

PERSPECTIVES

Teaching Legal Research and Writing

WHEN DOES HELP BECOME A HINDRANCE: HOW MUCH SHOULD WE ASSIST STUDENTS WITH THEIR GRADED LEGAL WRITING ASSIGNMENTS?

BY CHRISTINE G. MOONEY

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Introduction

After three years of teaching, I continue to ask myself what kind of help and how much of it I should be giving my students with their graded assignments. Which is the better way to learn how to research and analyze a legal issue: baptism by fire or witnessing a step-by-step demonstration of the process by an experienced legal writer? This question is unique to those of us who teach legal writing. Although students approach all of their professors for help, in most doctrinal classes students do not have the opportunity to question the professor as to the specific exam questions on which they are being evaluated. As legal writing professors, we evaluate our students on the basis of written assignments they have prepared over a period of weeks. Inevitably, therefore, our students are more pragmatic in their approach to our subject and tend to ask questions that are focused on the specific assignment at hand rather than on a general topical matter. In a sense, we are working toward a different goal from that of our students. Our goal is to help students become confident and self-sufficient legal thinkers and communicators, while theirs may be more immediate—determining how to execute the specific assignment on which their grade will be based.

Deciding how much assistance we should give students with their graded assignment requires consideration of what will be expected of them after they leave our classroom. For example, with what skills do employers expect students to arrive at their first legal position? Is our course the only writing course the students are required to take, or will other courses build on the foundation laid in the first-year course? If additional writing courses are required, what are students expected to know when they enter them? I know excellent teachers who have very different philosophies on the most effective way to teach writing. Some strongly believe that students must be thrown into the water and made to struggle if they are to

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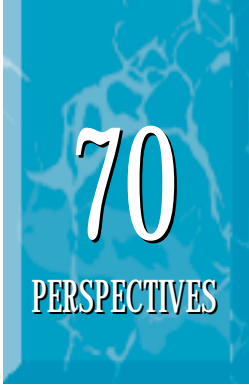
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become the kind of thorough and strategic-thinking lawyers we aim to help them become. Others believe that the better approach is to closely supervise students and ensure that they are staying on track and, if necessary, walk them through the research and writing processes, step by step.

Two fundamental questions emerge when evaluating this issue: first, what is the most effective way to teach legal writing and, second, what methods are fair to the students? Although I continue to revisit these questions, I believe that, after a thorough explanation of the nuts and bolts of legal writing and, where appropriate, some hands-on exercises, students are better off if, before the course is over, they are forced to struggle through the writing process largely on their own. I believe that while this approach may be more painful for the students in the short term, ultimately they will emerge from their struggle as more confident and experienced legal writers. In this article, I will outline the rationale that has led me to this conclusion.

What Is the Most Effective Way to Teach Legal Writing?

The *process* of legal writing is at the heart of what students must learn if they are to become effective advocates. They must learn to dissect a problem, identify the appropriate issues, and present a succinct legal analysis. The graded assignments we give, memo writing and brief writing, are vehicles in which students demonstrate their ability to construct and communicate that analysis. Accordingly, knowing the specific answer to a particular legal problem is, for purposes of what we are trying to teach, secondary and valuable primarily as a means for demonstrating one's analytical skills. It is essential that students be able to work through the analytical process on their own with a variety of legal issues. Once in practice, lawyers are not expected to be experts in all legal areas. In fact, lawyers often collaborate on different aspects of a case in order to provide a client with representation that pools the expertise of many professionals. Within the confines of a lawyer's assignment, however, every lawyer must be capable of presenting a complete and autonomous analysis. The legal writing skill is, therefore, a non-negotiable part of the competent lawyer package.

Assessing the kind of help that will best serve students requires more than evaluating their level of confidence about their own abilities. The fact that students may be uncomfortable with their task and find it daunting does not necessarily mean that we, as teachers, should supply them with answers. Providing students with help may temporarily ease their fears and feelings of incompetence, but, in the long run, they cannot become effective writers without experiencing some feelings of insecurity. Insecurity is an inescapable part of the learning process. Agonizing over whether one has researched an issue adequately or struggling to decide which is the strongest argument are parts of the thoughtful consideration required to craft sound legal analysis. Although showing students examples of good legal writing can be enormously helpful in teaching, students cannot learn how to synthesize the law and apply it to their case merely by looking at expertly written memorandums any more than they can learn how to ride a bike by observing a champion cyclist. There is simply no substitute for finding the law, reading it, and assessing its relevance without anyone else's input. After a certain amount of explanation, demonstration, and discussion, providing students with answers merely defers the time when they will have to discover them on their own and impedes their ability to develop into mature legal writers.

An additional problem that results from providing students with too many answers is that it may leave them ill equipped to handle assignments when they get to their first legal position. For students at schools that have no writing requirement beyond the first year, legal writing may be the only opportunity they have to learn how to compose legal analytical documents before they have to demonstrate their skills to an employer. Depending on the employer's environment, the student may be expected to know how to delve into a legal issue with minimal assistance. If a student's only experience in written legal analysis has involved significant help by the professor, that student may not be capable of meeting the employer's expectations. A student who has not been required to independently produce a legal document will be forced to either

admit his inability or try to learn on the job. If the student attempts to complete the assignment on his or her own, and the employer is generally familiar with the law in that area, the employer may immediately recognize the inadequacy of the student's work. The consequences could be far worse if the employer is not familiar with the area of law and acts on the student's faulty analysis. By failing to require students to take full responsibility for the legal writing process, we are creating an artificial environment that may distort students' perception of their abilities. Moreover, if students are not required to do the research themselves or are provided substantial assistance, they may know how to find the answer to the particular problem assigned, but that knowledge may not be transferable to another legal question. Ultimately, this lack of preparedness could cost students employment opportunities.

