

PERSPECTIVES

Teaching Legal Research and Writing

A NEW DIRECTION IN WRITING ASSESSMENT FOR THE LSAT

BY ANNEMARIE BRIDY

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In January of 2001, the Law School Admission Council (LSAC) embarked on a multiyear program to research and develop a scored writing assessment for use in law school admissions. LSAC test developers now face the challenge of designing a test of core writing skills that effectively gauges the preparedness of law school applicants to begin learning to “write like lawyers.” To meet this challenge, LSAC has already taken a number of important steps, including conducting preliminary studies to identify the appropriate domain of skills to be assessed. Since the project’s inception, LSAC test developers have been engaged in an ongoing dialogue with writing specialists and teachers of legal writing, who have agreed to offer advice and to evaluate the merits of various possible question types and test designs. At present, LSAC is working collaboratively with writing assessment specialists at the Educational Testing Service (ETS) to design and pilot-test prototype question and test formats. A final decision about whether to operationalize a scored writing assessment for the Law School Admission Test (LSAT) will not be made for a few more years and will depend in part on the outcome of a formal field-testing program, which will follow the research and development program currently underway.

This article will acquaint legal research and writing teachers, with whom LSAC shares an interest in promoting the development of strong writing skills among future lawyers, with LSAC’s work in the area of writing assessment. Beginning with a brief introduction to writing assessment on

the LSAT, it goes on to consider some of the important issues motivating and impacting the development of a new writing test for possible future use on the LSAT.

Why Assess Writing on the LSAT?

LSAC has long believed that writing skills are important in law school, and that such skills should be assessed on the LSAT and considered by schools when admissions decisions are made. Although law school applicants are routinely required to compose a personal statement, it is an important caveat that such statements are often prepared with the aid of professional writers and editors. One study has shown that the personal statement, though potentially a valuable indicator

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of an applicant's personal interests and qualities, is not necessarily a reliable indicator of writing ability.¹ Grades in undergraduate writing classes can be a useful indicator of writing ability, but many candidates applying for admission to law school will not have had to produce a piece of sustained analytical writing since their freshman or sophomore year in college. The LSAT thus represents an opportunity to elicit an authentic sample of an applicant's writing that gives evidence of his or her current writing ability level. In developing a new writing assessment for the LSAT, LSAC test developers are proceeding from the premise that there is valuable information to be derived from the well-focused "snapshot" of a test taker's writing ability that can be elicited by a carefully designed instrument administered and scored under controlled conditions.²

How Has the LSAT Assessed Writing Historically?

The LSAT has included a writing component since the early 1960s, though the nature of the writing portion of the test has evolved over time in keeping with shifts in writing assessment theory and writing pedagogy. In the 1960s and 1970s, the LSAT featured a multiple-choice writing ability test designed to assess sentence-level writing skills (grammar, syntax, usage, diction). In 1980, this test was eliminated, along with the writing score. In 1982, an unscored writing sample was introduced, and in 1985 the current "decision-problem" format was adopted.

The current format, developed by writing specialists in consultation with law school faculty, presents test takers with a fictional scenario in which a choice between two options must be made, considering two guidelines and a constellation of relevant facts (Fig. 1). The test taker is given 30 minutes in which to write an essay supporting one or the other of the two choices, using the guidelines and facts provided. Rather

than centrally scoring test-taker essays, LSAC photocopies and sends them to each of the schools to which an applicant applies. Admissions committees then review and evaluate the samples at their discretion.

Henry Petersen, a student of fashion design, must choose one of two summer internships. Write an argument in favor of his taking one internship rather than the other based on the following criteria:

- Henry wants to make contacts that will help his career after he graduates.
- Henry wants to learn as much as possible about the process of developing a creative idea into a marketable product.

Alfin Inc. has offered Henry one of the ten internships it offers every summer to promising design students. Alfin is a well-established clothing company with offices around the world. The interns work in the company's headquarters. Henry would be part of a large team working on a line of children's casual clothing to be marketed the following spring. Alfin has one of the oldest internship programs in the industry, and many former interns have gone on to illustrious and successful careers in the fashion world.

Rafaela Ufuzzi has offered Henry an internship at her fledgling clothing company. Only a few years out of school herself, Ufuzzi has already attracted attention for her bold, innovative designs. Sales of her clothing have increased dramatically over the last year, and her work was recently featured in a major fashion magazine. Henry would be the only intern in Ufuzzi's small company. In addition to working on a line of clothing that Ufuzzi has promised to produce for a major department store, Henry would also be expected to help with whatever projects come their way over the summer.

Figure 1: Example of an LSAT Decision Problem

Even though decision-problem writing samples are not scored, the current format has a clear advantage over the multiple-choice test it replaced, in that it requires test takers to employ "higher-order" writing skills. These include the ability to argue logically in writing, the ability to organize and present information coherently, and the ability to anticipate and answer objections to a stated position. Because these skills are more closely aligned with the sophisticated writing skills required in actual law school writing tasks,³ the current format is more accurately representative of

¹ See, e.g., Donald E. Powers and Mary E. Fowles, *The Personal Statement as an Indicator of Writing Skill: A Cautionary Note*, *Educational Assessment* 4 (1), 75-87 (1997).

² It is important to emphasize that LSAT scores are intended to function as a complement to other indicia of an applicant's qualifications and never as the sole arbiter of an applicant's qualifications. In keeping with this principle, an LSAT writing score would be intended to augment other evidence of writing ability contained in an applicant's file.

³ These would include, among others, such tasks as briefing cases, writing legal memoranda and appellate briefs, and composing responses to exam questions.

the domain of skills with which the test is concerned—what assessment professionals call the “construct.” Although it is not impossible to design multiple-choice test questions that effectively test higher-order writing skills, constructed-response formats (i.e., formats requiring test takers to compose their own responses) like the decision problem are much more conducive to testing writing skills beyond the sentence level.

Notwithstanding its fuller representation of the construct relative to that of prior formats, the current LSAT writing assessment does not parallel peer assessments, including the Graduate Record Exam (GRE), the Graduate Management Admission Test (GMAT), and the Medical College Admission Test (MCAT), all of which dedicate at least 60 minutes of testing time to writing, and all of which report a separate score for writing. In each of these three tests, the greater time afforded allows for the administration of two writing tasks, a doubling that significantly increases the stability and consistency of reported scores.⁴ Given that an increase in the number of tasks from one to two or more significantly increases score reliability, test formats currently under consideration by LSAC call for both multiple writing tasks and increased testing time.⁵

⁴ The GRE and GMAT writing assessments each consist of two discrete writing tasks—analysis of an argument and presentation of a perspective on an issue. The MCAT writing assessment consists of two identically formatted but substantively different writing prompts. Thus, GRE and GMAT “double” in the sense of having two distinct writing tasks; MCAT doubles in the sense of having two instances of the same task. From the point of view of construct validity, the complementarity of the GRE/GMAT model is arguably preferable to the redundancy of the MCAT model; discrete tasks can theoretically cover a fuller range of the skill domain (i.e., for more complete construct representation). However, administering two instances of the same task can produce a higher degree of score reliability.

⁵ Two-essay assessments, in which both essays are read and scored by two different raters, have substantially higher score reliabilities than assessments based on single essays. One way of measuring score reliability is to calculate the likelihood that a test taker taking the same test on two separate occasions will earn about the same score both times. This measure of reliability is known as “test-retest reliability.” See Hunter Breland, Brent Bridgeman, and Mary E. Fowles, *Writing Assessment in Admission to Higher Education: Review and Framework*, GRE Board Research Report No. 96-12R (1999).

Why Report a Score for Writing?

There are both practical and theoretical reasons why reporting a score for writing on the LSAT is a good idea. From a practical standpoint, the high volume of applicant files and the significant degree of training and coordination required to systematically evaluate the current writing samples militate against effective and consistent use of the writing sample in admissions decisions. A recent LSAC survey found that the degree to which the sample is used, as well as the way in which it is evaluated, varies widely from one law school to the next (and sometimes even within admissions committees at individual schools). Some schools reported that they do not use the sample at all. As it stands, the economy of the admissions process at many schools does not allow for a careful reading of all applicant writing samples, which means that potentially valuable information about applicants’ writing ability is being lost. Reporting a score for writing could contribute to a more nuanced and complete evaluation of applicants than is possible with the current unscored format. For example, a below-average writing score might function as a fortuitously early sign that an otherwise qualified applicant would benefit from tutoring or other academic support services. Conversely, an above-average writing score might serve to highlight or corroborate other indications of academic strength in an applicant’s file.

From the point of view of assessment theory, the lack of standardization within and across schools in the evaluation of the current LSAT writing samples is less than optimal. At the most basic level, the purpose of a standardized assessment is to allow the proverbial comparison of apples to apples. In the absence of a clearly articulated score scale based on specific performance criteria, those charged with evaluating the writing samples could be prone either to disregard them altogether or to evaluate them idiosyncratically. This uncertainty with respect to performance criteria affects test takers as much as it does admissions decision makers. The requirement that test takers produce a writing sample when they take the LSAT is intended to convey the message that law schools take writing seriously because it plays such an important role in

“Reporting a score for writing could contribute to a more nuanced and complete evaluation of applicants.”

“[I]n the absence of a score, it is difficult to persuade law school applicants that the writing sample actually counts.”

both law school and the legal profession. In a very real sense, however, the medium may be undermining the message; in the absence of a score, it is difficult to persuade law school applicants that the writing sample actually counts.⁶

Furthermore, candidates (unless they take the initiative to contact each of the schools to which they intend to apply) have no clear idea how their writing samples will be factored into admissions decisions. This lack of clarity may lead to diminished motivation on the part of test takers, which may in turn lead to underperformance on the assigned writing task. In order to be sure that a test provides a true measure of a test taker's best efforts, it is important that the test taker be sufficiently motivated. It is doubtful whether an unscored writing assessment can inspire the high level of motivation that underlies test-taker performance on the scored, multiple-choice sections of the LSAT.

How Will the Newly Developed Writing Assessment Be Scored?

Standardized writing assessments are scored, and writing scores are reported, in a variety of ways depending on the purpose and design of the assessment in question. Multiple-choice tests of writing ability are relatively unproblematic (and inexpensive) to score; each item has a single correct answer, and answer sheets can be machine scored. Constructed-response tests of writing are more difficult (and more expensive) to score; the range of test-taker responses is extremely varied, and the process of evaluation necessarily involves the subjective judgment of trained raters. The subjective element inherent in the scoring of constructed-response writing assessments is often cited by critics of standardized tests, who suggest that rater subjectivity leads to randomness and unreliability in the scoring process. While concern about the impact of rater subjectivity on score reliability is legitimate, the case tends to be overstated due to lack of understanding of the strict procedural controls and carefully articulated

⁶ Test preparation providers counsel test takers to spend their energy on the multiple-choice sections of the test and not to fret too much over the writing sample.

scoring criteria that govern the scoring enterprise in most large testing programs.

In the GRE program, for example, each essay is scored by two qualified raters, who are thoroughly trained to apply a scoring guide tailored to the format of the assessment.⁷ Before scoring “live” essays, raters score a set number of prescored essays to “calibrate” themselves to the score scale. Raters who are unable to calibrate are disqualified from scoring. During scoring sessions, raters are carefully monitored to ensure that the scores they assign are neither too lenient nor too stringent in comparison with those assigned by other raters. They are also monitored to ensure that they are applying the scoring guidelines consistently to successive essays over the course of the scoring session. In the event that the two raters' scores are discrepant by more than one point (on a six-point scale), a third, highly experienced reader adjudicates the discrepancy. Otherwise, the two scores are averaged and rounded-up to the next highest point.

