

# PERSPECTIVES

## Teaching Legal Research and Writing

### “REALITY LEGAL WRITING”: USING A CLIENT INTERVIEW FOR ESTABLISHING THE FACTS IN A MEMO ASSIGNMENT

BY BEN BRATMAN

*Ben Bratman is an Assistant Professor of Legal Writing at the University of Pittsburgh School of Law in Penn.<sup>1</sup>*

The traditional and simplest way to provide facts for a research and writing “objective” memo assignment is to write them out and give them to the students. Period. This method is easy and convenient for the professor to prepare and for the students to digest—an important factor in the fall semester when students are just beginning their training. It also provides the professor with considerable control over the parameters of the assignment.

But we should not be satisfied with that. As teachers of lawyering skills, we should seek to provide students with meaningful challenges that parallel as much as possible those they will face as attorneys in the “real world.” It may not be entirely unusual for a senior attorney to learn the facts from the client and then to paraphrase or describe them to a junior attorney in a note asking for a memo. However, it would only happen in a large law firm and only to a junior attorney who presumably will soon enough advance to a stage where he or she meets clients and does more than just respond to instruction delivered by paper. Thus, the professor-written factual narrative does little to give students a valuable and challenging real world experience.

Moreover, while the factual narrative advances a few pedagogical goals, it badly hinders others. We want to teach students to write an effective facts section, and we want generally to encourage them to use their own words.

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## CONTENTS

“Reality Legal Writing”: Using a Client Interview for Establishing the Facts in a Memo Assignment <i>Ben Bratman</i> .....	87
BRUTAL CHOICES IN CURRICULAR DESIGN ... Using Both Nonlegal Contexts and Assigned Doctrinal Course Material to Improve Students’ Outlining and Exam-Taking Skills <i>Charles R. Calleros</i> .....	91
TEACHABLE MOMENTS FOR TEACHERS ... Failing My ESL Students: My Plagiarism Epiphany <i>Alison Craig</i> .....	102
WRITERS’ TOOLBOX ... The Semicolon’s Undeserved Mystique <i>Anne Enquist</i> .....	105
TEACHABLE MOMENTS FOR STUDENTS ... Finding Low-Cost Supreme Court Materials on the Web <i>Beth Youngdale</i> .....	108
Toto, I Don’t Think We’re in Practice Anymore: Making the Transition from Editing as a Practitioner to Giving Feedback as a Legal Writing Professor <i>Emily Zimmerman</i> .....	112
Adding Method and Alleviating Madness: A Process for Teaching Citation <i>Joan Malmud</i> .....	117
Don’t Judge a Course by Its Credits: Convincing Students That Legal Writing Is Critical to Their Success <i>Christine G. Mooney</i> .....	120
Tools for Teaching the Rewriting Process <i>Jennifer Brendel</i> .....	123
WRITING TIPS ... Client Communications: Delivering a Clear Message <i>Joseph M. Williams and Gregory G. Colomb</i> .....	127
LEGAL RESEARCH AND WRITING RESOURCES: RECENT PUBLICATIONS <i>Donald J. Dunn</i> .....	132

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Not surprisingly, with factual narratives there is a tendency on the part of students to copy portions of the professor's narrative verbatim, and this sort of "spit back" is a meaningless and worthless exercise for students.

This realization led me two years ago to provide students with a transcript of a client interview, which eliminated the spit back problem. However, simply providing a transcript of an interview neglected teaching opportunities in the realm of fact gathering, particularly in the skill of analyzing governing law to determine what facts are important to know. This skill tends to be overlooked in persuasive writing assignments—summary judgment motions, appellate briefs, and the like—where traditionally we give students deposition or trial testimony and pleadings, or a formal record from which to cull facts. By the time such persuasive briefs are being drafted, discovery is over. But such a limitation does not have to apply to a memo assignment.<sup>2</sup>

As a result, I settled last fall on the idea of a client interview. But with 29 students, how many clients did I need? After all, a realistic client interview would not involve more than two or three attorneys. And, at first glance, the alternative of a single client being interviewed by the whole class during one 50-minute session seemed unworkable. There would be time for only one question per student, and there would be no guarantee that enough of the pertinent information would come out. That might minimize the learning experience for each student, and create headaches for me.

