

Beyond Course Evaluations: Yay/Nay Sheets

By Jessica L. Clark

Jessica L. Clark is a Visiting Associate Professor of Legal Writing at The George Washington University Law School in Washington, D.C.

Last year, I taught legal research and writing as an adjunct professor for the first time, and I eagerly and nervously anticipated my first set of course evaluations. Although my evaluations were overwhelmingly positive, they were not without criticism. Had I known about these critiques earlier, I might have been able to make some adjustments during the semester, rather than waiting until the spring to react to them. Also, in hindsight, knowing about the positive comments throughout the semester might have made me more confident in the classroom, and inspired me to try some different teaching techniques.

This year, I am in a full-time teaching position, and student feedback is even more important to me as I consider a teaching career. With teaching as my full-time job, I have more time to devote to class preparation and development of exercises and assignments for my students, but I also have more time to think about whether I am doing a good job. A good job, to me, means giving my students what they need to learn legal research and writing, or, being an effective teacher. One way I can measure my teaching effectiveness is, of course, by the standard end-of-semester course evaluations, but I decided to try something new this year to get feedback from students earlier in the semester—the Yay/Nay sheet.¹

Opportunities for student feedback happen in every class; at the end of each class period, students

can evaluate what just happened during the class.² Law teachers should take advantage of these opportunities for collecting student feedback to improve both the students' learning experience and the teacher's teaching experience.³ One way

¹ I can't take credit for the idea to use Yay/Nay sheets. The idea came from another teacher—my mom, Mary Wherry.

² Yay/Nay sheets are not the only way to get student feedback at the end of a class period. Gerald F. Hess wrote about several methods for teachers to get student feedback throughout the semester, including "the minute paper" and "teacher-designed feedback forms." Gerald F. Hess, *Student Involvement in Improving Law Teaching and Learning*, 67 UMKC L. Rev. 343, 346 (1998). Minute papers are designed to have the teacher ask a specific question about the class and to have the students anonymously write answers. *Id.* The teacher-designed feedback forms focus on asking students for input about their learning styles. *Id.* Unlike these two techniques, Yay/Nay sheets are unlimited in terms of what students can write as feedback.

³ Terri LeClercq also wrote about methods for getting student input, including the note card method, to improve teaching by responding to students' needs. Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. Legal Educ. 418, 419 (1999). With this technique, students "write down the major concept of the class" and questions. *Id.* Teachers can then use this information in planning the next class to address problems, misunderstandings, or questions from the class. *Id.*

In This Issue

149 Beyond Course Evaluations: Yay/Nay Sheets
Jessica L. Clark

156 Teaching Non-Litigation Drafting to
First-Year Law Students
Lisa Penland

Brutal Choices in Curricular Design ...

160 Peering Down the Edit
Libby A. White

165 Creating an Appellate Brief Assignment:
A Recipe for Success
Kathleen A. Portuan Miller

169 Beyond *Black's* and *Webster's*: The Persuasive
Value of Thesauri in Legal Research and Writing
Brian Craig

Writing Tips ...

178 Framing Academic Articles
Gregory G. Colomb and Joseph M. Williams

186 In Memoriam: Joseph M. Williams

187 Legal Research and Writing Resources:
Recent Publications
Barbara A. Bintliff

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

Editor

Mary A. Hotchkiss
University of Washington School of Law
and the Information School
Seattle, Washington

Editorial Board

Barbara A. Bintliff
University of Colorado
School of Law Library
Boulder, Colorado

Elizabeth Edinger
Catholic University of
America Law Library
Washington, D.C.

Penny A. Hazelton
University of Washington
School of Law Library
Seattle, Washington

Judith Meadows
State Law Library
of Montana
Helena, Montana

Kathryn S. Mercer
Case Western Reserve
University School of Law
Cleveland, Ohio

Helene S. Shapo
Northwestern University
School of Law
Chicago, Illinois

Craig T. Smith
Vanderbilt University
Law School
Nashville, Tennessee

Kay Todd
Paul Hastings Janofsky
& Walker
Atlanta, Georgia

Opinions expressed in this publication are those of the authors and should not be attributed to the Editor, the Editorial Board, or West.

Authors are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. The *Perspectives* Author's Guide and Style Sheet are posted at west.thomson.com/newsletters/perspectives/perstyle.aspx. Manuscripts, comments, and correspondence should be sent to:

Mary A. Hotchkiss, William H. Gates Hall, Box 353020, Seattle, WA, 98195-3020. Phone: 206-616-9333
Fax: 206-543-5671 E-mail: hotchma@u.washington.edu

To subscribe to *Perspectives*, use the card inside this issue, access west.thomson.com/newsletters/perspectives, or contact:

Ann Laughlin, West, Customer and Product Documentation, D5-S238, 610 Opperman Drive, Eagan, MN 55123. Phone: 651-687-5349
E-mail: ann.laughlin@thomsonreuters.com

west.thomson.com/newsletters/perspectives

Printed by West as a service to the
Legal Community.

continued from page 149

to collect this student feedback is to use Yay/Nay sheets at the end of each class period, as I did this year. In this article, after describing the Yay/Nay sheet, and how I use it in class, I give some examples of the student feedback I received from the sheets, including some discussion of how I used that feedback. Then, I conclude with some observations about the benefits of using Yay/Nay sheets.

The Yay/Nay Sheet

The Yay/Nay sheet is a simple and effective tool for collecting student feedback. It is a half sheet of regular sized paper, with two columns, one column headed “Yay” and the other “Nay.”⁴ It looks like this:



In the first class of the semester, I introduce the Yay/Nay sheets. I explain that a Yay is something the students liked about the class, or something they would like to see or do again. A Nay is something they did not like, or something they wish we would have done in class. I ask the students to write at least one Yay, and at least one Nay on the half sheet of paper that I distribute at the end of class. There are no limits on what the students can write, and these sheets are anonymous.

To use this technique effectively, I dedicate the last three to five minutes of each class period for the Yay/Nay sheets; this way the students have class time to fill them out, which likely improves both the content and number of student responses. On the first day of class, I also explain the purpose of these feedback forms: for the students to help me improve their experience in the course. I then reinforce this purpose by responding to the

student feedback throughout the semester, for example, by altering class content to cover a topic more in-depth or revisit a topic, by discussing something in class to clarify or provide additional examples, or even by changing my teaching methods.

During the fall semester, my students submitted more than 200 Yay/Nay sheets with a variety of comments ranging from praise about the class content to criticism of the class meeting time. Throughout the semester, based on this student feedback and my reactions to it, I improved my teaching, and, ultimately, improved my students’ learning experiences. To illustrate the types of feedback I received, and how I used the feedback to improve my teaching, I have provided several examples of Yays and Nays.

Yays

In some ways, the Yays are the best part of the Yay/Nay sheets because they are both professionally and personally satisfying, as well as fun to read. Reading the Yays reinforces my decision to take this full-time teaching job; I took this job because I think I can be a great teacher. Reading positive feedback makes me feel good because I like knowing that my students think I am doing a good job. The Yays do more than make me feel good; they also let me know what students liked about class content, an exercise or assignment, and my presence in the classroom. The positive feedback encourages me to continue developing my teaching techniques, and it keeps me excited about and engaged in teaching my classes. Generally, the Yays fall into two categories: comments about my presence in the classroom and comments about class content, including information and presentation.

First, the Yays about me, or my presence in the classroom, are especially entertaining and satisfying. Students notice things like my enthusiasm for teaching (“I don’t know how you have so much energy in the morning!”), and my attempts at using humor with a classroom full of law students (“Even though you didn’t get a room of law students to crack up, I enjoyed the light-

“I ask the students to write at least one Yay, and at least one Nay on the half sheet of paper that I distribute at the end of class.”

⁴ I print two Yay/Nay sheets per piece of paper, and cut the paper in half before distributing the sheets.

“Admittedly, the Nays are not as fun to read as the Yays. ... Like the Yays, the Nays fall into two general categories: constructive comments about the class content and complaints.”

hearted banter.”). Comments like these make me laugh, but I also appreciate that at least some of my personality comes through in the classroom.⁵ In another Yay about my presence in the classroom, a student wrote: “Overall classroom demeanor. I appreciate your professionalism.” Comments like this make me feel good about the relationship I am establishing with my students because I get the sense that my students like and respect me as a teacher. That is comforting, and, I think, a sign that I am doing a good job.

Second, students often wrote Yays about the class content, ranging from the actual information I gave them to my method of presenting the material. For example, students wrote as Yays: “helpful reminders on organization,” “I thought it was very helpful to suggest keeping a journal and a written record of sources reviewed and their purpose,” and, simply, “good information.” Students often wrote about specific things I talked about in class and how they could use that information. For example, “I liked the practical tips. You’re right—they sound simple, but something like scheduling time to brainstorm could really help me get ‘unstuck.’” These comments were useful to me because I knew that students understood the material I presented, and even thought of practical uses for the information.

Comments about the methods I used to present the class material were also common Yays. For example, one student wrote, “I found the PowerPoint helpful as a means of following the discussion.” Another student commented, “Slides and lecture were clear and useful.” These Yays let me know I gave my students the information they needed, and presented it effectively.

Nays

Admittedly, the Nays are not as fun to read as the Yays. Even so, the Nays can be just as satisfying on a professional level, because I can use the constructive

comments to identify things I can do to improve my teaching. Like the Yays, the Nays fall into two general categories: constructive comments about the class content and complaints.

First, students often wrote constructive Nays, where they identified something they did not like and also offered a suggestion for improvement. For example, after one of the first classes of the semester, several students wrote Nays about the handouts used during an in-class exercise not being available prior to class (e.g., “It would have been useful for the [handout] to have been assigned and read before the class.”). The students did not need the handouts prior to class for the exercise to work, but I could understand the desire to prepare for class by reading the handouts in advance. I reacted to this feedback by making the handouts available in advance for the following classes, and by sending an e-mail to the students letting them know when I posted the materials. In following classes, there were Yays about the handouts and other course materials being available online before class (“making PowerPoint available online”).

Second, there were Nays that were simply complaints that I would not change simply because the students did not like them, and in some cases, complaints I could not do anything about. For example, one student wrote a Nay about having to do an assignment that required work outside the classroom (“difficult to find time to do reading and assignments for class, helpful if everything is covered within class time”). My response to this was nothing—well, a laugh, and then nothing. Another student wrote as a Nay: “[handouts] not handed out in class.” For this Nay, I considered making and distributing hard copies of the materials I assigned as reading for the next class, but decided against it because I was committed to using electronic documents only, both to cut down on paper usage, and also because I think most law students are comfortable reading electronic documents.⁶

⁵ When I attended the AALS Workshop for New Law Teachers in June 2007, several panelists advised be yourself and let your personality come through in the classroom. I also read Kent Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. Legal Educ. 247, 247 (1993) (“be yourself as a teacher”).

⁶ See Kristen E. Murray, *My E-Semester: New Uses for Technology in the Legal Research and Writing Classroom*, 15 Perspectives: Teaching Legal Res. & Writing 194, 195–96 (2007) (describing students’ comfort with electronic documents).

There were also Nays about the class meeting time, 8 a.m. Often, students wrote simply “8:00 a.m.” as a Nay, and “too early.” One student even apologized on behalf of the class: “Sorry we’re all so sleepy.” The class time was not something I could change, for a number of reasons, but I understood why the time was a Nay (it was a Nay for me, too!). My way of dealing with this Nay was to make the class meeting time less burdensome by providing the students with engaging material and effective presentation in every class. Still, when the only comment in the Nay column was about the class meeting time, I considered that a positive because there was nothing negative about what actually happened in the class.

Yay and Nay

There were also comments that appeared in the Nay column for some students and in the Yay column for others. In one class, I spent about five minutes discussing footnotes and attribution, providing a basic introduction to the different types and purposes of footnotes. The Yay/Nay sheets from that class included comments about this part of the class in both columns: as a Yay (“discussion of footnoting principles/citation was good review, even if just to hear it again”); and as a Nay (“footnotes discussion seemed unnecessary”). These comments that fall into both columns are not surprising, and they serve a useful purpose in reminding me that my students have different experiences and different needs. With that in mind, I think about teaching both to the students who want more on a particular topic or concept, as well as to the students who might be bored because they are already comfortable with that topic or concept. Sometimes, the result is that I post additional reading or teaching notes after class; that way students that want more can get more. I also try to come up with exercises that we can use in class to put the information in practice, instead of merely lecturing about it.

Benefits of Using Yay/Nay Sheets

There are several benefits to using Yay/Nay sheets to collect student feedback throughout the

semester, for both the teacher and the students.⁷ First, my students and I benefit from the relationship that develops from using the Yay/Nay sheets. Students do not regularly have the opportunity to give their professors feedback until the end of the semester, when it is too late for the professor to do anything in response for that class of students. Setting up open communication from the very beginning of a course can make a teacher more approachable to the students, and the teacher may feel more comfortable in the classroom, especially after doing something in class that was initiated because of student feedback. There is also a sense of respect that comes from using Yay/Nay sheets; I let my students know I respect their opinions enough to ask for them, and even respond to them, which fosters a mutually respectful relationship. This relationship also helps foster a good classroom dynamic because students likely feel more comfortable talking in class or volunteering their ideas when they are regularly asked to give their positive and negative opinions about things in class.

Students appreciate the opportunity to give feedback with the Yay/Nay sheets. In fact, several students wrote Yays about the Yay/Nay sheets. For example, one student wrote “I like that you are seeking feedback,” and another student wrote “I love Yay/Nay sheets. Yay indeed!” The Yay/Nay sheets give the students the sense that they can influence the course, and in fact they do. When I respond to the feedback they give me, they know that I actually care about their opinions (I do), and that I am willing to make changes to accommodate their ideas (I am). Also, giving feedback and experiencing my positive responses to this feedback give my students a sense of ownership about the course, which also contributes to the good relationship we have.

Second, the student feedback gives me a good sense of whether my lesson plans were effective in terms

“Setting up open communication from the very beginning of a course can make a teacher more approachable to the students, and the teacher may feel more comfortable in the classroom. ...”

⁷ See LeClercq, *supra* note 3, at 427 (discussing the benefits of asking for student feedback during the semester).

“The feedback about class content and teaching techniques is useful to me because I find out whether my lesson plan worked in the classroom.”

of content and execution. When I see positive comments about a class exercise or discussion, I am confident that my execution of the exercise or discussion was effective, and that the students appreciated that use of class time. For example, following a class discussion critiquing legal writing excerpts for which I assigned reading with discussion questions before class, almost every student included a Yay about the exercise (e.g., “I liked the assignment [with questions] before class. I think it made the class more productive.”).

Hearing from students about how a particular class compared to other classes is also useful because that information helps me think about the lesson plans for future classes. For example, one student wrote a Yay after the same class critiquing legal writing: “Best class yet. Use of the examples was very helpful. This should be done in every class.” This comment was of course enjoyable to read, but also useful to me as the teacher because I started thinking about ways to incorporate more legal writing examples into the course. Even though I could not re-create the specific class exercise for every class, I could add more examples and critiquing through peer review or in-class rewriting assignments.

The feedback about class content and teaching techniques is useful to me because I find out whether my lesson plan worked in the classroom. I can then continue to use that technique or that type of exercise in future classes with confidence that my students will benefit from it. I also like knowing that the students think I gave them something useful. As the teacher, I know that I have important lessons to teach my students, but reading Yays that use the same words I used in class that day, or show how a student can use what I taught, means that, to at least some students in my class, the lessons are getting through. Also, asking students for their reactions to the specific class immediately following the class has the benefit of more accurately capturing what happened in class that day. Unlike with course evaluations where students might overemphasize a minor incident or complaint, because that is what they remembered at

the end of the semester, using the Yay/Nay sheets at the end of class results in students focusing on that class period only. With the class focus, the students often give me specific feedback about class content and teaching techniques, instead of the more general comments I would receive in end of semester evaluations.

Third, the student feedback is a powerful motivator. I love how I feel after a great class—excited and motivated to continue improving my teaching and my classes. Reading the Yays that show the students also thought it was a great class is truly satisfying, and I can reread the Yays when I need a confidence boost! The Yays also force me to maintain a standard; once students have praised my teaching style, my attitude, or the class exercises or assignments, I do not want to let them down. The Nays inspire me to think about how I can improve my teaching and reach out to more students in the classroom.

