, the City’s failure to notify him about his exposure to HIV, and the WTO riots.”

The sentence above incorrectly says the employee’s stress in *Chea* also came from these same three incidents that caused Officer Wu’s stress.

**Corrected:**

“Like *Chea*, in which the employee’s stress resulted from a series of incidents, in the instant case, Officer Wu’s stress resulted from three different incidents: the Aurora Bridge accident, the City’s failure to notify him about his exposure to HIV, and the WTO riots.”

In some situations, students will need to list many facts in order to compare or contrast cases, and doing so in one long sentence would affect readability. For those situations, they should have some companion sentence structures in their repertoire.

**Examples of companion sentences:**

In *Cook*, because Ms. Whitner ate most meals with the family, had her own room in the family home, was assigned several family-related chores, and was included in the family holiday photo, the court held that she was “treated as a member of the family.” (cite) Similarly, because Ms. Foster ate three to four times a week with the Nguyens, shared a room with their daughter, and vacationed

“In some situations, students will need to list many facts in order to compare or contrast cases, and doing so in one long sentence would affect readability.”

“Once students get the idea, it is fairly easy for them to come up with a variety of sentence structures for making factual comparisons.”

in Oregon with them, the court should decide that she was treated as a member of the family.

In *Cook*, the court noted numerous examples of how Ms. Whitner was treated as a member of the family: She ate most meals with the family, had her own room in the family home, was assigned several family-related chores, and was included in the family holiday photo. Similarly, in the present case, Ms. Foster can also point to numerous examples of how she was treated as a member of the family: She ate three to four times a week with the Nguyens, shared a room with their daughter, and vacationed in Oregon with them.

Interestingly, however, distinguishing facts often works best through a series of sentences with juxtaposed parts.

**Example:**

*Cook* is easily distinguishable from the present case. Ms. Whitner ate most meals with the family; Ms. Foster ate only three to four times a week with the Nguyens. Whitner had her own room in the family home; Foster shared a room with the Nguyens' daughter, but after October spent most nights at her boyfriend's apartment. Whitner was assigned several family-related chores, including cooking once a week and taking out the trash; Foster was never asked to perform any chores and was instead treated more like a guest. Whitner was included in the family holiday photo and wrote her own paragraph in the family Christmas letter; Foster was included in the Nguyens' Oregon vacation, but she paid for her own room, meals, and souvenirs. Therefore, although Ms. Foster was still living with the Nguyens at the time of the accident, the court is unlikely to find that Ms. Foster was treated as a member of the family.

Once students get the idea, it is fairly easy for them to come up with a variety of sentence structures for making factual comparisons. The examples above can open their eyes to some possibilities, but they will be even more receptive to the notion of explicit factual comparisons if they see a variety of examples written in a familiar context, such as their last assigned memo or brief. Once they have thought through how the facts are similar or different, they will be ready for that next important step: discussing whether the court's reasoning in the analogous case applies and whether that reasoning leads to a similar or different result for the case they are analyzing.

Although law students often complain about writing, many enjoy the “click” that occurs in their heads when writing and analysis work together symbiotically. The result—tightly woven arguments—is the fabric of strong legal analysis.

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## PROVIDING PROCEDURAL CONTEXT: A BRIEF OUTLINE OF THE CIVIL TRIAL PROCESS

BY JUDITH GIERS

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Make the next left, then go three blocks, slow down because it's a speed trap, then turn right at the light and you are there! Where?

This is what it feels like to be a law student. We give the students detailed directions, but we often don't tell them from where we are starting. Without procedural context, our directions are just like the directions above. Useless. We tell our students the ruling from a case without describing the procedural setting of the case. We tell our students not to worry about procedure, then we wonder why they don't understand standards of review. Or sometimes we do describe the procedural setting of the case—"this was an appeal from the denial of a proffered jury instruction"—in a way that no first-year law student is likely to understand.

For better or worse, legal writing instructors must teach procedure. We often ask our students to evaluate whether a particular fictional client can overcome a motion for summary judgment on a given claim. In order to answer such a question the student must be able to understand the difference between being able to win the lawsuit and being able to present sufficient facts to get to a jury. The difference here is all about procedure. If we don't explain to the students the differing standards of proof related to different phases of the trial process, they will never fully understand why they can survive summary judgment, but still lose the case.

For these reasons, I developed this brief outline of the civil trial process. I use this almost daily in class. When we are discussing a case, the first thing we do is identify where the various issues on appeal arose in the trial process. When we are discussing a fact pattern for one of our problems, we look for where we are in the trial process. My students say that this outline helps them understand their civil

procedure classes. I hope that is true. But I know this outline helps them to understand the procedural context of the cases and fact patterns we use in legal research and writing, and that is important, not only to their grade in my class, but to their development as lawyers.

### Basic Civil (Not Criminal) Trial Process

#### 1. Prefiling

##### a. Problem occurs

Jane Doe has a serious problem—perhaps a business deal falls through, she is involved in an accident, or grandma dies with large estate and no will.

##### b. Independent efforts at resolution fail

Jane tries to work out her problem herself, but is not successful.

##### c. Client contacts lawyer

Jane calls a lawyer (you), comes in to meet with you, decides she likes you, and asks you to help her solve the problem.

##### d. Informal discovery of facts

You investigate the facts by reading documents Jane provides, viewing evidence (e.g., going to the scene of the accident), talking informally with witnesses who will talk to you, etc.

##### e. Evaluation of potential claims

You review the known facts and research the law related to claims that might be available given those facts. You evaluate whether the claim is strong enough to make it worth going through the expense, risk, and strain of litigation. You notify Jane of your decision about whether the case is worth pursuing. If you decide to take the case, you and Jane sign an engagement agreement laying out the terms of your relationship.

##### f. Pleadings (complaints/answers) drafted and filed

You draft the complaint according to local pleading rules. The complaint, in very general terms, alleges the facts that Jane (now "plaintiff") says happened and what Jane thinks the defendant should be required to do about it. For instance, the complaint could ask for damages (that is, money) or for the defendant to perform some act

(like give back grandma's antique clock). The complaint is personally given to the defendant. This is called service of process. The defendant has a set amount of time to respond to the complaint. The defendant may file an answer that admits or denies each allegation in the complaint and says why plaintiff (Jane) shouldn't win, *or* the defendant can file a motion against the complaint (see below). If the defendant does nothing, the plaintiff will win by default and a "default judgment" will be entered. The case would end there unless the defendant moves to lift the default or appeals.

## 2. Postfiling/Pretrial

### a. Motions against complaint

Sometimes there are legal reasons to ask the court to throw out the complaint or make the plaintiff fix it. For example, if the complaint is filed too late or the court has no jurisdiction over the defendant, the defendant can move to have it dismissed. If the plaintiff's complaint is so vague that you can't figure out what she is complaining about, the defendant can move to make the complaint "more definite and certain." These motions attack basic legal requirements (like jurisdiction or the timeliness of the complaint) or problems with the form of the complaint (like it is too vague); these motions should *not* attack the truth of the plaintiff's allegations (the defendant can do that later). If the court dismisses a case in response to a motion of this sort, the case is over and the court's decision to dismiss the case is appealable. If a motion of this sort is denied, normally no appeal is allowed yet and the case goes forward for trial.

### b. Formal discovery of facts

This part of the process is called "discovery." At this stage, the trial court rules provide various ways for lawyers to get a look at the evidence the other side has. For example, you can question, under oath, the party on the other side and their witnesses (depositions), you can ask written questions of the other side (interrogatories), and you can ask for copies of documents and records of the other side (requests for production). These various discovery methods are all regulated by court rules. If the parties have a dispute about whether a particular thing is "discoverable," they can file discovery motions that ask the court to

decide the dispute. These are called discovery motions. Courts hate discovery motions and you should do everything in your power to work out discovery problems with the other side without the assistance of the court.

### c. Motions for summary judgment

Once discovery is over, both sides should know almost everything there is to know about the case. At this point, either side can move for summary judgment. When you move for summary judgment, you are asking the court to decide the case before having a trial. To get summary judgment, you have to show that there is no genuine dispute about what the material facts<sup>1</sup> are, and the undisputed facts show that your side wins under the law. You have to show that there is no dispute about the facts because the purpose of a trial is to resolve disputed facts. This is usually done by a jury, after all the evidence has been presented. If you have disputed facts, then you need to have a trial and you can't get summary judgment. If one side files a motion for summary judgment, the other side must respond with an explanation of why summary judgment should not be given. Summary judgment motions are all written, although there is usually an opportunity for a hearing in which the lawyers for the parties are allowed to argue their positions and answer any questions the judge may have about the motion. If summary judgment is allowed (granted) that ends the case. Because the case is over, the other side can appeal the summary judgment decision to the appellate court. If summary judgment is denied, the case then moves forward for trial, so no appeal is allowed.

### d. Motions about admissibility of evidence, and other trial issues

When you know the case is moving forward for trial, you need to think about what trial issues are likely to arise during trial. The most common issues relate to the admissibility of evidence. If you know there is going to be a dispute about the admissibility of some of the evidence, you can ask the trial court to decide that issue before trial by filing a "motion in limine." Having evidence issues

<sup>1</sup> Material facts are facts that make a difference to the outcome of a case.

decided ahead of trial usually makes the trial go more smoothly. Lots of other issues can also come up right before the trial (e.g., should the courtroom be closed during part of the testimony or should certain evidence be allowed to come in by videotape?). Most of these issues can be resolved using a pretrial motion. Normally, a party cannot appeal a court's decision to allow or deny this type of pretrial motion because the issues being decided normally do not make or break a case, and certainly do not officially end the case, as would a motion for summary judgment.

### 3. Trial

#### a. Jury selection

This is the very beginning of a trial. Here the lawyers get to ask questions of the pool of potential jurors and weed them out for all sorts of reasons, although not for illegal reasons. Issues regarding how a jury was chosen can arise on appeal. A common issue is whether one side used illegal reasons for eliminating a particular juror (e.g., it is illegal to remove a juror based on his or her race). If you think the other side is eliminating jurors (called "striking") for illegal reasons, you must voice an objection on the record in order to preserve the issue for appeal.

#### b. Opening statements

Opening statements are just the lawyers' overviews of their cases for the jury or the judge. Very few legal issues arise during opening statements.

#### c. Plaintiff's case-in-chief

This is when you, Jane's lawyer, present her case. You introduce evidence through witnesses; the witnesses, under oath, tell the jury what happened. The lawyers on the other side can object to evidence they think is inadmissible. If an objection is made on the record, the issue is preserved for appeal.

#### d. Motions for judgment as a matter of law (sometimes called "directed verdict")

At the end of the plaintiff's case, the defendant should move for judgment as a matter of law. This motion allows the defendant to raise certain issues on appeal that, without this motion, are otherwise

not available. Failure to make this motion now is often legal malpractice.

#### e. Defendant's case-in-chief

This is when the defendant presents his or her case. Once again, evidence is introduced through witnesses. The plaintiff's lawyer can object to evidence he or she thinks is inadmissible. If an objection is made on the record, the issue is preserved for appeal.