I did not have a crop of teaching assistants or local actors to call upon, and I was unable to recruit 10 of my former students. (Last year was my first year at a new law school, and even if it weren't, I'm not sure that I would want to try to

recruit 10 of my former students.) I began to doubt that I could create several simultaneous interviews by groups of three students. In addition, I began to sense that in an effort to mimic the realities of law practice, I would be losing control over the assignment and possibly compromising my goals of ensuring that each student had the same information and did not stray into analysis of a peripheral point. I would not be able to monitor each of the 10 interviews to confirm that each client was relating all the critical facts faithfully and fully, and the odds were that some of the clients would be less prepared than others.

The solution to me was a hybrid that, in my view, effectively balanced the aims of duplicating the real world environment and preserving teaching objectives.<sup>3</sup> First, I provided students with a written description of some of the facts—the framework. The case involved a female employee at a grocery store who was accused by a supervisor of theft from the register because the supervisor's review of the cash drawer revealed a discrepancy. The employee denied the accusation, and the supervisor then ordered the employee into a small room to remain until she would admit to the theft and return the money. The employee heard the supervisor ask another employee to watch the door of the room and not to let her out. She waited in the room for 30 minutes until the supervisor returned, verbally berated her, fired her, and ordered her to leave. She was traumatized by the accusation and the termination, and shortly thereafter she broke up with her boyfriend and moved to another city. I related in my memo to the students that the client was hysterical on the phone describing the incident, and that as a result

<sup>2</sup> To break in my students gently, I like to treat my assignments as a chronological trip through the litigation process, beginning in the fall semester with client problems existing prior to the filing of a lawsuit, then proceeding through the filing of the complaint, and continuing all the way to appellate briefs and oral argument at the end of the spring semester. Hence, I would never provide deposition or trial testimony for a fall semester memo assignment. It puts the cart before the horse when it comes to the order in which we should introduce new skills and concepts to students. Of course, there is also no need for the subject of a memo to be litigation based.

<sup>3</sup> Pedagogical needs or academic exigencies sometimes strongly counsel against duplicating the real world. As will be discussed, the client interview as I crafted it does not present such a situation. Two examples come to mind of situations that do: (1) Even though lawyers often have to begin and complete memos in a time span as short as one or two days, it would be counterproductive to require first-year law students to do the same. The students need the time to be taught and to develop the foundational skills necessary for completing a memo. (2) Even though lawyers regularly seek the assistance of other lawyers and nonlawyers in drafting briefs and other documents, academic prohibitions on obtaining such outside assistance are essential to ensure that students develop their own analysis and writing skills.

she did not provide additional details we may want to know. I also informed them that I had scheduled an additional interview with her for the next class meeting.

Before hatching my plan, I had found a second-year student with a yen for acting. She had been referred to me by a colleague as a conscientious person who would do well in this role. I spent some time with her and gave her a body of information from which she could draw answers to the questions students would likely ask to fill in the gaps in her story. I became comfortable that she would do well, and in fact she did. She struck a nice balance between portraying a real human being of a certain social and educational stratum—including some colloquial and off-handed remarks that made students laugh—and providing answers faithful to her script and responsive to the questions.

Students were to review a few designated cases on intentional infliction of emotional distress prior to the interview,<sup>4</sup> and were to bring to class two copies of at least two questions that they wanted to ask the client. I collected one copy of the written questions to ensure good-faith compliance with the assignment, and then students took turns asking one question of the client, with one follow-up or clarifying question permitted if the answer was unavailing. As the client answered questions, I took notes on her answers, to ensure that I had a record of the additional facts with which the students would be working. Prior to beginning, I advised students not to duplicate questions already asked by classmates, hence the need for students to prepare more than one question in advance. I also told them they were not obliged to ask one of their prepared questions; indeed, they needed to pay attention to earlier questions and answers, and, where appropriate, use their turn to follow up on incomplete or suggestive answers.

