

## Teaching 1Ls to Think Like Lawyers by Assigning Memo Problems with No Clear Conclusions

“An important early step toward thinking like a lawyer is recognizing and articulating counterarguments.”

*Brutal Choices in Curricular Design ... is a regular feature of Perspectives, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other “brutal choices” that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611, phone: (312) 503-8454, fax: (312) 503-2035.*

**By Sarah E. Ricks**

*Sarah E. Ricks is a member of the Legal Writing Faculty and Co-Coordinator of the Pro Bono Research Project at Rutgers School of Law-Camden in Camden, N.J.*

It is hard for many first-year students to recognize that a fact pattern can be susceptible to more than one legal interpretation under the binding law. While “thinking like a lawyer” has no precise meaning, it generally refers to “the ability to analyze facts and appreciate the shifting legal results produced by factual nuances, to separate a complicated problem into its component parts, to assemble facts into a meaningful whole; and, in running through it all, a capacity of ferreting out of a problem those features relevant to its resolution.”<sup>1</sup> Students entering law school “are surprised at the rigor—and ambiguity—associated with legal analysis.”<sup>2</sup> With experience, students

learn that legal analysis “is an art form, infused with imagination and creativity, with rarely only a single conclusion or only a single path to that conclusion.”<sup>3</sup> An important early step toward thinking like a lawyer is recognizing and articulating counterarguments. In their legal writing classes, starting 1Ls with a memo problem in which the client’s case likely does not state a claim can help students to make that step.

### Hurdles to Recognizing Counterarguments New Law Students Must Overcome

Students need guidance to appreciate that a fact pattern can be susceptible to more than one interpretation under the binding law. When I began teaching, fresh from 11 years of law practice, the first memo I assigned involved a seriously injured, sympathetic plaintiff who likely could not state a tort claim. I assigned the entire class to represent the sympathetic plaintiff. I naively thought that at least some students would react as experienced practicing lawyers by noting arguments on both sides, but concluding that the law would not favor their sympathetic client. I was baffled when every student predicted “good news” for the client—she could state a claim. Upon reflection, I realized I needed to more effectively teach students how to identify counterarguments.

In constructing an initial memo assignment, it helps to recall the hurdles a brand new law student must overcome in order to recognize plausible counterarguments. Some first-year students overlook counterarguments in their eagerness to find a remedy for an injured person. Some think the memo’s “yes” or “no” prediction is the main event

<sup>1</sup> David T. ButleRitchie, *Situating “Thinking Like a Lawyer” Within Legal Pedagogy*, 50 Clev. St. L. Rev. 29, 38 (2002–2003); see also Jay Feinman, *Law 101*, 337 (2000) (what judges, lawyers, and law students do is “[i]dentify the issues involved, consider the arguments on both sides, and come to a conclusion about how the issues should be resolved”).

<sup>2</sup> Kathleene Magone & Steven I. Friedland, *The Paradox of Creative Legal Analysis: Venturing into the Wilderness*, 79 U. Det. Mercy L. Rev. 571, 571 (2002).

<sup>3</sup> *Id.* at 572.

and the analytical steps to the answer are not important. Others think their job is not to predict the likely outcome but to tell the client what the client wants to hear. Others think that any fact pattern a teacher supplies must fit the requirements of the relevant legal claim. Many skim the surface of the law, focusing on the words alone and not the underlying reasons for the rules. Many skim the surface of the facts, noticing only those that support their predictions.

### Teaching Goals Served by Assigning a Problem That Likely Does Not State a Claim

Assigning a memo problem that likely does not state a claim early in a law student's career can help new students overcome each of these hurdles. Starting with facts that might not state a claim makes it more likely that students will notice that there can be multiple ways to apply the law to the facts. Requiring students to analyze borderline fact patterns at the outset of law school can help students "to see the malleability and ambiguity of law, illustrating for them how argumentation, persuasion and sagacity can literally form opinion and reality."<sup>4</sup>

Before a student can articulate and refute a counterargument, the student has to spot the counterargument. Starting with facts that tip toward not stating a claim means not only that there are good arguments on both sides but that some students will spot them. As students think through the legal analysis, and confront other students' views of the same analysis, the likelihood increases that they will realize that a legal rule may be susceptible to more than a single reading. While I limit memo assignments to legal tests with defined elements, I choose legal tests with inherent ambiguities to provide rich opportunities for students to explore how the words of the test draw meaning from how they've been applied to the differing facts of the binding

cases. For example, under the binding case law, what makes conduct "reasonable" or a change in circumstances "material"?