GRE raters score test-taker essays holistically, which is to say they assign a single score that reflects the quality of each essay considered as a whole.⁸ Like GRE, many other testing programs use a six-point holistic scoring scale, although the score scale can be expanded or contracted depending on the complexity of the tasks in the assessment and the needs of score users. For example, it may be adequate in certain contexts to divide essays into only three categories—below average, average, and above average. In other contexts, a higher degree of discrimination among written performances may be desirable. Some programs score essays analytically rather than holistically, assigning a number of separate scores or “subscores” to reflect the test taker's level of mastery of discrete skills within the domain.

Because LSAC has not yet settled on a specific design for the new writing assessment, it is too soon to project how LSAT writing scores will be assigned and reported if the assessment is

⁷ Information on the scoring process for the GRE analytical writing assessment was taken from publications available on the GRE Web site <www.gre.org>.

⁸ For a detailed discussion of the theory and practice of holistic scoring, see Willa Wolcott and Sue M. Legg, *An Overview of Writing Assessment* (1998).

operationalized.⁹ Regardless of the test design, however, every effort will be made to ensure that the score scale and the method of score reporting are maximally informative to both test takers and admissions committees. One possibility that LSAC is actively exploring involves including diagnostic information with score reports. Such information could be used productively by both test takers (who could seek extra help in targeted areas) and law schools (which could identify particular segments of the skill domain in which individual students require further development).

How Might an LSAT Writing Score Be Used?

In addition to designing the assessment and establishing scoring and score-reporting frameworks, LSAC must consider the critical issue of score use. There is always a danger, when a new quantitative measure of skills is introduced into an admissions process, that applicants will see themselves and their multifarious abilities “reduced to a number.” To avoid this pitfall, LSAC is considering how to reconcile the introduction of standardization into the writing component of the test with the preservation of the individual expression that is so important to writing. How can the new assessment be designed to function both quantitatively and qualitatively? Other important questions relating to score use also arise: What consequences, intended or otherwise, might the introduction of a scored writing assessment have on the practices of admissions committees and on law school applicants themselves? To what specific diagnostic uses could the new writing assessment be put? In what way might the addition of a scored writing assessment impact minority applicants? How should a writing score be weighed in relation to other indicators of writing ability in an applicant’s file? These questions and others like them will continue to be discussed with various elements of the LSAC constituency as the program progresses.

⁹ The assessment, whatever its design, will emphasize analytical writing skills beyond the sentence level. The primary emphasis in scoring will therefore be on critical thinking and analytical writing skills rather than on surface features such as grammar and mechanics.

Conclusion

Adopting a scored writing component and providing schools and test takers with detailed supporting materials could introduce important elements of transparency and predictability into the assessment of writing on the LSAT. All LSAT stakeholders stand to benefit from this proposition. Because test takers would know in advance how their writing will be evaluated, they would be better able to prepare effectively. Such preparation would ideally include an increased curricular focus on writing by law-school-bound undergraduates. Test takers would also recognize that strong writing skills could translate into a tangible competitive advantage in the admissions process, so they would be highly motivated to prepare and perform well. Admissions committees would receive information about the writing ability of applicants that is easily comparable, readily accessible, and statistically reliable. Ultimately, legal writing teachers also stand to benefit, as students would arrive at law school with a heightened awareness of the importance of writing and with a firmer grasp of the fundamental skills underlying effective legal writing.

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“All LSAT stakeholders stand to benefit from this proposition.”

“[T]he creation of the outline, or the process, is more important than the product.”

TEACHING OUTLINING FOR EXAM PREPARATION AS PART OF THE FIRST-YEAR LEGAL RESEARCH AND WRITING CURRICULUM

BY JESSICA ELLIOTT

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Last November, my dean asked me to conduct a lecture for all first-year students on outlining in order to help prepare them for their first set of exams.¹ I first thought that this task had fallen upon me, as director of the Legal Research and Writing program, because at the time, we were without an academic support professional. I also wondered why a doctrinal professor who was teaching one of the first-year classes did not take on the task. However, as I prepared myself to conduct this talk, I realized that the type of outlining that I would be talking about—outlining as a preparation tool for taking an essay exam—fit neatly within the Legal Research and Writing curriculum. In fact, I realized that rather than teaching the students a skill or a study method, I was teaching them organization, logic, and analysis, the same things that they learn in my class. Because students will be expected to employ the same organizational structure (generally referred to as IRAC—Issue, Rule, Application, Conclusion) and analytical tools in answering an essay exam question as they use in writing a legal memorandum, I was teaching students to construct an outline that mirrored the structure and included the same components (e.g., rules, reasoning, important facts), as a legal memorandum. Accordingly, I conducted my lecture to the students in a question-and-answer format, proving students with the following answers to the most frequently asked questions.

¹ I would like to thank all of the members of the legal writing e-mail discussion list who so generously shared with me their insights and materials in preparing for this talk.

How Is Outlining for Exam Preparation Different from My Weekly Outlining?

There is a difference between the weekly outlining of your courses that you have been told you have been doing, and the type of outlining that is used for exam preparation. Most first-year students came to law school having heard about outlining. You were told that each week you should be outlining your classes as a way of consolidating your notes and solidifying your understanding of the topics covered that week. If you adhered to this system, by the end of the semester you would have an outline of the entire course, which likely covered somewhere in the neighborhood of 50 pages. While having engaged in this process probably has given you a better understanding of the substantive material than you would have, had you not completed this outline, this type of outline will not serve as a study aid for your exam.

Outlining for exam preparation is a different process, and a process that I believe cannot begin until a student has gotten through a significant amount of class material. Depending on the class, this may happen at several times during the semester—at the end of each major topic, or may not happen until the last third of the semester, sometime in early or middle November. It should be noted that what I am advocating is not waiting until two weeks before the exam period to begin outlining; however, I do believe that the weekly outlining that is heralded by many as the key to law school success serves a different purpose and cannot, in most cases, replace the outlining study process that occurs nearer to the exam.

What Is Outlining?

Because we were talking about outlining as an exam preparation tool, the creation of the outline, or the process, is more important than the product. Once you have finished constructing your outline, you will have done most of the work toward preparing for your exam. Thus, it is not helpful to get an upperclass member's outline, rely on a commercial outline, or split up the work on an outline among the members of your study group. Each student must create his or her own outline. Your outline will be personal to you and must be constructed in a way that will be useful to you. That being said, the organization of the outline

.....

must focus on legal concepts and legal rules, rather than on particular cases. It is not a series of mini-case briefs or a chronological digest of class notes. Instead, it is a reorganization of all of the information that you have compiled in your class notes and your weekly outlines into a format that mirrors the process by which you answer an exam question on that topic.

When Should I Be Doing It?

The outlining process must begin now. You will need approximately one week per course to construct and learn your outline, and then you will need time to practice using it to answer exam questions. Thus, your outlines should be completed before the beginning of study week so that you can use the study week to take practice exams using your new outlines.

What Do I Need to Construct an Outline?

You need your casebook, your class notes, your syllabus, and possibly any useful study aids, hornbooks, or commercial outlines. I depart from some others in conceding that there is a place for commercially prepared study aids and outlines. Commercial products may be used in the creation of your own outline by helping you to understand the material that your professor covered in class. A commercial outline may also suggest an organizational structure for you. However, a commercial outline cannot replace an outline prepared by you, first, because the commercial outline will not be tailored to your particular course or the particular professor teaching your class, and second, because it is the process of constructing the outline that is vital to your exam preparation. Where you come across a legal issue on which a commercial product and your professor seem to be in conflict, the first step is to check with the professor. Often this apparent conflict in fact reflects some misunderstanding with the legal concept. Meeting with the professor will generally clear up what appeared to be, but in fact was not, a conflict. If, however, the professor confirms that there is indeed a difference, you must be guided by your professor's interpretation. After all, it is he or she who will be grading your exam.

How Do I Organize the Outline?

How to organize this outline is the most important piece of information in this lecture. It is the organizational aspect that distinguishes outlining for exam preparation from weekly outlining and it is this organizational structure that marries an outlining discussion with the legal research and writing curriculum. The failure to construct and organize the outline topically is the biggest problem that students have. Such failure will render the outlining process as well as the final product useless to the student in preparing for and taking a law school essay exam.

Teaching Tips:

At this point in the lecture, I ask students to consider not what a law school essay exam asks but rather, what one doesn't ask. I explain that they will never be asked simply "what happened in Smith v. Jones?" Nor will they be asked "what did we discuss in class on October 11?" In considering this, students are able to see that organizing an outline by case will not help them answer an exam question. Also, organizing an outline chronologically, meaning organizing topics in the order that you covered them in class, will not help them answer an exam question. Unlike an undergraduate class, where students are expected merely to memorize material and regurgitate it on an exam, a law school exam is fundamentally different. A law school exam question will ask you to predict the outcome or analyze the legal ramifications of a totally new and unfamiliar fact pattern.

How Will I Do This?

To do this, you will need to do more than regurgitate the rules (although you will have to be able to do this), but more importantly you will have to understand which rules apply to the new situation and how to apply the rules to the new facts. For instance, if an exam question fact pattern clearly asks about the sale of goods, you must know that you have to analyze the question under the Uniform Commercial Code (UCC), not under ordinary contract law. You need to have the steps for the legal analysis of a UCC case separate in your outline from the steps for analyzing an ordinary contract problem. This is where we get into the first major concept, which is organized by topic, not by case.

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“At this point, students can begin to see how the analytical process involved in outlining is similar to the process they use in drafting a legal memorandum.”

1. Identify broad legal concepts/topics and subtopics

You need to start the organizational process by identifying the large legal concepts that you covered in your class. To do this you may look to your syllabus, the table of contents or chapter headings in your casebook, and your class notes. Once you have identified the broad topics, list them.

Teaching Tips:

In my lecture, I asked the students to tell me what topics they covered in their torts class that year. On an overhead, we constructed the following list.

Assault

Trespass

False imprisonment

Battery

Wrongful conversion

Negligence

Interference with property

Intentional infliction of emotional distress

Trespass

2. Organize topics and subtopics

The next step is to organize the topics and subtopics. There are two issues important to this organization. First, you must consider whether there is any particular order in which the major topics need to go. In other words, do the major topics stand alone, or will you have to analyze several of them in a particular order on an exam question. Second, how do the subtopics fit under the topics? To organize the torts topics we identified we came up with the following sample framework for our outline.

Sample organization:

- I. Intentional torts
 - A. Assault
 - B. Battery
 - C. False imprisonment
 - D. Intentional infliction of emotional distress
- II. Interference with property
 - A. Wrongful conversion
 - B. Trespass
- III. Negligence

3. Identify rules and/or elements for each topic and subtopic

For each topic, you will need to identify:

1. The legal rule that governs
2. The rationale behind the rule

3. The extent of the rule's application

4. The elements of the rule

5. The major cases and any in-class hypos that

apply the rule—this is the illustration of the rule

6. Any exceptions to the rule or defenses

As you consider the rules that relate to each legal concept, ask yourself whether your professor has presented you with several different types of rules that might apply. You may be required to know more than just the majority rule. Perhaps you will need to know the minority rule, a statutory and a common law rule, an old or abandoned rule, or a Restatement or Model Code rule.

Teaching Tips:

At this point, students can begin to see how the analytical process involved in outlining is similar to the process they use in drafting a legal memorandum. I explain that their outline will contain all of the information that would be used to compile an IRAC discussion, with the exception of the application. The application of the new facts to the law is the main task they will have when answering an exam question. The question will provide the new facts to which the legal rule and reasoning will be applied.

How Do Cases Fit into My Outline?

