Teaching Practical Procedure in the Legal Writing Classroom

By Stephen E. Smith

Stephen E. Smith is Legal Writing Instructor at Santa Clara University School of Law in California.

The legal writing professor is in a unique position in the legal academe to engage students not only in the study of "thinking like a lawyer," but also in doing the things lawyers do. Beyond IRAC and citation, and beyond induction and deduction, legal writing classes can also teach the basic skills and vocabulary of litigation procedure, making it possible for students to hit the ground running when they arrive at an employer's doorstep during summers and after graduation.

The legal research, writing, and analysis class is a student's introduction to an entire discourse. It teaches a standard usage model that is new to the students, and shows concretely how the rules they are learning in their doctrinal classes are put to use. Learning procedural usage—the terminology used every day by lawyers to describe their actions and those of the other legal actors around them—can reinforce and augment what is learned in a civil procedure classroom, as well as provide a "hands-on" understanding of how these things work in practice.[1]

Access to more information on a topic makes it easier to understand. This is unremarkable—the more we see something, from the greatest number of perspectives, the better we know it. By addressing procedural issues in the legal writing class, we can provide students with yet another perspective on the procedural issues they are studying in their doctrinal classes—not in a way that interferes or distracts, but one that provides additional and, ideally, clarifying information.

This article is premised on the existence of a legal writing class that includes the preparation of persuasive briefs, typically, dispositive motions such as motions to dismiss or for summary judgment.[2] When these are a part of the writing program, numerous opportunities are presented to teach students the practical procedure they will encounter in their professional lives. This practical procedural training may include introduction to legal documents, legal vocabulary, local rules, and beyond.

Litigation Documents

A civil procedure class typically teaches motion practice in general terms, focusing on the important concepts underlying particular motions. A class segment on summary judgment, for instance, will focus on a topic such as how to determine whether an issue of fact is "material." There remain, however, many practical issues of motion practice that go unaddressed. It is a rare class that will explain to students that a California motion for summary judgment will be supported by a notice, a memorandum of points and authorities, and a "separate statement of undisputed material facts."[3] It is a rarer one still that will provide examples of these various documents.

The legal writing class provides those opportunities. It can show a student the types of documents lawyers produce, and explain their contents. From caption, to table of authorities, to the manner in

> "A civil procedure class typically teaches motion practice in general terms, focusing on the important concepts underlying particular motions."

[1] This is not a concept applicable only to the law, but one generally endorsed by proponents of "writing across the curriculum." "Writing assignments of this sort are designed to introduce or give students practice with the language conventions of a discipline as well as with specific formats typical of a given discipline." The WAC Clearinghouse, <wac.colostate.edu/intro/pop2e.cfm> (last visited May 12, 2008).

[2] This is increasingly common. The 2007 survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute indicates that 110 of 181 schools providing responses use pretrial motions as teaching assignments. The survey is available at <www.lwionline.org/survey/surveyresults2007.pdf>.

[3] *See* California Rule of Court 3.1350(c).

> “Within the realm of practical procedure, I also include developing the vocabulary and standard usage of in-court lawyering.”

which deposition testimony must be introduced,[4] the legal writing class exposes students to the micro-procedure of litigation documents. Students need to know not only whether a fact is material, but how that fact is physically presented to a court in the first place.

An important part of the practical procedure class component is familiarizing students with local rules. Elsewhere, they learn the broad language of the Federal Rules of Civil Procedure, but students must also discover the detailed requirements of particular courts. Here, students learn not only what documents must support a motion, but the detailed contents of a memorandum, and things as simple as page limits. The goal, of course, is not to ingrain whether a court requires 26 or 28 lines in a filed document,[5] but to know that such requirements exist, and that they must be considered when producing any court document.

The Language of Litigation

Within the realm of practical procedure, I also include developing the vocabulary and standard usage of in-court lawyering. In the course of teaching students to write briefs, they must learn not only techniques of persuasion, but the language used in the process of persuasion. Lawyers and judges, of course, have their own usages, which include not only terms of art, but standard phrasings that a knowledgeable member of the legal community will have internalized.[6] The legal writing class is the gateway to entry into that shared discourse.[7]

Student fluency in legal usage is important to later reception in the legal community. Personal credibility depends, in part, on a lawyer's ability to "speak the language." But the ability to participate in the discourse community takes time and experience. Familiarity with these usages may arise after years of participation in the legal world, but that world will be more receptive if students are given a head start.