As students think through the legal analysis for early memo assignments, they begin to realize that the policies underlying the rules—the reasons for the rule—provide useful guidance in predicting the application of the rule to borderline facts. While "many beginning law students arrive at law school blissfully unaware of the importance of language in their newly chosen endeavor... [t]he sooner first year law students appreciate the ambiguity of language, the sooner they can grasp the vital role that policy, the name lawyers often give to the reason underlying a rule, plays in resolving the ambiguities of language."<sup>5</sup> For example, whether a borderline fact pattern states a tort claim may depend on why the state adopted the tort. In a borderline statutory fact pattern, how the legislature intended the statute to be construed may tip the scale.

Starting with a memo problem that likely does not state a claim also helps students appreciate factual nuance in the record they're given. Different students notice different facts. Students realize through exposure to their peers' differing analyses of the same facts that another student views a fact they have overlooked as the basis of a solid counterargument—or even as potentially dispositive.

### Laying the Groundwork for Students to Recognize and Articulate Counterarguments

Transparency in the learning process can encourage students to entertain the possibility that a fact pattern is susceptible to more than one legal interpretation. I tell students up front that the legal problems they'll confront in my class are designed to be realistic law practice simulations, for which

“Transparency in the learning process can encourage students to entertain the possibility that a fact pattern is susceptible to more than one legal interpretation.”

<sup>4</sup> ButleRitchie, *supra* note 1, at 47.

<sup>5</sup> Howard A. Denmark, *How to Alert New Law Students to the Ambiguity of Language and the Need for Policy Analysis Using a Few Minutes and the Directions on a Bottle of Salad Dressing*, 36 Gonz. L. Rev. 423, 424 (2000–2001).

“The time to confront plausible alternative views of the legal analysis is before, not after, the recommendation to the client.”

there is no “right” answer. Like the complex legal problems they will confront in legal practice, the answers “yes” and “no” are both plausible, and students should focus on the steps in the analysis.

Being told openly that the depth of the analysis is what matters—rather than the ultimate answer—helps students resist the temptation to superficially analyze the problem by declaring the first similar case they read to be dispositive. Rather, regardless of which position he or she stakes out, each student is aware that there are powerful arguments for the opposite position and that the predicted result depends on which aspects of the law and facts the analysis emphasizes.

To further set the stage for exploring counterarguments, I banish “clearly,” “obviously,” and similar words from student memos. Throughout the first semester, I call the students’ attention to Linda Edwards’ admonition to banish words that ignore the complexities of legal analysis.<sup>6</sup> Students learn that words such as “clearly” are red flags for logical leaps, signals to the reader that the writer has not done the hard work of wrestling with ambiguity and has instead taken refuge in the written equivalent of shouting. As Professor Edwards warns, such words have developed a connotation exactly opposite their original meanings.<sup>7</sup>

To further prepare students to recognize the possibility of alternate applications of the law, I try to give the opposing view a physical presence in the classroom. One way is by splitting the representation. For two memo problems in the fall (and the appellate brief problem in the spring), half the class represents the plaintiff and the other half represents the defendant. Knowing that the student in the adjacent seat represents the other side reminds students to contemplate the possibility of alternate views of how the law might apply to the same set of facts. Splitting the representation helps counteract the common 1L tendency to see a

remedy for a sympathetic plaintiff, regardless of the law.

Once students have spent time analyzing the problem, and opinions are beginning to gel, I encourage students to consider alternate views by giving them tangible evidence that different people can view the analysis differently. As my first semester students are drafting and redrafting their research memos, I periodically ask the class for a show of hands for how many students predict the plaintiff will prevail and how many predict the defendant will prevail. Each year, the class splits about down the middle. Students who are tempted to skim the surface of a legal analysis by viewing it in only one way are confronted by the hands of those in the class who take the opposite view. Those hands are visual reminders that the legal analysis is not self-evident and that the student may be missing some legal or factual nuance if he or she has not refuted plausible counterarguments.

Finally, to help 1Ls overcome the natural inclination to tell people what they want to hear, I try to focus the students’ attention on the purpose of a memo: to help the supervising attorney and client to make an expensive decision. I tell them not to hide bad news from a client because that shortsighted eagerness to please ultimately will cost the client time and money. Neither the plaintiff nor the supervising attorney will thank the junior attorney for recommending a lawsuit that a court tosses on a motion to dismiss. Neither the defendant nor the supervising attorney will thank the junior attorney for failing to tell them that a court is likely to allow a complaint to go forward when an early settlement would have been cheaper. The time to confront plausible alternative views of the legal analysis is before, not after, the recommendation to the client.