To illustrate exactly how cases fit into the outline, we will take one sub-issue, for instance, battery, and fill in the rest of the outline for one of the elements. Notice how the elements are numbered under the sub-issue, the legal rule for each element gets listed under the element, and the cases provide the illustration of the legal rule. For example:

B. Battery

1. Intentional
2. Act by the defendant that brings about a harmful or offensive touching
 - a. Rule: Whether a contact is harmful or offensive is judged by a reasonable person standard. The touching need not be person to person but can result from any intentional act of the plaintiff.
 1. *Smith v. Jones*: Boy hit neighbor with a ball leaving a large bruise on the neighbor's arm. Court held that hitting a person with a ball constitutes a touching even though the boy's person never

touched the victim's. Court also held that evidence that the neighbor was injured by the ball and that he did not ask for the ball to be thrown to him established that touching was harmful or offensive.

3. Without consent

Teachers have found that the biggest mistake students typically make is to organize the outline by case. Cases should be present only as they illustrate legal rules or elements to legal rules. Any case description should be no more than four sentences including the holding, important facts, and relevant reasoning. In any case discussions you include, focus on the illustration the case provides of how the rule has been applied. You will need the rule that the court applied, the rationale that the court considered, the holding of the case, and the relevant facts (meaning the facts on which the court relied on in reaching its decision). You need to have this information because when you go to answer an exam question, you will be asked to consider a new set of facts and predict how a court will decide a legal question based on those facts. This prediction will be made by looking at what courts in other cases with similar facts did, and making comparisons to how similar or dissimilar the new facts are to the decided cases.

How Does Public Policy Fit In?

You may also need to know policy considerations or arguments for reform of the rule. This will depend on what your professor covered in class. Everything that you have covered in class will appear in your outline somewhere. If you are having trouble understanding where a particular concept fits in, you probably don't have a good understanding of the legal concept and you should go speak with your professor to clear it up. The outlining process can be a good tool to help you identify areas of confusion or misunderstanding. It is also important that you not include material that you did not cover in class. If you see a topic in a study aid, but your professor did not cover it, it does not belong in your outline.

Be Sure to Order Your Major Topics So That the Order Reflects the Process You Will Have to Go Through to Answer an Exam Question

A good way to illustrate this concept is by looking at your first-year contracts class. Some professors begin by teaching remedies. You would not, however, want to begin your outline with remedies. This is because ordinarily, a question on a contracts exam will provide you with a set of facts and ask you "Does person A have a cause of action against person B?" Unless the question tells you that you may presume liability and discuss only potential remedies, you will first have to determine whether there is liability before you can determine what the remedies will be. For example, a question might read:

A man hires a neighbor to clean and paint his boat in exchange for use of the boat on three weekends during the summer and \$100. After the neighbor finishes cleaning and painting the boat, he uses the boat one weekend and leaves it a mess. The man refuses to pay him the \$100 and says that he cannot use his boat again. The neighbor sues. Analyze.

In order to answer this question, you first must consider whether a valid contract has been formed. Thus, Formation might be your first major heading. Under Formation you would need to include subheadings for each of the components of contract formation (offer, acceptance, and consideration). For example:

1. Formation
 - a. Offer
 - b. Acceptance
 - c. Consideration

Next you will have to consider how a court would interpret the contract between the parties. Thus, your next heading may be Construction. Under that heading you would have to include each of the rules of contract construction that you learned in your course. For example:

2. Construction
 - a. Parole evidence rule
 - b. Conditions
 - c. Statute of frauds

“Everything that you have covered in class will appear in your outline somewhere.”

“In general, it is best to write your outline in short but complete sentences.”

Next you would have to consider whether there has been a breach of the contract, whether any defenses are available to the breaching party, and, finally what remedies are available. The rest of the contracts outline may look like the following:

3. Breach
4. Defenses
5. Remedies
 - a. Compensatory
 - b. Punitive
 - c. Liquidated
 - d. Specific performance

Teaching Tips:

As we walk through how we might use an outline organized in this manner to answer the question posed above, most students can see the logic behind the organizational structure. I try to stress to the students that the process of organizing an outline in the manner in which you would answer an exam question is itself an analytical exercise that is an important part of their exam preparation.

Furthermore, once we have discussed how cases are used in the outline only to illustrate legal rules and concepts, most students can see how closely an exam answer mirrors the IRAC-style legal memorandum writing that they have been doing in their legal writing class.

How Should I Format My Outline?

Although there is no one set way to format your outline, it is best to use standard outlining conventions. You will need your outline to be well organized and easy to read. Be consistent. For example, if you are putting the rule of law in boldface and case names in italics, keep that format consistent throughout your outline. Where there are several elements necessary to a cause of action, number them. It will be vital that you remember that there are, for instance, three elements to battery or four elements to false imprisonment. If you always think of the elements in an ordered, numbered list, you will be less likely to forget to analyze one on the exam. In general, it is best to write your outline in short but complete sentences. This will ensure that you have a clear understanding of the concepts and, after all, you will have to answer the exam question in complete sentences.

How Will I Use My Outline Once It Is Done?

Once your outline is complete, you will use only your outline to study for your exam. You will no longer refer to your casebook or your notes because all of the relevant information is in your outline. You will want all of your outlines to be completed before study week. During study week, you will practice answering sample exam questions based on the information you compiled in your outline. See whether your professor has practice exams on file—many do. If your professor does not, see if you can get some practice exams from a study guide. The length of your outlines will depend on your style and, to some degree, on the type of exam that you will be taking. Students will commonly ask whether they have to memorize their outline. The answer is generally yes. This is true whether your exam is closed or open book.

How Will My Preparation Differ for an Open Book Rather Than a Closed Book Exam?

The outline that you will prepare for an open book exam will not differ significantly from that prepared for a closed book exam. For an open book exam, the professor will expect your answers to be more detailed. The exam will probably have a greater number of or more detailed questions because the professor knows that you can reference your notes. However, you will not have the time to look up specific answers. You will have time to reference your notes only. You must have a good understanding of the law without rummaging through notes. Thus, for an open book exam, you may have slightly more detail in your outline and you will want to tab your outline so that you can easily refer to the section that you need. Finally, even for a closed book exam, your professor will expect you to cite to specific cases, statutes, and rules.

Teaching Tips:

To emphasize the importance of knowing case names, I e-mailed each of the first-year professors at our school and asked them whether they will expect students to refer to specific cases and statutes by name on their examination. Each one answered yes. I pulled out those e-mails and read quotes such as “I expect my torts students to cite to specific cases, by name, the more the better,” and “it will be important

.....

for students to know applicable sections of the code and cases,” to a room full of gaping jaws. Students were shocked by the specificity with which they would be expected to know the material from their courses.

In short, the type of outlining that I presented to my students is aimed at preparing students to write an IRAC-style answer to an exam question. My goal was to get students to engage in the process of organizing the substantive material from each of their classes in a logical framework that will assist them in analyzing an exam question. The outlining process is meant to train them to present material in an analytically logical manner, assist them in identifying areas of confusion within the material, and force them to know, understand, and even memorize the material. I emphasized for the students that their legal methods class had prepared them well for this type of analytical and organizational exercise. Writing a predictive memorandum, where they were charged with proving to their reader, through careful and well-supported analysis, that their prediction was legally correct, helped them develop key skills. Their exam answer must prove to their professor that their well-written analysis supports their answer to the exam question.

I close by telling students that in order to succeed on their first-year exams, they will need to memorize a lot of law. They will need to know this material cold and be able to access it from their minds and apply it quickly. I don't apologize for this. I tell them that as a professional, there is a certain amount of information basic to their profession that they will need to know. To end with a laugh, I remind them that if they were to have surgery on their appendix, they would hope that the doctor had memorized where the liver, kidneys, and other vital organs are. Just knowing the appendix would probably not be enough. And most students are willing to agree that they would not want the doctor looking it all up in the medical book while they are on the operating table.

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“Their exam answer must prove to their professor that their well-written analysis supports their answer to the exam question.”

“The advocate must carefully consider the framing of the legal issues.”

APPELLATE BRIEFING: A JUDICIAL PERSPECTIVE

BY JIM REGNIER

Jim Regnier is a Justice on the Montana Supreme Court in Helena.

Effective appellate brief writing is, as is everything in the law, both a science and an art. Every practitioner knows that representing a client before an appellate court is a critical phase of advocacy. Whether your task is to preserve a judgment on appeal or to persuade the higher court that prejudicial error occurred, it is crucial that you give your client every opportunity for success.

The goal of this article is to provide both students and legal writing instructors with helpful tips on how to represent clients successfully during the appeal phase of litigation. The majority of my comments will be directed toward effective brief writing. First, I will address overall strategy considerations, followed by some technical aspects of appellate brief writing. Finally, I will focus on the persuasive aspect of the appellate brief.

I. Know Your Audience

I recall agonizing as a trial lawyer, pouring over jury lists in anticipation of an upcoming trial. As soon as the list was available, I immediately provided copies to all the lawyers and staff in our firm so that we could brainstorm and hopefully learn about the folks who were going to decide the fate of our client.

It is just as important that you know something about the judges who are going to decide your case on appeal. Where has the court been heading? What will be its approach to your case? How can you most effectively communicate your message?

- A. What are the ground rules? Each appellate court operates under rules of procedure that may cover any and all aspects of the appeal. Be familiar with them! The sheer numbers of filings are increasing in almost all courts, limiting the amount of time a judge has to work on each case. If your brief violates the court's ground rules, you have—at a minimum—created a distraction from your message and done your client a grave

disservice even before you've started to make your argument.

- B. The brief is important. The brief is your first—and perhaps your only—chance to present your client's case to the court.

II. Develop a Strategy on Appeal

We all know the importance of developing a strategy or game plan for trial. Every successful trial lawyer knows that he or she must develop a theme or strategy to guide an orderly and persuasive presentation. A new strategy must be developed on appeal because the issues generally shift from combined factual and legal issues to purely legal questions. The advocate must carefully consider the framing of the legal issues. In fact, this may be the most important step in preparing your brief. Identify one or two of your best issues and state them well. Write out a short three- or four-sentence outline of your argument.

III. Know the Rules

Before undertaking the task of composing your brief, the first step is to know and carefully read the rules of the court to which you are presenting your appeal. Without knowing the rules you can't effectively play the game. Failure to scrupulously follow the rules risks dismissal of your appeal.

I direct your attention to the following considerations:

- A. The appeal must be derived from an appealable order.
- B. Make sure the notice of appeal is properly and timely filed. If another party has filed a notice of appeal, is a cross-appeal necessary on any issues that you would like the appellate court to consider?
- C. Make sure your brief complies with rules as to length and format. Be sure to cite to the record. Pay attention to the standard of review.
- D. Follow the rules regarding ordering of the transcript on appeal.

IV. General Comments Regarding Persuasive and Effective Brief Writing

- A. Provide a short but complete procedural history of the case. Provide the reader with

an outline of where you are going. Make sure you identify the order or issue you are appealing.

- B. Initially identify the parties' role in the appeal, e.g., appellant, respondent. Then refer to the parties by name.
- C. Clearly identify the standard of review and write with the standard in mind.
- D. State the legal issues clearly and concisely in short simple sentences.
- E. Limit yourself to no more than three legal issues.
- F. Present your facts as a short story.
- G. Pay particular attention to format. Use short paragraphs, subheadings, and bullet points.
- H. Don't make personal attacks.
- I. Poor grammar, spelling, sentence structure, etc., distracts the reader. Make sure the brief is understandable. Avoid overuse of italics, changing fonts, and overuse of bold. This becomes too distracting and doesn't help the judge.
- J. Cultivate credibility. This is not only important for the pending case but also because your reputation as an attorney is at stake, particularly your reputation in the court.
- K. Keep it short. Some judges immediately look to see how long the brief is. If it is long, they read it more quickly; if it is shorter, they take more time.
- L. Provide accurate citations.
- M. Tell the court what relief you're requesting.
- N. Never incorporate by reference.
- O. Make complete legal arguments.
- P. Have a friend read your brief. If your friend can't determine what the case is about, what your argument is, and what relief you're seeking, you need to start again.