#### f. Jury instruction conference

This is a very important phase of trial that you never see on TV. Sometime near the end of the trial, the judge will call all the lawyers together and have a conference about jury instructions. Jury instructions are, quite simply, the law put into layperson's terms so that the jury can apply the law to the facts to reach a verdict. In this conference, the judge will decide exactly how the jury instructions will be worded. In some routine cases, preprinted jury instructions can be used, but often at least a few jury instructions must be drafted by the court, with help from the lawyers. There are often major disputes about how exactly a jury instruction should be worded so that it accurately conveys the law to the jury. Disputes about how jury instructions are worded are common issues on appeal. If you argue for a particular wording and don't get it, you can appeal that after the trial is over.

#### g. Closing arguments

Here, each lawyer argue his or her case to the jury, explaining why the jury should find for his or her client based on the facts produced at trial and the law. Most lawyers try to weave the jury instructions into their argument so that the jury will see how the law that the judge is about to give them (see h. below) relates to the facts of the case.

#### h. Jury instructions given orally to jury by judge

Here, the judge just reads the jury instructions to the jury. The jury is not allowed to ask questions at this stage. Very rarely, the jury is allowed to ask written questions of the judge later, and sometimes the judge will answer a question. This is why the wording of the jury instructions is so important—there is usually no opportunity to clear up ambiguities.

i. Case submitted to jury and jury deliberates and reaches a verdict

j. Verdict delivered

The jury returns to the courtroom once it has reached a verdict. The verdict is usually read out to everyone in the courtroom by the foreperson of the jury.

k. Judgment entered

The court will enter into official court records a judgment reflecting the jury's verdict and awarding the relief the jury awarded. The date that judgment is entered is critical for the two posttrial motions in 1. below and for the filing of the notice of appeal.

**Posttrial motions:**

l. **Motion for judgment notwithstanding the verdict (JNOV) and motion for new trial**

Within a short time after entry of judgment (usually 10 days), the losing party may file a motion for judgment notwithstanding the verdict or a motion for new trial, or both. These motions are attempts to get the trial court to realize and admit that a serious error was made at trial and to either grant judgment for the losing party in spite of the jury's verdict or grant the losing party a new trial. The granting of a motion JNOV is appealable. The granting of a new trial motion is appealable in Oregon, but is *not* appealable in the federal system.

#### 4. Appeal

a. Notice of appeal

A notice of appeal is filed with the intermediate appellate court, usually called the court of appeals, within 30 days of entry of judgment.

b. Appellant's brief filed

The appellant (the party who lost at trial and is appealing) must write a brief explaining the legal error the trial court made and why that error harmed (prejudiced) the appellant during the trial. The error claimed must have been "preserved" at the trial. The appellant preserves an error by pointing out the error to the trial court as it is making the error. By and large, the appellant doesn't get to complain about errors that were not pointed out to the trial court.

c. Respondent's brief filed

The respondent (the party who won below) must write a brief responding to the arguments made in the appellant's brief. The respondent must explain why the appellant is wrong about the claimed errors by the trial court, or must explain that any error made did not harm the appellant.

d. Appellant's reply brief filed

The appellant gets to write a shorter brief to reply to the arguments raised in the respondent's brief.

e. Oral argument

Both sides get a chance to argue their positions before the appellate court, usually to a panel of three judges from the appellate court. Those three judges normally decide the case for the whole court without involving the other judges. In Oregon, each side usually gets 30 minutes to argue a civil case. In the federal system, a party may get 10 or 15 minutes or 20 minutes in an important case, or no oral argument in a run-of-the-mill case. The purpose of oral argument is to allow the judges a chance to ask questions about legal arguments. The lawyers' purpose is to answer those questions and highlight the best, most important points in their briefs.

f. Case taken under advisement or submission

This step can take many months. After hearing arguments, the court will go back and think about them. The court will look closely at whether errors were preserved (see b. above). If you argued that the trial court made a legal error (e.g., the trial court gave a jury instruction that did not properly reflect the law), then the appellate court will look at that question with no deference to the trial court. This is called "de novo" review. If you argued that the trial court made more of a judgment-call type error, such as letting in certain evidence even though you argued that it was unduly gruesome, the appellate court will look at that question while giving substantial deference to the trial judge, who was there and saw the evidence as it was coming in. These differences in the way the appellate court looks at certain kinds of questions are the result of different "standards of review." A standard of review is simply the particular way that an appellate court will look

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at a particular question. There are many different standards of review. (One of your jobs as you write an appellate brief is to figure out what the standard of review is for the issue you raise.)

**g. Written decision (opinion) issued**

Once the appellate court has agreed on a decision in the case, an opinion will be written reflecting that decision. The case will be affirmed (this is the appellate court saying the trial court was right) or reversed (this is the appellate court saying the trial court was wrong). Sometimes a reversal includes a remand for trial or retrial (telling the trial court to go ahead and try the case). Sometimes a reversal does not include a remand—that means the respondent wins the entire case. Occasionally, cases are affirmed without opinion. That just means that the appellate court thinks the trial court did not make a mistake and it isn't worth writing about it.

**h. Petition for review/petition for certiorari in supreme court**

If you lose at the intermediate appellate court, you can try to appeal to the highest appellate court, usually called the supreme court. Most supreme courts have discretionary review authority. That means the judges on those courts get to decide which cases they want to review. So, the first step at the supreme court level is to convince the court to take your case. You file a brief for that purpose, showing why your case is important enough for the judges on the supreme court to take time to look at it.

**i. Opposition to petition for review/certiorari (optional)**

Of course, your opponent doesn't want the supreme court to take your case, so he or she may file a responding brief explaining why the court should not take the case.

**j. Review allowed or denied by court**

Once the petition and any opposition are filed, the court will decide whether to take the case. There is no oral argument on this issue.

**k. If review allowed**

If review is allowed, the court will issue a briefing schedule to the parties and the case will proceed in similar fashion to the court of appeals process described above in 4a–4h.

This is a very generalized overview of the trial process. There are all sorts of other things that can happen to make a case proceed in a different fashion. But this is how most cases make their way through the civil litigation process. Parties can settle their differences at any point in this process using mediation or arbitration. These alternative forms of dispute resolution are becoming very popular.

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## THE USE OF TRIVIA AS A TOOL TO ENHANCE THE TEACHING OF LEGAL RESEARCH

BY MARK W. PODVIA

*Mark W. Podvia is Associate Law Librarian and Archivist at The Dickinson School of Law of the Pennsylvania State University in Carlisle, Pa.*

Despite what we librarians may think, the vast majority of our students do not regard legal research as the most exciting subject. While most—unfortunately not all—students realize the importance of good legal research skills, class assignments are often viewed with emotions that range from sheer boredom to outright apathy.

In an effort to increase student interest in legal research exercises, those of us who teach legal research at The Dickinson School of Law of the Pennsylvania State University have tried incorporating law-related trivia questions into our assignments. These trivia questions have ranged from law school or other legal history to questions regarding the portrayal of lawyers in books and films and on television.

Students are neither required nor expected to attempt to do the trivia questions, however the vast majority of our students do make an effort to complete them. Students who complete the trivia questions receive rewards ranging from extra credit—normally one point for getting all the questions correct—to prizes such as mugs, books, candy, or gift certificates. The prizes are sometimes awarded at a special ceremony in the library where winners are selected from among those who correctly answered all the questions. These ceremonies are always well-attended, even by those who are not in the running for a prize.

The student reaction to the trivia questions has been very positive. In an evaluation of 60 students conducted during the spring of 2003, 54 respondents indicated that they had completed at least one set of trivia questions during the 2002–2003 academic year. Two students indicated that they had answered some questions, while four had not answered any.

Of the 54 students who completed at least one set of questions, 52 indicated that they had enjoyed doing them, one did not enjoy doing them, and one left the question blank. Forty-two of those respondents said that the questions enhanced their learning experience, while 11 said that the questions did not enhance their learning experience and one left the question blank.

Of the six students who did not complete at least one set of questions, all listed a lack of time as their reason. One also noted that she did not enjoy trivia questions.

Among the comments from those who had completed at least one set of trivia questions were the following:

- The bonus questions were like dessert after the meal. They put a smile on my face.
- I'm not sure how much "relevant" learning I did as a result of the trivia questions, but they were fun!
- The questions are fun and entertaining.
- They were really fun and I learned a lot of interesting trivia.
- They added variety to the monotony of everyday work!
- They made the research assignments somewhat fun.
- Good break from law school. Helps make research more interesting.
- Fun facts.
- Good break and fun to learn new and interesting facts.
- I spent more time trying to answer the bonus and just-for-fun questions than the actual assignment.
- Doing the bonus questions brought some much needed fun (and stress relief) to homework and law school in general. Our classes often take themselves too seriously and these questions reminded me that there is life outside of law school.
- They're great for a diversion, and it's nice from time to time to try finding information that doesn't have to be cited in *Bluebook* format.
- A bit of amusement in an otherwise dull library.
- Make them even tougher!
- The nonpracticing lawyer questions were particularly interesting—you don't just have to practice law with a JD.

- It's great to see that lawyers are involved in a variety of professions showing one that a law degree can help one achieve many different dreams.
- I looked for answers and at times it became a challenge to find them.

In addition, the following responses were received from those who said that the questions enhanced their learning experience:

- The bonus questions get me thinking about the assignment. Once I'm online looking up the answers to the bonus questions, I might as well do the rest of the assignment. It's kind of like a dare, a challenge to get the right answers. Plus you can never know too much random trivia and it turns a dry topic into something you actually want to do.
- The just-for-fun questions helped to practice isolating key words for computer database searches in a way that was less onerous than standard legal queries.
- Made the assignments worthwhile and it even helped my Internet research strategies.

Those who had not completed at least one set of trivia questions provided the following comments:

- I enjoy the just-for-fun questions, but rarely have time to do more than a few of them.
- I never know more than a few. I stink at trivia!
- The trivia questions were interesting but I just didn't have the time to do them.
- Too much work in all my classes. If it isn't required, I don't do it.
- I hate looking stuff up.

Here are some of the trivia questions that we have used. You might want to see how many you can correctly answer. The answers can be found at the end.

### Lawyers on the Big Screen

The following questions are based on various films that highlight the legal profession. Guess the name of the film in which these Hollywood "attorneys" starred.

1. 1973: John Houseman as a Harvard law professor.
2. 1962: Gregory Peck as a Southern lawyer.
3. 1992: Tom Cruise as a U.S. Navy lawyer.
4. 1993: Tom Hanks as lawyer Andrew Beckett.
5. 1957: Henry Fonda as a jury member.
6. 1962: Gregory Peck as a lawyer threatened by an ex-con.
7. 1990: Harrison Ford as a prosecuting attorney.
8. 1959: James Stewart as a defense attorney.
9. 1997: Keanu Reeves as a lawyer.
10. 2000: Albert Finney as attorney Ed Masry.
11. 1959: Paul Newman played a Philadelphia lawyer.
12. 1998: Anthony Hopkins portrayed John Quincy Adams.

### Television Lawyers

Many television shows have been built around lawyers. See if you can identify the law-related television shows featuring these actors and actresses.

1. Eddie Albert played a New York lawyer who moved to the country to become a farmer in this 1960s show.
2. Tracey Needham played attorney Meg Austin during the first season of this current show.
3. Assistant District Attorney Sylvia Costas, played by Sharon Lawrence, was killed in a courthouse shooting incident on this television show.
4. William Talman, as District Attorney Hamilton Burger, rarely won a case in this drama.
5. Actress Ellen Foley portrayed Public Defender Billie Young in this courtroom series.
6. Susan Dey played Assistant District Attorney Grace Van Owen in this drama.
7. Simon Baker plays a hot-shot lawyer sentenced to community service for drug use in this television drama.
8. Actor Tom Cavanagh operated his law practice out of a bowling alley in this television show.
9. Amy Brenneman starred as Judge Amy Madison Gray in this popular television show.
10. Jill Hennessy played Assistant District Attorney Claire Kincaid in this drama.
11. James Garner was Chief Justice Thomas Brankin in this short-lived series.
12. Julian McMahon played a truly wicked lawyer in this current series.