The kind of assistance we should provide to our students depends upon the stage of the course and the type of assignment. Certainly, we must guide students through the initial assignments. It is unreasonable to expect students to handle an entire memorandum or brief on their own without instruction and lots of discussion. Nonetheless, we should be facilitating independence from the very beginning of the first semester by assigning problems that students can manage without significant assistance. Early ungraded assignments should be quite simple, focusing on just a few skills and leaving others until later. For example, at Villanova, as with many other schools, the students' initial assignment is a closed memo and the issue is clearly spelled out. Students are provided with only three short cases and a simple statute upon which to base their analysis. With this framework, students can concentrate on the structure and substance of the analysis.

At Villanova, the second assignment is also ungraded and relatively simple, but this time, students are required to do the research themselves. A week or so after the problem has been assigned, students are required to submit a research report. The report is used to identify those students who are off track with their research. I meet with those students individually,

discuss their research steps with them, and, hopefully, steer them in the right direction. They then report to me a day or two later to ensure that their new strategy has been successful. If the student is still having difficulty, we talk about the problems he or she is experiencing and I continue to monitor that student's progress until we are both satisfied that the student is on the right track. When students turn in this assignment, they receive extensive comments on both the form and the substance. Every student is required to meet with me individually to review those comments and discuss areas for improvement. Each student then rewrites the same assignment and submits it for an additional round of comments.

Having had extensive feedback on the ungraded assignments, students are then expected to handle the graded assignments substantially, although not entirely, on their own. As a class, we discuss the assigned issue in general terms and review basic research strategies. In addition, students are permitted, but not required, to submit an outline of their argument and meet with me individually to discuss it.

Understandably, first-year students are insecure about their legal writing abilities and seek assurance that they are on the right track. Both within their individual conferences and on an ad hoc basis, student questions range from "Can you tell me if I'm going in the right direction?"; "Which issue should I discuss first?"; "Where do I find the standard of review?"; "I've written my Summary of Argument section. Will you review it?" to the inevitable "How many cases should I use?" While all of these questions are predictable, they are not necessarily equally appropriate. For example, some students try to alleviate their insecurity by asking the professor to review a draft of their graded assignment. I believe this is an inadvisable practice and I have a policy against reviewing drafts (as opposed to outlines) of graded assignments. First, I have found that it is impractical to give general comments without implying that anything

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I do not comment upon is acceptable. Second, it is inappropriate to comment on the students' work when that work is the basis for the grade they will receive. While, hopefully, the students will learn a great deal from doing their graded assignments, the primary purpose of a graded assignment is not to teach. Rather, the purpose is to test the students' ability to apply what we have tried to teach them.

Fairness Considerations

The second fundamental consideration involved in deciding how much assistance to offer students is fairness to the students, individually and as a group. With respect to individual fairness, I have found that the most important element is communication of our expectations. We must communicate our expectations clearly and repeatedly. If we are going to walk students through the earlier assignments and then expect them to complete the graded assignments wholly independently, we must be sure that they are aware of this. Regardless of how much help we provide to students, it is important that they understand that at some point, they will be expected to stand on their own two feet. Therefore, there must be some transition that launches them from collaborative work to independent responsibility.

In addition, students must understand that the standards by which we will evaluate them will change throughout the year. Unlike their doctrinal classes where students are judged by one standard at the end of the course, in legal writing, students are submitting their work and receiving feedback on an ongoing basis. With each submission, more is expected and the standard is raised. For example, in reviewing an early assignment, I do not expect the level of case analysis to be as sophisticated as I will for the later graded assignments. Likewise, I am not overly concerned about citation form at the beginning of the year, yet citation form is a substantial part of the technical evaluation of the graded assignments. Because the standards are raised with each assignment, I do not grant students' request to tell them what grade I would assign to their early, ungraded work if I were assigning grades. Although it is important to alert a struggling student to the fact that his or her work is below that of the other students, it can be

misleading to imply that good performance on a particular assignment is the benchmark by which students should measure their work on future assignments.

The second fairness issue we should be concerned with is fairness to our students as a group. Although in an ideal world, legal writing would be taught one-on-one, legal education institutions cannot afford this luxury. As a result, we must be cognizant of the fact that our students are competing for grades, and in many schools, are ranked against one another. Realistically, if grading on a curve, we can assign only so many A's. Therefore, we need to consider whether it is fair to meet with some of our students five or six times and others only once. After all, we cannot really represent that we are offering the same opportunity to all of them since, despite our best intentions, there probably are not enough hours between the date we distribute an assignment and the due date to meet with all of our students five or six times. It is important to try to avoid unwittingly providing some students with an advantage over others. Therefore, if a student poses a specific question that I consider appropriate about a graded assignment, generally I repeat that question to the entire class (in person or by e-mail) and provide the answer to all the students.

Perhaps more than any other class they will take in law school, students must actively participate in legal writing in order to learn it. While we can provide the knowledge and teach the principles students need in order to succeed in legal writing, we cannot give them the experience that is such an essential part of the learning process; this they must obtain for themselves. Although I expect to continue to revise and refine my teaching approach as I gain more experience, I believe that part of my job is to ensure that my students leave my class having had the experience of drafting a legal memorandum and brief largely on their own. While, admittedly, this approach has caused both my students and me some angst, I have found that the students' progress and confidence in their abilities when they complete their first year of law school make the struggle extremely rewarding and worthwhile for all of us.

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