### Exposure to Different Students’ Analysis of the Same Facts

In predicting a likely outcome, applying even a limited body of law to a borderline set of facts can “involve a variety of inferences, deductions and connections ... [and] application can be unique from

<sup>6</sup> Linda H. Edwards, *Legal Writing and Analysis* 277 (2003).

<sup>7</sup> *Id.*

one person to the next, depending on thought processes, perspective, background and the like.”<sup>8</sup>

Students can learn to recognize alternative ways to apply the law to the same facts by being exposed to a different student’s analysis of the identical record. Some methods to expose students to alternative views are requiring students:

1. to read fellow students’ memos;
2. to perform and observe oral law practice simulations; and
3. to participate in classroom drafting exercises.

**Peer editing.** At Rutgers-Camden, 1Ls anonymously exchange draft discussion sections of their first memo with two other students to “peer edit” each memo before returning it to the writer, using a questionnaire to guide the editing process.<sup>9</sup> When a memo problem involves borderline facts, each student “editor” is likely to peer edit a draft predicting the opposite result, based on a counterargument the student editor either rejected as unpersuasive or perhaps overlooked entirely in drafting his or her own analysis.

**In-class oral law practice simulations.** Students can identify counterarguments in oral law practice simulations if they explore other students’ views of the analysis. As students work through the analysis for their first legal memo, I require them to role-play the law practice simulation of a junior attorney briefing a supervising attorney. Requiring a student to verbally defend the memo’s prediction can help the student appreciate nuance in the facts and law and confront previously elusive counterarguments. Oral questioning can be an opportunity to explore whether the memo’s prediction is consistent with the reasons

underlying the rules. Students may learn that facts they overlooked could be outcome determinative.

My class does a “brief the supervising attorney” role play three times. First, after they have completed a draft of the memo, all students do an in-class, one-on-one role play: a student “junior attorney” briefs a student “supervising attorney” on the issue, answering questions and defending the junior attorney’s prediction. This 10-minute simulation may involve two students with opposite views of the likely outcome and differing views of the law and facts likely to be emphasized by a court.<sup>10</sup>

Second, immediately after the whole class completes the one-on-one simulation, one pair of students comes to the front of the room to switch roles and do the simulation again, this time in front of the class. In a later class, after the students have turned in revised drafts of the memo, we revisit the “brief the supervising attorney” simulation on the same analysis a third time. This time, I play the supervising attorney and two students stand in front of the class as a team to answer my skeptical questions. This allows the class to hear two additional views of the likely legal analysis, further fleshing out counterarguments students may have missed when first grappling with the problem.

**In-class written law practice simulations.** Finally, my students are exposed to other students’ analyses of the same facts during an in-class drafting exercise, collectively outlining a motion to dismiss the claim. Some students can’t recognize that a fact pattern is susceptible to more than one legal interpretation until they have been recast in a different role and asked to reanalyze the problem. For example, after the students have turned in revised drafts of the first memo, I ask the entire class to become the attorney for the defendant assigned to draft a motion to dismiss the claim. The class brainstorms different potential

“Oral questioning can be an opportunity to explore whether the memo’s prediction is consistent with the reasons underlying the rules.”

<sup>8</sup> Magone & Friedland, *supra* note 2, at 574–75.

<sup>9</sup> The peer edit exercise was part of the existing Rutgers–Camden curriculum when I began teaching and was adapted from Villanova University School of Law. The exercise asks editors to evaluate both analysis and writing style. At Rutgers-Camden, editing guidelines include identifying strengths and weaknesses of the large-scale organization, e.g., “use of roadmap paragraph, headings, CRAC, overall logical organization,” and of the small-scale organization, e.g., “discussion of all elements, use of thesis sentences.”

<sup>10</sup> The useful model of the one-on-one “brief the partner” simulation between students was part of the existing Rutgers-Camden curriculum when I began teaching and I expanded it as described below.

“The process of writing ... can deepen a student’s understanding of the law and its differing, plausible applications to the facts.”

arguments as I jot them on the board. The board fills quickly. After several minutes, I stand back and ask the students whether the memos that predicted the facts *would* state a claim anticipated and refuted each of the likely counterarguments. I ask whether each memo that predicted the facts *would not* state a claim had thoroughly explained why.