V. Appellant's Brief

You have lost the case in the trial court. Appellate judges look for any way to affirm (contrary to the belief of the trial bench). Your task is daunting. Your true goal is to grab the attention of the appellate judges and let them know that your client has been unfairly treated in the court below. A sterile, legalistic approach will not carry the day. You must, in good taste, persuade through

a combination of a legally compelling and emotional presentation. Judges are most concerned about fairness. Was the playing field level at trial or did the trial judge skew the contest by misapplying the rules?

- A. Develop a one- or two-sentence plot.
- B. In the statement of the case, provide an accurate history of what has occurred below. Don't clutter this unnecessarily with facts. You need to grab the reader's attention as quickly as possible and let him or her know what the case is about. What happened below? What area of law is involved?
- C. Identify and simplify the issues. Consider the order of presentation.
- D. Let the facts do the talking. Make your presentation people-oriented. Bring in your strategy and develop your factual presentation around your strategy.
- E. A summary of the argument may be the most important part of your brief. It requires you to state clearly and concisely why you should win this appeal. This takes time to prepare. Focus the judges' attention on the heart of your appeal.
- F. The argument should meld the facts and law. A "controlling" case is persuasive if it is factually similar.
- G. What do you want the court to do? In the conclusion, take the opportunity to again summarize your argument and tell the court why your client was unfairly treated below.

VI. Respondent's Brief

You're the winner at this stage—the good guy in the white hat. Support the trial court and don't overlook your tremendous advantage—the appellate court wants to affirm. Don't be pulled into the appellant's presentation by only responding to the appellant. Affirmatively support the trial court.

- A. Have a detailed understanding of the correct standard of review that applies to the issues presented. If the appellant has misstated the standard of review, bring this to the attention of the court. Remember, very few issues on appeal are entitled to *de novo* review. Quote the trial judge when appropriate.

“You must, in good taste, persuade through a combination of a legally compelling and emotional presentation.”

“Judges care about the content, tone, and format of appellate briefs.”

- B. There is no need to provide your own statement of the case so long as appellant’s statement is adequate.
- C. Very seldom can you rely on the appellant’s statement of facts without adding to the facts and pointing out that they are incomplete.
- D. Issues sometimes need to be restated, but don’t fail to respond to all of the appellant’s contentions.
- E. Focus on the record.
- F. Factual determinations made by the trier of fact are entitled to deference on appeal.
- G. The determinative issues were properly decided by the trial court and any ancillary issues, although not correctly decided, are not determinative of the outcome.
- H. The facts can be clearly distinguished from other precedent.

VII. Reply Brief

Generally, a reply brief must be confined to new matters raised by the respondent. If you address and rebut those new matters, your reply brief has served its purpose.

VIII. Conclusion

Effective and persuasive brief writing is the most important asset of the appellate lawyer. Judges care about the content, tone, and format of appellate briefs. The time you invest in writing and rewriting is crucial to the success of your appeal. In many courts, you will not get an opportunity to orally argue unless you persuade the court that your case is worthy of oral argument.

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INCORPORATING SOCIAL JUSTICE ISSUES INTO THE LRW CLASSROOM

BY MIKI FELSENBURG AND LUELLEN CURRY

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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, or to Mary Lawrence, University of Oregon School of Law, 1515 Agate Street, Eugene, OR 97403, phone: (541) 346-3848.

“The future is not a result of choices among alternative paths offered by the present, but a place that is created—created first in the mind and will, created next in activity. The future is not some place we are going to, but one we are creating. The paths are not to be found, but made, and the activity of making them, changes both the maker and destination.”—John Schaar

“Honor isn’t about making the right choices. It’s about dealing with the consequences.”
—Midori Koto

“Brutal: very harsh or rigorous[;] plain and direct, although distressing in effect.”—*New World Dictionary of the American Language*

The decision to bring social justice themes into the legal research and writing classroom presents difficult choices, well within the definition of “brutal.” We base this conclusion on audience

reaction to our presentations at two conferences¹ and to our research on the topic.²

Before confronting the choices involved in incorporating issues of social justice into the legal writing classroom, the term must be defined.³ In their article, *Teaching Social Justice Through Legal Writing*, Professors Pamela Edwards and Sheilah Vance define social justice as “the process of remedying oppression, [including] ‘exploitation, marginalization, powerlessness, cultural imperialism, and violence.’”⁴ More specifically, social justice issues include “problems involving race, ethnicity, and interracial conflict, ‘class conflict, gender distinctions, ... religious differences,’ and sexual orientation conflicts.”⁵ Other areas that fit this definition of social justice focus on the rights of the disabled, the elderly, children, and families. Any questions that implicate issues of a power imbalance within society can be deemed “social justice issues.”

Having defined the term, the next step is to examine the nature of the “brutal” choices involved. Two main choices arise. The first is whether or not to incorporate such issues into the

“Any questions that implicate issues of a power imbalance within society can be deemed ‘social justice issues.’”

¹ We presented on using social issues in the legal research and writing (LRW) classroom at a North Carolina statewide legal writing conference in May 2001, and at the National Legal Writing Institute (LWI) Conference in Knoxville, Tenn., in May 2002.

² In preparation for the Knoxville LWI conference, we posted an e-mail through the LWI e-mail discussion list asking for legal writing professors’ experiences with using social justice issues in the classroom. We are extremely grateful to the numerous professors who responded. Their ideas, practical suggestions, and willingness to share information were instrumental in the development of our presentation and this article. Our work in this area goes back to the 1998 Ann Arbor, Mich., LWI conference, where we began to talk to each other about race and other social justice issues, an exploration and discussion that we continue to pursue.

³ “What do we mean when we say ‘social justice’? I’ve perceived many views on this. Does it mean incorporating legal issues impacting historically marginalized communities (e.g., discrimination claims—which I think is what many people think of)? Or seeking a more contextualized analysis of legal issues (e.g., needing to look beyond the ‘black letter law’ and ‘legally significant facts’ to see what is really happening in any given case)? Or discussing with students the politics of power and oppression? Or making the legal writing classroom more inclusive of non-traditional students and views?” E-mail from Lorraine Bannai, Legal Writing professor, Seattle University School of Law, to Miki Felsenburg, associate professor of Legal Research and Writing, Wake Forest University School of Law, and others, *Pursuing Social Justice Inside and Outside the LRW Classroom* (June 17, 2002) (copy on file with Professor Felsenburg).

⁴ Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 J. Leg. Writing Inst. 63, 64 (2001).

⁵ *Id.*

“The teacher must consider whether his or her ultimate goal is to influence students’ development as people, lawyers, or both.”

classroom at all. If the response to that choice is yes, the second choice involves what method to use. There are at least three methods.⁶ In general, the first method requires students to analyze in the broader context of a specific social issue. The second is more indirect: a social issue is the subject of the assignment, but students write only about their legal analysis, not the larger social issue. The third method involves creating a “real world” context for the characters in a problem by describing their race, class, disability, sexual orientation, etc., whether or not the legal analysis involved directly involves those characteristics.

The threshold choice, whether to bring social issues into the LRW classroom, is a difficult one and has the potential to resonate deeply in the classroom throughout the school year.⁷ The reasons to do so seem initially straightforward, although the choice involves layered pros and cons and considerable potential danger. The teacher must consider whether his or her ultimate goal is to influence students’ development as people, lawyers, or both, and to what degree the teacher’s own social justice agenda might or should influence the agenda set for the class.⁸

The incorporation of social justice themes into the classroom reflects several benefits. In doing so, the LRW teacher demonstrates that the world is complex and varied, not generic.⁹ If the LRW teacher does not give the characters in his or her legal writing problems a real-world context, the students will form their own pictures. Such pictures may reflect the dominant white culture or the students’ own experiences and prejudices.¹⁰

⁶ These methods are discussed fully below. See *infra* p. 78.

⁷ Edwards & Vance, *supra*, n. 4, at 74–83 (Edwards and Vance discuss several concerns that could occur if social justice issues are brought into the classroom, such as student and teacher comfort with the chosen issue, and academic freedom for the teacher, among others).

⁸ See Brook K. Baker, *Incorporating Diversity and Social Justice Issues in Legal Writing Programs*, 9 Perspectives: Teaching Legal Research and Writing 51, 51 (2001) (noting the difficulty of bringing legal writing professors’ own views on social justice issues into the classroom).

⁹ *Id.* at 53–54.

¹⁰ See Julie Landsman, *A White Teacher Talks About Race* 40 (Scarecrow Press 2001) (the white author describes the “unconscious arrogance that accompanies [a white person’s] assumption of [his or her] place at the center of the world.” In her preface, she states, “White people do not usually think of themselves as having a race; race is a marker for ‘the other.’ When we refer to a person, without further description, the social norm is white (and male and straight and not disabled.” *Id.* at xv). Along these same lines, see Baker, *supra* n. 8, at 53–54.

Real clients, however, are never generic. The working lawyer does not create a mental picture of the client, the opposing counsel, the opposing party, or the judge, because these people are real. Thus, students can be challenged to confront one of the realities of practicing law if legal writing problem characters exist within a social context.¹¹ Students should have the opportunity to confront their own prejudices in the classroom, rather than for the first time when dealing with real clients. Students also need the chance to think about how to fight stereotypes in front of judges and juries before actually having to do so.¹²

LRW teachers help law students acquire a legal vocabulary. Including social justice issues and contexts helps ensure that their vocabulary is based in the diversity of the real world.¹³ Along the same lines, choosing a socially just and relevant topic that sparks interest in doing “good” in the world may spur students to choose a particular career path or later accept pro bono work.¹⁴

Further, choosing a “cutting-edge” or controversial topic can create interest in the subject, thus engaging students intellectually. Just because a legal writing problem has a good split of authority or an accessible standard of review doesn’t necessarily make it interesting.¹⁵ In fact, such problems may be deadly dull, and our students must wrestle with them sometimes for weeks at a time. By choosing something more “meaty” that involves social justice, teachers can increase students’ interest as well as their own.¹⁶

¹¹ Anne Enquist, Lorraine Bannai, & Ramona Witt, LWI Presentation, *(Un)Conscious Assumptions and (Un)Intended Messages: Recognizing Bias in Legal Writing, Analysis, and Argument* (Knoxville, Tenn., June 1, 2002) (the workshop explored the techniques for teaching students how to deal with race, gender, and class issues likely to confront them in practice).

¹² *Id.*

¹³ *Id.*

¹⁴ E-mail from Ruth Anne Robbins, clinical attorney and supervising attorney of Rutgers Domestic Violence Project, Rutgers School of Law, Camden, to Professor Felsenburg, *Response to Request* (Sept. 20, 2001) (copy on file with Professor Felsenburg).

¹⁵ *Id.*

¹⁶ E-mail from Sheila Simon, assistant clinical professor, Southern Illinois University, to Professor Felsenburg, *Survey for LWI Conference* (Sept. 20, 2001) (copy on file with Professor Felsenburg) (Professor Simon, commenting on choosing socially relevant subjects, said, “It has always made it more fun for me, and I think the students appreciate a topic that at least one person is energetic about.”).

The above are just a few of the many reasons why bringing social justice issues into the LRW classroom is a good idea. However, there are three areas of immediate concern that may weigh on the side of not bringing social justice issues into the LRW classroom: the pedagogy of teaching legal writing, the well-being of the students, and the well-being of the LRW teacher.