During each class, I usually have a sense of how things are going. There are times when I think an exercise worked well, and times when I think my lecture points on a particular topic did not give the students the information I intended to give them, or perhaps just not as clearly as I planned. While I am standing in front of the classroom, I am aware of the classroom dynamic and think I have a good sense of when students are responding to the material. But, without Yay/Nay sheets, I am not sure if the students share my evaluation of the class. Reading the Yay/Nay sheets often reinforces my thoughts about the class, makes me confident about my teaching abilities, and helps me identify ways to improve.

Finally, and related to all of these benefits, using Yay/Nay sheets makes me a better teacher, and that is the ultimate benefit to the students. Before using Yay/Nay sheets, I waited until the end of the semester to get a sense of what the students thought of me as a teacher and of the course. I did not go into class each day thinking about what I would do that would wind up in the Yay column or the Nay column. Since I started using Yay/Nay sheets, I still do not go into class wondering what will end up in those columns. But I do go into each class confident that I have an

interesting, engaging, worthwhile class planned, and that I will reach my students to give them something they need.

I look forward to teaching my classes because I have a sense that I have established a good relationship with my students, even if I don't know them very well, based on their feedback throughout the semester. I am motivated to keep the Yay columns filled, and the Nay columns empty, but I also look forward to the Nays that I can do something about, which will lead to improvements that benefit the entire class. Using Yay/Nay sheets has increased my confidence in my teaching abilities, and that contributes to my overall job satisfaction, which no doubt, translates into the classroom. In the words of one of my students: "Yay indeed!"

© 2008 Jessica L. Clark

“I am motivated to keep the Yay columns filled, and the Nay columns empty, but I also look forward to the Nays that I can do something about. ... ”

Another Perspective

“When I think of teaching first-year law students to conduct effective legal research, I think of teaching a young child to ride a bike—a two-wheeler without training wheels. Few parents would expect their children to jump up onto a bicycle and ride off without a hitch. Rather they expect a few (if not many) tumbles and some tears and scraped knees.

In an attempt to make the process as pain-free as possible (both for their children and for themselves), most parents begin the riding lesson by holding onto the back of the seat to steady the bicycle while their children ‘ride.’ Feeling secure, the children are able to establish a kinesthetic understanding of bicycle riding that they would be unable to gain if all their effort was concentrated on attaining a balance that is far beyond their reach. With the hands of caring parents steadying them, they are able to work the pedals and steer a straight course down the sidewalk. They may even pick up enough speed to leave their parents a bit worn as they struggle to keep up—one hand firmly grasping the seat and holding it steady. But while the children certainly can propel the bike forward under their own power, they really have not yet learned to ‘ride’ the bike (despite their insistence that they have).

In order for each child to take the next step and truly learn to ride the bicycle, the parent must let go of the seat. This may result in the occasional crash at first, but Lance Armstrong would never have become a three-time champion of the Tour de France if years earlier his parents had not finally let go.

Conscientious parents, however, don't just let their children continually fall down, hoping that eventually something will ‘click’ and the child will ride off down the sidewalk. They coach and assist, provide the insights of experience, offer feedback (both as to specific technique and general approach), and act as a cheerleader throughout the process and when success is finally achieved.

There are many parallels between teaching a young child to ride a bicycle and teaching a law student how to conduct effective and efficient legal research. These parallels are rooted in learning theory. Learning, like riding a bicycle, is active. It takes effort and concentration, and it can be hard work.”

—Kristin B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning Through Learner-Centered Assessment*, 94 *Law Libr. J.* 59, 60 (2002).

Teaching Non-Litigation Drafting to First-Year Law Students

By Lisa Penland

Lisa Penland is an Associate Professor of Law at Drake University Law School in Des Moines, Iowa, where she teaches Legal Writing. She also teaches Contract Drafting in the May and August interim sessions each year.

Often transactional and non-litigation drafting is given scant attention in the first-year legal writing curriculum. The lack of attention given to transactional drafting is not due to the wish of legal writing professors to limit its coverage; rather, it is more likely a result of an already overtaxed curriculum and just not having a sufficient amount of time to cover the subject. Legal writing and lawyering skills professors would be hard-pressed to identify any nonessentials in the first-year curriculum that could be omitted to make more room for non-litigation drafting. Many schools have realized, however, that non-litigation drafting is an essential lawyering skill that should be integrated into the required curriculum and have incorporated a drafting course as a required or available third semester of legal writing.¹ In addition, non-litigation drafting is an animal of a different sort than the typical first-year topics and many legal writing and lawyering skills professors are not trained to teach transactional drafting.²

¹ Of the 181 law schools that responded to a 2007 joint survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute, six law schools require law students to take a transactional drafting course and 54 schools offer a transactional drafting course that fulfills the advanced writing requirement. <www.lwionline.org/survey/surveyresults2007.pdf> (last visited January 12, 2008).

² Legal analysis and writing taught in the first-year curriculum are oriented to analytical and persuasive writing; the goal of non-litigation drafting is to use language in a very precise way to translate the intent of the parties into a legal document. The method of the latter is specifically and precisely different than analysis and persuasion. See generally Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2007); George Kuney, *The Elements of Contract Drafting with Questions and Clauses for Consideration* (2003); Charles M. Fox, *Working with Contracts: What Law School Doesn't Teach You* (2002).

The challenges for first-year legal writing professors are identifying the core drafting essentials and determining how to teach them in a very limited amount of class and curricular time. This challenge led me to develop a 50-minute drafting class incorporated in the legal writing curriculum that provides the students with the “bare bones” of transactional and non-litigation drafting.

In crafting a drafting class period, I had three essential goals. As a no-nonsense, skills-oriented teacher, I wanted to provide the first-year law students with information that would be useful and relevant to the practice of law. Also, because the law school curriculum generally fails to acknowledge the large role that transactional law plays in the practice of law (and that more than half of our students will practice in this area),³ I wanted to spark the students’ interest in transactional practice. My thought was that if a student’s interest is sparked early in her legal career, she might then be able to take courses that would be helpful once engaged in transactional practice. Finally, because Drake Law School has long emphasized ethics and professionalism in the law school curriculum,⁴ I wanted to integrate a discussion of how ethics and professionalism relate to drafting. Goals readily in hand, I set out to devise a class that would fulfill them. Little did I know that it would take three years to arrive at an optimal method for achieving those goals.

In the first year that I set out to teach a 50-minute class on non-litigation drafting, I crafted a general overview lecture based on a standard textbook on

³ I discuss these concepts in greater detail in another article. See Lisa Penland, *The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid?*, 6 *Appalachian J.L.* 73 (2006).

⁴ The integration has developed into an ethics and professionalism orientation extending over the first year of law school focusing on the rules of ethics, conventions of professionalism, and concepts of integrity.

“The challenges for first-year legal writing professors are identifying the core drafting essentials and determining how to teach them in a very limited amount of class and curricular time.”

legal drafting,⁵ integrated a chapter from an ethics and professionalism textbook devoted to writing,⁶ and prepared an assignment asking the students to draft a mutual release. The broad overview lecture certainly didn't provide my students with any concrete skills they could incorporate in the practice of law.⁷ The assignment did nothing to further skill development as most students ran to the form books and copied a mutual release from the forms. The 50-slide PowerPoint accompanying my lecture was dry and long and did little to create even the smallest spark of interest in practicing transactional law. I did find that the integration of the ethics and professionalism text along with an assignment related to it fulfilled my goal of shedding some light on how ethics and professionalism are implicated in non-litigation drafting. Having struck out on two of my goals, but having made some headway in developing the kind of class to which I aspired, I returned to the chalk board the next year.

In the second year, I invited a transactional lawyer to speak to the class. I continued to integrate the ethics and professionalism reading and assignment. In addition, in another assignment, the students were required to locate two different forms from the form books in the library. The transactional speaker was engaging; he relayed a few war stories and did a great job of giving the students some insight into the dynamic of putting a deal together. While the transactional speaker truly set off fireworks for transactional practice, the students gained very few skills useful and relevant to the practice of law. The ethics and professionalism continued to work well. I still wasn't where I wanted to be in achieving my goals.

⁵ Susan L. Brody, Jane Rutherford, Laurel A. Vietzen & John C. Dernbach, *Legal Drafting* (1994).

⁶ Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* ch. 8 (2006).

⁷ I do not attribute this to the textbook on which I relied. Rather, I tried to include too many concepts in a 50-minute lecture. In part, this was due to my own inexperience in teaching non-litigation drafting. Until I had taught contract drafting, it was unclear to me which concepts were the most important concepts for first-year students to take away from a drafting class.

In the third year, I decided to use my experience from having taught contract drafting through three interim sessions to design the class. I knew I wanted the students to take away something useful; however, having taught an entire course on drafting, I was skeptical about being able to convey something truly useful, relevant, and practice-oriented in a 50-minute class. I put together a drafting highlights lecture in which I focused on what I considered to be the most important aspects of non-litigation drafting. It was clear that the most useful and relevant information would be highlighting essentials of drafting and highlighting those areas in which the students ought to educate themselves when engaging in transactional drafting.⁸ Thus, the class contained three components: a drafting highlights lecture, a quiz based on the lecture, and the continued integration of the ethics and professionalism text. At last, I had found the solution. The class provided useful, relevant, practical information to my students; it lit a spark in the students about transactional lawyering; and the students came away with a sense of how ethics and professionalism are implicated in non-litigation drafting.

The highlights lecture is introduced by noting the different types of legal drafting: (1) objective/advisory drafting in which documents are prepared that analyze the law in order to understand the law or advise a client; (2) litigation drafting in which documents are drafted as a part of legal or administrative proceedings; and (3) "deal and death" drafting, which are documents that have a legal effect in and of themselves. I always advise the students that I use the terms deal and death drafting because they have a nice "ring," but that non-litigation drafting is actually broader than these terms imply. It includes not only contracts, wills, and trusts, but legislation, corporate documents, and other similar documents. I like to highlight that the purpose of objective and

⁸ Indeed, in my view, the biggest danger is failing to give students enough knowledge to realize that, without further education (either in class or by self-educating), a law school degree does not in itself give them the competency to draft non-litigation documents.

“[H]aving taught an entire course on drafting, I was skeptical about being able to convey something truly useful, relevant, and practice-oriented in a 50-minute class.”

“If the students take nothing else away from this class, I heartily desire that they understand that they *shall* always use ‘shall’ to create a covenant.”

advisory documents is to think about a mess; the purpose of litigation documents is to fix a mess; and the purpose of deal and death documents is to prevent a mess. Essential to creating a spark of transactional interest in the students is emphasizing that the role the attorney plays in the transactional process, while representative, is not nearly as adversarial as the role of the litigation attorney. Clients are generally motivated to complete a deal and are pleased when it happens; preventing a mess can be vastly more rewarding than trying to clean up after the mess has occurred!

The highlights lecture then goes on to discuss the “bare necessities” of contract drafting, which include six concepts: (1) building blocks aren’t just for kids; (2) learn the language; (3) a good mechanic knows her parts; (4) have a love/hate relationship with forms; (5) there is no such thing as boilerplate; and (6) use plain language.⁹

In discussing the building block concept, my emphasis is that the students learn that a contract is made up of building blocks. To translate the deal your client wants to achieve into a document that will be legally effective, the lawyer must understand that there are components of a contract that affect that translation.¹⁰ Just as choosing a particular word is essential in translating one language into another, choosing the language you will use in crafting a contract determines what kind of a component you have created and its legal import. The building blocks are representations and warranties, covenants, conditions precedent, rights, discretionary authority, and declarations.¹¹ Within this portion of the highlights lecture, I transmit some basic

and essential information about each of these components.

Turning to the concept of learning the language, I emphasize that specific language in a contract connotes specific building block concepts. If the students take nothing else away from this class, I heartily desire that they understand that they *shall* always use “shall” to create a covenant. In addition, I caution that the words “must” and “may” and other terms of art must be used appropriately to create particular types of building blocks.

When we discuss the concept that a good mechanic knows her parts, I provide the students with a contract that is annotated to demonstrate the macro organizational structure of most contracts: preamble, recitals, statement of consideration, definitions, action, representations and warranties, covenants, conditions, endgame, general provisions, and signature lines.¹² In addition, introducing the concept that students should have a love/hate relationship with forms emphasizes that forms are a helpful starting point, but because each contract or deal is unique and because there are countless drafting errors in many book forms, the forms should only provide a jumping-off point.

I also like to warn students that there is no such thing as boilerplate. Many lawyers merely lift what they consider to be boilerplate from other forms and contracts believing that these general provisions are interchangeable from one contract to another. In reality, these general provisions are often very important in aligning the rights and duties of the parties.¹³ In addition, the import of general provisions may vary depending on the jurisdiction. Finally, I caution the students to use plain language.¹⁴ Lawyers are prone to archaic, pretentious writing and nowhere is this more prevalent than in contracts.

⁹ My primary reference for my interim contract drafting course is Tina Stark’s textbook *Drafting Contracts*. See Stark, *supra* note 2. The bare necessities of my highlights lecture is based upon that textbook and what my experience in teaching the contract drafting course has led me to believe are the most important contract concepts.

¹⁰ See Stark, *supra* note 2, pt. 1.

¹¹ *Id.*

¹² *Id.* ch. 5.

¹³ *Id.* ch. 16.

¹⁴ *Id.* ch. 18.

The PowerPoint and handouts I've created for my PowerPoint lecture intentionally do not give the students all of the information that they receive orally in class. They are forewarned that at the close of class, they will be given a quiz that they must complete and turn in by the next morning and that much of the information is not going to be found in the written materials. This gives the students the incentive to listen closely during the class time.

Among the questions asked on the quiz are questions requiring the students to identify the purpose of some of the macro-organization components of the contract, such as the recitals, the statement of consideration, the subject matter performance, and the like. Because I have focused on the use of the word "shall" to signify a covenant, I generally include a question that requires them to choose the most appropriate phrasing for a covenant. The quiz is fairly short and it focuses on the essential concepts covered in class. Since the students have been forewarned that they will be

tested on the class materials, most of them pay close enough attention in class that they only miss one or two quiz questions.

Is this the last incarnation of this class? Probably not! My hope is that students leave the class with a taste of (and hopefully a spark for) transactional practice and how it differs from litigation. Additionally, the highlights lecture outlines the core concepts of contract drafting and at least puts the students on notice that they must educate themselves in order to become adept at deal and death drafting. Finally, it continues to integrate ethics and professionalism issues unique to transactional drafting. It is doubtful I will ever create the perfect "50-minute" drafting class because transactional drafting shouldn't be relegated to 50 minutes of the first-year legal writing curriculum. Nevertheless, after trial and error, my 50-minute class is coming close to being the best that it can be.¹⁵

© 2008 Lisa Penland

“My hope is that students leave the class with a taste of (and hopefully a spark for) transactional practice and how it differs from litigation.”

Another Perspective

“One of the joys of teaching is the endless variety of the classroom experience. We are free to experiment with different material and ways of presenting that material. As we master our subject areas, we can turn our attention to finding the best ways to engage students in those subjects. For example, we may ask students to ascertain the facts of a hypothetical by conducting a mock client interview. We might conduct oral arguments to have students address the constitutionality of a statute. Students in large classes can be divided into groups and asked to present or report their analysis of a particular issue. The possibilities are endless and are only limited by our imaginations.

The benefits of variety accrue both to students and teacher. The break in classroom routine for the student often brings relief from the sometimes tedious, traditional student-teacher dialogue. Of course, too many different experiments in one semester can send students a message of instability and can prevent students from getting good at anything in particular.

When these alternative forms of teaching are used selectively, however, they can engage all of the students actively in the learning process. This kind of involvement can promote more effective learning because each student is participating in the process. The break in routine also leaves a lasting impression on students. Former students often remind me that the experience of drafting a complaint and answer and arguing a false imprisonment claim was a high point of their first semester in Torts class.”

—Mary Kate Kearney & Mary Jane Kearney, *Reflections on Good (Law) Teaching*, 2001 L. Rev. Mich. St. U. Det. C.L. 835, 844–845.

¹⁵ The materials for the drafting class have been compiled and I'd be happy to share those materials. Send an e-mail request to lisa.penland@drake.edu.

Peering Down the Edit

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

By Libby A. White

Libby A. White is an Associate Professor of Legal Writing at the Villanova University School of Law in Villanova, Penn. While teaching Legal Writing is her first love, she also has dabbled in teaching Logic for Lawyers, Animal Law, and Transactional Drafting.