Additional in-class drafting exercises could further require students to grapple with the ambiguities in the application of the law to the facts. Shifting focus to what *new* facts would help the client, students could brainstorm about what evidence a defendant might need to successfully move for summary judgment. To compile that evidence, what documents would the defendant want to see and what interrogatories could be posed to the plaintiff? Which witnesses would the defendant want to depose, and what would some of the questions be?<sup>11</sup> What questions could be asked of the client or of the client’s employees? Would an expert be useful? This could be a valuable opportunity for students to grasp that facts in real life do not come prepackaged but instead can be developed by creative thinking and research. Class brainstorming on these next steps in the litigation process could be incorporated into a recommendations section of the memo, encouraging students to reflect on their counselor role and to take ownership of the client’s legal problem.<sup>12</sup>

### Writing and Rewriting

The process of writing itself can deepen a student’s understanding of the law and its differing, plausible applications to the facts. “Writing is a thinking process that tests whether one’s thoughts are clear to a reader unfamiliar with the facts, the issue, or

the cited legal authority.”<sup>13</sup> As they write about a legal problem, “students are apt to discover the reciprocal relation of writing and thinking.”<sup>14</sup>

My students rewrite their first predictive analysis after receiving feedback from multiple sources: written feedback from me, written feedback from two student/peer editors, and oral feedback from the “brief the supervising attorney” simulation, in addition to witnessing two students perform the simulation in front of the class. At varying stages in the process, different students will see that there is more than one path to a logical conclusion.<sup>15</sup> Showing the class client letters explaining the conclusions, or requiring students to draft their own, would provide opportunities to explore plain language, ethics, and tone when communicating predictions to a client.

### Evidence That These Techniques Work

There is some evidence that these techniques can be effective in teaching students to recognize that there is no single, obvious application of the binding law to the client’s facts. Each year, I weight the first research memo toward not stating a claim for a sympathetic plaintiff and each year, the class splits about down the middle on whether the facts state a claim.

Some students change their initial predictions as they learn more about the law and perceive the potential relevance of previously overlooked facts in the file, which consists of realistic litigation documents. Last fall, for example, 15 of my 42 students changed their mind about the predicted outcome at least once. Not all students tell the client “good news,” resisting the temptation to shade the

<sup>11</sup> See Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. Legal Educ. 57, 68 (1992) (outlining in-class discovery exercise).

<sup>12</sup> To demonstrate how these additional steps can reshape the factual record, an upper-level student could be brought into class to role play the “client” in an oral interview with the class of attorneys.

<sup>13</sup> Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. Marshall L. Rev. 303, 314 (2000).

<sup>14</sup> Schultz, *supra* note 11, at 67; see Busharis & Rowe, *supra* note 13, at 311 (“[T]he act of writing creates understanding. ... [W]riting is ... a creative process, in which new ideas are constructed as the writer seeks to express his understanding of the matter at issue”).

<sup>15</sup> Magone & Friedland, *supra* note 2, at 572.

analysis to tell the client what the student thinks the client wants to hear. Seventeen of my 42 students delivered bad news to their assigned clients on the first memo.

These results stand in sharp contrast to my first semester of teaching when, as I recounted at the beginning of this essay, not a single one of my students recognized that the sympathetic plaintiff likely couldn't state a tort claim. Now I start the fall semester by telling the students that in real life the answer to a memo rarely will be clear because if it were, the supervising attorney would not need the junior attorney to draft a research memo. By the middle of the semester, I think most students accept that often-repeated statement because they have started to recognize the ambiguities inherent in the memo problems they're analyzing. By the end of the fall semester, I hope that students have started to appreciate that ambiguity is opportunity: if a fact pattern is susceptible to more than one legal interpretation, that uncertainty in how the law will apply to their clients' facts can be an opportunity for their clients to prevail. I tell students that if the answers to legal questions were obvious, no one would need lawyers to help figure it out—and lawyers would be robbed of the fun and creativity of legal analysis.<sup>16</sup>

© 2005 Sarah E. Ricks

“I tell students that if the answers to legal questions were obvious, no one would need lawyers to help figure it out—and lawyers would be robbed of the fun and creativity of legal analysis.”

### Another Perspective

“The problems with which lawyers must deal are infinitely varied, as are the possible solutions or answers, but many of the problems fall within one category: those requiring a reliable prediction of the probable legal consequences of a particular state of affairs. This text is primarily concerned with the skills required to work with this category of problems. Simplistically, reliable prediction requires identification of five problem elements (not necessarily in the order given): the raw facts, the law that may *possibly* control, the legal question or questions, the legally significant facts, and the law that will *probably* control.”

—Marjorie D. Rombauer, *Legal Problem Solving: Analysis, Research and Writing* 1 (4th ed. 1983).

<sup>16</sup> *Id.*