### Lawyers and Law Students Who Gained Fame by Not Practicing Law

One of the great advantages of a law degree is its versatility, and it should not be surprising that many law students and lawyers have become famous by doing work that falls outside of the traditional practice of law. See how many of these nonpractitioners you can identify.

1. This former lawyer paid a famous visit to Atlanta, Georgia, in 1864. He is best remembered for his statement that “War is Hell.”
2. This former lawyer was elected mayor of Cincinnati in 1977, but is better known as the host of a sometimes controversial talk show.
3. This famous college gridiron coach earned his law degree from Cornell in 1894. While he coached at Cornell, Iowa State, Georgia, Stanford, and Pitt, he is best remembered as the coach of the Carlisle Indian School.
4. This Yale Law School graduate and Boston lawyer authored a Victorian mystery series that featured amateur sleuth Julian Kestrel.
5. In 1505 this German law student decided to become a monk after nearly being killed in a severe thunderstorm. He later gained considerable fame as a theologian.
6. This New York City lawyer became the star announcer of *Monday Night Football* in 1970, a position he left after the 1983 season.
7. In 1814 this 35-year-old Georgetown lawyer wrote a poem that was later set to the English tune “To Anacreon in Heaven.”
8. This lawyer portrayed the angel Gorgan on the *Star Trek* episode “And the Children Shall Lead.” Fans have rated the show as one of the worst *Star Trek* episodes ever.
9. A 1978 graduate, this author published a famous account of his first year at Harvard Law School.
10. This 1969 graduate of the Brooklyn Law School once served as a correspondent on *Good Morning America* and now hosts his own syndicated show.
11. This Hofstra University pre-law dropout was featured on the cover of *Sports Illustrated*’s swimsuit issue in 1982.
12. This former Mississippi lawyer has seen six of his 14 best-selling books made into films.

### United States Supreme Court Trivia

Established pursuant to Article III of the Constitution, the United States Supreme Court is certainly not trivial, but it does have a rich and colorful history. See how much Supreme Trivia you know about our nation’s highest Court.

1. What president appointed the most Supreme Court Justices?
2. What words appear above the main (western) entrance of the Supreme Court building?
3. How many Justices originally served on the Court?
4. In what year was the first female Justice, Sandra Day O’Connor, appointed to the Supreme Court?
5. In what building did the United States Supreme Court first meet?
6. When was the current Supreme Court building completed?
7. Who was the first Chief Justice?
8. What color robes did the Supreme Court Justices originally wear?
9. Who was the only person to serve as both President of the United States and Chief Justice?
10. As you face the Supreme Court bench, who sits to the immediate left of the Chief Justice?
11. On what date did the Supreme Court first meet?
12. Which Supreme Court Justice died in North Carolina while trying to escape his creditors?

### Answers

#### Lawyers on the Big Screen

1. *The Paper Chase*
2. *To Kill a Mockingbird*
3. *A Few Good Men*
4. *Philadelphia*
5. *12 Angry Men*
6. *Cape Fear*
7. *Presumed Innocent*
8. *Anatomy of a Murder*
9. *The Devil’s Advocate*
10. *Erin Brockovich*
11. *The Young Philadelphians*
12. *Amistad*

**Television Lawyers**

1. *Green Acres*
2. *JAG*
3. *NYPD Blue*
4. *Perry Mason*
5. *Night Court*
6. *L.A. Law*
7. *The Guardian*
8. *Ed*
9. *Judging Amy*
10. *Law & Order*
11. *First Monday*
12. *Charmed*

**Lawyers and Law Students Who Gained Fame by Not Practicing Law**

1. General William Tecumseh Sherman
2. Jerry Springer
3. Glenn S. “Pop” Warner
4. Katherine “Kate” Ross
5. Martin Luther
6. Howard Cosell
7. Francis Scott Key
8. Melvin Belli
9. Scott Turow
10. Geraldo Rivera
11. Carol Ann Alt
12. John Grisham

**United States Supreme Court Trivia**

1. President George Washington. He appointed 11 Justices.
2. “Equal Justice Under Law”
3. Six—a Chief Justice and five Associate Justices
4. 1981
5. Merchants Exchange Building, New York City
6. 1935
7. John Jay. He took the oath of office in 1789 and served until 1795.
8. The Justices originally wore scarlet-faced robes. By 1800 the Justices had switched to the simple black robes that they wear today.
9. William Howard Taft. He served from 1921 to 1930.
10. The senior Associate Justice
11. February 2, 1790
12. Associate Justice James Wilson

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## UPCOMING EVENTS

**July 10-14, 2004:** 97th Annual Meeting of the American Association of Law Libraries in Boston, Massachusetts. See <[www.aallnet.org/events](http://www.aallnet.org/events)>.

**July 21-24, 2004:** 11th Biennial Conference of the Legal Writing Institute in Seattle, Washington. See <[www.lwionline.org/activities/conferences.asp](http://www.lwionline.org/activities/conferences.asp)>.

“The time attorneys spend on case preparation is serious business.”

## PRINT SHEPARD'S IS OBSOLETE: COMING TO TERMS WITH WHAT YOU ALREADY KNOW

BY TRAVIS MCDADE AND PHILL JOHNSON

*Travis McDade is a Reference and Bibliographic Services Librarian at the Moritz College of Law—Ohio State University in Columbus. Phill Johnson is an Assistant Professor of Library Administration and Law Reference Librarian at the University of Illinois in Champaign.*

### Introduction

The law firm of Badder & Worse is located three blocks away from a comprehensive law library that is open to the public. Because of its proximity to all of this free legal material the firm has decided not to maintain its own library nor subscribe to any online legal database like LexisNexis® or Westlaw®. The two named attorneys at the firm bill their time at \$300 per hour.

The first attorney makes three separate trips to a law library three hours away, billing the client his full fee for the six-hour journeys. The other attorney drives down the street to the closer law library on three separate occasions where he uses print Shepard's® to update 25 cases relied on in a brief for his client. The total billing time for his trips to the law library amounts to eight hours.

The first attorney will eventually be sanctioned, have his license revoked for a month, and be told by his state's supreme court that his course of conduct suggests an “objective to lay hand on as much remuneration as the client was willing to provide without regard to the actual legal service furnished.”<sup>1</sup> The second attorney, who will not be sanctioned, will never be questioned on his research behavior and never give it a second thought.

Is there a difference between the two? Probably, in terms of culpability. But in terms of outcome there is no difference: both attorneys charge their clients for time that needn't have been spent.

<sup>1</sup> Matter of Comstock, 664 N.E.2d 1165, 1169 (Ind. 1996).

### Overbilling

The time attorneys spend on case preparation is serious business. A recent mini-scandal in the state of Illinois revolved around attorney Joyce Britton, who continually billed the state for up to 22 hours per day.<sup>2</sup> According to the director of the Department of Children and Family Services, the agency Britton most often charged, Britton was eventually investigated by both the Illinois State Police and the FBI.<sup>3</sup>

More mundane and low-profile overbilling cases take place all the time and, despite almost never reaching the ridiculousness of attorneys charging the equivalent of a full year of 12-hour days like Britton, result in sanctions nonetheless. The 1995 case of *Peterson v. Foote* offers a prime example of the problem of overbilling and a good synopsis of jurisprudence on the issue.<sup>4</sup>

The U.S. Court of Appeals for the Second Circuit wrote that, among other criteria, a court could excise those hours billed by an attorney that were not “reasonably expended” and which didn't show good “billing judgment.”<sup>5</sup> In the opinion the court looked at hours reasonably spent and made some severe reductions including cutting by almost two-thirds the time claimed for a fairly pro forma procedure, cutting the time spent on preparation for oral argument in half (a loss of almost 40 hours), and cutting the time spent doing research and drafting a brief by a third.<sup>6</sup>

In *Peterson* the attorney was fairly lucky (if losing almost \$10,000 is lucky). Often, shoddy research and overbilling result in more than just a trimming of billable hours—they result in sanctions. Failure to cite correct authority or pretending that countervailing precedent doesn't exist—both of which are often products of lack of updating—results in disciplinary action, usually of the Rule 11 sort.<sup>7</sup> Extreme examples of overbilling,

<sup>2</sup> *Worse Than It Looks*, Chicago Sun-Times, June 26, 2002, at 41.

<sup>3</sup> Jess McDonald, *DCFS Was Vindicated by Investigators*, Chicago Sun-Times, July 2, 2002, at 28.

<sup>4</sup> *Peterson v. Foote*, 1995 WL 118173 (N.D.N.Y. Mar. 13, 1995).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 3–4.

<sup>7</sup> Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U.L. Rev. 1, 5 (1997).

as seen with Britton, could potentially lead to criminal charges.

So while cases in which attorneys are disciplined for overbilling are rare, they are still serious.

### Electronic Updating

It was predicted in *Law Library Journal* as early as 1986 that use of full-text electronic Shepard's might soon become part of an attorney's standard of care; or, if not that, at least part of every law firm's pretrial ritual.<sup>8</sup> The then-new electronic form of Shepard's was a faster version of the print publication, whose use by attorneys in updating cases was already an expectation.<sup>9</sup> It made perfect sense at the time that electronic Shepardizing™ would be a mandated part of every attorney's arsenal. Yet now, 15 years later, print Shepard's is still taught to first-year law students in schools all across the country. The maroon volumes and their yellow supplement still darken the shelves of many law libraries. It is plausible that this tendency by law libraries and legal research professors to cling to the Shepard's books has slowed the legal profession's transition to electronic updating.

There is a range of reasons why students are taught to use the print version of Shepard's. These run the gamut from the pedagogical value of legal research theory to simply intractable tradition. Some schools feel that a major purpose of the legal research class is to give students a concrete understanding of how research has been conducted in the past; that is, by giving students an understanding of the paradigm upon which LexisNexis and Westlaw are based, they become better researchers using those databases. Others keep teaching it for the reason that they think it is still practically applicable—that law firms still rely on their young attorneys being able to update cases using the books. Some are simply loathe to get rid of books in which they have invested so much money. And some schools keep teaching the use of print Shepard's simply because that is the way it has always been done. The reasons behind

teaching law students to use print Shepard's are not as important as the fact that many students are still taught to use those books. And that, increasingly, is a disservice.

It is axiomatic that online updating is better than print. It is more efficient. It is more accurate. It is more comprehensive. It is more timely. Any attorney who uses print Shepard's to update cases has to go through a several-step process for each case. First, go to the location in the library where the print version is housed. Second, find the right page in the right edition of Shepard's. Third, locate the citation on the page and look at the citing cases, taking note of particular symbols. Fourth, update the service by checking the supplements. Fifth, phone the company to see if anything has changed more recently than the update allows. For anyone who has ever navigated the semi-hieroglyphic fine script of print Shepard's, these steps are often easier said than done. Add to this the constant need to refer to the key page in order to decipher some of the symbols and the need to take care not to miss a citation, and accurately Shepardizing a case in print quickly (that is, in under 10 minutes) is a hard-learned skill.