First, the pedagogy. Both teaching and learning legal writing are hard tasks. For most students, legal writing is a new skill that is every bit as difficult and maybe even more so than the underlying skill of legal analysis itself. Most teachers view negatively anything that distracts from the learning process. There is a danger that students, especially beginners, may be so distracted by feelings about the race, sex, religion, culture, or background of problem characters that the learning process itself suffers.¹⁷

The second concern centers on the well-being of the students. If the problem concentrates on issues involving characteristics students themselves may have, those students could feel spotlighted. No student should be expected to be the authoritative voice for a group.¹⁸ An openly gay student, for example, may feel pressured to take the lead in discussing a problem about homosexual adoption. On the other hand, a gay student who is not open about his or her sexuality could feel even worse and might refrain from participating at all because of a fear of exposure. Similarly, a student who holds an opinion on a social justice issue he or she perceives as unpopular with the rest of the class may feel silenced or spotlighted by the discussion. If a problem has an identifiable “bad guy,” students who share some of the same characteristics may feel criticized or ridiculed. For example, on a problem

¹⁷ E-mail from George Gopen, professor of the Practice of Rhetoric, adjunct professor of English and senior lecturing fellow, Duke University, to Professor Felsenburg, *Social Issues in LWR* (Sept. 21, 2001) (copy on file with Professor Felsenburg) (Professor Gopen stresses, “Anything that distracts the teacher and the students from focusing on LANGUAGE and ARGUMENT and AUDIENCE and READERS is deleterious to a writing course. The more interesting the ‘subject matter’ is, the greater the danger that the energy in the course will be misdirected to the ‘issue’ and therefore away from the ‘writing.’”) (emphasis in original).

¹⁸ Baker, *supra* n. 8, at 55; see Helen Fox, “When Race Breaks Out”: *Conversations About Race and Racism in College Classrooms* 96–97, 113 (Peter Lang Publishing Group 2001) (describing the frustrations felt by many students of color when expected to repeatedly educate their white classmates on racial issues).

dealing with an abortion clinic shooting, students with anti-choice sentiments may worry they will encounter personal criticism if they reveal their feelings about the issue during a discussion of the problem.¹⁹

Another concern is the possibility that a student has had the negative experience depicted in the problem.²⁰ The student may feel “trapped” into dealing with a subject area he or she might well choose to avoid in real life. For example, a student who has been raped may be severely distressed during discussion of a memo assignment about a similar situation. And, because work on memo problems may last several weeks, that student could be exposed to a long period of discomfort. All of these reactions could have a negative effect on the student, both in terms of furthering his or her legal writing skills and in terms of his or her relationships with classmates.

Additionally, the well-being of the LRW teacher may also be at stake. In most law schools, LRW professors do not have solid job security.²¹ Each teacher must carefully consider the potential danger if he or she chooses difficult, controversial, classroom subjects.²² It is disconcerting to think of a troop of students marching down to complain to the administration that they have been forced to take on subjects that make them uncomfortable.²³ Class discussion of a controversial topic could

¹⁹ In a traditional legal writing problem involving criminal activity, a typical student would be unlikely to identify with a criminal in the same way as a student might if a social justice issue is at the center of the problem.

²⁰ Baker, *supra* n. 8, at 54.

²¹ Jo Anne Durako, *2000 Survey Results: Association of Legal Writing Directors/Legal Writing Institute*, 7 J. Leg. Writing Inst. 155, 163 (2001) (The survey reports that most programs use full-time, non-tenure-track teachers, adjuncts, or a hybrid staffing model. Just five programs in the country reported that only tenured or tenure-track teachers teach legal writing. In four of the hybrid programs, tenured or tenure-track teachers are employed in addition to non-tenured teachers).

²² Edwards & Vance, *supra* n. 4, at 77–81 (discussing the dangers that can derail a legal writing teacher’s career if using social justice issues in legal writing problems becomes controversial).

²³ See, e.g., *Boston Public*, Chapter 37 (Fox television broadcast Feb. 25, 2002). In this episode of the television series about teachers and students at a public high school, there is enormous conflict when the students debate use of the “n-word” in a class taught by a provocative and often controversial teacher. The white teacher, who is inept at the discussion but probably means well, and who tries gamely to engender honest discussion of the difficult topic, is nearly fired by the African-American principal when the debate erupts community-wide and students, parents, and community activists complain.

“No student should be expected to be the authoritative voice for a group.”

“While all students will not be dealing with cutting-edge issues in their law practices, all will be practicing in an increasingly diverse world.”

“blow up,” leaving the teacher to deal with the fallout, in terms of its effect on the students, class dynamics, and the teacher’s career.²⁴

Thus, the reasons not to bring social justice issues into the classroom are compelling. The fear of hindering the learning process, damaging students, or damaging our own careers is legitimate.

Ultimately, however, many teachers choose to deal with social justice issues just because it makes good sense. While all students will not be dealing with cutting-edge issues in their law practices, all will be practicing in an increasingly diverse world. All students will be called upon to work with and for others from varying backgrounds. The more we as teachers can use aspects of this reality in the classroom, the better prepared our students will be to practice law in the real world.

Finally, having decided what is meant by social justice and having decided that social justice issues belong in the LRW classroom, the final choice, related strongly to the choices already discussed, is how to do it. As described above, there are at least three major ways to bring social justice issues into the classroom, but others probably exist as well. The first involves directly using social justice issues to create a context for a legal writing problem. The second is more indirect: letting the social issue serve as the backdrop for the problem, without the social issue being discussed as part of the analysis. The third involves designing a “case file,” and giving a social context to all the characters in the problem.

A legal writing problem designed around a race- or sex-based employment discrimination claim illustrates the first method, the direct use of a social justice issue. Other examples of direct uses of social justice issues include such cutting-edge topics as homosexual adoption, stem cell research, and abortion. In working on these types of problems, students are forced to read the statutes and the cases that deal directly with these specific, social justice issues. A student working on an employment discrimination problem, for example, may have to read parts of Title VII of the Civil Rights Act of 1964.²⁵

²⁴ Edwards & Vance, *supra* n. 4, at 77–81.

²⁵ 42 U.S.C. §§ 2000–2000e-16 (2000).

Clifford Zimmerman at Northwestern University School of Law has developed an interesting process for using social justice issues directly. He requires students to do outside reading on the topic and to write ungraded, reflective essays on their thoughts about the subject.²⁶ He also allows students to choose sides on advocacy problems, and requires them to maintain journals,²⁷ which may help to avoid some of the potential problems outlined earlier.

The second method is more indirect: using a social justice topic as the underlying subject of an LRW problem, but without making the social justice topic the core of the analysis. An example would be a problem involving a race discrimination statute, but analyzing and focusing only on the statute’s elements, rather than discussing racism and its effects directly. With Title VII, for example, it is quite possible to talk about common *prima facie* elements²⁸ of race-based employment discrimination without ever discussing the real-life consequences when someone is not hired, not promoted, or fired because of his or her race.

Even if a writing problem has a social justice backdrop, it does not necessarily require a discussion of the underlying reasons—the social justice reasons—the statute was developed in the first place. While students may have experienced discrimination themselves, the class can analyze the legal writing problem without discussing the societal basis for the statute or the experiences that many of them may have had. Thus the teacher may be able to use a problem dealing with real-world, cutting-edge, interesting issues, without running as great a risk of interfering with the learning process,

²⁶ E-mail from Clifford Zimmerman, clinical associate professor of law, Northwestern University School of Law, to Professor Felsenburg, *Re: Am I Too Late?* (Oct. 12, 2001) (copy on file with Professor Felsenburg).

²⁷ *Id.*

²⁸ Although the precise elements required to prove a Title VII claim of racial discrimination in employment will vary depending on the facts of the case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 13 (1973), generally speaking, the complainant must show that he or she “(i) ... belongs to a racial minority; (ii) ... applied and was qualified for a job for which the employer was seeking applicants; (iii) ... despite his [or her] qualifications, he [or she] was rejected; and (iv) ... after his [or her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” *Id.* at 802.

disadvantaging some students or endangering his or her career.²⁹

The third method of bringing social justice issues into the LRW classroom uses a case file for each assignment, regardless of the assignment's actual legal issues. Characters in such LRW problems have social contexts, not just legal ones. They are described according to their race, sex, age, or other physical characteristics. They wear culturally or religiously significant garb and have names reflecting diverse ethnicities.³⁰ For example, a potential client, Ms. Cho, crashes her car when a tire fails. While this products liability problem is not directly related to the background of the client, by giving her an ethnicity and identity, she becomes more of a person. The problem could also incorporate the social and cultural context of other characters, such as the judge, the opposing counsel, or other parties. One could deliberately choose to include these contexts, even though they are not directly related to the potential client's legal problem.

The teacher who decides to use social justice issues in his or her classroom also faces several other, related choices. Choosing to use social justice issues may require the teacher to think about the type of atmosphere that exists in the classroom.³¹ Considerations include the degree to which tolerance of differing views is emphasized, whether the class is deliberately inclusive and encouraging for those not members of majority groups, and the teacher's level of comfort with minority viewpoints.

Still other issues involve whether the teacher should reveal his or her point of view on a social issue, and to what degree a teacher should advocate a particular viewpoint.³² Even among those who are

committed already to using social justice issues, opinions vary widely. Some feel that the teacher's personal opinions belong in the classroom, and that all law teachers have a duty to instill socially responsible values in their students. Others believe just as strongly that a teacher's personal opinions have no place in the classroom.

Response to our LWI workshop showed that the legal writing community is intensely interested in the brutal choices and consequences involved in using social justice issues in the legal writing classroom. Even after our presentation ended, discussion of the issues continued through lunch and into the next day. Out of those discussions came the suggestion that those interested explore organizing a mini-track on using social justice issues in the classroom for the next biennial LWI conference.

While these questions will not be easily or quickly resolved, we remain committed to the idea that our students will be the ultimate beneficiaries as we continue to struggle with how best to prepare them to practice law in a world where diversity is an ever-present reality, and social justice remains an elusive goal.

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“Choosing to use social justice issues may require the teacher to think about the type of atmosphere that exists in the classroom.”

²⁹ However, by not allowing some discussion of the social justice issue itself, the teacher runs the risk of some students feeling alienated, silenced, or frustrated, resulting in the same concerns for the learning process, the students' well being, and the teacher's job security discussed above.

³⁰ Baker, *supra* n. 8, at 53.

³¹ See Fox, *supra* n. 18, at 75–78 (describing several different methods teachers use to set ground rules for discussion of racial issues in their classes). In Professor Curry's civil rights seminar, she allows students to set the atmosphere by asking each of them to write out three ground rules for discussion, which she then compiles and gives to everyone. In addition, Professor Curry asks students to agree that they will not share outside of class what is said in class in a way that identifies the speaker.

³² Edwards & Vance, *supra* n. 4, at 75.

“The variety of titles applied to updating services leads to great confusion.”

WHERE DO I FIND RECENT LEGISLATION AND STATUTORY ANNOTATIONS PUBLISHED AFTER A CODE VOLUME OR POCKET PART?

BY JANICE K. SHULL

Janice K. Shull is the Head of Technical Services at the Law Library of Louisiana in New Orleans.

Teachable Moments for Students ... is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a “teachable moment,” a brief window of opportunity when—because he or she has a specific need to know right now—the student or lawyer asking the question may actually remember the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. It is a companion to the Teachable Moments for Teachers column that gives teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. Readers are invited to submit their own “teachable moments for students” to the editor of the column: Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, phone: (303) 492-1233, fax: (303) 492-2707.