Whenever I read or hear the term “peer edit” I picture a person “peering” quizzically at a document, pencil clenched tightly between the teeth. I’m not so sure this is far from the truth when considering how our students act as peer editors as new law students. In fact, the term is arguably an oxymoron because, as many a student has stated to me when tentatively offering up their edits for review: “I tried, but I really wasn’t sure that I knew what I was doing.” Hence we have the conundrum of teaching students to edit before they know how to write. Yet every year, my colleagues and I force our students to “be us” for their first open memorandum, and to evaluate and edit, anonymously, the writing of two of their peers. Compounding this difficulty is finding the time for the students to perform the peer edits within the short time frame of a strict curriculum.

The Question Mark

Is the peer edit in a legal writing course worth the effort? This is the annual question that wriggles uncomfortably in our minds. There are so many

problems that can occur as a result of peer editing, especially peer editing less than two months into the first year of law school, that the hoped-for advantages seem to totter in their wake. Does it make sense to create a time-consuming task for the student and one that is often frustrating for the teacher? Will the students tell each other the wrong thing and consequently unravel all the good work done by the teacher up to that point, with the complementary professorial grinding of the teeth and the tearing out of hair?

To complicate matters further, advice from other legal writing professors is often contradictory: do peer edits later since the students will know more and do a better job; do them earlier in the year—the students will learn faster and will retain the knowledge sooner; do them anonymously to encourage the students to be honest editors; don’t do them anonymously because the writers are more likely to do a better job when they know their editors will know who they are; give the students simple objective guidelines to follow so they will feel better as editors and will retain that knowledge; give the student open-ended editing questions so they have to think through the process, thereby coming to a better understanding of legal writing in general. What is a legal writing professor to do?

Is it worth it?

The Exclamation Point

Just when you think the peer edit is ineffective and of negligible value, in walks a student glowing from the experience. The student has “seen the light!” or “now understands!” or “realizes how poorly (oh dear!)” he/she is doing. Our oft-unrealized hope with the peer edit is to create these epiphanies for the editors. The advantage of peer editing, I tell my students, is for the editor because the editor is the one who must think through all the rules, understand what the writer is saying, and comment coherently. It is less advantageous to the one being edited because that

“Is the peer edit in a legal writing course worth the effort? This is the annual question that wriggles uncomfortably in our minds.”

person is passive and may only learn more if (a) the edited comments are clear and correct, (b) he or she actually reads the edited comments, and (c) the student editor's comments supplement the comments the legal writing professor has given.

One group of editors that benefits is comprised of those who are probably already doing a pretty good job with legal writing. They have tried to learn the rules, applied them in their own work, and now take their editing job seriously as a result. Their edits are things of beauty: much neater handwriting than mine, serious and constructive comments, and helpful advice.

A second type of editor who benefits is the "raised eyebrow" editor, or one who experiences the true "eureka moment" of "oh, that's how it's done!" These are the students who would have understood eventually, but this awakening experience speeds up their learning. And last comes the formerly arrogant, now humbled, editor who thought that legal writing was "a snap," and turned in a terrible paper, only to discover, not through my comments, but through editing of other, better papers, how poorly he or she has done. These two latter groups benefit only if they edit good papers. If they edit only poor papers, there is probably no epiphany for the slower learners. For the arrogant editor, editing a badly drafted memorandum may instead serve as an unfortunate confirmation of that editor's writing prowess.

For all other editors, the peer-editing process does not seem to make an impact. This is likely connected to the effort put into editing, or the lack thereof. The snowy white spaces on the pages of the edited memorandum are still spotless after the edit, and the responses to the questions on the peer editing checklist are those wonderfully useless comments like "nice try!" or "good introduction!" My threats of receiving a "check minus" for poor edits seem to have no effect on these "editors."

Despite my belief and my comments to my classes that the peer edit is primarily for the benefit of the editor, at times it is equally advantageous to the one being edited. Every once in a while, my memo

conferences start with a student reverently holding a student edit, extolling the virtues of that editor, and telling me how much that editor helped with his or her comments. To my chagrin, my carefully edited (but not so neatly written) comments on that same paper lie forgotten on the table. I fortify my tattered teacher's pride by being very glad that the student is learning and by convincing myself that it doesn't matter that the student seems to be learning more from a first-year student who has only had two months of legal writing rather than from me, who, after all, is the teacher! I have also had poor students realize that their memos were critiqued by three people with comments that consistently identified the same concerns. This recognition brings home to them that (a) I am really not out to get them and (b) maybe they should work harder. A final advantage is that student editors will sometimes pick up problems that I missed, so having a good student edit does supplement what I do, and I'm grateful for that.

On the other hand, some students are suspicious of other students' critiques and only want to hear from me, so they don't give much credence to the edits, even if the edits are quite good.

The Semicolon

I also have a selfish motive in requiring a peer edit; it is one that I only discovered and used this year. Despite recommendations from highly respected colleagues to wait until later in the year to do peer edits, I decided to schedule a peer edit the second week of class, and before the students handed in their first piece, a closed memorandum. My goal was to embed the objective legal writing conventions in the mind of the peer editor and, as a result of the edits, to prevent the legal writing professor (me) from quietly going mad from writing in the margins, for the umpteenth time, "do not use first person," "spell out numbers 1-99," or "a court is an 'it,' not a 'they.'"

Prior to this year, I assigned the closed memorandum and gave my students a sheet detailing the legal writing conventions they should use when writing the memorandum, and these conventions

“Despite my belief and my comments to my classes that the peer edit is primarily for the benefit of the editor, at times it is equally advantageous to the one being edited.”

“The best edit would be to critique a good memo and a bad memo and to understand the differences, but in our world, it is almost impossible to make sure each student gets one of each.”

were crystal clear and nonnegotiable. Nonetheless, and this is a mystery right up there with the perennial question of “don’t they read their e-mail?” my students almost universally ignored these conventions in producing their closed memoranda. My idea, therefore, was to make the student editors write those repetitive comments on the closed memoranda, to have the writers incorporate the comments, and then to have the writers turn in the old, peer-critiqued memorandum and the new edited version. The ideal result would be that everyone would learn those pesky but necessary conventions, that I would not have to repeat myself on every paper, and that I actually might be able to comment on legal analysis and produce brilliant legal writers.

Alas, the results were mixed. Thankfully, I had to comment much less than I would normally have had to because the editors caught many of the omissions and mistakes by the writers. However, these catches were scattered and inconsistent. While the papers were cleaner and more in line with legal writing conventions, they were not as clean as expected, even though I had given the editors defined lists with boxes to check.

While part of the problem was that my expectations were too high, I also believe that lack of time to edit caused the inconsistencies. I scheduled the peer edit session, to be supervised by my teaching assistants, for one 50-minute session the day before the paper was due. The students have since told me that this was not enough time for them to edit a four-page memorandum and that they were frustrated by this time restriction. My surprise at this complaint shows me that I had forgotten how unfamiliar they are with this process and how insecure they are with learning new skills. I also think that they may have been more tentative in editing papers of writers they knew since I did not make this peer edit anonymous. Next year, I will give them more time and perhaps make it anonymous. Maybe, then, my dream of commenting more on legal analysis than on legal writing conventions in the closed memorandum will come true.

The Comma

Aye, there’s the rub, and that’s the downside of the newbie editor commenting on the newbie legal writer. The editor may say the wrong thing, thereby complicating a learning process that is already steep and challenging. In addition, the editor may either be too effusive, causing false expectations in the writer, or too harsh, deepening the insecurity of the new legal writer. The editor may also suffer from critiquing only poor papers because there may be so much wrong with the papers, the editor may feel overwhelmed. The best edit would be to critique a good memo and a bad memo and to understand the differences, but in our world, it is almost impossible to make sure each student gets one of each. These are major negatives, and they can create more work for the teacher in trying to correct the problems. This is also why a lot of people recommend doing peer edits in the second semester or not at all.

A teacher can reduce, although not eliminate these problems, through careful preparation before the peer edits. To reduce the first problem, incorrect comments, I provide checklists for the editors that list the specific requirements for each section. I also tell the students that I will review the peer edits for incorrect comments and cross them out before returning them to the writers and that I will make a note of the incorrect comments and discuss them in our conferences on the open memorandum. Unfortunately, I sometimes get editors who completely miss the point and criticize a good memo for those very reasons that make it a good memo. In those cases, I have to start from scratch with the student editor in explaining why those items the editor is criticizing are the very ones that make a good memorandum. While it is a little disheartening to discover a student who really has not understood what I’ve been teaching, ultimately it’s a positive to catch the student’s misconceptions early and certainly well before the graded memo assignment.

For the second problem, the editor being too complimentary or too harsh, I tell the students that there is no paper that will be “perfect” and no paper that will be “horrible” (although that may not always be true). I explain to them about the problems with

inducing false expectations or insecurity in the writer and that what I would like them to be is constructive and fair. For the most part, they get them. If not, I hold back the papers that are too effusive or too harsh, and I talk to the editors about them. Of course, reviewing the peer edits, eliminating incorrect comments, and discussing these with the editors and writers take a lot of time.

The third problem, where editors may critique only poor papers, is a difficult one to solve. I have thought about trying to pull a good paper and a bad paper and copying them for everyone to edit. My problem is that my peer edit on the open memoranda occurs two or three days after they are handed in because the conferences on the memoranda begin the next week. A possible solution would be to have the conferences begin later so that I would have time to find the appropriate memoranda to edit, but then the rewrites run up against the graded memo assignment. In the end, what has stopped me from doing this is that I still think that it is valuable for some people to be peer edited in addition to acting as peer editors. As noted under The Exclamation Point above, the editing of a student's paper can reinforce or enhance my comments (or even surpass them). Because of this advantage, I have retained the anonymous peer edit of everyone's papers, with all of its inherent faults.

The Colon

So, with all the pros and the cons in mind, here is what I suggest legal writing professors do: if you have time, and if the students have time, the peer edits are worth it. For some of the students, it's how they learn best. For others, it's how they become better self-editors. Admittedly the peer edit is a tool with built-in frustrations, and I don't think there is much to be done about those frustrations. I think also that peer edits can be done very early if you give the editors defined, objective guidelines. Learning to act as an editor makes a student a better writer and a better self-editor, and this can occur at a much earlier stage in the process. But the emphasis should be on providing the students with discrete, realistic tasks. For instance, the professor

may ask the students to first focus on the "big picture structure and overall message" by outlining the piece and then analyzing the outline.¹ The students can then later focus on "small-scale writing" by highlighting the subject and verb in every sentence or by highlighting and eliminating "glue words" such as prepositions.²

To counteract bad habits, it is best to take the time to train the students to be good editors.³ If possible, "pass around a few briefs [or memos], maybe a good one, a bad one, and a mediocre one, and have them critique the briefs [memoranda] as a class so they get the hang of it."⁴ One teacher has had his class do peer editing as a group of four, rather than anonymously, as the best way to go, but he notes that time management for the group is a problem.⁵ Another echoes this advice by recommending "writing partners" and then conferencing with them on their collaborations.⁶

There is disagreement as to whether the peer edits should be anonymous with some teachers recognizing that first-year law students can be defensive and insecure if their names are on the papers. Others believe that a student putting his or her name on the paper makes that student more responsible for the piece and sets up "an

¹ E-mail from Marcia McCormick, Assistant Professor, Cumberland School of Law, to LRWPROF-L@LISTSERV.IUPUI.EDU (Aug. 28, 2007) (copy on file with author).

² *Id.*

³ E-mail from Benjamin R. Opiari, Ph.D., Writing Instructor, Office of Professional Development, Howrey LLP (Washington, D.C.) to LRWPROF-L@LISTSERV.IUPUI.EDU (Aug. 28, 2007) (copy on file with author). He calls them "peer reviews," rather than peer edits.

⁴ *Id.*

⁵ *Id.*

⁶ E-mail from Nancy Wanderer, Director, Legal Research and Writing Program, University of Maine School of Law, to LRWPROF-L@LISTSERV.IUPUI.EDU (Aug. 28, 2007) (copy on file with author).

⁷ E-mail from Sue Liemer, Director, Lawyering Skills, Southern Illinois University School of Law, to LRWPROF-L@LISTSERV.IUPUI.EDU (Aug. 29, 2007) (copy on file with author).

“Admittedly the peer edit is a tool with built-in frustrations, and I don't think there is much to be done about those frustrations.”

“There are many resources available to the legal writing professor that will help provide training for peer editing and there are just as many ideas on how best to implement its benefits.”

expectation of constructive criticism.”⁷ Lack of anonymity also reflects the practice of commenting on documents post-law school.⁸

Those who champion editing in the second semester find that peer edits are more useful and constructive when the students have a semester “under their belt[s].”⁹ One editing exercise that I and others use is to have students peer edit the statement of facts for the graded brief in the spring. The students “give each other great feedback about the persuasiveness of the story and theory of the case.”¹⁰ One professor has her students edit their oral argument partner’s brief that is on a different issue; she states that “when a better student teams with a struggling student—or even one who is solid but not as strong as the better student—I find that both of them turn in a better final product. They also comment on how much they learned in the process.”¹¹

The Period

There are many resources available to the legal writing professor that will help provide training for peer editing and there are just as many ideas on how best to implement its benefits.¹² The biggest stumbling block is time management, which I have partially counteracted by having my teaching assistants monitor the peer editing during mandatory sessions that are in addition to my students’ regular class time. I let my students know

at the beginning of the semester that this class time is considered part of the course so that there is less grumbling. The other major problem is training, and that too is time-consuming. My training, by necessity, is through handouts and feedback because I can devote little time in class to editing, and that does limit the quality of the peer edits for many students. Ultimately, I believe that peer editing is a tool that will help most of my students. Either they benefit from it individually as an ignition to understanding or they benefit cumulatively, along with all the other tools I give to them, in the hopes that one or more will help them understand how to be good legal writers.

© 2008 Libby A. White

⁸ E-mail from Opipari, *supra* note 3.

⁹ E-mail from Ruth Anne Robbins, Clinical Professor, Rutgers School of Law-Camden, to LRWPROF-L@LISTSERV.IUPUI.EDU (Aug. 28, 2007) (copy on file with author).

¹⁰ *Id.*

¹¹ E-mail from Kris Panikowski, Adjunct Professor and Lawyering Skills Instructor, University of San Diego School of Law, to LRWPROF-L@LISTSERV.IUPUI.EDU (Aug. 28, 2007) (copy on file with author).

¹² These resources, which are too numerous to list here, include almost all legal writing texts and a number of law review articles on editing techniques, Legal Writing Institute (LWI) Idea Bank submissions, LWI conference materials, and archived e-mails available at <www.lwionline.org>.

Creating an Appellate Brief Assignment: A Recipe for Success

By Kathleen A. Portuan Miller¹

Kathleen A. Portuan Miller is Assistant Professor of Legal Research and Writing at the Paul M. Herbert Law Center, Louisiana State University, in Baton Rouge.

Creating an appellate brief problem and preparing for a dinner party share some commonalities. Both tasks can be overwhelming—in terms of time and details. But, I found out, after years of cooking and teaching—that organization is the key to a successful dinner and a compelling appellate assignment. When I am planning my dinner party, I think about where to get interesting ideas for the dinner, what foods are seasonally appropriate, what recipes to use for each dish, how to set the table, and how to serve the meal. Putting together an appellate brief problem also requires detailed planning.² Like the dinner party, a key element to a successful assignment will be using the right materials (the freshest ingredients). Through trial and error, I've found this recipe for success in creating an appellate brief assignment.

I. Looking for Sources—Here's How to Begin

1. Moot Court Case Book

New York University publishes the *New York Moot Court Casebook*, which is chock-full of ideas for federal appellate briefs. Each entry contains a complete record, including the complaint and answer, motions, affidavits, and the opinion of the lower court. There is also a memorandum of law, loaded with cases and analysis. All of the assignments are federal problems and cover many

different topics. There are about 15 assignments in one casebook.

In addition to using these ideas for appellate briefs, you can tailor the problems to create an interoffice memorandum. You can purchase a copy of the 2007 *Moot Court Casebook* and a CD-ROM for \$90. Older editions with a CD-ROM cost \$85. Checks, with a letter on official school letterhead, can be sent to: Moot Court Board, Attention: Casebook Editor, New York University School of Law, 110 West 3rd Street, New York, New York 10012.

2. NITA Materials

The National Institute for Trial Advocacy (NITA) has trial advocacy books with great appellate brief assignments, including the record, and loads of support materials. *Advocacy Before Appellate Courts—Book I: Record of Proceedings* is available for \$35, and *Advocacy Before Appellate Courts—Book II: Legal Support Materials* is available for \$30. You can contact Customer Support in Colorado at 1-800-225-6482 or NITA at 1-877-648-2632.