But that is not really up for debate. Online updating is supposed to be better—that is what makes it de rigueur at law firms. But there is another reason that ought to make it extra appealing to good legal research advocates. In the print vs. electronic debate there is one word that often gets mentioned, but never on the side of the electronic source: serendipity. One of the prior drawbacks of electronic sources was the difficulty of browsing. Researchers scanning titles in print often discovered related sources through browsing. Recent enhancements to online Shepard's and West's citation research service, KeyCite®, now permit researchers to browse online.

Tracking down ancillary cases in print Shepard's is onerous. The books are, at best, utilitarian—they are a resource upon which practitioners do not linger. Once the updating is done the books are back on the shelves until the next time. But the online updating services are almost a pleasure. There is no disconnect. The researcher is made aware of how the case has been treated by other courts and where those courts are located and is instantly transported to the exact

“It is axiomatic that online updating is better than print. It is more efficient. It is more accurate. It is more comprehensive. It is more timely.”

<sup>8</sup> Daniel Dabney, *The Curse of Thamus: An Analysis of Full-Text Document Retrieval*, 78 *Law Libr. J.* 5, 37–38 (1986).

<sup>9</sup> *Id.* Also, see generally, *Smith v. United Transp. Union Local No. 81*, 594 F. Supp. 96 (S.D. Cal. 1984); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984).

“In the not-too-distant future it may well become negligence per se to use print Shepard’s instead of the more efficient and reliable online version.”

page in question. Time that might otherwise have been spent tracking down the location of possible referencing cases can now be spent reading them, and cases several steps removed from the original are brought closer. Both online services allow quick navigation in all directions (forward, backward, lateral) from the original case.

This speed and ease doesn’t come without a price, of course, and that price has been the main impediment for practitioners. But both LexisNexis and Westlaw are making electronic updating services increasingly affordable alternatives to print Shepard’s. Either through blanket coverage, specific area plans, or the case-by-case service available to the public (and priced at under \$5 per case), both services are competing for a rapidly sophisticated market and both are willing to cut prices to get it. As the competition between the two gets stiffer, there are not going to be firms—regardless of how small—that don’t use electronic updating. With overbilling suddenly relevant, the use of print Shepard’s is a liability both in terms of existing alternatives and the fact that there is no record of use.

As for cost to academic law libraries, it has been the experience of the authors—both of whose law schools have recently been in the market for electronic updating—that maintaining subscriptions to print Shepard’s is no less expensive than a subscription to the electronic versions available. Our public monitors offer access to updating that is not only more comprehensive, timely, and easier for pro se patrons to use but also no more expensive than our former print subscriptions.

### Conclusion

The print version of Shepard’s is obsolete. A clunky, slow, and inelegant tool, it is the research equivalent of legalese. Legal writing instructors who preach concision and clarity in the written word ought not then supplement this lesson on the research end with the multistep dinosaur that is print Shepard’s and expect their students to understand the difference.

In the not-too-distant future it may well become negligence per se to use print Shepard’s instead of the more efficient and reliable online version. The time it takes to use the service, coupled with the fact that anything in print can never be fully up-to-date, makes the process seem almost absurd in light of the extant alternatives. Law schools are certainly a place where change comes slowly but the instruction of legal research ought not get caught generations behind. Teaching students how to use an updating service that is neither useful, timely, nor much used in the real world anymore seems like a big waste of class time. And the fewer print sources we force students to learn that they’re never going to use, the more they’ll pay attention to the ones we teach them that are truly valuable.

At the colleges of law at Ohio State University and the University of Illinois, where the authors work, the law libraries have said goodbye to all but a skeleton crew of print Shepard’s. On our public monitors we have subscribed to the electronic versions of KeyCite and Shepard’s, respectively, and at prices well below the print equivalent. The legal research classes have been evolving to reflect this change. Law school culture nationwide should evolve as well.

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## OUR QUESTION — YOUR ANSWERS

BY JUDY MEADOWS AND KAY TODD

*This is a column of reader-prepared answers offered in response to a specific question posed by Perspectives. Readers are invited not only to submit “answers” but also to submit “questions” they would like to see addressed in future issues.*

## OUR QUESTION

We were curious as to how extensively practitioners and researchers have adopted the electronic versions of Shepard’s®. We surveyed our colleagues to determine how many law libraries are still providing print copies of Shepard’s and why. We asked: Does your library still have the hard copy of Shepard’s or do you rely solely on electronic access? What has influenced your decision to stay or convert? What were your users’ reactions to your decision?

## YOUR ANSWERS

The answers were more varied than we had expected. We were not surprised to learn that very few court and practitioners’ law libraries use exclusively the print citators. Those that had shifted to Shepard’s online indicated the switch took a number of elements into account, including the following:

- Currency
- Organization of the information, with direct links to the cases
- Ease of use
- Efficiency
- Less expensive
- Increased preference for desktop convenience of all electronic media
- Extended potential for further research

In addition to these elements, some law librarians have eliminated print Shepard’s in a move to conserve valuable shelf space.

Judith Gill, a county law librarian, told us that her flat-fee subscription to LexisNexis® “allows us to provide the digital version for the same cost to the patrons as the print version access. We are beginning to have some success in getting people to e-mail their results back to themselves, since we don’t charge for that. It is particularly beneficial to the local university students and to the general

public, since they have no clients to bill. It’s nice to be able to remove some of the cost barriers to legal information, whether for non-lawyers, or for practitioners whose clients have shallow pockets.”<sup>1</sup>

Susan Levinkind, co-author the of NOLO Press legal research book, provided this comment: “We have Lexis.com and my opinion is that Shepard’s is the legal research tool which has most benefited from electronic format—it is very much easier to use—one integrated list, words instead of symbols, current up to the minute—and the competition between KeyCite® and Shepard’s has improved both tools. I say this even though I am not a fan of competition.”<sup>2</sup>

Despite the popularity of online Shepard’s, most law libraries have kept selected print Shepard’s for financial and content-based reasons.

For many libraries, the online version is affordable only if they also keep the hard copy. One librarian said that maintaining the print Shepard’s at her current subscription level was tied to her online contract. County librarians in New York said that their online LexisNexis subscription is through a contract negotiated at the state level. They are afraid that if they lose access to Shepard’s during future LexisNexis contract negotiations they will have a very hard time justifying the expense of repurchasing the print titles.

Many law libraries are retaining the print Shepard’s for their own jurisdiction. They do so because the hard copy has features not available in the online version, such as session laws, noncurrent codes, and municipal ordinances.<sup>3</sup> Jane Morris, director of Customer Programs, Case Law & Citations for LexisNexis confirmed the difference in print and online features: “In the state citators, which contain statutory coverage, print includes coverage of statutes that are not in current code and also session laws and other similar uncodified

<sup>1</sup> E-mail from Judith Gill, Wood County Law Library, Bowling Green, Ohio, to Judy Meadows, state law librarian of Montana (Jan. 14, 2004) (on file with author).

<sup>2</sup> E-mail from Susan Levinkind, Superior Court of California, County of Santa Clara, San Jose, California, to Judy Meadows, state law librarian of Montana (Jan. 14, 2004) (on file with author).

<sup>3</sup> In Georgia, for example, the online Shepard’s doesn’t include the 1933 Code—in effect until 1982—or Georgia session laws—critical to research on local or regional authorities.

“Despite the popularity of online Shepard’s, most law libraries have kept selected print Shepard’s for financial and content-based reasons.”

“Not surprisingly, it appears that it is the older attorneys and judges who have been the least enthusiastic about new formats.”

laws. These are not available online, only the coverage of current code. I understand from a number of librarians I’ve spoken with over the years that this is one of their principal reasons for retaining print.”

Jane Morris adds, “Also, some users prefer Shepardizing™ statutes or regulations in print, because you can easily ‘check around’ your particular subsection for other variations that might be on point for you. As I suspect you know, we have historically presented statutes as they are cited, so if the court cites to ‘section 101(a) through (c)’ it will appear in Shepard’s that way, and not under each of the three separate subsections. So it can be valuable in print to cast your eyes quickly over the page, around the citation of interest to you, to pick up any odd references you might have missed. Of course it’s possible to do this online, but for many researchers who started out using print it somehow seems easier in print. Some print products will also contain divisions (e.g., for court rules with an unusual citation syntax in *Shepard’s Federal Rules Citations*) that are not available online.”<sup>4</sup>

Helen Capdevielle, the librarian for a St. Louis firm, had difficulty with the *Shepard’s Bankruptcy Citations* print version. She told us that full citation listings for various cases were tricky to locate. “One of our bankruptcy attorneys could not figure out why the print version Shepard’s (*Bankruptcy Citations*) did not give a full list of citing references to his case. We were able to locate a list in the print *Shepard’s Federal Citations* and online via Lexis.com. When I finally heard from Lexis, they explained the connection between the various federal Shepard’s in print. However, I personally do not feel comfortable with the particular process or explanation. The Bankruptcy Shepard’s pages have a note at the bottom stating: ‘To Shepardize® a decision shown here with bankruptcy service parallel citations, please use one of the corresponding Bankruptcy divisions.’

<sup>4</sup> E-mail from Jane Morris, director of Customer Program, Case Law & Citations, LexisNexis, to Judy Meadows, state law librarian of Montana (Jan. 21, 2004) (on file with author).

I have encouraged our attorneys who do research involving bankruptcy case law to update cases and statutes online.”<sup>5</sup>

Reasons for keeping print copies varied. Judith Gill told us that her decision to retain hard copy was based on what her judges would need if online access were unavailable. “In a pinch, if all we have is a flashlight, we could still provide information support until everything got up and running again.”<sup>6</sup>

In San Francisco and other metropolitan areas, the public law libraries support paralegal training programs. The librarians feel they must have at least one print citator available for educational purposes. The authors wonder however about the disconnect of paralegal programs teaching students how to use the print Shepard’s when law school legal research programs focus on online citators.

One county law librarian, who has kept all the print titles, told us that she is unable to project what her library’s mission will be in the future. She struggles with balancing the preservation of the integrity of the collection with the cost of offering access through various formats. Another said, “I think the trend is such that, inevitably, multiple volumes of Shepard’s and their attendant supplements will be replaced by the ease of use of online sources whether these sources contain an equal level of detail and authority or not. Sadly, most patrons will gravitate toward a quick solution rather than an authoritative one.”<sup>7</sup>

The survey showed limited resistance to converting from print to online citation services. Not surprisingly, it appears that it is the older attorneys and judges who have been the least enthusiastic about new formats. Ann Fessenden, circuit librarian for the U.S. Court of Appeals for the Eighth Circuit, said, “The Judicial Conference of the U.S. eliminated print Shepard’s from the list of publications purchased for new judges’ chambers in 1992, and there was a big push to cancel the existing subscriptions. Some judges were pretty upset at first, but I think they have adjusted.

<sup>5</sup> E-mail from Helen Capdevielle, librarian, Lewis Rice & Fingersh LC, St. Louis, to Kay Todd, senior legal researcher, Paul Hastings Janofsky & Walker LLP, Atlanta, Georgia (Jan. 14, 2004) (on file with author).

<sup>6</sup> Gill, *supra* note 1.

<sup>7</sup> E-mail from Kevin Clanton, library director, Clark County Law Library, Nevada, to Judy Meadows, state law librarian of Montana (Jan. 13, 2004) (on file with author).