A student from a local law school is researching the issue of charter schools for a law review note and needs to see the amendments to the law from the legislative session two months ago. A lawyer representing a group of parents plans to challenge the current charter school law based on a case decided six months ago in another jurisdiction. An interested parent wants to know what is going on with these new charter schools. The key word for researching these questions is “current,” or to use the publishers’ favored term, “advance.”

For state statutory law and the annotated United States codes, the publishing system of bound volumes updated by pocket parts or pamphlet supplements shelved next to the base

volume makes perfect sense. The user needs only to identify the relevant code section in the base volume and then look for the same section in the pocket part or the pamphlet supplement for the bound volume to find more recent changes to the law or case annotations that cite that particular statute. The difficulty begins in finding enacted legislation or case annotations after the coverage date of the annual pocket part.

Publishers of statutes and codes have developed updating tools that are integral parts of most annotated codes. These updating “services” bear a variety of titles but fall into two categories: those that update the code itself and those that provide recent annotations of judicial decisions and other opinions arranged by code section. The basic purpose of all updating services is to bridge the time gap between slip laws¹ or slip opinions² and bound volumes with pocket parts.

The variety of titles applied to updating services leads to great confusion. Those that update statutes and codes with recently enacted legislation are called advance legislative service, session law service, legislative service, special statutory pamphlet, and advance sheets (not to be confused with the advance sheets that supplement a case reporter). For simplicity in this discussion, this group will be identified by the most common title of advance legislative service. The pamphlets that contain recent case annotations, variously referred to as advance code service, interim annotation service, and advance pamphlets, will be identified here as advance code services.

It is vital to understand that there is great variation among states, not only in the titles of updating services, but in what information is included and the schedule of publication. All of the services published by the two most common state code publishers, West and LexisNexis, share some features in common. However, the publication of interim legislative material follows the pattern established by the individual state code or statutes and these vary widely across the nation. The state legislature or secretary of state maintains the final authority for determining the code arrangement and the publication of any accompanying research aids.

¹ First publication of a state or federal law, issued by Congress or state legislatures. Printed in pamphlet or single sheets format.

² First publication of a state or federal court opinion, issued by the court. Printed in pamphlet or single sheets format.

Not all states have advance code or advance legislative services. Currently, 44 states and the District of Columbia have advance legislative services published with their codes; six states lack advance legislative services. Advance code services are published for 34 states plus the District of Columbia; 16 states do not have an advance code service. Two states—Kansas and South Carolina—lack both.

For the researcher who is tracking legislation on a particular topic, an advance legislative service is an invaluable tool. These pamphlets are issued at the end of each legislative session and contain the complete text of each law as enacted, in act number order (sometimes called chapters). The text of the acts is identical to the slip laws published by the legislature, and they can stand alone as a record of the legislative session activity, similar to bound volumes of a state's acts (also called session laws).

The publishers of advance legislative services incorporate research aids to enable the code updating process. The researcher who wants to know if an existing code section has been amended or repealed will need to consult a cumulative table of statutes amended, added, repealed, or suspended. Other typical research aids include an alphabetical list of acts; a cumulative table of act numbers with the statutes affected by each section; a list of House and Senate bills that became acts; lists of court rules; a cumulative list of bills that were vetoed by the governor; and a cumulative index. Legislative summaries briefly highlight the most important legislation of the session. Along with the text of the act, most states include a brief description of the act, the House or Senate bill number, the effective date, and the author of the bill. A few states also provide the legislative history, the House and Senate committees that considered the bill, and a list of code sections affected by the act.

Advance legislative services are eventually replaced by the annual pocket parts or pamphlet supplements to a state code. Occasionally there may be changes to code section numbers or corrections to the text of an act after it has been published in an advance legislative service. The officially certified edition of a state code, or in some states an official publication of session laws, will always prevail over an advance legislative service.

Occupying the other end of the research spectrum, advance code services directly supplement the annual pocket parts or cumulative code supplements and are designed for the researcher who needs recent cases citing a particular code section or statute. Advance code services are arranged according to the state code or statute numbering system and contain annotations of state and federal court opinions reported in a number of sources, such as a regional reporter, *Supreme Court Reporter*[®], *Federal Reporter*[®], *Federal Supplement*[®], *Bankruptcy Reporter*[®], *Federal Claims Reporter*[™], and *Federal Rules Decisions*[®]. Other sources of opinions may include the state's attorney general or ethics board. Research aids, such as references to law review commentaries, popular legal treatises, West digest topic and key numbers, and *American Law Reports* (ALR)[®] annotations, mirror the editorial material included in a code's bound volumes and pocket parts.

Advance code services vary in their frequency of publication, whether they are cumulative or noncumulative, and in their linkage to a state's advance legislative service. Some advance code services reprint recent legislation and provide a correlation table between act numbers and code section numbers. Oddly, some services even include lists of state officials and judges, although few users would think to look in these supplementary services for such information.

The users of advance code services must be attentive to the closing dates of decisions reported in each issue. For subsequent opinions, researchers are instructed to see the advance sheets of the reporters or to access an online service.

Conclusion

The researcher who needs to obtain recent legislation or case annotations on a particular code section should determine if the publisher of the state code in question provides updating services beyond the pocket part or pamphlet supplements to the code. A familiarity with the lists, tables, and editorial aids included in these advance services will shorten the research process. Whatever updating mechanism is used in a particular state, statutory research is not complete until current legislative activity has been reviewed.

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“Advance legislative services are eventually replaced by the annual pocket parts or pamphlet supplements to a state code.”

“All along we had been overlooking the possibility of projecting an ordinary word-processing program onto the screen.”

NOT READY FOR POWERPOINT? REDISCOVERING AN EASIER TOOL

BY MELISSA SHAFER, SHEILA SIMON, AND SUSAN P. LIEMER

The authors teach legal writing in the Lawyering Skills program at Southern Illinois University School of Law in Carbondale.

Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own “teachable moments for teachers” to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: sirico@law.vill.edu.

Our Lawyering Skills program here at Southern Illinois University School of Law works as a team, and sometimes we even get scared as a team. We were fearful to take those first few steps beyond using the chalkboard in the classroom. In little time, however, our team figured out how to enhance our legal writing instruction and accommodate a variety of learning styles through the selective use of technology. And we never imagined we could catapult so quickly toward the forefront of technology users at our law school.

Know Your Tools

Last year our school purchased various technology tools, including smart podiums with accompanying SMART Board technology. Our legal writing team attended several training sessions offered by the information technology experts at our law school. We were earnest and attentive students. We listened carefully, took copious notes, and asked numerous questions. We heard about

the SMART Board’s Notebook, special markers, and magic eraser. Yet, despite our best efforts to learn this new technology at these training sessions, we simply had little idea how to operate or use it in our classrooms.

We decided that this year we would take one lesson plan and brainstorm the technology possibilities for presenting that material. We made an appointment with one of our in-house technicians, Rick Burkett. The secret for us was that Rick was well-versed in text and its uses. As we talked with him about our goals, we complained that PowerPoint is too linear. If you have one plan and only one way to get there, it works well. We told him that so much of our classes involve being able to work with the flow of ideas from the class, and the ideas could come in several orders. He understood; he is both a computer expert and a Ph.D. student in history. Like us, he is a word nerd. He casually mentioned that we could use WordPerfect on our smart podiums with the projectors just as easily as the PowerPoint program. It was that simple comment, almost an aside, that led to our moment of epiphany.

We discovered that we could use our familiar, old friend WordPerfect on the podium computer! All along we had been overlooking the possibility of projecting an ordinary word-processing program onto the screen.¹ We could project either prepared documents, off-the-cuff class contributions, or in-class edits for all to see on the SMART Board. We did not have to stick to inflexible PowerPoint presentations or limited Notebook functions.

Many of our classes involve small group work. Previously, we asked the students to write their groups’ results on the chalkboard. Now we can type each group’s “question presented,” for example, and it is instantly projected onto the screen. Now their work is highly legible. In-class comparisons and editing are easy, using all the functions of WordPerfect that we already use instinctively. Plus we can save the results from class discussion to post to The West Education Network® (TWEN®) or any other type of course Web site.

¹ If your law school does not have smart podiums and SMART Boards, you can still use WordPerfect in the classroom using just a projector and a laptop. Who knew?

In addition, we often want to note work well done, so that other students can benefit from good examples. Projecting a WordPerfect document with the sample student work for everyone to read on the screen does that job very effectively. Any document you create or save in word processing can be projected onto the screen. It is also cheaper than making photocopies (which, in a year of tight budgets, can be extremely helpful).

Select the Right Tool

In an hour we were able to see infinite possibilities for the use of technology in our classrooms. Not only did finding the right tech instructor help, but exploring the technological programs for a specific lesson really put it into context for us. It was essentially learning by doing, because we had a specific use in mind as we were trained. We three legal writing professors were also the only professors in the room, so we could focus on our unique needs and ask all the silly questions we wanted.

We had to stop and take a look at our whole tool belt to be able to see that somewhere in between the chalkboard and a laser light show was an appropriate use of technology for our writing classes. While you should have an array of tools at your disposal, including PowerPoint, you need to choose them appropriately.² Just because you have a cool, new tool does not mean it is right for the job. For example, to cut out a hole in drywall to put in an outlet you could use your brand new Milwaukee Heavy Duty Sawzall or you could use a hand saw. The hand saw is the better choice because it is easier to control for a small, precise task.³ The Sawzall has all the power you need, but it would be easy to go too far and too fast, and who wants to patch a gash in brand new drywall?

² For a discussion on the need to use new technologies judiciously, see Molly Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 Am. U. L. Rev. 85 (1998). For warnings about the dangers of over-relying on technology in legal education, see David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. Leg. Educ. 469 (2001). See also Suzanne Ehrenberg, *Legal Writing Unplugged: Evaluating the Role of Computer Technology in Legal Writing Pedagogy*, 4 J. Leg. Writing Inst. 1 (1998).

³ Interview with John S. Rendleman, III, Esq., Sawzall owner (Sept. 4, 2002).

Always Take Safety Precautions

All power tools require certain safety precautions. If you use a Sawzall, you read the instructions first and then don safety goggles and gloves. We learned that when using word processing to project text onto a screen, our “safety goggles” were a hands-on practice session and an early arrival to class. During practice sessions, every professor had a chance to practice, not just watch the others. This chance to put our hands on the equipment made all the difference in our ability to use it in class. Also, we learned to stop slipping into the classroom just as the bell rang. We needed time to check the classroom equipment and to get everything turned on and running. Finally, we did not throw out our old, no-tech lesson plans. (This simple precaution was very helpful when one professor forgot her key to the smart podium.)

We have not given up on PowerPoint. In fact, our new technological confidence has helped us create two PowerPoint presentations to use in class this year.⁴ And when visual images come up during class rather than during advance planning, the best method may still be the chalkboard. But now we have not just the power of all these tools, we have the power that comes from knowing our old friend WordPerfect is available for us to select when it is the right tool for the job.

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⁴ We found helpful tips for using PowerPoint in Angela Caputo, *Four Pointers to Effective Use of PowerPoint in Teaching*, 10 Perspectives: Teaching Leg. Research & Writing 132 (2002). See also Maria Perez Crist, *Technology in the LRW Curriculum: High Tech, Low Tech, or No Tech*, 5 J. Leg. Writing Inst. 93 (1999); Lucia Ann Silecchia, *Of Painters, Sculptors, Quill Pens, and Microchips: Teaching Legal Writing in the Electronic Age*, 75 Neb. L. Rev. 802 (1996).

“While you should have an array of tools at your disposal, including PowerPoint, you need to choose them appropriately.”

“Pleadings come in many forms, so you can’t frame every one in exactly the same way.”