A typical problem, called “Discrimination Cases,” includes a summary of the pleadings, along with testimony, exhibits, appraisals, correspondence, an applicable statute, and a memorandum of law that analyzes the cases. In addition, the actual opinion from the *Federal Reporter*[®] is included.

3. Bar Association Meetings

A good way to kill two birds with one stone is to attend a local bar meeting or lunch. In addition to meeting many members of the local bar, you can find out what issues attorneys are litigating. Many times, the attorneys are litigating new topics that have not been resolved or are working on topics where there is a split in the law. At one Baton Rouge Bar Association lunch, I found out that case law is split regarding whether a matter is medical

“Creating an appellate brief problem and preparing for a dinner party share some commonalities. Both tasks can be overwhelming—in terms of time and details.”

¹ Thanks to Michael deBarros, a second-year LSU law student, who helped research this paper.

² Editor's note: See also James D. Dimitri, *Writing Engaging, Realistic, and Balanced Appellate Advocacy Problems*, 16 *Perspectives: Teaching Legal Res. & Writing* 93 (2008).

“After perusing cases dealing with circuit splits and selecting a topic, you should look for the older, underlying cases that are on point that have not yet been overruled.”

malpractice or health care under the Louisiana medical malpractice statute.

4. Westlaw®

Westlaw provides a great way to find a split in the case law on a given topic. If you go to the Louisiana Cases database (LA-CS) for example, and run the search *circuit /5 split*, you can find out where the circuits are split on an issue.³ On Westlaw, search terms in the cases are highlighted for easy review.

For example, in Louisiana, there was a split in the circuits concerning the enforceability of arbitration clauses in consumer standard form contracts. Two circuits read these clauses liberally while two circuits interpreted these clauses narrowly. The Supreme Court of Louisiana resolved this split in *Aguillard v. Auction Management Corp.*, 908 So. 2d 1 (La. 2005). In another case, *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294 (La. 2001), the Supreme Court examined the interpretation and application of Louisiana law relating to noncompetition agreements. The Supreme Court noted that the courts of appeal within Louisiana have reached different conclusions as to the scope of competitive activity that may be curtailed by such agreements. Although the court ultimately remanded the matter to the trial court, the text of the decision is useful for developing an appellate problem since it cites relevant cases and lays out the arguments on both sides.

5. Using KeyCite®

After perusing cases dealing with circuit splits and selecting a topic, you should look for the older, underlying cases that are on point that have not yet been overruled. Once you identify these leading cases, you can use KeyCite on Westlaw to find cases that have cited either positively or negatively to the leading cases. The ideal topic

will have leading, or seminal, cases with equal numbers of positive and negative citing references.

6. LexisNexis®

LexisNexis, like Westlaw, can help you to find a split in the case law. In Louisiana Cases Combined, you can run the search *circuit w/s split! or divid! and date aft 2000*. The results point the way to the splits in the circuits. In the *SWAT* case, LexisNexis provides convenient categories such as Overview and Core Terms. Under Core Terms, the words “to resolve a split among the circuit courts of appeals” are highlighted to make perusal easy. Lexis conveniently highlights key terms so you can quickly find the splits.

7. Looseleaf Services

Looseleaf services, because they are so current, have the latest law on the subject, plus commentary. A few noteworthy looseleaf services are BNA's *Daily Tax Report*, which has the latest law in the tax area, the CCH *Blue Sky Law Reporter*, which has the latest in corporate and securities law, and BNA's *United States Law Week*, which provides very current analysis of significant federal and state cases in all practice areas, as well as important legislative and regulatory developments.

8. American Law Reports

American Law Reports, or ALR®, contains annotations written by experts in the field. These annotations show majority-minority splits among state and federal courts. ALR also gives references to other helpful sources in the Research References section. For example, in the annotation, *Wrongful or Excessive Prescription of Drugs*, 19 ALR 6th 577 (2006), by George L. Blum, the research references include West topics and key numbers that apply to the particular annotation; in addition, pertinent Westlaw databases and even sample search queries are provided. Also included are other applicable ALR annotations and citations to the legal encyclopedias *American Jurisprudence 2d* and *Corpus Juris Secundum*® and to law review articles.

³ Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 Utah L. Rev. 917.

9. Newsletters and Journals

Newsletters are great. For example, in Louisiana, there is *Maraist's Civil Law and Procedure Newsletter*, which sums up recent issues and significant developments in case law in one- or two-sentence blurbs. The *ABA Journal* and the *National Law Journal* contain practitioners' columns with summaries of new litigation or developing areas of law.

10. Legal Writing Institute Idea Bank

The Legal Writing Institute provides an Idea Bank, available online at <www.lwionline.org>. If you submit an idea, you can take an idea for an appellate brief from the Idea Bank. Many of the ideas for appellate briefs or memoranda include answers and show the split of authorities. If you use these sources, you can also contact the drafter of the problem and get a sample answer and a student-written paper. The 2006 Idea Bank is available online at <www.ideabank.rutgers.edu>.

The Legal Writing Institute is located at Walter F. George School of Law, Mercer University, 1021 Georgia Avenue, Macon, Georgia 31207; 478-301-2622.

11. Additional Online Services

Blogs, or online journals, can be an excellent way to gather cutting-edge topics for appellate brief problems. Some law professors and attorneys write blogs containing their commentary about developments in different areas of the law. One particularly useful blog, Split Circuits, authored by Professor A. Benjamin Spencer of the University of Richmond School of Law, tracks developments concerning splits among the federal circuits.⁴ Another blog, Blawg Republic, provides a digest view of the latest news and commentary from the legal blogging community.⁵

In addition to blogs, Seton Hall University School of Law of New Jersey publishes the *Seton Hall Circuit Review*, which contains a Current Circuit

Splits column—a superb tool for fielding topics for appellate brief problems.⁶ The column contains brief summaries of recent circuit splits identified by a federal court of appeals opinion. It is arranged by topic under civil and criminal law categories.

II. Putting the Assignment Together

Once the preliminary search for a topic is complete, check that the topic affords both parties an equal opportunity to argue each of their respective positions. In order to facilitate this opportunity, there must be a “balance of cases” (that is, each party must have a sufficient number of cases that bolster his or her position). The problem should also be simple enough for a first-year law student to understand.

Professors Michael Millemann and Steven Schwinn discuss how balance is created through “reverse engineering.”⁷ That is, the creator of the appellate brief problem forges the analytical paths retroactively, working from the legal authorities, the analysis, and the arguments, back to the facts.⁸ This process establishes a limited number of acceptable pathways for the students to follow. As part of the reverse engineering, the question for the students is defined by the predetermined answer. When the students' authorities, analysis, and arguments comport with the teacher's expectations, then the problem has worked.⁹

When I am creating a capstone legal writing problem like an appellate brief assignment, I make sure I give students an opportunity to exercise all of the skills they have learned throughout the course—print and online research skills, writing skills, and whatever analytical approach to legal analysis we have focused on, whether IRAC, CREAC, five-step, or REAC. I support the use

⁶ *Seton Hall Circuit Review*, <law.shu.edu/journals/circuitreview/index.html>.

⁷ Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 *Clinical L. Rev.* 441, 458 (2001).

⁸ *Id.*

⁹ *Id.*

⁴ Split Circuits, <splitcircuits.blogspot.com>.

⁵ Blawg Republic, <www.blawgrepublic.com>.

“Once the preliminary search for a topic is complete, check that the topic affords both parties an equal opportunity to argue each of their respective positions.”

“As I draft the problem, I make sure I have summarized the law and arguments for each side of each issue. Finally, I create the facts so that one side does not seem to be the winner.”

of a hypothetical fact situation rather than using a real case because the hypothetical problem can be designed to meet specific learning objectives. As I draft the problem, I make sure I have summarized the law and arguments for each side of each issue. Finally, I create the facts so that one side does not seem to be the winner. It's important to fit the facts with the law so that when the law is analyzed and applied to the facts, neither side appears to be a clear winner. I recommend choosing a substantive topic from one of the subjects taught in first-year courses.¹⁰

In addition to a balance of the cases, there should be two major issues in the same area of law. (Multiple issues tend to confuse the judges, as well as the students.) The issues should be able to be tailored so that the appellant and the appellee are able to slant them to support their arguments.

The facts of the assignment should raise these issues, and the law needs to support the arguments for the appellant and the appellee under the facts of the assignment.

Allowing the students to slant the issues to their side will serve both as a foundation that will allow them to solidify their arguments and as a means to clear up confusion as to which party is the appellant and which is the appellee.

III. Conclusion

I began by comparing creating an appellate brief problem to preparing for a dinner party. Both tasks can be overwhelming—in terms of time and details—but also extremely rewarding. The key to success for both ventures is planning and careful selection. I hope this short piece has given you some ideas on how to “cook up” an appetizing appellate assignment.

© 2008 Kathleen A. Portuan Miller

Another Perspective

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

Authors are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. The *Perspectives* Author's Guide and Style Sheet are posted at west.thomson.com/newsletters/perspectives/perstyle.aspx.

¹⁰ See, e.g., Barbara Blumenfeld, *Integrating Indian Law into a First Year Legal Writing Course*, 37 Tulsa L. Rev. 503 (2001).

Beyond *Black's* and *Webster's*: The Persuasive Value of Thesauri in Legal Research and Writing

By Brian Craig

Brian Craig is an attorney at Thomson-West in Eagan, Minn., and an adjunct legal writing instructor at the University of Minnesota Law School.¹

I. Introduction

The U.S. Supreme Court has increasingly relied on dictionaries² and numerous articles have discussed the persuasive value of dictionaries to construe statutes, contracts, and patent claims.³ Despite this extensive theoretical literature, a dearth of scholarly literature remains on the efficacy of thesauri in the legal framework. This article discusses the value of thesauri, in conjunction with dictionaries, as persuasive secondary sources to ascertain the plain and ordinary meaning of words and phrases. Based on empirical research, this article examines the frequency of opinions that cite to thesauri from 1990 to 2006. The article also provides a review of opinions where courts found thesauri persuasive and unpersuasive in construing statutes, regulations, and contracts. Finally, the article discusses the benefits of using thesauri in legal research.

Peter Mark Roget created and published the first modern day thesaurus in 1852 with the *Thesaurus*

of English Words and Phrases.⁴ The word *thesaurus* comes from the word *treasure* in Latin. The Merriam-Webster Dictionary defines a thesaurus as “a book of words or of information about a particular field or set of concepts; especially: a book of words and their synonyms.”⁵ Many modern day thesauri bear Peter Roget’s name, including *Roget’s International Thesaurus*, *Roget’s II: The New Thesaurus*, *Roget’s New Millennium Thesaurus*, and *Roget’s 21st Century Thesaurus*. Other popular general thesauri include *Webster’s Collegiate Thesaurus*, *Webster’s New World Thesaurus*, *Webster’s New Dictionary of Synonyms*, the *Random House Thesaurus*, and Rodale’s *The Synonym Finder*. *Burton’s Legal Thesaurus* and *West’s® Legal Thesaurus/Dictionary* are the two leading legal thesauri.⁶

Since the English language has a wealth of synonyms, a thesaurus can help to identify synonyms for certain terms. One source identified 223 different terms for the word *marijuana* and noted that Eskimos reputedly have 22 different words for *snow*.⁷

Judges in the American legal system have cited to thesauri in judicial opinions for many years. The earliest known reference to *Roget’s Thesaurus* in a

“This article discusses the value of thesauri, in conjunction with dictionaries, as persuasive secondary sources to ascertain the plain and ordinary meaning of words and phrases.”

¹ The views expressed in this article do not necessarily represent the views of Thomson-West or any of its employees.

² Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437, 1440 (1994). For example, the 1992 Term had a fourteenfold increase in citations to dictionary definitions over the 1981 Term. *Id.* at 1438.

³ See Jason Weinstein, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. Mich. J.L. Reform 649 (2005); Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 Fordham L. Rev. 2177 (2003); Scott A. Turk, *The Proper Method for Using Dictionaries to Construe Patent Claims*, 6 Chi.-Kent J. Intell. Prop. 43 (2006); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 Buff. L. Rev. 227 (1999); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275, 334 (1998).

⁴ Bryon Cahill, *The Perfect Word—It’s Out There*, 29 Writing! 22, Feb. 1, 2006.

⁵ Merriam-Webster Online Dictionary, <mw1.merriam-webster.com/dictionary/thesaurus> (last visited Aug. 31, 2007).

⁶ *Ballentine’s Legal Dictionary and Thesaurus* and *Ballentine’s Thesaurus for Legal Research and Writing* are the only other known legal thesauri. Only one unreported case has cited *Ballentine’s Legal Dictionary and Thesaurus*. See *Smith v. City of Hartford*, 2000 WL 1058877, at *15 (Conn. Super. Ct. July 14, 2000). No reported opinions have cited *Ballentine’s Thesaurus for Legal Research and Writing*.

⁷ *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997) (citing Esther Lewin & Albert E. Lewin, *The Thesaurus of Slang* 243 (1994)).

“Since words are the tools of the lawyer’s craft, legal writers should employ all resources, including thesauri, to find the meaning of terms in the English language.”

reported case occurred in 1857 in Maryland.⁸ Early American courts consulted thesauri along with dictionaries to find the plain meaning of words. This form of analysis whereby courts consult thesauri in conjunction with dictionaries continues in modern jurisprudence.

Courts and judges have addressed the benefits of using thesauri in legal analysis. In the foreword to *Burton’s Legal Thesaurus*, U.S. Supreme Court Justice William O. Douglas observed:

In the English language, each word may have several meanings. Often, it is the use of a specific word or term upon which a case or controversy may hinge. Only by using precise language can the waters remain clear and unmuddied allowing justice to take its course unfettered by those who would mislead or misrepresent. It is through the use of such a tool as the Legal Thesaurus that one may find the precise term to fit the nuances of a particular situation.⁹

Since words are the tools of the lawyer’s craft, legal writers should employ all resources, including thesauri, to find the meaning of terms in the English language.

II. Methodology and Results

A. Methodology

The empirical study included in this article consists of comprehensive data derived from U.S. federal and state court reported opinions from 1990 through 2006 that explicitly cite to thesauri.

To determine the frequency of judicial opinions that cite thesauri, searches were conducted in the Westlaw® All Federal and State Cases database (ALLCASES). Prior empirical research has previously been conducted using Westlaw. Similar searches were also conducted on LexisNexis® to confirm the results. Specific references to thesauri

were identified to determine the number of cases that cite to each thesaurus in the study corresponding to calendar years from 1990 to 2006.

Thesauri with fewer than three references were excluded from the study. All unpublished cases were also excluded from the analysis. Furthermore, the study excludes those opinions that merely mention the word *thesaurus* or an unspecified version of *Roget’s Thesaurus* without reference to one of the specific thesauri in the study. The results in Table 1 do not distinguish between the different editions of a thesaurus with the same name. For example, the column for *Roget’s International Thesaurus* in Table 1 includes references to the third, fourth, and fifth editions. Likewise, references to *Burton’s Legal Thesaurus* also include citations to any edition, including the 1980, 1992, and 1998 editions. Any references to the *Merriam-Webster Collegiate Thesaurus* are included with citations to *Webster’s Collegiate Thesaurus*. In Table 2, results show the frequency of citations to legal thesauri, including specific citations for all three editions of *Burton’s Legal Thesaurus*. Where a single opinion cites to the same thesaurus more than once, only one reference is included. The citations include references to thesauri in any portion of the opinion, including concurring and dissenting opinions. The references include instances where courts found thesauri both persuasive and unpersuasive. Further analysis of specific cases where courts found thesauri persuasive and unpersuasive is provided below. The Westlaw queries, conducted on August 31, 2007, are on file with the author.

B. Results of Empirical Study

The results of the empirical study demonstrate that courts have increasingly relied on thesauri since 1990. Other studies have noted the increased reliance on dictionaries by the U.S. Supreme Court.¹⁰ It seems a logical extension that courts have also increasingly relied on thesauri since dictionaries and thesauri are both common reference books for the English

⁸ *New England Car Spring Co. v. Baltimore & Ohio R.R. Co.*, 11 Md. 81 (1857).

⁹ William O. Douglas, Foreword to *Burton’s Legal Thesaurus* xi (1980).