Of course, the Shepardizing is normally done by law clerks. Most of today's law clerks are very electronically oriented and may not even know how to use the print!"<sup>8</sup>

Judith Gill said, "There was some resistance to the change; there always is. However, our patrons had ample warning and training opportunities. There were a few stubborn die-hards ('just call me Compusaurus'), but the changing information world imposed its own imperatives. We offered support, sympathy, and good systems, and in the end, it worked."<sup>9</sup>

The San Bernardino County law librarian told us that some users at one of his branches did not like the online version because of the slowness of response. Once a high-speed connection became available the complaints disappeared. He said, "There are some people that claim they do not like or cannot use the computer and they want a staff person to do the search for them. They are probably the same people who would have asked someone to walk them through each print volume as well."<sup>10</sup>

Acceptance of online Shepard's is winning out over original resistance. In Kentucky, the Supreme Court law clerks do all the Shepardizing for the justices, and they do it online. The court's librarian, however, said, "I would never presume to take the hard copy Shepard's away from our Justices as they might use them one day. Besides, the books look really nice on their bookshelves!"<sup>11</sup>

In the law firm environment, firms have had to adjust from previously absorbing the cost of print collections as overhead to billing clients for online research. Frank Drake said, "Our attorneys, for the most part, have had no problem switching to using Shepard's on Lexis or KeyCite on Westlaw®, though a couple dinosaurs have balked, and one

branch office objected to paying (i.e., billing clients) for online charges."<sup>12</sup>

Our colleagues' thoughts on the necessity of teaching how to use the print citators were fairly consistent. One state law librarian said, somewhat facetiously, "I think that Shepardizing is the one legal research process that can be totally taught and done online—and that the books will soon disappear. The only reason law school students should even have to see the maroon volumes is to appreciate how cumbersome the process used to be. However, most students, raised in the era of computers, probably don't care to hear how hard it used to be in the old days!"<sup>13</sup>

Our prognostication is that print citators will be but a dim memory in another decade or so. Until then, we will rely on a few of the hard copies for Shepardizing statutory law and serving our older clients who have not been able or willing to embrace electronic research. Fewer schools will teach how to use print Shepard's, as they will see no reason to do so and, undoubtedly, because no law faculty will know how to use them!

Our thanks to everyone who responded to the questions we posed.

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<sup>8</sup> E-mail from Ann Fessenden, U.S. Court of Appeals for the Eighth Circuit, to Judy Meadows, state law librarian of Montana (Jan. 13, 2004) (on file with author).

<sup>9</sup> Gill, *supra* note 1.

<sup>10</sup> E-mail from Larry Meyer, Law Library director, San Bernardino County, California, to Judy Meadows, state law librarian of Montana (Jan. 13, 2004) (on file with author).

<sup>11</sup> E-mail from Carol Parris, Kentucky state law librarian, to Judy Meadows, state law librarian of Montana (Jan. 14, 2004) (on file with author).

<sup>12</sup> E-mail from Frank Drake, Arnstein & Lehr LLP, Chicago, to Kay Todd, senior legal researcher, Paul Hastings Janofsky & Walker LLP, Atlanta, Georgia (Jan. 14, 2004) (on file with author).

<sup>13</sup> E-mail from Jane Colwin, state law librarian of Wisconsin, to Judy Meadows, state law librarian of Montana (Jan. 15, 2004) (on file with author).

“Our prognostication is that print citators will be but a dim memory in another decade or so.”

“The marriage of TTS technology and the e-brief portends a significant change in the nature of the brief, or at least in the perception of it.”

## VOICE OF THE FUTURE: AUDIO LEGAL BRIEFS

BY CHRISTOPHER G. WREN

*Christopher G. Wren works as an assistant attorney general in the Criminal Appeals Unit of the Wisconsin Department of Justice.<sup>1</sup>*

*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, 357 East Chicago Avenue, Chicago, IL 60611, phone: (312) 503-8454, fax: (312) 503-2035 or to Mary Lawrence, University of Oregon School of Law, 1515 Agate Street, Eugene, OR 97403, phone: (541) 346-3848.*

The audio legal brief lurks in our future. This impending development will bring with it a number of interesting challenges and concerns for lawyers and judges, as well as for law faculty who teach legal writing.

An audio legal brief results when the electronic file used to create a legal brief passes through a text-to-speech (TTS) conversion program, yielding an audio version of the brief.

As a general matter, computer-aided TTS programs do not represent new or cutting-edge technology. Bell Labs, for example, demonstrated a speech-synthesis device at the 1939 World's Fair.<sup>2</sup>

<sup>1</sup> The views expressed in this commentary do not necessarily represent those of the Wisconsin attorney general, the Wisconsin Department of Justice, or any of the department's other employees. I greatly appreciate the thoughtful comments and suggestions of my wife and frequent writing collaborator, Jill Robinson Wren, a lawyer in Madison, Wisconsin. In my writing, as in my marriage, I accept most of them, reject a few, and welcome all.

<sup>2</sup> Bell Laboratories, Background: Bell Labs Text-to-Speech Synthesis: Then and Now, at <[www.bell-labs.com/news/1997/march/5/2.html](http://www.bell-labs.com/news/1997/march/5/2.html)> (last visited Dec. 18, 2003) (Web page archive on file with author). AT&T Labs TTS Web page <[www.research.att.com/projects/tts/](http://www.research.att.com/projects/tts/)> offers access to online demonstrations of AT&T's current computer-based TTS technology at <[www.research.att.com/projects/tts/demo.html](http://www.research.att.com/projects/tts/demo.html)> and <[www.naturalvoices.att.com/demos/](http://www.naturalvoices.att.com/demos/)> (last visited Dec. 18, 2003) (Web page archives on file with author). See also Joseph P. Olive, “The Talking Computer”: *Text to Speech Synthesis*, at <[mitpress.mit.edu/e-books/Hal/chap6/six1.html](http://mitpress.mit.edu/e-books/Hal/chap6/six1.html)> (summarizing the history of talking machines) (last visited Dec. 18, 2003) (Web page archives on file with author).

In addition, many stand-alone TTS programs exist, easily available at little or no cost over the Internet.<sup>3</sup>

Similarly, electronic briefs (sometimes called “e-briefs”) do not represent a cutting-edge technology,<sup>4</sup> even though few lawyers yet file them. Typically, the e-brief consists of the word-processing file used to create the written brief, or an Adobe Acrobat file derived from the word-processing file. The lawyer submits the file to the court, either in addition to or in lieu of the printed brief. Sometimes, the e-brief evolves into a multimedia document, with hyperlinks to cited legal authorities and parts of the court record, and even to nontext items, such as audio and video files.

The marriage of TTS technology and the e-brief portends a significant change in the nature of the brief, or at least in the perception of it.<sup>5</sup> Currently, the e-brief, even the multimedia e-brief, remains a document created primarily for visual review—for reading. The audio legal brief, however, affords aural review. Thus, the underlying document, originally intended for one of the senses (vision), will now serve a second sense (hearing).

The emerging dual-purpose character of the legal brief creates a predicament for the writer. A composition style suited for the eye does not necessarily work well for the ear, and vice versa.

<sup>3</sup> For example, ZDNet Downloads offers numerous demonstration, freeware, and shareware programs identified as TTS software (<[downloads-zdnet.com.com/3120-20-0.html?qt=text-to-speech&tg=dl-20](http://downloads-zdnet.com.com/3120-20-0.html?qt=text-to-speech&tg=dl-20)> (last visited Dec. 18, 2003). For a no-cost, relatively easy-to-use freeware TTS program, visit the Natural Voice Reader site <[www.naturalreaders.com/index.html](http://www.naturalreaders.com/index.html)> (last visited Dec. 18, 2003) (Web page archive on file with author); see also ReadPlease <[www.readplease.com/](http://www.readplease.com/)> (last visited Dec. 18, 2003) (Web page archive on file with author). In addition, the Microsoft® Windows® XP operating system includes a built-in TTS engine and, through the XP “help and support” feature, offers a link to commercial third-party providers of TTS programs at <[www.microsoft.com/speech/evaluation/thirdparty/engines.asp](http://www.microsoft.com/speech/evaluation/thirdparty/engines.asp)> (last visited Jan. 25, 2004).

<sup>4</sup> Bradley J. Hillis, *Electronic Briefs in Trial and Appellate Courts* (Apr. 20, 2000), available at <[jurist.law.pitt.edu/courttech3.htm](http://jurist.law.pitt.edu/courttech3.htm)> (last visited Dec. 18, 2003) (Web page archive on file with author).

<sup>5</sup> I realize that vision-impaired lawyers and jurists can, and sometimes do, deal with written documents (including briefs) in audio form. The documents, however, remain targeted overwhelmingly toward an audience that will review them visually rather than aurally. Here, the issue concerns the effect of TTS conversion when aural review evolves from a limited-use technique implemented out of necessity (an environment in which authors will continue to treat their documents as primarily visual artifacts) into a mainstream technique used for reasons of convenience (leaving the author routinely uncertain as to whether the audience will review the document visually or aurally).

Moreover, some conventions used in writing legal briefs—footnotes and legal citations, to name two of the most obvious—will undoubtedly involve some difficult trade-offs for writers and audiences.

The judicial use of audio legal briefs highlights troubling aspects of this development as well. A little background might help here. Beginning in February 2001, I served as my employer's representative on a state-court committee appointed to create criteria for an electronic filing (e-filing) system the Wisconsin Supreme Court hopes to create for the Wisconsin court system.<sup>6</sup> Early in the discussions, one of the co-chairs remarked that one supreme court justice especially wanted e-filed briefs in order to put them on a CD, pop the disc into a player with TTS capability (perhaps using a laptop computer), and listen to the briefs while commuting between home and the court.

As an appellate lawyer who writes briefs for his livelihood, I see this use of audio legal briefs as presenting three principal difficulties. First, I doubt the desirability of a judge evaluating a lawyer's views—and, likely, a truncated version of those views—while simultaneously navigating through traffic. That does not strike me as something to encourage.<sup>7</sup>

Second, and a complement to the distraction issue, the introduction of audio legal briefs implicates an analog of the "presentation order effect" or "stimulus effect." These phrases refer to the subtle bias that arises from the order in which a reader encounters documents, thus affecting the reader's judgment about the relevance of a given document.<sup>8</sup> Here, the effect would arise from the reader (or, in this case, listener) encountering the

<sup>6</sup> On December 18, 2002, the Wisconsin Court System Electronic Filing Committee filed its final report with the director of the Wisconsin court system.

<sup>7</sup> I'd also like to think that a commute between home and office would provide the typically overworked judge with an opportunity, however short, to take a breather from the judicial burden and listen to some music, tune in talk radio, or just travel in silence and contemplate the world passing by.

<sup>8</sup> See, e.g., Michael Eisenberg & Carol Barry, *Order Effects: A Study of the Possible Influence of Presentation Order on User Judgments of Document Relevance*, 39 J. Am. Soc'y for Info. Sci. 293, 293 (1988). Researchers in various fields recognize, and attempt to control for, the possibility that the presentation-order effect can skew results. See, e.g., Norm Otto, Scott Amman, Chris Eaton & Scott Lake, *Guidelines for Jury Evaluations of Automotive Sounds*, Sound and Vibration, Apr. 2001, at 1, 5, available at <[www.sandv.com/downloads/0104otto.pdf](http://www.sandv.com/downloads/0104otto.pdf)> (last visited Dec. 18, 2003) (PDF archive on file with author).

legal brief in a format and under circumstances that could unfavorably influence the listener's perception of the brief when he or she later reads it in the format the author intended and under circumstances the author expected would exist when the reader came to consider it.