By way of example, in California and some other jurisdictions, what would be a Rule 12(b) motion in federal court is called a "demurrer."[8] My students, the majority of whom end up in California practice, need to learn the simple terminology of the demurrer. Initially, I provide instruction on its language. I tell them a demurrer is referred to as such—not a "motion for demurrer," just a demurrer. I tell them they will "demur" to the complaint, not "move for a demurrer." I explain to them that demurrers and objections are "sustained," unlike motions, which are "granted."

Similarly, students need to know *who* uses the various terms they become familiar with through their readings. A student recently wrote, "we find the Plaintiff's complaint to be without merit." He was writing a brief for defendant. This provided an opportunity to deepen his understanding of situational or positional usage—only triers-of-fact "find" things in the law. Litigants *hope* for particular findings.

This sort of usage information is necessary at even the simple level of document title. My students are assigned to write a "memorandum of points and authorities in support of" a demurrer or motion.[9] Nonetheless, I persistently receive multiple submissions by students of their "Motion of Points of Authority for Demurrer." Initially, I found this frustrating, but after realizing that one time is not enough for almost any concept, I began to embrace the opportunity it provided to further explain standard legal usage.

Usage norms that every lawyer takes for granted can be new and strange to an unfamiliar student.

---

[4] *See* California Rule of Court 3.1116.

[5] *See, e.g.,* United States District Court for the Northern District of California, Local Rule 3-4(c)(2) (requiring no more than 28 lines of text per page).

[6] For further treatment of this issue, *see* Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 Clinical L. Rev. 501 (2006).

[7] Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489, 508–09 (2002).

[8] Cal. Civ. Proc. Code § 430.10.

[9] *See, e.g.,* United States District Court for the Northern District of California, Local Rule 7-4(a).

A colleague tells of a student describing a party as having been "depositionized." Practical procedure training includes even material so seemingly minor as explaining to young lawyers that "deponents" are "deposed."[10]

Matters of Evidence

Students regularly have trouble understanding the relationship between allegations and evidence. Many of the problems I use involve pre-answer motions, contending that a plaintiff has failed to state a claim. Invariably, students use language about evidentiary standards. They mention the preponderance of the evidence standard. They assert that plaintiff has "no evidence," or decry an "absence of evidence." They contend that a litigant "can't prove" an element, before proof is an issue at all.

This provides yet another opportunity to engage an important procedural issue in a practical way. In discussing the difference between allegations and evidence, my students learn important concepts underlying motion practice

The Right Law in the Right Place

In motion papers, both substantive and procedural law are raised and argued. Typically, students know about *Erie*[11]and its progeny by the time I am addressing motions, but they have, of course, never come face-to-face with its principles in practice. They may have heard about the issues that arise in a motion, and have some general understanding of how the issues are treated, but they have not had to dig in and get their hands dirty presenting the law to a court.

Every motion my students write contains a section addressing the legal standard to be applied to the motion. This section tells the court what information it must consider in ruling on the motion. It describes how the court should look at that material. This changes, of course, based on the type of motion. Is it a motion to dismiss for failure to state a claim?[12] For lack of personal jurisdiction?[13] Is it for judgment on the pleadings?[14] Each requires the court to take a particular approach.

This realm, of course, is one purely of the jurisdiction in which the motion is filed. It is astonishing, however, what may be found in the "legal standard" section of a student brief. Where a student should be referring to Rule 56 or *Anderson v. Liberty Lobby*,[15] she may recite the summary judgment standard in a faraway state court. This is a good opportunity to make concrete the class's understanding of *Erie*, to say "I know that the substance/procedure distinction is a difficult one to make, but here's a place where it is clear." Students may cheer this one patch of clarity in their otherwise confusing first year.