¹⁰ See Thumma & Kirchmeier, *supra* note 3.

language. From 1991 to 1996, the mean annual number of reported cases that cited to any of the thesauri in the study was 16. From 2001 to 2006, the mean annual number of reported cases that cited to any of the thesauri in the study was 22. Although this upward trend is not large, the results show that judges increasingly rely on thesauri.

The empirical study also analyzes which specific thesauri courts cite most frequently. One measure of a source's impact and influence is the frequency with which courts cite that source.¹¹ Table 1 shows that courts cited to *Roget's International Thesaurus* more than any other thesaurus between 1990 to 2006 with 52 total references. *Roget's II: The New Thesaurus* was the second most popular nonlegal thesaurus with 38 total citations. *Webster's Collegiate Thesaurus* (including references to the *Merriam-Webster Collegiate Thesaurus*) and *The Synonym Finder* tied for third among the most popular general thesauri over the past 16 years.

As shown in Table 2, which shows explicit citations to legal thesauri from 1990 to 2006, courts cited to *Burton's Legal Thesaurus* more frequently than *West's Legal Thesaurus/Dictionary*. Fifty reported opinions cited to *Burton's Legal Thesaurus* while courts cited to *West's Legal Thesaurus/Dictionary* in 30 separate opinions. Since 2001, courts have particularly favored *Burton's Legal Thesaurus*. From 2001 to 2006, courts cited to *Burton's Legal Thesaurus* in 23 opinions compared to eight references to *West's Legal Thesaurus/Dictionary*. Based on the frequency of citations, this nearly threefold disparity in the frequency of reported cases between *Burton's Legal Thesaurus* and *West's Legal Thesaurus/Dictionary* over the past five years affirms *Burton's Legal Thesaurus* as the leading legal thesaurus.

The empirical data demonstrates that courts have increasingly relied on legal and nonlegal thesauri as persuasive secondary sources. Although courts have cited *Burton's Legal Thesaurus* and *Roget's International Thesaurus* most frequently over the past 15 years, legal writers should also consider the benefits of consulting other thesauri including *Roget's II: The New Thesaurus*, *Roget's New Millennium Thesaurus*, *Roget's 21st Century Thesaurus*, *Webster's Collegiate Thesaurus*, *Webster's New World Thesaurus*, *Webster's New Dictionary of Synonyms*, *Merriam-Webster's Online Thesaurus*, *Random House Thesaurus*, *The Synonym Finder*, and *West's Legal Thesaurus/Dictionary*.

III. Treatment by the U.S. Supreme Court

As the highest court in the land, the U.S. Supreme Court serves as standard-bearer of American jurisprudence and lower courts respond to guidance and trends from the U.S. Supreme Court.¹² The U.S. Supreme Court has explicitly cited to thesauri to determine the meaning of specific words in three separate opinions. In *McLaughlin v. Richland Shoe Co.*, Justice Stevens cited to *Roget's International Thesaurus* to ascertain the meaning of the word *willful*.¹³ Stevens wrote that “the word ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional.’”¹⁴ In *McLaughlin*, Justices Rehnquist, White, O'Connor, Scalia, and Kennedy joined Justice Stevens in delivering the opinion of the court.

Besides Justice Stevens, Justice Scalia is the only other justice to explicitly cite to a thesaurus in a U.S. Supreme Court opinion.¹⁵ Other commentators have previously observed that

“The U.S. Supreme Court has explicitly cited to thesauri to determine the meaning of specific words in three separate opinions.”

¹¹ See Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 Fla. St. U. L. Rev. 1331, 1332 n.7 (2005) (noting that “[v]arious types of citation analysis have been used for decades in the legal community to gauge the impact of books, law review articles, court decisions, or judges, among other things”).

¹² See Sarah A. Maguire, *Precedent and Procedural Due Process: Policymaking in the Federal Courts*, 84 U. Det. Mercy L. Rev. 99, 100 (2007).

¹³ 486 U.S. 128, 133, 108 S. Ct. 1677, 1681 (1988).

¹⁴ *Id.*

¹⁵ Based on a Westlaw search for the term *thesaurus* in the All U.S. Supreme Court Cases database (SCT) on Aug. 31, 2007.

“When a state legislature fails to define a statutory term, courts often apply the ordinary meaning of the term as found in the dictionary.”

Justice Scalia frequently cites to dictionaries and *Roget's Thesaurus* in textual legal analysis.¹⁶ A search for the term *thesaurus* in opinions written by Justice Scalia yields two cases.¹⁷ In one opinion in which he concurred in part and dissented in part, Justice Scalia cited to *Roget's International Thesaurus* to find the plain and ordinary meaning of the adverb *regularly*, writing that it “can mean ‘constantly, continually, steadily, sustainedly.’”¹⁸ In another dissenting opinion, Scalia cited to *Roget's Thesaurus of Synonyms and Antonyms* to construe the term *compile*.¹⁹

While the U.S. Supreme Court has not extensively relied on thesauri, a review of opinions indicates that some justices, particularly Justices Stevens and Scalia, will look to thesauri as persuasive secondary sources in certain situations.

IV. Selected Cases Where Courts Found Thesauri Persuasive

When a state legislature fails to define a statutory term, courts often apply the ordinary meaning of the term as found in the dictionary. Although courts routinely look to dictionaries such as *The Merriam-Webster Dictionary* or *Black's Law Dictionary**, the question remains open on whether thesauri can serve as helpful secondary sources when trying to determine the plain and ordinary meaning of words in constitutions, statutes, regulations, and contracts.

A. Construction of Statutes and Constitutional Provisions

In construing statutory provisions, courts may consult dictionaries in use at the time the statute was enacted. A thesaurus can also serve as an

appropriate source to ascertain the ordinary, plain, and usual meaning of undefined terms.

A number of state courts have relied on *Roget's International Thesaurus* as an aid in finding the plain and ordinary meaning of terms in statutory construction. The Iowa Supreme Court looked to *Roget's International Thesaurus* along with dictionaries to find the plain and ordinary meaning of the terms *policy-making duties*, which the Iowa Legislature failed to define in the Iowa open meetings law.²⁰ The Louisiana Supreme Court also relied on *Roget's International Thesaurus* to conclude that the words *imminent* and *impending* in a statute are synonymous.²¹ Meanwhile, the Washington Supreme Court also cited to *Roget's International Thesaurus* to conclude that the words *arising from* are synonymous with the words *resulting from*.²² *Roget's International Thesaurus* provides helpful guidance to determine the plain meaning of state statutes by the court of last resort in many states.²³

Federal courts have also consulted *Roget's International Thesaurus*, especially to determine the meaning of the word *willful* or *willfulness*. Following the U.S. Supreme Court's reference to *Roget's International Thesaurus* to arrive at the meaning of the word *willfulness* in *McLaughlin v. Richland Shoe Co.*, the U.S. Courts of Appeals for the Second, Fourth, and Fifth Circuits have also cited *Roget's International Thesaurus* to find the common usage of the word *willful* or *willfulness*.²⁴ After the U.S. Supreme Court consults a specific thesaurus to find the meaning of a particular term, other courts

¹⁶ See 3 *Sutherland Statutory Construction* § 65A:10 (6th ed.); Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol'y 401, 407 (1994).

¹⁷ Based on a Westlaw search for *ju(scalia) & thesaurus* in the All U.S. Supreme Court Cases database (SCT) on Aug. 31, 2007.

¹⁸ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 259, 110 S. Ct. 596, 623 (1990).

¹⁹ *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 162, 110 S. Ct. 471, 480 (1989).

²⁰ *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 354 (Iowa 2005).

²¹ *Garza v. Delta Tau Delta Fraternity Nat.*, 948 So. 2d 84, 93 (La. 2006).

²² *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 435 (Wash. 1977).

²³ See also *Lockhart v. Cedar Rapids Cmty. Sch. Dist.*, 577 N.W.2d 845, 847 (Iowa 1998); *State ex rel. Kroger Co. v. Indus. Comm'n of Ohio*, 687 N.E.2d 768, 771 (Ohio 1998).

²⁴ See *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 43 (2d Cir. 1989); *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 110 (4th Cir. 1988); *Cash v. Jefferson Assocs., Inc.*, 978 F.2d 217, 218 (5th Cir. 1992).

will likely follow the Court's lead and look to that same thesaurus to find the meaning of that same term.

Courts also rely on *Burton's Legal Thesaurus* to find the meaning of terms not expressly defined in statutes. The Tenth Circuit cited *Burton's Legal Thesaurus* to construe a provision not defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).²⁵ In construing the meaning of the term *monitoring*, the Tenth Circuit held that a term not defined in a statute must be construed in accordance with its ordinary and natural meaning.²⁶ The court stated: "[t]he verb 'monitor' is generally synonymous with audit, check, control, inspect, investigate, observe, oversee, regulate, review, scrutinize, study, survey, test and watch."²⁷

In a concurring opinion, one Alabama Supreme Court justice consulted a thesaurus in construing a provision found in the Alabama Constitution.²⁸ To find the meaning of the term *interested* as used in Ala. Const. art. IV, § 93, which prevents the state from being placed in business enterprises in competition with private individuals or corporations, Justice Houston opined:

[N]owhere can I find any authority to support the majority's contention that the phrase "[to] be interested in" is synonymous with the phrase "to be in competition with." *The Oxford Thesaurus*, American Edition 242 (1992), does not list "compete" as a synonym of "interested," nor does it list "interested" as a synonym of "compete," pp. 70–71.²⁹

The lack of a synonymous term in a thesaurus can also assist the court in determining the plain meaning of a specific word.

Federal courts have also relied on the Merriam-Webster Online Thesaurus to find the plain meaning of words found in statutes where Congress has failed to provide express definitions. Two bankruptcy court judges cited to the Merriam-Webster Online Thesaurus to find the meaning of the terms *subject to* under 11 U.S.C. § 521.³⁰ The Fifth Circuit also cited to the Merriam-Webster Online Thesaurus to construe the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).³¹ Relying on the online thesaurus, the Fifth Circuit recognized that the terms *plausible* and *credible* do not have identical definitions.³²

Courts have utilized other thesauri, including the *Random House Thesaurus* and *Roget's New Millennium Thesaurus*, as aids in statutory construction. The Tenth Circuit relied on synonyms found in the *Random House Thesaurus* for the term *modify* to conclude that the term *modify* as used in 18 U.S.C. § 1818(i)(2)(F), is ambiguous.³³ The Mississippi Supreme Court consulted *Roget's New Millennium Thesaurus* in a 2007 opinion in which the court found that synonyms for the word *duly* include "appropriately," "fitly," "properly," and "suitably."³⁴

While thesauri do not serve as the definitive source to interpret statutes, several courts have relied on thesauri, especially *Roget's International Thesaurus* and *Burton's Legal Thesaurus*, as aids in statutory construction.

B. Construction of Regulations and Other Agency Actions

Like dictionaries, thesauri can also provide guidance in construing regulations and other

“Courts have utilized other thesauri, including the *Random House Thesaurus* and *Roget's New Millennium Thesaurus*, as aids in statutory construction.”

²⁵ See *Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 569 (10th Cir. 1996).

²⁶ See *id.*

²⁷ *Id.* at 569.

²⁸ *Ex parte Alabama Alcoholic Beverage Control Bd.*, 683 So. 2d 952, 959 (Ala. 1996).

²⁹ *Id.* at 959.

³⁰ *In re Jackson*, 348 B.R. 487, 497 (Bankr. S.D. Iowa 2006). See also *In re Brickey*, 363 B.R. 59, 64 (Bankr. N.D.N.Y. 2007).

³¹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See *Pondexter v. Dretke*, 346 F.3d 142, 149 (5th Cir. 2003).

³² *Id.* at 149.

³³ *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1147 (10th Cir. 1997).

³⁴ *Cousin v. Enter. Leasing Co.-S. Cent., Inc.*, 948 So. 2d 1287, 1293 (Miss. 2007).

“Since thesauri are akin to dictionaries, courts also employ thesauri to find synonyms to find the plain and ordinary meaning of terms in contracts.”

actions by administrative agencies. It is well settled that it is appropriate to consult dictionaries to discern the ordinary meaning of a term not explicitly defined by regulation. Authority also exists for the use of thesauri to determine the plain and ordinary meaning of words in regulations where the administrative agency fails to provide an express definition.

The Tax Court of Indiana referenced the utility in consulting thesauri to find the plain and ordinary meaning of terms appearing in regulations and agency bulletins.³⁵ The opinion states that where “specific words or phrases used in the statutes, regulations or documents like the bulletin in question are not defined, [the court] will strive to give those words or phrases their plain, ordinary and usual meanings ... [and a] myriad of dictionaries and *thesauri*—both general and specialized—are available to assist the taxpayer in ferreting out a word’s or phrase’s meaning.”³⁶ Furthermore, the opinion states, “[t]he Court also reminds Counsel ... that today’s word processing programs often have a thesaurus feature for ease of reference in assisting the writer in fleshing out the meaning of a word or phrase.”³⁷

The Eleventh Circuit also cited to a thesaurus to find the meaning of the term *frivolous* to determine whether an alien filed a frivolous application for asylum. The court noted that “[s]ynonyms for frivolous are ‘carefree, fanciful, fickle, giddy, flippant, nonchalant.’ Roget, International Thesaurus (3d ed.1965). ... Here we think that the record very clearly reflects that [petitioner] was sincere, albeit fraudulent, in his application. He was not nonchalant or flip.”³⁸

³⁵ *CDI, Inc. v. State Bd. of Tax Comm’rs*, 725 N.E.2d 1015, 1022 (Ind. Tax. 2000).

³⁶ *Id.* (emphasis added).

³⁷ *Id.* See also *Korotko-Hatch v. John G. Shedd Aquarium*, 65 F. Supp. 2d 789, 801 (N.D. Ill. 1999) where a U.S. magistrate judge consulted the thesaurus in the court’s computerized word-processing program, Corel® WordPerfect®, Version 8.0, to find synonyms for the terms *youthful* and *academic*.

³⁸ *Barreto-Claro v. U.S. Atty. Gen.* 275 F.3d 1334, 1339 (11th Cir. 2001). For further discussion by the Eleventh Circuit of the efficacy of thesauri, see Part V. Selected Cases Where Courts Found Thesauri Unpersuasive, *infra*.

In the construction of administrative regulations and other administrative agency actions, thesauri can serve as persuasive resources to find the plain and ordinary meaning of certain words and phrases.

C. Construction of Contracts

Thesauri can also assist in the interpretation of words and phrases found in contracts and agreements. In searching for the meaning of contractual terms, courts often resort to the dictionary to ascertain a term’s common meaning. Since thesauri are akin to dictionaries, courts also employ thesauri to find synonyms to find the plain and ordinary meaning of terms in contracts.

In a 2002 opinion, the Eleventh Circuit cited thesauri to construe terms not expressly defined in contracts.³⁹ The court researched synonyms found in two thesauri to find the meaning of the word *expense*, which the court considered the crucial word in the disputed terms “health care expenses” in a contract. The court consulted *Roget’s International Thesaurus* and the Merriam Webster Online Thesaurus and found that synonyms for expense include expenditure, cost, outlay, and disbursement.

The Third and Ninth Circuits have also cited thesauri to construe contracts. The Third Circuit cited *Burton’s Legal Thesaurus* and dictionaries to find the meaning of the terms *eligible* and *entitled*.⁴⁰ The Ninth Circuit also cited *Burton’s Legal Thesaurus* and dictionaries to find the meaning of the phrase “no longer” used in a contract.⁴¹

Courts of last resort in several states have found synonyms helpful and persuasive in construing contracts. The Oklahoma Supreme Court cited *Webster’s New World Dictionary and Thesaurus* in construing the word *jurisdiction* where the court noted that synonyms for jurisdiction include

³⁹ *Vencor Hosps. v. Blue Cross Blue Shield of Rhode Island*, 284 F.3d 1174, 1181 (11th Cir. 2002).

⁴⁰ *Local Union No. 1992, Int’l Bd. of Elec. Workers v. Okonite Co.*, 189 F.3d 339, 350 (3d Cir. 1999).

⁴¹ *United Food & Commercial Workers Union Local 1119 v. United Markets, Inc.*, 784 F.2d 1413, 1416 (9th Cir. 1986).

authority, range, supervision, and control.⁴² The Wyoming Supreme Court consulted *Burton's Legal Thesaurus* and found that one of the synonyms for *satisfy* is *settle* in construing the phrase “fully satisfied” in a contract construction action.⁴³

Federal and state courts alike have consulted a variety of thesauri to find the plain meaning of words when construing contracts.