Third, the audio legal brief gives a new meaning—and not necessarily a desirable one—to the notion of an author's "voice," which in an audio legal brief could easily take on an oral tone unanticipated by the writer. In what voice—dulcet? authoritative? aggressive? Elmer Fudd-ish?<sup>9</sup>—will the listener hear the writer's words? And could the introduction of a literal "voice" turn the audio legal brief into a form of oral argument?

Audio legal briefs will pose particular challenges for law faculty who teach legal writing. Legal writing teachers already face a formidable array of difficulties when guiding students to competence in legal communication. Thus far, however, those difficulties have not included teaching the hybrid form of communication inherent in the audio legal brief. Although overlap exists, legal writing instruction typically deals separately with principles and practices associated with written communication (briefs, memoranda, etc.) and those associated with oral communication (mainly oral argument). The audio legal brief will almost certainly put considerable pressure on that dichotomy and require legal writing teachers to develop new theories and techniques for teaching dual-purpose communication.

Regardless of whether the audio legal brief looks like a desirable development for legal practice and academia, the march in this direction appears inevitable. Technology has moved inexorably toward integration of media of all sorts, and the audio legal brief represents simply another instance of that progression. Unlike most other integrations, however, the audio legal brief also has the potential to affect the rights and privileges of litigants. That prospect argues for anticipating and confronting with special care the promise and danger this particular technological innovation carries with it.

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<sup>9</sup> Fans of Bruce Springsteen cannot forget—or, in some cases, forgive—Robin Williams' rendition of "Fire" as sung by Elmer Fudd. Robin Williams, *Elmer Fudd Sings Bruce Springsteen (Fire)*, Throbbing Python of Love (Casablanca Records 1983).

“Regardless of whether the audio legal brief looks like a desirable development for legal practice and academia, the march in this direction appears inevitable.”

“Practice seems to have forever changed the way I read and write, erasing my memory of how I read before I became a lawyer.”

## TEACHING STUDENTS ABOUT THE LEGAL READER: THE READER WHO WON'T BE TAKEN FOR A RIDE

BY JESSICA E. PRICE

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*Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own “teachable moments for teachers” to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: [sirico@law.vill.edu](mailto:sirico@law.vill.edu).*

I have just completed my first year of teaching legal writing as a full-time professor. I came to the job from litigation practice, and I assumed that my real-world experience and practical focus would make it easier for me to relate to students. Not long into my first semester of teaching, I began to realize that my practical orientation worked both to my benefit and my disadvantage.

My practical knowledge and experience did help to engage students in the subject, because they were naturally excited to learn about the things that lawyers really do and how to do those things well; at the same time, however, my immersion in law practice put me at a distance from students. Practice seems to have forever changed the way I read and write, erasing my memory of how I read before I became a lawyer. I find that I need to make an extra effort to understand my students' struggles with writing for a legal audience.

The first time I really became aware of the gulf that my practice-based mind-set was creating between my students and me was during a one-on-one conference with a particularly dedicated

student. This student could form a logical syllogism with ease, understood that he had to spell out the reasons behind his conclusions, and had excellent basic writing skills. Yet, his legal writing was just so-so, and I was becoming frustrated with my inability to help him rise to my expectations.

His approach was to build up to his conclusion, explaining each sub-point of the analysis in sequence, and then hitting the reader with the overall conclusion at the end, like a punch line he was waiting to deliver at just the right moment. He also tended to explain his reasoning too thoroughly, making slightly different points that were really the same. The overall effect was similar, perhaps, to the discussions taking place in his traditional doctrinal classes, where the analysis builds slowly over the course of the hour until the answer is finally revealed, by the professor, at the end.

In written comments on his first, short pieces, I explained that he needed to work on the pace of his writing, to deliver his analysis more directly and concisely. But those comments did not seem to help, and his first draft of a research memo exhibited the same problems. I tried to provide more specific comments this time around, explaining that he would communicate his ideas more easily to the reader if he would put his conclusions up front, and then prove them, and if he would cut out or combine repetitive points of analysis.

These comments encapsulated my only major concern with his writing, and I expected him to focus on them in his conference. Instead, he directed our discussion to other, minor concerns, pointedly avoiding those comments. His obvious reluctance to discuss my major concerns puzzled me. I viewed the “pace” issue as an easy and noncontroversial one, a simple, practical suggestion about how to write the way that lawyers want to read. If he understood the comments, the problem would be easy to fix and would dramatically improve his legal writing.

Near the end of the conference, as he started to skirt around the issue, I finally realized why he was hesitant to discuss it; he was defensive. He understood my comments perfectly, but he had rejected them. He explained that making the changes I suggested would lessen the persuasive impact of his analysis. He viewed his “build up to

the punch-line” approach as an intrinsic characteristic of his “writing style,” a characteristic that made his argument more persuasive, adding value to his writing that I simply did not seem to understand.

Immersed in my real-world orientation, a world in which virtually all the legal writers I was familiar with, at least all of those whom I considered effective, approached their legal writing in the way I was suggesting, I had not even considered the possibility that he would take these comments about his pace as a personal criticism.

Sitting across the table from him, I now saw that he did not view my comments, as I did, as practical suggestions, but instead heard them as criticisms of his general writing style, that amorphous concept that students seem to think of as some inborn, unchangeable way of writing, naturally flowing from one’s brain to one’s pen, separating the people who can naturally write well from those who cannot.

Mostly, I felt embarrassed. My comments had given him the impression that I disliked his style. By characterizing the problem as one relating to the pace of his writing, and by telling him that he would communicate more effectively if he followed my suggestions, I suggested his way of writing failed to effectively communicate his logical thoughts.

In reality, there was no such problem with his writing style. His writing was pleasant and easy to read, and his build-up-to-the-punch-line approach communicated the same information that I wanted him to communicate. I just wanted him to state his conclusions first and then prove them, simply and concisely.

Why? If his approach communicated his logic effectively, why was I insisting that he change it? The problem, I realized, was not with his writing; it was with his readers. His readers were not the ones he seemed to have in mind. He was thinking of the sort of readers I remembered from my undergraduate studies, readers who were critical and sharp-minded, but also patient, and interested in understanding the way that a writer thinks about a problem rather than immediately dissecting the problem through the reader’s own eyes. Readers who will come along for a leisurely ride on the writer’s train of thought.

These were not the readers I was familiar with from law practice. The legal readers I had in mind are impatient and rabidly critical. They are not much interested in understanding the way a writer thinks but instead only in what the writer thinks, and why, so that they can decide whether they agree or disagree, as quickly as possible.

This epiphany made my job a lot easier. I stopped talking about my student’s writing style and started talking about his audience. I explained that in my experience most legal readers do not enjoy the carefully crafted, slow-building development of a writer’s ideas. Instead, they want to start judging the writer’s conclusions, right from the beginning. They see such judgment, in fact, as the entire goal of reading. So, they want to hear the writer’s conclusions right off the bat, and then hear the reasons why the writer thinks those conclusions are correct. In fact, they usually spend their reading time picking apart the writer’s analysis in the back of their minds.

This simple change in approach did the trick. He got it. Almost immediately, he stopped worrying about whether his writing style was good enough. He revised his draft, and it was terrific, from my legal-reader’s point of view.

I had another such experience while working during the second semester. This time, I was working with a student who was able to zero in on effective, persuasive reasons to support one point of view or another in class discussions and in one-on-one conversations, but who struggled with basic writing skills, and failed to present written arguments in the sort of logical framework her future audience would expect. She used rules of law as support, which she would draw on occasionally during the course of her argument, sort of as side notes—rather than using the rules themselves as structures around which to craft her argument.

I had offered extensive comments on this student’s first draft of a brief and additional comments on supplemental drafts she asked me to review. Though my written comments explained exactly what I thought she needed to do—for example, identifying the rule of law that she needed to begin with, and identifying the thesis statements that did appear in her analysis—they seemed to provide little help, and she was not making much progress.

“I explained that in my experience most legal readers do not enjoy the carefully crafted, slow-building development of a writer’s ideas.”

“I focused on the way a legal reader approaches reading: as an exercise in criticizing someone else’s argument.”

Again, we had a breakthrough in conference. After almost half an hour of talking about particular problem areas in her draft, and of her inability to understand some of my comments, and the ways in which she thought she had responded to them, in short, getting caught up in the minutiae of her writing, I realized that she was not really hearing me. We were talking past each other. I was telling her that her reader wanted to hear her conclusions up front, and then, in a logical, almost mathematical order, the sub-points supporting those conclusions. She was telling me that she was giving the reader all of that, pointing to the places where she had, indeed, written her thoughts on the paper (just not in the order I wanted).

I closed her paper and started talking about lawyers, rather than about her writing. I focused on the way a legal reader approaches reading: as an exercise in criticizing someone else’s argument. I explained that the legal reader prefers to hear the conclusions up front because this makes it easier to start criticizing the writer’s thoughts right away.

I could see a spark of recognition in her eyes. She said that she was sure her professor last semester had tried to tell her this too, but that only now was it making sense. We immediately worked on one of her paragraphs right there in the conference, and she improved it more than she had in the previous hours and days of line-by-line rewriting and editing. Later in the week, she brought in another revision, which showed similar improvement. This one short conversation about what legal readers expect had a greater impact on her writing than did hours and hours of focus on the particular words and sentences she wrote.

I recognize that, as Kathryn M. Stanchi has pointed out, by guiding students to conform their writing style to their audience’s expectations in this way, I choose “to ease the students’ entry into the [legal] community, not to challenge the customs or culture of the community.”<sup>1</sup> I have yet to discover an effective way to appropriately challenge the

customs or culture of the legal writing community within my first-year writing course, although I have occasionally discussed such issues with individual students. I believe, though, that I better prepare my students to think critically about the traditional conventions of legal writing when I accurately frame my criticisms as based upon the expectations of the legal audience, and not upon a belief that the legal audience’s expectations represent an intrinsically superior form of communication.

I still struggle to maintain a balance between keeping my practice-based orientation and really understanding how my students see the task of legal writing. When I find myself couching my comments in terms of the “effectiveness” of a student’s writing, I realize I am falling back into the mind-set that the conventional, familiar approach to legal writing is the only way to communicate ideas “effectively.” Remembering these first-year experiences helps get me back on track.

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<sup>1</sup> Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7, 22 (1998).

## USING TECHNOLOGY TO FILL THE GAP: NEITHER PAPER NOR LIVE CLIENTS

BY TIMOTHY D. BLEVINS

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*Technology for Teaching ... is a regular feature of Perspectives, designed to introduce and describe the ways in which teachers of legal research and writing are using technology to enhance their teaching. Through Volume 9, this column was edited by Christopher Simoni, Associate Dean for Library and Information Services and Professor of Law, Northwestern University School of Law. Readers are invited to submit their own "technological solutions" to Mary A. Hotchkiss, Perspectives Editor, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, WA 98195-3020, phone: (206) 616-9333; fax: (206) 543-5671, e-mail: hotchma@u.washington.edu.*

In an earlier issue of *Perspectives*, Ben Bratman described the dilemma of trying to inject a sense of reality into the writing of the objective memorandum.<sup>1</sup> Every year we legal writing professionals gather, and every year we discuss with one another the dry delivery of paper facts to first-year students.<sup>2</sup> Generally class size and the need for uniformity among the multiple sections that legal writing professors teach necessitated the need to employ the "KISS" principle in making memorandum assignments.<sup>3</sup> Bratman incorporated the use of an upper-level law student to act the part of the client and he allowed his students to ask the client questions. While questioning brings a level of reality to the assignment, there are some risks in using actor-clients. To reduce the risks, I have turned to technology.