Erie aside, issues of jurisdiction arise regularly in the legal writing classroom—when are we using persuasive and binding precedent, and why? The same student who cites state law in describing the federal summary judgment standard may also provide language from a different federal circuit, from 1955. This provides the opportunity to discuss why one might or might not make such a choice.

Choice of law issues, too, may arise in student work. I recently assigned a motion for summary judgment filed in federal court, against a complaint for defamation arising under California law. I received a draft memorandum providing the elements of defamation, with citation to a recent California case—so far so good—that quoted two Florida cases. The elements of defamation, of course, are familiar and well-developed and

"Many of the problems I use involve pre-answer motions, contending that a plaintiff has failed to state a claim."

[10] This article describes the procedural language likely to be encountered in the context of writing a persuasive trial court brief, but there are of course numerous other procedural terms that students need to learn even earlier in their studies, simply to be able to understand the cases they read—terms like *plaintiff, defendant, complaint, summons, affirm, reverse,* and the list goes on.

[11] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[12] Fed. R. Civ. P. 12(b)(6).

[13] Fed. R. Civ. P. 12(b)(2).

[14] Fed. R. Civ. P. 12(c).

[15] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

> “After I comment on a set of drafts, I always devote a portion of a subsequent lecture to issues of practical procedure that have arisen in student papers.”

available in most, if not all, jurisdictions. Accordingly, I suspected what turned out to be true—she had cited a California court that was deciding a matter under Florida law. This provided an opportunity to discuss not only federal-state issues, but also the question of why we might choose one state's law over that of another.

Creating Assignments to Engage Procedural Issues

From practical applications of *Erie*, to the use of proper terminology, to the specifics of local court rules, procedure permeates the task of writing to courts. Legal writing teachers should not shy away from engaging these issues, but treat them as a natural and necessary part of a new lawyer's professional development. Problems should be developed that can exploit this educational need.

It is perhaps impossible to teach law students to write persuasive memoranda *without* including some automatic amount of procedural education. A motion assignment necessarily results in student familiarity with what a motion *is*, and will lead to some amount of terminological familiarity.[16] There are ways, however, to further the goal of increased familiarity with practical procedure. These are obviously non-exhaustive, but provide some ideas.

First, the use of a variety of motion assignments will necessarily result in more exposure to more concepts and terms. Instead of two 12(b)(6) motions, a teacher might assign one, along with a subsequent Rule 56 motion. This will introduce students to different types of documents: a Rule 12 motion might include only a complaint that the memorandum responds to, while a Rule 56 set of materials may have to engage declarations and exhibits.

Second, assigning separate state and federal motions will result in student exposure to distinctions in national and local terminology and rules. It is important for students to be aware of the separate sovereigns, with separate sources of substantive and procedural law. A variation on this theme is to assign problems in which state law is the basis for a cause of action for a diversity action in federal court, or in which federal law is alleged in a state court.

Additionally, assignments may require the resolution of some practical procedural question. Can a particular attachment to a complaint be considered by the court? Was a local rule violated, and what are the consequences?

Lecture Strategies

Aside from the obvious answer of creating a list of practical procedure issues to address, students can tell a legal writing professor what they need to learn through the drafts they produce. As students struggle to enter into their new milieu, they inevitably (and yes, sometimes comically) make errors. They make legal errors. They make language errors. These errors may point out shortcomings in our teaching—“she should have known that, did I forget to mention it?” But they may also simply demonstrate how much there is to learn. This can be useful because it lets the teacher know what it is in the world of procedure and procedural discourse that requires further explanation. After I comment on a set of drafts, I always devote a portion of a subsequent lecture to issues of practical procedure that have arisen in student papers.

It can also be useful to simply go through cases the students are discovering in the course of their research and to isolate practical elements useful for them to learn. What sorts of documents are the courts considering? What sort of terminology are they using?

The legal writing class provides many opportunities to introduce students to the breadth of micro-procedural matters that arise in practice every day. A certain amount of procedural material inevitably arises, but we may provide even more than these inevitable basics and exploit the opportunity to teach students more about the things they must know to be able to be effective, conversant lawyers early on in their careers.

© 2008 Stephen E. Smith

[16] For example, the student might become familiar with basic usage such as a motion is “granted,” rather than, say, “approved.”