V. Selected Cases Where Courts Found Thesauri Unpersuasive

Although thesauri can serve as helpful secondary sources to determine the plain and ordinary meaning of words, courts do not always find thesauri persuasive. Legal writers should use some caution when relying on thesauri as persuasive resources in briefs.

In *Price v. Time, Inc.*,⁴⁴ the Eleventh Circuit outright rejected the efficacy of thesauri in determining a word's plain meaning and instead relied especially on *Black's Law Dictionary* and other standard reference works. To argue that the term *newspaper* included magazines such as *Sports Illustrated* in the Alabama shield law, the defendants in *Price* cited to *Roget's 21st Century Thesaurus in Dictionary Form* and *Merriam-Webster's Collegiate Thesaurus* because those books list *magazine* as one synonym of *newspaper*. The court found fault with counsel's “selective synonymizing” since other thesauri not cited by defendants fail to list the term *magazine* as a synonym for *newspaper*.⁴⁵ The *Price* court continued with its rejection of thesauri:

More fundamentally, a thesaurus is not a dictionary. It does not purport to define words but instead suggests synonyms and antonyms. A synonym is not a definition because words that are similar can, and often do, have distinct

meanings. To illustrate the problems with the definition-by-thesauri approach, we note that the listing of “newspaper” that the defendants cite from *Roget's 21st Century Thesaurus in Dictionary Form*, *supra*, also indicates that “scandal sheet” is a synonym of “newspaper.” *Id.* at 573. We doubt that most publishers of newspapers or magazines would define their product as a scandal sheet. Another example of the perils of using a thesaurus to define can be found when one looks up “lawyer.” Among the listed synonyms in one thesaurus are “fixer,” “mouthpiece,” “ambulance chaser,” and “shyster.” *Roget's International Thesaurus*, *supra*, at 422–23. We doubt that counsel would concede that those synonyms define lawyers.⁴⁶

Based on this strong language in *Price*, counsel should consider the possible ramifications of citing to thesauri in briefs, especially where different thesauri provide inconsistent results. Although the *Price* decision does not outright reject the use of thesauri in all circumstances, counsel writing a brief before the U.S. Court of Appeals for the Eleventh Circuit should check entries in multiple thesauri before citing to a thesaurus to avoid “selective synonymizing.”

While some courts have rejected the utility of thesauri and found them unpersuasive in certain cases, no authority exists that outright prohibits the use of thesauri as a helpful resource to find the plain and ordinary meaning of terms.

VI. Using Thesauri in Legal Research

Along with the persuasive value of thesauri as authoritative secondary sources, a thesaurus can also help those who conduct legal research. One author wrote that “often a thesaurus is more helpful for a writer than a dictionary, because the thesaurus uses information the writer already knows as a reference point.”⁴⁷ Another article suggests that

“Although thesauri can serve as helpful secondary sources to determine the plain and ordinary meaning of words, courts do not always find thesauri persuasive.”

⁴² M.J. Lee Constr. Co. v. Oklahoma Transp. Auth., 125 P.3d 1205, 1214 (Okla. 2005).

⁴³ Hayes v. Am. Nat'l Bank of Powell, 784 P.2d 599, 609 (Wyo. 1989).

⁴⁴ 416 F.3d 1327, 1336–1338 (11th Cir. 2005).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Paul F. Kirgis, *Lawyer's Bookshelf*, 72 N.Y. St. B.J. 50, 52–53 (2000) (reviewing Jo Ann Harris et al., *New York Evidence with Objections* (1999)).

“Print and online thesauri can also assist those who conduct legal research to find and use the appropriate terms for effective searching.”

“[e]ven knowledgeable professionals occasionally need an encyclopedia, thesaurus, dictionary, or other general reference to serve as a springboard to further investigation or guide a creative problem-solving initiative.”⁴⁸ Another commentator recognized the value of thesauri, especially legal thesauri: “Just like a regular thesaurus, a legal thesaurus provides alternate terms for a specific word or phrase. This can greatly aid researchers who may not be aware of the legal terminology in the area in which they are researching.”⁴⁹ In further support of legal thesauri as helpful resources, the Library of Congress assigns legal thesauri the KF classification for U.S. legal authorities.

Thesauri and dictionaries can assist legal researchers in finding synonymous and related search terms to expand the search parameters. For example, *Burton’s Legal Thesaurus* lists “deliberate,” “inflexible,” “intractable,” “obstinate,” and “unyielding” as synonyms for the term *willful*.⁵⁰ *Black’s Law Dictionary* lists “act of nature,” “act of providence,” “superior force,” “vis major,” “irresistible superhuman force,” and “vis divina” as related terms for *act of God*.⁵¹ These synonyms can assist the legal researcher. An article in the *Law Library Journal* also identifies thesauri as useful legal reference tools along with dictionaries.⁵²

Researchers can also use online thesauri to find synonyms and alternative terms not previously considered. Both Westlaw and LexisNexis have an online thesaurus feature to search for synonyms and related terms. The online thesaurus and related terms feature on LexisNexis contains data from the *Burton’s Legal Thesaurus* and *Webster’s Collegiate Thesaurus*. In addition to a standard thesaurus feature, Westlaw also has a Smart Tools® feature to

improve search results by suggesting synonyms and related legal terms. Legal researchers can also search leading thesauri for free on the Internet.

Print and online thesauri can also assist those who conduct legal research to find and use the appropriate terms for effective searching.

VII. Conclusion

Although the synonyms found in thesauri are not determinative, legal professionals should consider the value of thesauri as helpful and persuasive secondary sources, in conjunction with dictionaries, to ascertain the plain and ordinary meaning of particular words found in statutes, regulations, and contracts.

Table 1
Frequency of Citations to Thesauri
U.S. Federal and State Cases (1990–2006)

Legend

- A: *Roget’s International Thesaurus*
- B: *Roget’s II: The New Thesaurus*
- C: *Roget’s New Millennium Thesaurus*
- D: *Roget’s 21st Century Thesaurus*
- E: *Burton’s Legal Thesaurus*
- F: *Webster’s Collegiate Thesaurus*
- G: *Webster’s New World Thesaurus*
- H: *Webster’s New Dictionary of Synonyms*
- I: *Random House Thesaurus*
- J: *The Synonym Finder*
- K: *West’s Legal Thesaurus/Dictionary*
- L: *Oxford Dictionary and Thesaurus*
- M: *Oxford Thesaurus: American Edition*
- N: *Merriam-Webster Online Thesaurus*

⁴⁸ William H. Ginsburg, *Problems in Health Care Law (7th Edition)*, 18 J. Legal Med. 395, 396 (1997).

⁴⁹ William A. Hilyerd, *Using the Law Library: A Guide for Educators Part IV: Secondary Sources to the Rescue*, 34 J.L. & Educ. 273, 279 (2005).

⁵⁰ *Burton’s Legal Thesaurus* 600 (2006).

⁵¹ *Black’s Law Dictionary* 37 (8th ed. 2004).

⁵² *Standards for Appellate Court Libraries and State Law Libraries*, 98 Law Libr. J. 189, 198 (2006).

Table 1

Year	A	B	C	D	E	F	G	H	I	J	K	L	M	N	Total
2006	3	2	5	0	4	3	0	0	0	2	2	1	0	1	23
2005	5	3	2	1	6	4	0	0	0	0	1	0	0	0	22
2004	2	4	2	1	2	1	0	0	1	1	0	3	0	0	17
2003	3	2	0	0	5	0	1	0	0	0	2	0	0	1	14
2002	3	3	0	0	3	3	1	0	1	0	3	1	0	0	18
2001	3	2	0	1	3	2	3	1	0	0	0	1	0	0	16
2000	3	2	0	1	1	0	1	0	0	1	3	2	0	1	15
1999	3	4	0	1	4	0	0	0	1	1	2	0	0	0	16
1998	2	2	0	1	3	1	0	0	0	0	3	1	0	0	13
1997	1	1	0	0	4	1	1	0	2	2	1	1	1	0	15
1996	1	0	0	3	2	0	0	1	0	0	0	0	1	0	8
1995	1	3	0	0	1	0	2	0	0	1	0	0	0	0	8
1994	4	0	0	1	2	1	0	2	0	2	2	0	0	0	14
1993	2	4	0	0	2	0	1	0	0	1	1	0	1	0	12
1992	11	2	0	0	2	1	0	1	1	3	4	0	0	0	25
1991	3	2	0	0	3	2	0	1	1	0	1	0	0	0	13
1990	2	2	0	0	3	0	0	1	0	5	5	0	0	0	18
Total	52	38	9	10	50	19	10	7	7	19	30	10	3	3	267

Table 2

Year	A	B	C	D	E
2006	4	1	2	1	2
2005	6	5	0	1	1
2004	2	1	1	0	0
2003	5	1	1	3	2
2002	3	1	2	0	3
2001	3	1	0	2	0
2000	1	0	0	1	3
1999	4	0	0	4	2
1998	3	0	1	2	3
1997	4	0	1	3	1
1996	2	0	0	2	0
1995	1	0	1	0	0
1994	2	0	1	1	2
1993	2	0	0	2	1
1992	2	0	0	2	4
1991	3	0	0	3	1
1990	3	0	0	3	5
Total	50	10	10	30	30

Table 2
Frequency of Citations to Legal Thesauri
U.S. Federal and State Cases (1990–2006)

Legend

- A: *Burton’s Legal Thesaurus* (all editions)
- B: *Burton’s Legal Thesaurus* (3d ed. 1998)
- C: *Burton’s Legal Thesaurus* (2d ed. 1992)
- D: *Burton’s Legal Thesaurus* (1980)
- E: *West’s Legal Thesaurus/Dictionary*

© 2008 Brian Craig

Framing Academic Articles

“Readers need your help to engage a conceptual problem, to see why it matters and how it can motivate them to follow a sustained argument.”

By Gregory G. Colomb and Joseph M. Williams

Gregory C. Colomb is a Professor of English at the University of Virginia in Charlottesville. Joseph M. Williams was a Professor of English at the University of Chicago.¹ Both have been visiting professors at the National Judicial College. They have been regular contributors to the Writing Tips column in Perspectives.

In previous columns we've discussed the different kinds of writing that lawyers do, ranging from pleadings to transactional documents to contracts to client communications. We have, however, not yet looked at one kind of writing that law students often do and practicing lawyers sometimes do: academic term papers for law school and articles for law journals, trade magazines, and related publications read by other professionals and more general readers (we'll call this kind of writing "academic"). It would be easy to assume that you have mastered this genre by the time you reach law school: after all, you've been writing successful academic papers for years. But we know that many of you still find writing term papers difficult. And even if you do it easily, a complete practitioner must also be able to *explain* to herself and others what she did that made those texts succeed. If we can rely on our experience, that ability is not widespread.

Fortunately, academic writing follows the principles we covered in earlier columns that discussed other genres, but with two key differences. The first concerns the kind of problems they address. Most pleadings, memos, and client communications address a concrete problem that is immediately present in the reader's situation. If the problem is not solved, it exacts costs on someone, often on the

reader. That kind of problem can be solved only when someone *does* something. So a lawyer asks a judge to make a ruling, issue an order, or make some other decision; or she advises a client to follow some regulation or structure a deal in a specific way. In other words, most legal writing is instrumental; it seeks to enlist someone to take an action to address a concrete need.

In academic writing, however, the problems are seldom so immediate or concrete. More important, they rarely address an issue that calls on someone to *act*. Instead, they require only that we improve our understanding or change our beliefs.

The second difference is related to the first. When a document calls for action to address a pressing concrete problem, not only are readers already motivated by their situation to read on, but writers can use those motivations to focus readers on the message. But when a document doesn't address an immediate problem that, left unsolved, will exact palpable costs, but rather a distant conceptual question that affects only our understanding, writers have to work hard to generate and sustain their readers' motivation, attention, and focus.

Of all the writing difficulties we have seen in academic writing, few are as common or as troublesome as those that stem from the fact that its problems are only conceptual. Readers need your help to engage a conceptual problem, to see why it matters and how it can motivate them to follow a sustained argument. If you don't know how to do that reliably, you'll struggle now to hold your teacher's attention; and if, down the road, you can't define a conceptual problem so that readers outside the law can see its significance, you won't succeed in a public forum that depends on convincing others that you have important things to say.

Because you must do most of the work of defining problems to motivate readers in your introductions, this column will look at the introductions to

¹ It is with great sadness that *Perspectives* notes the death of Professor Joseph M. Williams on February 22, 2008. Please see memorial for Joseph Williams on page 186.

successful articles (and class papers). Even more than in more standard legal documents, a well-written introduction to an academic paper profoundly influences not just how we read, understand, and judge what follows, but how well we remember it the next day, and then how we talk about it to others.

Practical vs. Academic Problems

As we explained in an earlier column,² writers must define the problem their paper addresses by making readers see that it has two parts: a situation and its consequences. Readers must see both parts, because what makes a situation a problem are its consequences and its costs, and the less tolerable the consequences the more motivating the problem. For example, a car that won't start is usually a problem, but not much of one if you own two cars and the other one will get you where you want to go. But even if the car that won't start is your only one (and you can't call a friend or a taxi), the significance of the problem still depends on other consequences. You have a small problem if you just want to while away a few hours with a Sunday drive; the problem is more significant if you need to get to an interview for your dream job. It's the size of the cost that defines the size of the problem.

Few writers address problems as immediate and concrete as a car not starting. But legal writers often do. In most legal documents, readers know about the problem, because, as we said earlier, if it is left unsolved, significant pain follows. A judge presented with a motion knows that she must make a decision. A client trying to negotiate a deal knows that he must avoid giving away too much. With practical problems, the tangible cost makes it easy for readers to care:

Problem Situation: Client does not properly evaluate customs fees when changes in exchange rates alter the real price of imported goods.

Problem Costs: Client loses money because it fails to recoup excess customs fees when rates

fall and is assessed penalties when it underpays fees when rates rise.

To paraphrase Dr. Johnson, nothing concentrates the mind like a hanging—or lost money.

But academic problems do not involve tangible conditions with tangible costs. Instead, they are conceptual questions like not knowing how life began or not knowing how the Magna Charta has or hasn't influenced habeas corpus in Asian countries. In some cases, you would have little difficulty showing the full dimensions of your academic question, for example, if its answer might tell us how life began and developed. But you do have work to do if you want to write about how an ancient document has or hasn't influenced the Chinese legal system. What makes this a compelling question is not obvious, except perhaps to a few specialists.

For these kinds of academic problems, you can't point to intolerable costs like lost jobs or lost money. You can't even point to specific, eventual miscarriages of justice, much less to immediate, known ones. All you can do is show that by not knowing whether the English principle of habeas corpus appears in Asia, we cannot know something else, something larger and more consequential: Does habeas corpus speak to a universal principle of justice, or is it merely a cultural artifact of the English-speaking people? Of course, many people will think that that larger question is itself not consequential enough to merit the time to read its answer. But for the specialists, it's a question that might turn their professional lives upside down.

So the challenge of academic problems is their conceptual nature. They are not immediate, pressing problems that exact palpable costs. They do not involve tangible pain or loss that readers are eager to avoid. And they are not concrete events or conditions that readers can readily see. Instead, they raise questions whose answers help readers understand the world in ways that they find satisfying and perhaps even useful, but only in the long run.

As an *academic* writer, your job is to define your academic problem in ways that help readers see

“So the challenge of academic problems is their conceptual nature. They are not immediate, pressing problems that exact palpable costs.”

² Gregory C. Colomb & Joseph M. Williams, *So What? Why Should I Care? And Other Questions Writers Must Answer*, 9 Perspectives: Teaching Legal Res. & Writing 136 (2001).

“When an introduction raises a practical problem, readers are primed to sit up and take note. The Common Ground states the reader’s actual, immediate situation.”

its full dimensions, see why its question needs an answer, and see why your answer is likely to make them better understand something they care about. The most important place you do that is in your introduction.