Before describing how I use technology to convey information to the students, there is a need to describe some of the risks, beyond those

<sup>1</sup> Ben Bratman, "Reality Legal Writing": *Using a Client Interview for Establishing the Facts in a Memo Assignment*, 12 *Perspectives: Teaching Legal Res. & Writing* 87 (2004).

<sup>2</sup> LWI biennial meetings in even years; ALWD biennial meetings in odd years.

<sup>3</sup> KISS: Keep It Simple Stupid.

described in the earlier article, of using the "live" client. Due to time constraints in the writing course, I would not be able to meet, in order to ensure the felicity of the interview, with each of the multiple sections I teach and I would, from necessity, need to rely on the actor remaining true to the part. This is nearly impossible to imagine. Group dynamics being what they are, with some students easily assimilating into a cohesive group while others remain on the fringes of the group, I feared that the actor may interject some information into one interviewing session that was not there in another session, either through voice inflection or kinesics.<sup>4</sup> Additionally, our team of writing professors wanted to use the same facts so that all our students would be working on the same problem.<sup>5</sup> Using one client in 12 sections of legal writing was not a task we wanted to deal with, fearing the interviewee would become dry in the presentations with a result similar to facts on paper.

Then there were the logistics of finding interview spaces, a desire that we would want smaller groups of students in the interviews, and accounting for any absent students. If the interview could not be available for an absent student at a later date, we would need to re-create the interview on paper, a derivative of the facts on paper problem.

Finally, in discussions with the team, I recognized that many of our students receive and process information differently than their professors do. It was felt that we should take advantage of the "small screen" to present the facts. Now, we needed to avoid the Sgt. Joe Friday delivery attitude of "The facts. Just the facts, ma'am."<sup>6</sup> Bring on the technology in the form of a camcorder and a delivery system.

<sup>4</sup> Not an unfounded fear as I have used live clients at another school.

<sup>5</sup> I began writing in the first person because the program went through massive reconstruction; a process that involved myself and the director. I moved to the third person in my writing because a team of legal writing professors formed and began using the new program in 2003. It was the team that made the program a success.

<sup>6</sup> Of course, this reference to the 1960s television series *Dragnet* and Sgt. Joe Friday was lost on many of our students. It is my hope that I have not also lost all of the readers of this article.

“Using one client in 12 sections of legal writing was not a task we wanted to deal with, fearing the interviewee would become dry in the presentations ...”

“Uniformity was achieved in the problem presentation, and every student heard the tonal inflections and watched the body language of the interviewee.”

First, however, we needed to create a single issue problem for the assignment. Surprisingly, the scenario described in the earlier article neatly parallels the problem we put together for our students. The earlier article described an intentional infliction of emotional distress issue wherein the author directed the students not to deal with any potential false imprisonment issues; we developed a false imprisonment issue and then directed the students to ignore any intentional infliction of emotional distress issues.<sup>7</sup> The scene for our problem takes place in a hospital room between a patient and a physician.

There was no budget for this project, and it began at a time when the school was in its earliest formative years. We did have a VHS format camcorder, and I was willing to use my own VCR for playback. I sat down and wrote out a client interview scene, my first screenplay. I recruited a staff member from our library to play the interviewee part, I would be the off-camera interviewer, and another member of our staff would become our cameraman.<sup>8</sup> Editing would be a nightmare because it would be necessary to use outside resources to cut and splice the film, an expense I did not want to address. My goal was to get the interview in the can in a single, uninterrupted scene. “Take one” had a few problems, but “take two” was a success.

With the scene on tape I set about making multiple copies. I figured six copies would be enough. I placed all copies, except the master, on reserve in the library. I asked that the library code the tapes for a maximum check-out period of four hours and to ask the viewers not to take the tapes out of the library.<sup>9</sup> The next step was to create the assigning memo.

<sup>7</sup> Bratman, *supra* note 1, at 88.

<sup>8</sup> My gratitude to Virginia Musso and Warren McEwen for their contributions in scene one and Professor Gerry Glynn for his contribution in scene two.

<sup>9</sup> These were not real problems; we had two VCRs and one portable television in the library. Technology, like the school, was in its infancy.

The assigning memo was the firm’s interoffice memo written from the senior partner to the associate. The crux of the memo was that the firm was considering taking on a new client and that the associate needed to craft a not-more-than-six-page memorandum that analyzed the potential for a false imprisonment claim. The client wanted us to look at every avenue available that would prevent the defendant from ever doing this to anyone again. The assigning memo went on to state that, as it was the firm’s policy to videotape every client interview, with the client’s permission, a copy of this client’s interview was available to them through the firm’s library. The senior partner recognized that there may have been other causes of action that the associate may identify after watching the videotape. However, the associate was to focus only on this one cause of action. As such, the senior partner had assembled a criminal statute and three cases that the associate should apply to the facts. No other authorities could be cited in the associate’s memorandum.<sup>10</sup> A date was assigned for the completion and submission of the memorandum.

The exercise worked beautifully. The students watched the videotape in groups or by themselves. We had engaging classroom discussions regarding the content of the interview. The students began submitting separate portions of the memorandum and, later, they completed drafts of the memorandum. Along the way we provided extensive feedback on the writing, the analysis, and the citation form, and, when necessary, we challenged students on the use of relevant facts. Uniformity was achieved in the problem presentation, and every student heard the tonal inflections and watched the body language of the interviewee.

<sup>10</sup> The wording was carefully chosen. We did not want the students to cite to any other authorities (closed universe) but we also did not want to prevent the student from doing some independent research in the applicable areas of law.

There were a couple of problem areas, both of which can be easily corrected in the assigning memo. First was the spelling of proper names. The writing team certainly knew what we expected the students to hear and understand when it came to names. What we had failed to account for in our planning was the cultural backgrounds of our students. The pronunciation of a name does not always result in one simple spelling of that name. Future assigning memos will include this detail. Second was the students' understanding of what was meant by the phrase "to look at every avenue available." The professors wanted the students to advise the senior partner of what could be done under the law, both criminally and civilly. Initially, many students recognized for their professors that the criminal aspects would be handled by the state attorney and since we were a "firm," the students would deal only with the civil side of the problem. Clarity in the assigning memo should resolve this conflict.

This semester we digitized the videos into a format that could be viewed on a computer, and we delivered the video via the program's Web page. We have added a couple of VCRs and televisions are more accessible, but we also have many computer terminals from which the students can now access the information. They can watch it as often as they want to watch it, and they can stop the video to make notes whenever they need to stop it. We are currently working with our information technology (IT) personnel, our main campus video production personnel, and our School of Art and Theater students to create better quality computer files that are more readily accessible to students at off-campus locations, which should make the videos even better in the future.<sup>11</sup>

<sup>11</sup> In addition to the people I have already identified in this article, I want to acknowledge Jeff West and Rob Pamplona, our on-campus IT gurus; Nancy Strohmeyer, my colleague and associate director of the library; Associate Dean Glen-Peter Ahlers, interim director of the Legal Research and Writing program; and Helia Hull, assistant professor, along with Visiting Professors Anjali Nayyar and Julie Koves, for their assistance and feedback in creating this project. Dean J. Richard Hurt has allowed us the opportunity to test and evaluate the use of this technology.

For the purists amongst our legal writing community, I know you will recognize that videotaping client interviews is not standard operating procedure in most firms, and the use of video files prevents students from interacting with the clients. However, I believe that the use of technology in the practice of law will lead to the creation of more client files that contain computer video files to preserve the information and to insulate practitioners from claims of malpractice. As far as interacting with clients, well, I will save that skill training for my client counseling course where, I am certain, we will revisit some of these video files before moving on to live interviews.

The project was declared a success; the students themselves declared it so in their course evaluations.<sup>12</sup> Overall the students appreciated working with a client rather than getting the facts on paper. We have moved on to another level in delivering the assignments, and we look forward to improving the process as we learn.

Barry University invites you to review the videos and supporting materials. Please go to <[www.scribes.org/tblevins](http://www.scribes.org/tblevins)>. From this Web site you may view the videos or download them for later viewing.

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<sup>12</sup> There were a couple of discouraging remarks made by students, and we may not be able to overcome each problem. We will, however, take into consideration the student comments as we move to the next generation of problem delivery.

“This semester we digitized the videos into a format that could be viewed on a computer, and we delivered the video via the program’s Web page.”

“In fact, if a brief or memo or letter is to hold its reader’s attention, the prose should have enough variety, enough rhythmical life, to help the reader stay alert.”

## THE SUBTLETY OF RHYTHM

BY STEPHEN V. ARMSTRONG  
AND TIMOTHY P. TERRELL

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Compared to painting, writing suffers from a terrible aesthetic disadvantage. To the eye, pictures offer the immediate and unmistakable pleasures of movement and variety. Writing, in contrast, plods dismally and interminably across the page, a string of black marks on white paper, one word after the next without variation or escape. By its nature, it is monotonous.

Most legal writers are either oblivious to this disadvantage or have long since stopped struggling against it. If prose is by definition the tedious march of sentences across the page, so be it. Thus, they are unabashed when they perpetrate paragraphs as rhythmically boring as this one:

The conflict, moreover, involves an important question of law on which a uniform nationwide rule is essential. For example, it would be intolerable for the minimum wage provisions to have different applications in different regions of the country. In the same way, it would also be intolerable for there to exist in some states but not others a judge-made exception to the priority of a secured creditor’s perfected lien under the UCC. The continuing inconsistency on these matters could have serious economic consequences because creditors would be reluctant to finance businesses in regions where their liens may not enjoy true priority.

This paragraph has the rhythmical characteristics of most legal prose. Each sentence is longer than the previous one. There is almost no internal punctuation. And, when there is some, it shows up in the same place: near the beginning.

Legal writing doesn’t have to be so monotonous. In fact, if a brief or memo or letter is to hold its reader’s attention, the prose should have enough variety, enough rhythmical life, to help the reader stay alert. That variety is more than a defense against the reader’s ever-lurking boredom. It is also a subtle but powerful method of adjusting the emphases of your prose, so that it does a more precise, nuanced job of indicating to readers what is most important and what is less so — without resorting to the crudities of underlining and italics.

Many of your students may be inclined to believe that the skill to write rhythmically interesting prose is so much a matter of inborn talent that they shouldn’t even aspire to mastering it. They are wrong, of course. The basic methods are relatively simple.

The first step: Vary the lengths of your sentences.

The second step: Vary the internal structure of the longer sentences. You can do this in three ways:

- Create pauses of slightly different lengths by using different kinds of punctuation: a dash slows a reader down a little more than a semicolon, which in turn creates a longer pause than a comma.
- More important, vary the number of words between the pauses.
- Vary the complexity of the syntax. The more complex it is, the more it will rely on subordinate clauses and phrases that interrupt the sentence’s flow.

Here is an example, from Churchill’s *History of the Second World War*, of these methods at work:

We must take September 15 as the culminating date. On this day the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London.

It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters. ...