DELIVERING A PERSUASIVE CASE: ORGANIZING THE BODY OF A PLEADING

BY GREGORY G. COLOMB AND JOSEPH M. WILLIAMS

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In a previous column, *Framing Pleadings to Advance Your Case*, 10 Perspectives: Teaching Legal Res. & Writing 92 (2002), we explained how effective advocates use the opening sections of a pleading to construct a conceptual framework that prepares decision makers for what is to come. That frame should help readers know what to expect, so that they can read and understand the main body of the document as easily as its substance allows and, more importantly, in a way that supports the decision the document seeks. The most persuasive pleadings dispose readers to agree right from the start: when a decision maker reaches the end of the opening sections, he or she pauses for a mental breath and thinks: *Now I see what you want me to decide and why. If you can deliver what you promise here, you’ll get what you want.*

Pleadings come in many forms, so you can’t frame every one in exactly the same way. Often, a court or commission will require specific parts in a specific order. But no matter their requirements, effective advocates design their opening sections to address three questions that every decision maker needs answered:

What kind of decision do I need to make?

What specific issue do I have to decide?

What decision do you want and why should I give it to you?

In the most common structure, writers answer these questions using the following parts:

<i>What kind of decision?</i>	Caption + Introduction
<i>What specific issue?</i>	Issue
<i>What decision and why?</i>	Summary of the Argument

When you create a frame including these elements, however, you also create a contract with your reader: you promise to deliver details of fact, law, and reasoning that support the argument your framework forecasts. If readers judge that you have not delivered as promised, they may feel deceived. In fact, the more persuasive the framework, the riskier it is not to deliver the supporting details, endangering not only the success of that document but also your reputation as an advocate.

So a good opening is not enough. Even though the frame is the most important part of any document, you must also design the main body so that readers readily see how it has delivered on what you promised at the start. Unfortunately, we cannot give you a default template for organizing the body: that decision depends on the nature of the argument, the complexity of the law, the number and complexity of relevant facts, the level of the decision maker’s knowledge, and so on. What we can give you, though, are some general principles that you can use to design a body that shows readers how you have delivered on the promises you made at the start.

Organizing the Statement of Facts

Every advocate has heard the cliché that it is better to have the facts on your side than the law. Facts matter: your arguments will be most persuasive when they rest not on your assertions, no matter how well reasoned, but on facts that seem to speak for themselves. So it’s smart to begin planning the body of your pleading by organizing and drafting your statement of facts. But then when you’ve drafted your argument, go back and *revise* your facts to fit your argument. In your draft of the facts, you discover what facts you have (and what ones you may still need to find). In your second draft, you pare down your facts to the relevant ones and arrange them into a coherent story that anticipates and supports your argument.

Facts never really speak for themselves, of course. So in your first pass you have to cycle back and forth between facts and the law. Start by creating a bare-bones sketch of the argument you think you can make as soon as you can (at this point, don’t worry about their order). Your arguments may change as your document develops,

but without a preliminary sense of what they are, you cannot know what facts you may need.

Next, collect in one place all the facts you have. By the time you get to drafting, you will probably have recorded facts in many forms: summaries of depositions, notes from interviews, documents provided by clients, facts statements from legal memoranda, and so on. For this first pass, you can just cut and paste what you have into a simple chronology. Your goal now is more completeness than coherence. But be sure that your account follows some pattern so that you can locate specific facts (or their absence) as you draft your arguments. Highlight those facts that you know are crucial to your case, facts without which your argument would fail, facts that you will emphasize in your argument.

Now go back to your arguments and draft them as carefully as you can. When you finish, return to the facts to reshape them into a coherent story that both supports and prepares readers for those arguments. You can't mix fact and argument: most decision makers respond badly to facts stated in ways that seem overtly argumentative, or worse, mingled with argumentative claims and language. But effective advocates always write the facts so that *readers* begin to anticipate the most important arguments to come. That's another reason why it is so important to begin with a framework that prepares readers to look for the key elements of the applicable law or regulations: when readers know what arguments to expect, they will look in your statement of facts for those they expect to see reappear in your fuller arguments.

To design a statement of facts that tells a coherent story and anticipates your arguments, follow these four steps:

1. Eliminate irrelevant facts; find missing, but relevant ones

Though decision makers want the whole story, they don't want to know every fact you have. They especially don't want a story so complex that they cannot hold it in mind at once. In general, the simpler the story supporting your arguments, the more persuasive you will be.

So start by testing your facts for relevance. For this step, don't rely entirely on your own memory and understanding: you know so much that you will see connections invisible to readers and will

mentally fill gaps that stop readers in their tracks. Instead use these simple tests:

- A fact is relevant if it is mentioned (or implied) anywhere in your argument, whether or not the decision maker may already know it.

This test is obvious and easily applied: read through each argument looking for every fact or assertion that depends on a fact; highlight each one in your statement of facts. If you cannot find it, add it or note its absence. (This sounds so basic that you might wonder we mention it all. But we can tell you from experience that time and time again, writers rest their arguments on facts that never appeared in their statement of facts.)

- A fact is relevant if it is a (non-obvious) part of the chain of causes leading to a relevant fact or linking two relevant facts.

Your story will not seem coherent if its parts do not seem to follow an intelligible pattern of action. For example, suppose you represent Tiny Entrepreneur suing Giant Corporation, alleging that Giant used bogus threats of trademark suits to convince Tiny's customers to stop buying Tiny's products. It may not be directly relevant to your legal arguments that Tiny had twice recently sued Giant and won, but it *is* relevant to help a decision maker understand why Giant might do what you allege.

- A fact is relevant if it adds background that the decision maker does not know but needs to understand your story.

Here, the key question is the decision maker's need to know: avoid unnecessary background at all costs, but do put unfamiliar or puzzling facts in a context that makes sense of them. For example, if your case involves a familiar sales environment, you should not include background facts on the role of advertising in retail sales. If, however, your case involves an arcane, technical aspect of a niche business, you should explain enough background for the decision maker to understand why people acted as you say they did.

You'll face the toughest decision about the relevance of background when you have facts about your opponent's bad acts that are irrelevant to your legal arguments but might be relevant to your story. Most decision makers will tolerate some casting of a bad light on your opponent, but only if they agree with your assessment and only if you do not seem to replace objective facts with ad

“[E]ffective advocates always write the facts so that readers begin to anticipate the most important arguments to come.”

“Ignoring bad facts risks your credibility; seeming to hide them can be fatal.”

hominem attack. But all responsible decision makers recoil when advocates start slinging mud. You have to have a good feel for your reader to know how far you can go. So be cautious about facts whose only contribution is to put a “spin” on the story.

2. Evaluate the relevance of “bad” facts

Even when the facts are on your side, you are likely to have some that at least challenge, if not undermine, your arguments. If you address them in your argument, you must include them in the statement of facts. But even if you don’t, consider weaving them into your story. Ignoring bad facts risks your credibility; seeming to hide them can be fatal.

3. Group facts into episodes with headings

Readers struggle to understand and remember a story that comes to them as an undifferentiated string of events. So if your facts take longer than a page or two, group them into discrete episodes that you “name” in headings. If you can think of nothing better, create chronological groupings. If possible, use key events, not dates to indicate episodes in your story:

Events Leading Up to the Merger

The Merger

Discoveries After the Merger

You’ll help readers remember key facts and connect them to your arguments if the episodes and their names anticipate major themes in the argument to come:

Kinahan’s First Discrimination Complaint

Abco’s Corrective Actions

Kinahan’s Second Complaint

The Parties’ Resolution of the Second Complaint

Kinahan’s Third Complaint

Abco’s Finding That There Was No New Discrimination

4. Revise the story to match your arguments

Your facts will be more persuasive if your readers learn them not as a list of discrete items but as a coherent story. Rewrite each episode so that it tells a story. Use language that anticipates the key terms in your argument, and focus your sentences on the character that puts your client on the right side of the standard and your opponent on the wrong side.

In particular, if a fact is crucial to your argument, be sure that your reader will see that fact as an important one. At the very least, introduce it in a new paragraph. And if you can, introduce it with language that emphasizes what is important about it. For example, if the date of an event is important relative to some other date, don’t just date it:

On March 5, 1999, plaintiff informed defendant that the filters did not meet the specifications stipulated in the contract.

Make it clear why that date is significant:

On March 5, 1999, 18 months after plaintiff had accepted delivery of filters and six months after expiration of the guarantee, plaintiff informed defendant that they did not meet the specifications stipulated in the contract.

Be careful, however, that you do not let this kind of highlighting become thinly veiled argument:

It was not until March 5, 1999, more than 18 full months after plaintiff had accepted delivery of filters and six months after the clearly stated expiration date of the guarantee, that plaintiff finally got around to alleging that the filters did not meet the specifications stipulated in the contract.

As you construct these stories, remember that decision makers not only want to do what is legal, they also want to do what is, in some intuitive sense, the right thing to do. If the facts of the case give you any opportunity to show that, now is the time to bring it in—with subtlety.

Organizing Your Arguments

Your arguments should give the decision maker reasons to decide as you ask, usually one major reason per section. Those reasons can correspond to the elements of a cause of action, criteria in a regulation, or any other basis you might have for a legal argument. We can’t tell you what reasons you’ll need: that varies with each case. What we can tell you is how to deal with them once you have them.

1. Create a separate section for each contestable major reason and its support

You help readers follow your argument if you design your document so that it helps them see its outline. Each major reason should have its own

section, with a heading that states both that reason and a precis of its support. For example, this is not helpful:

Abco can make fair use of the Elston's publications.

This is more helpful:

Abco can make fair use of the Elston's publications because they are the product of mere mechanical compilation and do not reflect creative or original thought.

Your readers can then deal with your argument one reason at a time, but also have an outline of the whole in the sequence of your headings.

Don't assume that you should have a separate section for every element in a legal standard or criteria in a regulation. You can often dispose of an element of a decision in a sentence or two—because it is uncontested, because the decision maker has ruled, because you can predict how the decision maker will rule, and so on. Don't waste your reader's mental energy by focusing on those elements already yours.

Organize your arguments to focus your reader's attention on those matters where you need an argument to gain a crucial element of the decision. The only reason to devote an entire section to a point already won is to gain the rhetorical advantage of having won it. For example, if you have just won a bitterly contested ruling that your opponent has improperly thwarted discovery, you *might* briefly rehash that argument in subsequent documents, but only if you are sure your reader is willing to be reminded. Otherwise, don't distract decision makers with what is not at issue.

Also try to avoid sections that appear to be arguments but are in fact only recitations of the applicable legal standard. Set aside a separate section for the applicable standard only if you cannot either weave it through individual sections or cover it in the introductory paragraph of a section, *in no more than a sentence or two*. If you do have a separate section, clearly label it so that readers do not expect to find arguments. (Of course, most readers will simply skip it.)

If to establish a major reason you have to make substantial arguments for several subreasons, group them so that you can present each important subreason in its own subsection. Suppose, for example, that in order to show that Abco should be held responsible for an action, you have to prove

three distinct, contested elements. You'll help readers see that logic if you lay it out visibly on the page, with a main heading and three subheadings:

Abco is responsible for action X because it meets elements A, B, and C.

Abco meets element A because of evidence i, ii, and iii.

Abco meet element B because of evidence

Abco meets element C because of evidence

Of course, in a case like this you do most of your arguing in the subsections. Usually, the only text for the main section is a framing paragraph that establishes the three elements and summarizes the arguments in the subsections.

2. Select an order for your reasons/sections

Once you have identified the main reasons that will define the sections in your document, you must arrange them in the most persuasive order. Sometimes you have little choice: some reasons fall into a logically *necessary sequence*, so that you can deal with one reason logically only after you have already dealt with others.