Pragmatic vs. Academic Introductions

Prototypical pragmatic introductions follow a three-step pattern common in many genres. Here, for example, is how the pattern works out in a simple client communication:³

1 As you recall, in a conference call on June 2,
2 2004, we discussed the exclusivity and first-
3 refusal proposals with representatives of
4 Clearlines.com. *Step 1: Common Ground*
5 Clearlines now claims that in this call we made
6 promises that we do not recall, that are not
7 reflected in our contemporaneous notes, *Step*
8 *2a: Problem Situation* and that would make
9 the deal significantly less attractive. *Step 2b:*
10 *Problem Costs* This letter summarizes the June
11 2 conversation and lists talking points for any
12 further conversations with Clearlines. Please
13 review it carefully now and again before any
14 contact with Clearlines so that there can be
15 no possibility of further confusion on these
16 issues. *Step 3: Resolution/Recommended*
Action

Step 1. The pattern begins (sentence 1) by setting a context that puts readers and writers on a shared ground of information. We call this step **Common Ground**, a position of stability that is generally unproblematic or at least familiar.

Step 2. The next step (sentence 2, line 5) disrupts that stability by raising the **Problem**, something new or newly recognized that threatens both the stability of the Common Ground and the reader’s well-being. That Problem comes in two parts, the threatening Situation (Clearlines is making a surprising claim) and its intolerable Consequences (if they prevail, you lose money).

Step 3. The final step returns readers to at least a promise of stability by stating or promising some

solution to the problem. We call this step the **Resolution**: to solve or at least mitigate the problem, review our talking points before you talk to Clearlines again.

Put together, the introduction looks like this:

1. (Stable) Common Ground
2. (Destabilizing) Problem
 - a. (Threatening) Situation
 - b. (Intolerable) Consequences
3. (Restabilizing) Resolution

A Law Review Introduction

When an introduction raises a practical problem, readers are primed to sit up and take note. The Common Ground states the reader’s actual, immediate situation. The Problem and its costs directly threaten the reader’s well-being. And the Resolution tells the reader what to do to protect himself from harm. In such cases, a writer can count on a reader to be motivated enough by self-interest to read on with focus and attention.

Not so with an article sent off to a law review. If the editors can’t see in the first few pages that it speaks to a question worth answering, it is unlikely to get a sympathetic reading. But even if it should make its way into the journal, readers will flip past it if they don’t see in its introduction that its question is consequential enough *to their beliefs and understanding* to merit their attention.

In order to motivate their readers, law review articles execute the three steps in a standard introduction, but in distinctive ways. What follows is a typical introduction, condensed to highlight its key elements (we have eliminated footnotes):⁴

- 1 In today’s society, would Major John André, a
2 British spy captured behind American lines in
3 civilian clothes in 1780, be hanged? Though
4 he was considered a fearless officer, a fine

³ See *supra*, note 1; Gregory C. Colomb & Joseph M. Williams, *Client Communications: Designing Readable Documents*, 13 *Perspectives: Teaching Legal Res. & Writing* 106 (2005).

⁴ Condensed and adapted from David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty*, 127 *Mil. L. Rev.* 1 (1990).

5 gentleman, and a noble patriot, he suffered the
6 punishment mandated by military law. Over
7 time, our legal traditions have changed, but the
8 punishment for spying has not. Article 106 of
9 the Uniform Code of Military Justice (UCMJ)
10 prescribes that anyone convicted of spying
11 shall suffer the death penalty. It is the only
12 offense for which death is mandated,
13 reflecting the centuries-old judgment of
14 military men that the betrayal of a comrade is
15 a crime so heinous that its proper punishment
16 must be death. *Common Ground*

17 Recently, however, the Supreme Court has
18 rejected mandatory capital punishment in
19 civilian cases, because the Court requires a
20 decision maker to consider the circumstances
21 of the crime, both mitigating circumstances
22 and aggravating factors. Since the mandatory
23 death provision of Article 106 also ignores
24 circumstances, it too might come under
25 constitutional scrutiny: Will the Court apply
26 the constitutional requirement to consider
27 circumstances not only in civilian death
28 penalty cases, but in military cases as well?
29 *Problem Situation/Question* If so, Article 106
30 can no longer be enforced and the UCMJ
31 will have to be revised by Congress. More
32 significantly, if this new civilian standard
33 applies to military justice, it will challenge one
34 of the military's most fundamental values,
35 that the ultimate betrayal mandates the
36 ultimate penalty. *Problem Consequences*

37 This article examines the history of penalties
38 for spying, precedents from the Supreme
39 Court and the Court of Military Appeals, and
40 the status of spying under current international
41 law, concluding that there is very little chance
42 that the mandatory provisions in Article 106
43 can long survive. *Resolution/Answer*

Step 1: Common Ground (lines 1–16). This step does two things for readers. It first locates the issue of the paper in its larger context of legal history, legal theory, or public affairs. It reports the received wisdom, the standard view of the issue the article will address. Ideally, that view is presented in a way that makes it seem settled, unproblematic, and generally shared (even if only by a small number of specialists). But you cannot just report that context as you find it. You must shape this review so that it specifically focuses on just those aspects of the standard view *that you intend to question*, perhaps

by expanding them, but more often by correcting or even refuting them. This review should include many of the key concepts that will also show up in the statement of your question and its answer.

In nonlegal journals, the common ground usually consists of a review of the research that led to the standard view you will question. An article addressing a problem of sound change in Old English, for example, would cite the published articles that established the position the article will correct. In legal journals, however, the common ground is often not a research review, because legal articles usually address issues that have more general social significance than, say, the evolution of Old English *ham* to *hom*—issues such as law enforcement, race relations, congressional powers, and so on. If a law review article does review specific articles, holdings, and other writings pertinent to the issue, that review usually appears after the introduction.

In our condensed example, the common ground consists of the first paragraph that locates a social policy in the history of the law.

In today's society, would Major John Andre, a British spy captured behind American lines in civilian clothes in 1780, be hanged? ... anyone convicted of spying shall suffer the death penalty. It is the only offense for which death is mandated, reflecting the centuries-old judgment of military men that the betrayal of a comrade is a crime so heinous that its proper punishment must be death.

In a standard law review article, the common ground is typically the longest segment of an introduction, often covering as much as a page or more. In its worst version, it goes on for pages mentioning every bit of remotely relevant information that the writer could find.

Step 2: The Problem (lines 17–36). This part of an introduction has two parts, each of which plays a specific role in motivating a reader.

- The first part is the problematic situation—in law review articles, something that we do not know or understand. It is typically introduced with *but*, *however*, or some other word or phrase

“In a standard law review article, the common ground is typically the longest segment of an introduction, often covering as much as a page or more.”

“Once readers decide that the question is worth answering, they begin to look for that answer. Most readers prefer to see the answer at the end of the introduction. . . .”

signaling that what follows contradicts or at least qualifies the common ground.

This step motivates careful reading by telling the reader *What you just read may seem to be settled and unproblematic, but in fact it is wrong, or at least not entirely right:*

Since the mandatory death provision of Article 106 also ignores circumstances, it too might come under constitutional scrutiny: Will the Court apply the constitutional requirement to consider circumstances not only in civilian death penalty cases but in military cases as well?

In other words, we may have thought that death for spying is a settled issue, but it is not.

The statement of the problem situation is typically brief, no more than a paragraph and often as little as one sentence. It states what we do not know or entirely understand.

The second part of the problem tells us why we need to resolve it by explaining the consequences of not knowing or understanding the issue as well as we thought we did.

■ Once we see the problematic situation, we want to know why it matters. This typically involves the consequences that make the situation (in this case, our ignorance) intolerable, although writers sometimes replace that with the benefits of resolving it.

If so, Article 106 can no longer be enforced and the UCMJ will have to be revised by Congress. More significantly, if this new civilian standard applies to military justice, it will challenge one of the military's most fundamental values, that the ultimate betrayal mandates the ultimate penalty.

This part is also typically brief. But if the question is arcane or surprising, it may take a few paragraphs to trace all of the consequences that make the question worth answering.

Step 3. The Resolution (lines 37–43). Once readers decide that the question is worth answering, they begin to look for that answer. Most readers prefer to see the answer at the end of the introduction, as in this example. But if you have good reason to save your answer for the conclusion, you have to give

readers *some* resolution—most commonly, a promise of an answer.

This article examines the potential application of the Supreme Court's decision and the challenges it poses to current military law.

Sometimes that promise is in the form of a verbal table of contents:

Part one traces the history of penalties for spying and explains the parallels between Article 106 and civilian law; part two examines precedents from the Supreme Court and the Court of Military Appeals and the status of spying under current international law; part three examines the likely effects of the Supreme Court's decision in civilian law; and part four explores the challenges the decision poses to current military law.

Note that this standard three-step pattern creates a psychological dynamic familiar in many kinds of writing: stability-disruption-restabilization. In this regard, introductions are like fairy tales (with one exception). Almost all fairy tales open in the same way, with a seemingly ordinary, even serene situation:

Once upon a time, Little Red Riding Hood was skipping along the forest path carrying lunch to her Grandmother's house . . .

The next move is predictable: This calm and happy scene is disrupted:

... when suddenly the Wolf jumped out from behind the tree, frightening her so much she almost dropped her basket.

In other words, in the combination of Common Ground + Problem Statement, a writer provides a few sentences to set the scene, first so that we can better understand what to expect in the story, but *also so that he can disrupt that situation, heightening his narrative impact*: what seemed settled stability to the reader turns out not to be so settled after all. In this case, what we thought was true of the law is not.

Like fairy tales, articles also give readers the satisfaction of a happy ending—in this case, the answer to a question that does (or at least should) bother readers. And like fairy tales, that resolution is provided not by the protagonist/reader but by an

outside agent. In fairy tales, that outside agent is a woodsman, fairy godmother, or white knight. In articles, it's the writer who steps in to save the day by answering the question.

The key difference between fairy tales and introductions involves *when and where* readers look for a resolution. In fairy tales, we know that things will turn out well, but we have to wait to the end for the *happily every after*. But few readers look forward to reading law review articles the way that children look forward to mom or dad reading their favorite story. So rather than make their readers wait in suspense, thoughtful writers provide the answer up front, typically at the end of the introduction.

A Term Paper Introduction

Term papers in law school look a lot like law review articles in many respects. But because their goal is not just to teach readers something new but to show a teacher how much the writer knows, they tend to highlight the writer's research a bit more. What this means for introductions is a longer and more research-based common ground.

Here is a typical introduction to a term paper (we have omitted some sentences and many footnotes):

1 When it enacted the Refugee Act of 1980,
2 Congress fulfilled its obligations under the
3 United Nations Protocol Relating to the Status
4 of Refugees. In the 1980 Act, the definition of a
5 refugee is almost identical to the definition in
6 the Protocol. But in addition to bringing U.S.
7 law in line with the internationally recognized
8 definition of refugee, Congress also intended
9 to bring greater uniformity to asylum law ...
10 [explanation of how new definition brings
11 uniformity]. *Common Ground*

12 In addition to a new statutory definition, courts
13 also have new standards of review to guide
14 judicial review of Board of Immigration
15 Appeals ("BIA") asylum decisions. Rather than
16 bring uniformity, however, the new definition
17 and standards of review have proved to be
18 almost arbitrary in their application. Courts
19 have ... [analysis of applications]. Under the
20 guidance of Federal appellate courts, the
21 U.S. now appears to have a system of
22 "standardless" judicial review of asylum
23 decisions. *Common Ground*

24 It would appear that such a standardless
25 system is on its face unfair and that courts
26 should strive to achieve the original intent of
27 the 1980 act, to bring uniformity to asylum
28 decisions. Many commentators have lamented
29 that our current system gives even less
30 deference to BIA decisions than did traditional
31 standards. *Common Ground* But before the
32 current system can be productively criticized
33 and reformed, we must first understand
34 how and why the courts have created this
35 apparently arbitrary system. *Problem Situation/*
36 *Question* Such an arbitrary system might in
37 fact be fairer and more just if, for example,
38 asylum cases are too varied for a single
39 standard or if a vague "substantial evidence"
40 standard allowed courts the leeway they need
41 in cases that rarely have a reliable paper trail.
42 Until we can understand what needs the
43 current system has evolved to meet, we
44 cannot reliably know how or even whether
45 it should be standardized. *Problem*
Consequences

46 Part one of this paper discusses the traditional
47 standards of review that have evolved through
48 both case law and statute. Part two analyzes
49 the "standardless" review problem, namely
50 the failure of many courts to comply with
51 traditional standards. Part three shows why a
52 simple return to a single, uniform standard will
53 not serve the cause either of justice or of U.S.
54 immigration policy. It will also suggest some
55 ways to make the current system less arbitrary
56 without eliminating the flexibility that the
57 courts have created for themselves.

Resolution/Answer

There is little difference between this paper and law review articles in its problem statement (lines 24–35) and resolution (lines 46–57). The problem situation is a single sentence that raises a question by stating what we don't but need to know: *Why did courts depart from uniformity?* The statement of the problem consequences is longer, but still relatively brief: *We can't reliably criticize what we don't understand.* The resolution suggests an answer to the question: *A uniform standard is not appropriate, but we can make the system less arbitrary.* As is often the case, the resolution also forecasts the analysis that will lead up to that conclusion, in the form of a verbal table of contents.

“As is often the case, the resolution also forecasts the analysis that will lead up to that conclusion, in the form of a verbal table of contents.”

“Legal publications intended for a general audience typically follow the now-familiar pattern: Common Ground–Problem Statement–Resolution.”

In its common ground, however, this paper is very different from a law review article. The common ground is (before our elisions) almost four times as large as the rest. Students often use the common ground not only to set up a context for readers but also to begin to establish their standing as informed members of a scholarly community. In this case, the writer offers three kinds of common ground. The first (lines 1–11) analyzes the statute that is not the subject of study but its underlying basis. The second (lines 12–23) presents the known “facts” about the process the paper will analyze. And the third (lines 24–31) presents an expected response to those facts, one that the paper itself will complicate, if not wholly overturn.

With this elaborate common ground, not only does the writer “set up” her readers to think that something seems to be true (*This arbitrary process is unfair*) so that she can show it is not, but she accomplishes two other rhetorical goals. She “educates” her readers about the scholarly conversation her paper will join, and by doing so she establishes her own credentials for entering that conversation as a knowledgeable peer.

Law review articles sometimes take this research-based approach to the common ground, but much less often than the quicker policy-based approach of the Major John André example above. When they do begin with research, it is usually because they address a highly specialized question whose background and significance readers need help to see.

A General Circulation Introduction

Legal publications intended for a general audience typically follow the now-familiar pattern: Common Ground–Problem Statement–Resolution. Once again, they tend to be distinctive not in their problem statement or resolution, but in their common ground. Because writers cannot assume that general readers care about legal questions that can often seem arcane, they try to locate their questions not in the realms of policy or legal scholarship, but in the professional and personal lives of their readers.

You may remember some standard advice about reaching general readers: grab their attention with a snappy quotation, interesting fact, or engaging anecdote. You can’t substitute a snappy opening for a good problem statement, but quotations, facts, and anecdotes frequently serve as common ground in introductions to general circulation articles. Here is one that uses both recent events and a White House quotation to bridge the gap between its technical legal question and its readers’ concerns:⁵

On March 14, 2000, also known as “Black Tuesday” for biotechnology, the White House issued a joint statement by President Bill Clinton and Prime Minister Tony Blair of the United Kingdom. They called for “unencumbered access” to the results of publicly funded genetic research, including all raw sequence data: “To realize the full promise of this research, raw, fundamental data on the human genome, including the human DNA sequence and its variations, should be made freely available to scientists everywhere.” *Common Ground* Even though the statement also endorsed “intellectual property protection for genetic-based inventions,” stock prices in the biotechnology section immediately plummeted. *Problem Costs* But was that a rational response to an announcement that included no new policies? Will individual patents be threatened by publishing the massive amounts of sequence information from the many genome projects under way? *Problem Situation/Question* This article explains what the biotechnology industry can expect from the PTO and why commercial enterprises and academic institutions should not abandon hopes of patent protection for gene-based inventions simply because a relevant DNA sequence appears somewhere in a genomics database. *Resolution/Answer*

In this case, the writer must build a connection between matters readers already care about and a fairly technical question about a highly technical branch of the law. So not only does he frame the common ground in terms of a threat (“also known as ‘Black Tuesday’ for biotechnology”) but he reverses the two elements of the problem statement, beginning with the costs—*Biotech companies may*

⁵ Condensed and adapted from Mark S. Ellinger, *Genome Projects and Gene Patents: What’s Left to Claim?*, Technology Law Alert (Fish & Richardson, LLP, Minneapolis, Minn.) Dec. 2000.

lose money—before he states the question—*Will patents be harder to get once genetic data is widely available?* Then in the resolution, he offers not only an answer but a promised respite from those costs (“should not abandon hopes of patent protection”).