Time allowed for only one full round of questions, but for the most part students used that round effectively, asking questions raised by the

governing legal standard. An intentional infliction claim requires that the conduct be extreme and outrageous, and one student therefore asked for more details on what exactly the supervisor said to the client when he accused her of theft and when he “verbally berated” her; another asked whether anybody else was present to hear him. An intentional infliction claim also requires severe emotional distress, and therefore one student asked the client to describe the symptoms of her distress, and another asked what medical attention she had received, if any. The claim also requires proof of a causal link between the outrageous conduct and the distress, and therefore students asked questions pertaining to the breakup with her boyfriend, and the timing and causes of it.

Occasionally, the client disarmed students when she claimed to not understand a legal term that they used in a question, or when she became uneasy and reticent in answering questions of a somewhat personal nature. This presented a perfect opportunity for students to rephrase questions using more lay terminology or more sensitive language.

Overall, the interview was a success. Students had to analyze law and determine what specific facts they needed to know to effectively apply that law to their client’s situation. They had to phrase questions in lay terminology so as not to confuse a client who knew little of the law. These both struck me as skills best learned by simply doing them just as a lawyer would, though with a bow to pedagogical limitations by narrowing the scope of the interview and assignment to one relatively simple claim.

The element of the interview that was perhaps least realistic—having 29 “attorneys” interview one client—served many very important teaching purposes. As mentioned, it obviated the need to find 10 people to portray clients, and ensured that all students had essentially the same assignment. But more importantly it presented the opportunity for students to learn from each other as they listened to classmates ask questions that maybe

“Occasionally, the client disarmed students when she claimed to not understand a legal term that they used in a question, or when she became uneasy and reticent in answering questions.”

<sup>4</sup> To narrow the students’ focus on developing analysis and interviewing skills and to avoid substantive overload, I directed the class to ignore any potential false imprisonment or defamation claims in the assignment. In retrospect, I could have better served the students by providing a fact pattern that indisputably suggested only one type of claim. Next time.

“The variables with human behavior are endless. And almost any behavior on the part of the client presents a challenge for students to confront and react to.”

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they had not thought of, or that they had thought of but weren't sure if they should ask. And to ensure that important teaching opportunities were not lost amidst my effort to create a somewhat realistic interview, I interrupted occasionally to query students on why they asked a certain question. Their answers helped the learning experience as well.

Certainly, finding just the right volunteer to play the client contributed to the success of my experiment, but I was confident that success did not depend heavily on the volunteer doing such a good job. After all, clients are human beings, and in the real world of law practice, some are nervous or not very conversational, and some are forgetful. The variables with human behavior are endless. And almost any behavior on the part of the client presents a challenge for students to confront and react to. Moreover, as the teacher, I maintained control over and knowledge of what was and was not disclosed to the students. Had the client, in my judgment, not disclosed sufficient information for the assignment to work, I could have provided any missing facts in a supplemental memo or, if time permitted, scheduled a second interview.

During the interview, students seemed engaged and intrigued, and the informal feedback I later received was very positive. By way of self-critique, I have identified two areas in need of improvement. First, only one or two students asked questions following up or building on earlier answers to questions from classmates. I was so concerned by the time constraints of a 50-minute class that before we began I strongly emphasized the need for students to limit themselves to one question (and one follow-up to their own question). As a result, many students felt obliged to ask their own prewritten question and might have eschewed the opportunity to ask questions following up on earlier answers. The solution might be to advise students that they will not sacrifice the right to ask their own question if they choose first to follow up on an earlier question and answer. Careful time management could still permit this. Second, to help me identify other

strengths and weaknesses of the experiment, and to preserve the factual record in case of dispute, I should have videotaped the interview.

I look forward to trying this formula again, and I welcome ideas on improving it from my research and writing colleagues.

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