The variation in sentence length is obvious. But look also at the variation in syntax between the second and third sentences, on the one hand, and the fifth and sixth. In the former, Churchill goes out of his way to interrupt the sentences: Notice the interruption between the second sentence's subject and verb and, in the third sentence, the choppy rhythm in the middle. In the fifth and sixth sentences, he creates a quite different effect. In the fifth, the only internal punctuation comes near the end. There, instead of interrupting the sentence dramatically, he prepares for an ending that is anticlimactic in structure as well as content. In the sixth, to pull us quickly through the sentence, he allows himself a casual syntax, built around two "ands," that high-school English teachers warn against.

The variations in rhythm do more than keep us alert. Churchill forces us to slow down, almost to stumble, where the content is dramatic and deserves close attention. Then, when he moves on to less important material, he relaxes the syntactic tension and allows us to speed up. A superb job, and superbly unobtrusive.<sup>1</sup>

Now an example from a lawyer, though one equally famous—or, to some tastes, notorious—as a writer. Here is Justice Cardozo's opening to *Palsgraf v. Long Island R.R.* As in the previous example, the variations in rhythm are not random, but help to reinforce the substance. And they result from the same techniques that Churchill used: varying the lengths of sentences and varying their internal structure.

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package

<sup>1</sup> This example is drawn from Richard Lanham's *Style: An Anti-Textbook* (1974). Lanham takes the longer passage from which these sentences come as the occasion for a detailed, illuminating analysis of the "music" of Churchill's prose.

was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.<sup>2</sup>

Note in particular the sentences after the word "moving"—how their choppiness mirrors the chaotic movements being described. And the very short "fireworks" sentence near the end, with its verb at the sentence's end, is a masterful example of nonidiomatic syntax that draws us up short.

Both Churchill and Cardozo write a prose that has a distinctive flavor and is more "literary" than most legal prose. Your students probably shouldn't be encouraged to emulate them, at least not in their early years as lawyers. Can you teach them to use these techniques without their being accused of literary affectations? Of course. They may have to limit the range of their rhythmical effects so their style does not draw attention to itself. But there is still room for skill.

Let's return to the example with which we began. If you were to give this to your students as an editing exercise, their goal would be not only to improve the rhythms, but to use the rhythms to underline what matters most about the content. Here's one possible result:

Moreover, the conflict involves an important question of law on which a uniform nationwide rule is essential. It would be intolerable, for example, for the minimum wage provisions to be applied differently in different regions of the country. Similarly, it would be intolerable for courts in some states, but not in others, to grant exceptions to the priority of a secured creditor's perfected lien under the UCC. This inconsistency would do more than inconvenience specific

<sup>2</sup> 248 N.Y. 339 (1928). Cardozo's opinions have generated a vast commentary. For one example of a very close reading of *Palsgraf* and another famous Cardozo opinion—*Hynes v. New York Cent. R.R. Co.*—see Richard Weisberg, *Poetics* (1992).

“Both Churchill and Cardozo write a prose that has a distinctive flavor and is more ‘literary’ than most legal prose.”

“This version is not flashy, but it is much more effective.”

creditors. In a region where creditors are reluctant to finance businesses because their liens may not enjoy true priority, the economy could suffer serious economic consequences.

In the revision, the editor has made two changes:

- More variety in the lengths of sentences—not a lot, but just enough to make a difference. In particular, note the relatively short fourth sentence.
- More variety in the sentences' structure. Punctuation now shows up occasionally in the middle of a sentence, not just at the beginning. And it is used to emphasize what is important. In the second sentence, we are forced to pause after “intolerable.” In the third, the short phrase “but not in others,” separated from the rest of the sentence by commas, highlights the disparate results that are central to the paragraph's argument.

This version is not flashy, but it is much more effective. And its effects are more than cosmetic: They refine the content, by sharpening the play of nuanced emphasis that should be part of how we think, not just how we write.

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## LEGAL RESEARCH AND WRITING RESOURCES: RECENT PUBLICATIONS

COMPILED BY DONALD J. DUNN

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*This bibliography includes references to books, articles, bibliographies, and research guides that could potentially prove useful to both instructors and students and includes sources noted since the previous issue of Perspectives.*

Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. Rev. 49 (2003).

Provides guidance to attorneys preparing briefs for electronic submission. Describes the trends toward accepting and encouraging electronic communications in the court system, “analyzes current research on electronic communication,” and “proposes a new ‘tech-rhetoric’ for the legal community and offers guidelines and strategies for lawyers to use in electronic communication with the courts.” *Id.* at 49–50.

John D. Edwards ed., *Iowa Legal Research Guide*, 2003 [Buffalo, NY: William S. Hein & Co., Inc., 546 p.]

Designed for attorneys and other researchers seeking the key resources associated with a particular area of law in Iowa. Includes “Starting Points” for basic sources, a “Research Process” section detailing steps to follow and sources to consult, and a “Final Checklist” as a double-check of the procedures followed.

Raymond T. (Tom) Elligett Jr. & John M. Scheb, *Stating the Case and Facts: Foundation of the Appellate Brief*, 32 Stetson L. Rev. 415 (2003).

Shows that “[t]he appellate brief’s Statement of the Case and Facts can catch the judge’s attention, introduce the party’s theme and show the court that the writer’s side should prevail. ... [I]n many cases, how the advocate develops and presents the facts can be the turning point in the appeal.” *Id.* at 424.

Elizabeth Fajans et al., *Writing for Law Practice*, 2004 [New York, NY: Foundation Press, 593 p.]

Organized around three modes of written communication in the law, with each requiring specialized writing skills: litigating (conceptualization), informing and persuading (clarity of analysis, organization, and expression), and rulemaking (precision).

Stacey L. Gordon, *Online Legal Research: A Guide to Legal Research Services and Other Internet Tools*, 2003 [Buffalo, NY: William S. Hein & Co., Inc., 412 p.]

Provides detailed information about the nine major subscription databases and an overview of more than 160 free Internet sources. Also includes information relating to the federal courts and state legal and government agencies.

Thomas R. Haggard, *Legal Drafting in a Nutshell*, 2d ed., 2003 [St. Paul, MN: West, 375 p.]

Covers both the thinking process and writing process of legal drafting, with chapters on style and usage, ambiguity avoidance, terminology for creating different legal consequences, and proper uses of definitions. Also covers understanding the client’s objectives, factual investigation, conceptual approaches, organization, and canons of interpretation.

Catherine F. Halvorsen & Diana C. Jaque comps., *Keeping Up with New Legal Titles*, 95 Law Libr. J. 579 (2003).

Succinct reviews of 15 law-related books published in 2002 and 2003.

Robert Haibin Hu, *Research Guide to Chinese Patent Law and Practice*, 2002 [Buffalo, NY: William S. Hein & Co., Inc., 390 p.]

Provides an overview of the Chinese patent system, current laws and regulations, administrative and judicial decisions, international treaties and agreements, patent agents, specific legal experts, statistics and other publications, organizations, and resources.

Robert M. Jarvis et al., *Amicus Humoriae: An Anthology of Legal Humor*, 2003 [Durham, NC: Carolina Academic Press, 272 p.]

A reprint of 25 of the funniest law review articles from the past 50 years, arranged under law students, law professors, lawyers, judges, and legal scholarship. Includes a comprehensive bibliography.

Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 *Widener L.J.* 597 (2003).

"[E]xplore[s] how and why judges use verse in their opinions and ... evaluate[s] the advantages and disadvantages of this form." *Id.* at 598.

Christina L. Kunz et al., *The Process of Legal Research*, 6th ed., 2004 [New York, NY: Aspen Publishers, 530 p.]

Presents an introduction to the process of legal research and includes illustrations and examples of research problems. Shows best research practices with coverage of electronic research integrated into the text.

Terri LeClercq, *Guide to Legal Writing Style*, 3d ed., 2004 [New York, NY: Aspen Publishers, 140 p.]

Provides a focus on the nuances of legal writing style. Discusses basic skills, style issues, and clear organization. Gives how-to guidance and examples of both good and bad writing. The new revision emphasizes legal ethics. Accompanied by a CD-ROM with multiple exercises.

Jeffrey Metzler, *The Importance of IRAC and Legal Writing*, 80 *U. Det. Mercy L. Rev.* 501 (2003).

A very brief article describing how the proper use of IRAC (issue, rule, application, conclusion) can provide organization and focus to legal writing.

Susumu Miyazaki, *Should Japan Adopt a Plain Language Rule?*, 13 *Minn. J. Global Trade* 1 (2004).

First discusses "the historical background, structures, strengths and shortcomings of the plain English doctrine." Then outlines "Japan's current situation and its regulation regarding disclosure as an alternative solution." Finally, discusses "the new movement to introduce a plain language doctrine in Japan and the effects of the combination of current regulation and the plain language rule on the financial system." *Id.* at 2.

Deborah Mongeau, *Public Beach Access: An Annotated Bibliography*, 95 *Law Libr. J.* 515 (2003).

Provides extensive annotations of law-related resources covering legislative, regulatory, and judicial aspects of public beach access from the view of both the beachgoers and shorefront property owners.

Nadia Nedzel, *Legal Reasoning, Research, and Writing for International Graduate Students*, 2004 [New York, NY: Aspen Publishers, 350 p.]

Developed for the needs of international graduate students in LL.M. programs. Takes a skills-oriented approach to the "what" and "how" of legal research and writing.

Brandon D. Quarles & Matthew C. Cordon, *Legal Research for the Texas Practitioner*, 2003 [Buffalo, NY: William S. Hein & Co., Inc., 423 p.]

Focuses on the types of resources and research processes commonly encountered by modern-day practitioners. Covers basic skills as well as more involved areas such as jury instructions, briefs and records, civil jury verdicts, and attorneys general opinions. Includes 15 charts.

.....

Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing*, 2d ed., 2003 [St. Paul, MN: West, 480 p.]

A selected compilation of cases designed to illustrate advanced legal writing. Chapters cover statutes or rules, jury instructions, contracts, issues, objective statements of fact, and persuasive statements of fact. Also covers research memos, argument, pleadings, notices of motion, motions, orders, interrogatories, general correspondence, opinion letters, wills and trusts, and research papers.

Suzanne E. Rowe, *Oregon Legal Research*, 2003 [Durham, NC: Carolina Academic Press, 240 p.]

Demonstrates how to find and stay up-to-date with Oregon cases, statutes, regulations, and court rules. Explains how to locate secondary materials for Oregon law. Includes tips for proper citation form for Oregon sources.

Mary Whisner, *Re: Memos*, 95 Law Libr. J. 601 (2003).

Discusses the various types of written memoranda that librarians often use to transmit their results to the patron. Provides ideas relating to purposes, style, and format. Includes an annotated checklist of tips for writing these memos.

Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 Stetson L. Rev. 247 (2003).

Especially useful to legal writers is the section of the article titled “The Opinion” (at pages 257–66), which discusses structure, style, and audience.

Mark E. Wojcik, *Illinois Legal Research*, 2003 [Durham, NC: Carolina Academic Press, 248 p.]

Demonstrates how to find and stay up-to-date with Illinois cases, statutes, regulations, and court rules. Explains how to locate secondary materials for Illinois law. Includes tips for proper citation form for Illinois sources.

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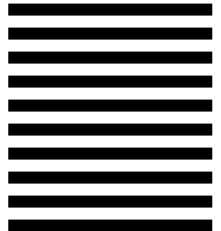
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