Even in the arcane world of patent law, a good introduction can show ordinary readers not only what they can expect to learn but why they should care enough to want to learn it.

Conclusion

As the proverb tells us, *Well begun is half done*. It may not always feel that way to a writer—especially since good writers often wait until they have a complete draft before they flesh out a complete introduction. But the proverb does tell us something important about readers. Readers

will thank you for an introduction that defines a problem that motivates them to want to see both your answer and how you support it; that locates that problem in a context of familiar understandings and beliefs that are challenged by your question; and then that gives an answer that is plausible but also leads them to ask, *Well, how did you arrive at that?* Such a beginning will launch readers into the body of your paper motivated to learn more, focused on what matters most, and ready to follow your argument to its end. With readers like that, you and your paper are more than half done.

© 2008 Gregory C. Colomb and Joseph M. Williams

“Readers will thank you for an introduction that defines a problem that motivates them to want to see both your answer and how you support it. ...”

Another Perspective

“Expertise does not exist in a vacuum; it is a social construct. The concept of expertise cannot exist independently of a community of knowledge. The knowledge about which one is considered by others to be expert is developed, defined, evaluated, maintained, and transmitted by those in the community who are qualified to make judgments about what counts as expertise. If that is so, then we acquire expertise not in a vacuum, but as novices who must be socialized into a community of knowledge, into a community of discourse by those who constitute the community. The process of becoming an expert is at least as much a social process as an exercise of individual effort and intellect. Put this way, expert thinking is successful socialization.

And at this point, perhaps, we can see the wider relationships among the schemes of development, the skills of critical thinking, and the skills of expert thinking: they all emphasize the movement from the concrete to the abstract, from visible presence of a singular instance to the more general and abstract category, from concrete singularity to abstract multiplicity.”

—Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 Legal Writing 1, 13 (1991).

In Memoriam: Joseph M. Williams, 1933–2008

Joseph M. Williams, professor emeritus at the University of Chicago, Department of English Language and Literature, died of heart failure on February 22, 2008, at his home in South Haven, Michigan. He is survived by his wife, Joan Steck, three children from his first marriage, two stepsons, and seven grandchildren.

Williams was a renowned English scholar and linguist who focused on the history and craft of writing. He was the author of several landmark works on writing pedagogy, including *Style: Ten Lessons in Clarity and Grace*. First published in 1981, the ninth edition of this definitive work appeared in 2007. Although not specifically tailored to legal writing, this style manual has been used extensively by legal writing instructors. Williams' other notable works include *The Craft of Argument*, *The Craft of Research*, and *Origins of the English Language: A Social and Linguistic History*.

Williams began teaching at the University of Chicago in 1965. He was one of the founders of the University of Chicago's Little Red Schoolhouse writing course, an instructional

program for undergraduate, graduate, and law students that focuses on the fundamentals of writing and the importance of storytelling. This course, also known as Advanced Academic and Professional Writing, has had a profound impact on writing programs worldwide. Williams was also a founding partner of Clearlines, a communications consulting firm that trains writers in corporations, law firms, government agencies, and academic institutions. Through Clearlines, Williams worked with scores of lawyers, helping them improve the structure and clarity of their professional communications. In 2006, Williams received the Legal Writing Institute's Golden Pen Award for his lifetime contributions to legal writing.

Readers of *Perspectives* benefited from Joseph M. Williams' and Gregory Colomb's contributions to the Writing Tips column. Over the past 12 years, they co-authored 11 columns, focusing attention on effective storytelling, coherent prose, and effective client communications. Williams' final column appears in this issue, Spring 2008. The *Perspectives* editorial board and readers are grateful for Joe Williams' passion for clarity and elegance in writing and his contributions to the writing community.

Legal Research and Writing Resources: Recent Publications

Compiled by Barbara Bintliff

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

Linda J. Barris, *Understanding and Mastering The Bluebook: A Guide for Students and Practitioners* 2007. [Durham, NC: Carolina Academic Press, 136 p.]

A guide to the essential rules and sub-rules of *The Bluebook*, the text uses a “building block” approach with step-by-step instructions. Numerous illustrations, explanations, tips, hints, and cautions help users understand the rules and avoid common mistakes. It includes rule comparison charts and clear, bullet-point explanations.

Kirsten K. Davis, *Building Credibility in the Margins: An Ethos-Based Perspective for Commenting on Student Papers*, 12 *Legal Writing* 73–104 (2006).

This article discusses the importance of using an ethos, an ethical appeal to reason that reflects fairness and authenticity, in individualized evaluation and commentary on student writing. The author argues that legal writing faculty should provide feedback in a manner that leads to student perceptions of fairness, and provides guidance on how to accomplish this.

Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing The Federalist, 1986–2007*, 31 *Seattle U. L. Rev.* 75–106 (2007).

“This Article examines the use of history in legal interpretation through an empirical analysis of one of the most prominent examples of historical evidence in law:

citations to *The Federalist* in Supreme Court Justices’ published opinions,” particularly when different justices cite the same historical source to support opposing interpretations. *Id.* While identifying numerous areas relating to the use of historical sources that need investigation, the author concludes that the most important task is “to focus on the more practical, methodological questions of how we can assure that when historical sources and methods are used in the law, they are used appropriately.” *Id.* at 106.

Tim Gallagher, *Recent Law Review Articles Concerning the Legal Profession*, 31 *J. Legal Prof.* 377–391 (2007).

A selectively annotated bibliography of law journal articles on numerous topics focusing on the subject of the legal profession.

International Elder Law Research: A Bibliography, 2 *J. Int’l Aging L. & Pol’y* 143–166 (2007).

A guide to agencies and organizations; conventions, documents, and reports; Web sites and databases; and journals and books related to international elder law journals. Most resources were produced in the last 10 years, but some older sources are included.

Jeanne Kaiser & Myra Orlen, *Using a Literary Case Study to Teach Lawyering Skills: How We Used Damages by Barry Werth in the First-Year Legal Writing Curriculum*, 12 *Legal Writing* 59–72 (2006).

The authors recount their experience using an account of complex litigation following a childbirth that went “horribly wrong,” (Barry Werth, *Damages: One Family’s Legal Struggles in the World of Medicine* (1999)) to teach legal research and writing. *Id.* at 63. The authors describe their pedagogical objectives, evaluate their use of literature to teach research and writing, and outline future plans.

Legal Research Series [Durham, NC: Carolina Academic Press]

Volumes in the Legal Research Series are state-based research guides that provide the essential elements of legal research in the state covered. Each volume includes an

overview of the research process. Standard sections in each volume include cases, statutes, legislative history, constitutions, administrative law, court rules, and secondary sources. There is limited coverage of federal law. Teacher's manuals are planned for each state. Teachers manuals are currently available for Arkansas (2007), Florida (2d ed. 2002), Georgia (2007), Illinois (2003), Michigan (2006), Missouri (2007), Oregon (2003), Pennsylvania (2007), Tennessee (2007), and Washington (2005). Forthcoming in 2008 are manuals for Arizona, California, Connecticut, Massachusetts, New York, and Ohio. Manuals for other states are planned.

Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer,"* 2007 [New York: Oxford University Press, 336 p.]

The author uses "anthropological linguistics" to reveal how the intellectual transformation from thinking of problems in moral and emotional terms to considering them in the framework of legal authorities takes place. "This move away from moral frameworks is key, she says, arguing that it represents an underlying worldview at the core not just of law education, but for better or worse, of the entire US legal system—which, while providing a useful source of legitimacy and a means to process conflict, fails to deal systematically with aspects of fairness and social justice. The latter part of her study shows how differences in race and gender makeup among law students and professors can subtly alter this process." Publisher's Information.

Stephen A. Newman, *Using Shakespeare to Teach Persuasive Advocacy,* 57 *J. Legal Educ.* 36–59 (2007).

The author describes his experience using speeches of the characters Brutus and Antony from Shakespeare's *Julius Caesar* to teach persuasive advocacy. He explains in detail how the speeches illustrate key concepts, and concludes that "[b]y examining the way each speaker relates to his audience, crafts his appeals, and communicates his central points, the student

can identify many of the essential elements of advocacy." *Id.* at 59.

Beth Simone Noveck, *Wikipedia and the Future of Legal Education,* 57 *J. Legal Educ.* 3–9 (2007).

The author argues that using wikis in law classes encourages students to deliberate with each other, to exchange and defend their ideas and arguments, and to enhance their expertise. Whether an internal, class-use-only wiki or a public forum, wikis encourage active learning rather than passive information consumption, and foster the democratic ideal of deliberation.

Lee F. Peoples, *Legal Ethics: A Legal Research Guide,* 2d ed., 2006 [Buffalo, NY: William S. Hein, 89 p.]

Updating a 1992 bibliography, the author offers a comprehensive, selectively annotated bibliography on legal ethics research. It includes coverage of issues arising under the Sarbanes-Oxley Act and a helpful section on researching legal ethics and the hierarchy of legal authorities.

Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States,* 17 *Ind. Int'l & Comp. L. Rev.* 307–354 (2007).

This article examines why England and America took divergent approaches in finding a balance between growth and restraint in the common law, based on publication and citation practices. It also explores the potential consequences for the common law, and "predicts the impact no-citation rules will have on the future of the common law through an examination of the precedential value of unreported and unpublished cases, the role of the judiciary in controlling the growth of the common law, jurisprudential theories, and the degree no-citation rules will be enforced in both jurisdictions." *Id.* at 308.

Remote Sensing, Air, and Space Law International Bibliography 1930–2007: A Special Publication of the Journal of Space Law, 33 *J. Space L.* iv–vi, 1–182 (2007).

A comprehensive bibliography of domestic and international literature, including articles and books, dissertations, reports, U.S. Supreme Court cases, proceedings and

symposia, and other materials published between 1930 and 2007. Most materials are in English, but many foreign language materials are included. Entries are placed in either subject-based categories (for example, space law and remote sensing and aviation) or format-based categories (space law international conventions and air law treaties and conventions). Some sections are annotated. The journal issue includes a searchable CD-ROM with the same bibliography.

Suzanne E. Rowe, *Reasonable Accommodations for Unreasonable Requests: The Americans with Disabilities Act in Legal Writing Courses*, 12 *Legal Writing* 3–57 (2006).

After explaining ADA requirements and exploring current literature in law and science concerning learning disabilities, this article “examines specific requests that may arise in courses with intensive writing, research, or skills components and analyzes appropriate responses to reasonable and unreasonable” ADA requests. *Id.* at 7. The author’s thesis is that “provision of *excessive* or *inappropriate* accommodations may harm students with learning disabilities by preventing them from developing the complete set of skills needed to practice law.” *Id.*; emphasis in original.

Sarah O’Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, 14 *Clinical L. Rev.* 301–335 (2007).

“Increased communication between legal research and writing (‘LRW’) programs and clinical programs is desirable because it provides students with a seamless learning experience, enhances faculty teaching in both departments, and creates opportunities for collaboration that benefits a law-school community generally. . . . Clinical and LRW faculty can overcome these differences [in teaching approaches] with increased communication and a conscientious commitment to incorporate principles of each other’s teaching into their own pedagogy.” Abstract.

Troy Simpson, *Persuading Judges in Writing: Tips for Lawyers (And How Technology Can Help)*, LLRX.com, Oct. 30, 2007 (available online at <www.llrx.com/features/persuadingjudgesinwriting.htm>).

The author explains how good written advocacy can help lawyers in England, Australia, and America to persuade judges, and provides readers with some practical tips to accomplish this challenging task.

Thomas A. Smith, *The Web of Law*, 44 *San Diego L. Rev.* 309–354 (2007).

Taking inspiration from statistical physicists, the author reports on the highlights of a citation study he conducted that examines the shape of the American legal citation network of cases and other legal authorities. He posits that, by studying the overall shape of this network and its links, we can “learn new things about how law is organized” and how it evolves. *Id.* at 310. “Preliminary results strongly suggest that the American case law network has the overall structure that network theory predicts it would: a structure that visually and in general terms appears much like that of the Web and other citation networks, such as those of scientific papers. It shows that this structure, however its precise mathematical structure may ultimately be characterized, is present at virtually every jurisdictional level of our legal system, from the U.S. Supreme Court to the lower state courts.” *Id.* at 313.

Ken Strutin, *Criminal Resources: False Confessions*, LLRX.com, Nov. 24, 2007 (available online at <www.llrx.com/features/falseconfessions.htm>).

“This article surveys selected web-based resources and publications that shed light on the psychology and interrogation practices behind false confessions, as well as highlighting notable educational and bibliographic materials.” Introduction. Includes brief annotations to sources in the following categories: current awareness; false confession research; recording custodial interrogations; resources; PowerPoint presentations; and bibliographies.

Teaching Writing and Teaching Doctrine: A Symbiotic Relationship? (Symposium in celebration of the 25th anniversary of the Brooklyn Law School Legal Writing Program), 12 Legal Writing 171–292 (2006). Articles include:

Elizabeth Fajans, *Learning from Experience: Adding a Practicum to a Doctrinal Course*, 12 Legal Writing 215–228 (2006).

A discussion of a then-proposed practicum to be added to an administrative law course. Includes an intended syllabus.

Eric Goldman, *Integrating Contract Drafting Skills and Doctrine*, 12 Legal Writing 209–214 (2006).

An account of the author's experience in addressing the challenges of teaching concurrently contracts doctrine and drafting.

Claire R. Kelly, *An Evolutionary Endeavour: Teaching Scholarly Writing to Law Students*, 12 Legal Writing 285–292 (2006).

An outline of a seminar on scholarly writing for law students, with suggestions for adapting the model to a seminar on a doctrinal topic.

Pamela Lysaght, *Writing Across the Law School Curriculum in Practice: Considerations for Casebook Faculty*, 12 Legal Writing 191–207 (2006).

A discussion of the choices and considerations that might factor into a decision by doctrinal (“casebook”) faculty who are considering adding writing assignments to a course. The author includes a methodology for developing effective writing assignments.

Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 Legal Writing 229–283 (2006).

The author provides an argument for teaching narrative to students, especially those hoping to become litigators. Then, using excerpts from a work in progress, he illustrates his argument with examples of what a pedagogy for teaching narrative might include.

Carol McCrehan Parker, *Writing Is Everybody's Business: Theoretical and Practical Justifications for Teaching Writing*

Across the Law School Curriculum, 12 Legal Writing 175–190 (2006).

The author discusses theoretical justifications for including legal writing across the curriculum, focusing on the curricular goals of teaching legal analysis, preparing professional documents, and developing legal imagination and professional voice. She also considers practical justifications that support including writing components of doctrinal classes.

Thirty-Ninth Selected Bibliography on Computers, Technology, and the Law, 33 Rutgers Computer & Tech. L.J. 367–431 (2007).

An unannotated annual compilation of the “most important and timely articles on computers, technology, and the law,” indexed by subject. *Id.* Subjects include computerized legal research and computers and legal reasoning.

Marcus P. Zillman, *Deep Web Research 2008*, LLRX.com, Nov. 24, 2007 (available online at <www.llrx.com/features/deepweb2008.htm>).

“The Deep Web covers somewhere in the vicinity of 900 billion pages of information located through the world wide web in various files and formats that the current search engines on the Internet either cannot find or have difficulty accessing. Search engines currently locate approximately 20 billion pages. . . . This article and guide is designed to give you the resources you need to better understand the history of the deep web research, as well as various classified resources that allow you to search through the currently available web to find those key sources of information nuggets only found by understanding how to search the ‘deep web.’”
Introduction.

© 2008 Barbara Bintliff

Perspectives

Teaching Legal Research and Writing

This newsletter contains articles on ways to develop and improve legal research and writing skills, and provides critical information on electronic legal research and solutions to legal research problems. Beginning with volume 1, all issues of *Perspectives* are available in the Perspectives database (PERSPEC) on Westlaw® and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. *Perspectives* is also available in PDF at west.thomson.com/newsletters/perspectives.

All articles copyright 2008 by West, a Thomson Reuters business, except where otherwise expressly indicated. Except as otherwise expressly provided, the author of each article in this issue has granted permission for copies of that article to be made for educational use, provided that (1) copies are distributed at or below cost, (2) author and journal are identified, (3) proper notice of copyright is affixed to each copy, and (4) the editor of *Perspectives* is notified of the use. For articles in which it holds copyright, West grants permission for copies to be made for educational use under the same conditions.

The trademarks used herein are the trademarks of their respective owners. West trademarks are owned by West Publishing Corporation.