But often your reasons will be logically *parallel*: they "add up" to support a claim but they do not depend on one another. For example, we all know that if something looks like a duck, walks like a duck, and quacks like a duck, it is probably a duck. But the object in question would be just as much a duck if we demonstrated its quack before its look and walk. This distinction is important because you must deal with sequential and parallel reasons differently.

Logically sequential reasons. If reasons fit into a logical chain of reasoning, arrange their sections in that sequence. For example, if a legal standard requires that an act be performed with a specific intent to harm, it makes little sense to argue intention before you have established that the act was in fact performed. So if you must argue both, argue performance first and intention second, unless the same evidence establishes both, in which case you can argue them together.

Another kind of logical sequence concerns not steps in a logical chain but steps in a decision process. For example, suppose that in addition to the arguments about performance and intention, you also have arguments about a statute of limitations. The logical order would then start with the statute of limitations, because if you can prove

“Don't assume that you should have a separate section for every element in a legal standard or criteria in a regulation.”

“Get the good stuff out early.”

a statute of limitations has expired, the other points simply don't arise as issues. Points that pre-empt others are logically prior to them.

On the other hand, do not argue an uncontested point just because it fits into a logical sequence. For example, suppose that to hold Abco responsible for an act you have to show (i) that the person performing the action was Abco's agent, (ii) that Abco explicitly authorized the agent to perform that kind of action, and (iii) that Abco had actual knowledge of the action. If it is obvious and uncontested that any agent would be explicitly authorized to perform the action in question, don't waste a whole section on that point: you'll only distract readers from what you do need to prove. Simply fold the uncontested point into the introduction to the next contested reason in the sequence:

Since it is uncontested that Abco had authorized its agents to enter into agreements like the Kinahan Pact (cites), the next issue is whether Abco had actual knowledge of Kim's actions

Legal arguments also have one other form of logical sequence that is uncommon elsewhere, arguing in the alternative: Abco didn't do it; but if it did, it didn't mean to; and if it did mean to, it didn't cause any damage. These arguments usually have a necessary logical order, which you should follow.

Logically parallel reasons. Reasons are in parallel when they don't depend on one another. You can put these reasons in any order, so you should arrange them to best rhetorical effect. To judge the rhetorical effect, you have to consider not only their value in supporting your claim but also their effect on your readers. That means balancing several factors, some having to do with the nature of the reason itself and others having to do with the disposition of your readers.

Here are some principles of order based on the nature of the reasons. They assume (as every writer should) that a decision maker doesn't want an argument that reads like a mystery story, building and building until, on page 36, it unveils its crowning point. Get the good stuff out early. Add lesser arguments not quite as afterthoughts, but as clearly ancillary. Consider these orders:

- i) dispositive first
- ii) strong before weak
- iii) simple/short before complex/long

iv) substantive before technical

Other principles of order depend on what your readers know and believe:

- v) welcome before unwelcome
- vi) easy before difficult
- vii) familiar before unfamiliar
- viii) common sense before merely legal

If all of these principles apply to a group of reasons in the same way, you have only to follow that order. But they often conflict. For example, dispositive reasons are often technical ones—a party has failed to follow a necessary procedure, and the law says the decision maker must rule against them no matter the substance of their argument. No one likes to make decisions like that, so you help a decision maker rule on a technical issue if you first show that your substantive argument has merit. You can weigh these questions well only on a case-by-case basis, and only if you have good tactical instincts and a lot of knowledge about your readers.

A complication: in a complex argument, you may have some reasons that are logically sequential and others that are parallel. Distinguish these two possibilities.

- The sequential reasons make a larger point that is parallel to your other reasons. (For example, you could label them: Pa, Pb, [S1, S2, S3] Pc, Pd.)

In that case, make the sequential reasons subreasons that you group around the larger point. Then decide where that larger point fits in relation to the other parallel reasons. Just remember that any logical sequence that establishes a single major reason is likely to be both more complex and more difficult to process.

- The parallel reasons all support a larger point that is one step in a logical sequence of reasons. (For example, you could label them: S1, [Pa, Pb, Pc] S2, S3, S4.)

In that case, make the parallel reasons subreasons that you group around a larger point that you locate in the logical chain of reasons.

A final note on order: If your document responds to your opponent's argument, do not be influenced by the order of reasons in his or her document. Make your argument your own, not a me-too reflection of your opponent's. The order of reasons that best supports the decision he or she

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wants will seldom be the order that best supports the decision you want.

3. Frame each section in the same way you framed the whole

Decision makers want you to help them read each section and decide its issue as much as you helped them with the whole. Advocates sometimes think that, having framed the overall argument, they should approach each of its sections step-by-step, starting at the beginning and slowly building up to a conclusion. That strategy imposes less cost on readers for a section than for the whole, but it is no more welcome. Start each section by framing its issue, stating its point, and forecasting key elements of its argument.¹ Also be sure that in stating these, you use key terms that you repeat in the supporting argument.

The best test for a sound organization is to ask a colleague to skim your pleading as quickly as he or she can. Tell that person to read only the statement of the case, to skim the statement of facts, and then to read only the first paragraph after each heading in the body of the argument. If that person cannot give you back a coherent summary of your argument, you have a problem.

The most persuasive legal pleadings can seem almost magical, marvelous creations that coordinate stories, legal reasoning, common sense, factual investigation, shared principles, emotional appeals, rhetorical gambits, and anything else the advocate can draw in to make a decision seem logically inevitable, emotionally satisfying, and just plain right. But you don't need magic to put together an effective pleading. Even when you don't have all the facts or law or common sense on your side, you can make the best case for your client by following one by one the steps for framing a pleading so that readers begin having accepted your promises, and then by following the steps for designing the main body to deliver on those promises.

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¹ See *Framing Pleadings to Advance Your Case*, 10 Perspectives: Teaching Legal Res. & Writing 92 (2002).

“The best test for a sound organization is to ask a colleague to skim your pleading as quickly as he or she can.”

LEGAL RESEARCH AND WRITING RESOURCES:
RECENT PUBLICATIONS

COMPILED BY DONALD J. DUNN

Donald J. Dunn is Associate Dean for Library and Information Resources and Professor of Law at Western New England College in Springfield, Mass. He is a member of the Perspectives Editorial Board. This bibliography includes references to books, articles, bibliographies, and research guides that could potentially prove useful to both instructors and students and includes sources noted since the previous issue of Perspectives.

Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1 (2002).

A lively analysis of opinions in two federal cases from different circuits discussing whether an unpublished opinion is citable and, if so, whether it is binding precedent or should be used only for its persuasive value. Briefly discusses the emergence of West's *Federal Appendix*, which reports "unpublished" federal opinions since January 1, 2001.

Bibliography Issue [on Dispute Resolution], 17 Ohio St. J. on Disp. Resol. 711 (2002).

An annual issue of this journal, this one contains more than 200 pages of annotations of books and articles on the topic of alternative dispute resolution.

Diana Botluk, *The Legal List: Research on the Internet*, 2002 ed. [St. Paul, MN: West, 320 p.]

Provides legal research starting points for legislative resources for the federal and state governments; the judiciary and their opinions; secondary sources and reference tools; news, media, and business; legal ethics and professional responsibility; and international and foreign law. Shows how to make contact with other professionals.

Valerie J. Atkinson Brown, *Legal Research via the Internet*, 2001 [Albany, NY: West/Thomson Learning, 96 p.]

A basic guide to conducting legal research on the Internet designed for attorneys, paralegals, law clerks, and law enforcement personnel. Part of the West Legal Studies series.

Nancy Carol Carter, *Native Hawaiians: History, Law and Research*, Legal Reference Services Q, No. 1, 2002, at 5.

"[E]xamines Native Hawaiian legal issues and sovereignty aspirations against a backdrop of the long and unsavory history of American involvement in the Pacific Islands that became our fiftieth state." *Id.* Discusses legal issues still unfolding; includes a selected annotated bibliography.

Saul Cornell, "Don't Know Much About History": *The Current Crisis in Second Amendment Scholarship*, 29 No. Ky. L. Rev. 657 (2002).

Examines the often conflicting opinions relating to interpretation of the Second Amendment, showing which authors have staked out various positions. Argues that a "more sophisticated and historically grounded interpretation of the Second Amendment" is needed. *Id.* at 682.

Joyce H. Corrington comp., revision by James R. Elkins, *John William Corrington: A Bibliography*, 26 Legal Stud. F. 899 (2002).

A bibliography of the publications of John William Corrington (1932–1988), a frequent writer of legal fiction.

Howard Darmstadter, *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting*, 2002 [Chicago, IL: ABA Section of Business Law, 179 p.]

Much of the material is from the author's column, "Legal-Ease," in *Business Law Today*. Offers tips designed to improve most legal documents by removing obsolete legal conventions and writing in a style suited to current conditions.

Mark Davis, *The Concise Dictionary of Crime and Justice*, 2002 [Thousand Oaks, CA: Sage Publications, Inc., 296 p.]

Contains more than 2,000 definitions of criminal justice terms. Discusses, for example, abduction, cycle of violence, eyewitness testimony, facial reconstruction, habeas corpus, and typology.

Daphne A. Dukelow, *Pocket Dictionary of Canadian Law*, 3d ed., 2002 [Ontario, Canada: Carswell Company, 550 p.]

Provides information on current Canadian legal definitions. Includes more than 7,000 definitions, citations of authority, and cross-references.

Bryan A. Garner, *Effective Writing Requires Lifelong Commitment to Honing the Craft*, *Stud. Law.*, at 10, Sept. 2002.

Suggests that to be a good writer one must not isolate himself or herself from criticism, learn to achieve simplicity, and develop an easy-going, sensible (nonlegalistic) writing style.

John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 *Law Libr. J.* 427 (2002).

Examines the use of nonlegal sources by the Supreme Court of the United States from the October Term 1989 through the October Term 1998.

Gary L. Hill et al., eds., *Teaching Legal Research and Providing Access to Electronic Resources*, 2001 [Binghamton, NY: Haworth Press, 224 p.]

Discusses, among other topics, electronic resources, first-year and advanced research, teaching research in government and law firm libraries, and foreign and international law research. Published simultaneously as *Legal Reference Services Quarterly*, volume 19, numbers 3/4.

Diana C. Jaque & Lee Neugebauer comps., *Legal Reference Books Review*, 94 *Law Libr. J.* 519 (2002).

Succinct reviews of nine legal reference books published in 2001. Continues the reviews from earlier issues of *Law Library Journal*.

Sally J. Kelley, *Agricultural Law: A Selected Bibliography, 2001*, 55 *Ark. L. Rev.* 303 (2002).

An annual listing of books and articles related to agricultural law and arranged under 37 subjects. The initial bibliography, covering 1985–1992, and its supplements are available at <www.NationalAgLawCenter.org>.

Thomas F. Kibbey, Note, *Standardizing the Rules Restricting Publication and Citation in the Federal Courts of Appeals*, 63 *Ohio St. L.J.* 833 (2002).

“[P]roposes a model rule that would standardize the federal courts of appeals’ rules restricting publication and citation of certain opinions.” *Id.*

Ruth Ann McKinney, *Legal Research: A Practical Guide and Self-Instructional Workbook*, 3d ed., 2001 [St. Paul, MN: West Group, 304 p.]

Can be used as a stand-alone text or as a supplement to another book. A *Teacher’s Manual* and a *Computer-Assisted Legal Research Supplement* are also available.

Buckner F. Melton Jr. & Jennifer J. Miller, *The Supreme Court and The Federalist: A Supplement, 1996–2001*, 90 *Ky. L.J.* 415 (2002).

An update of Buckner F. Melton Jr., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789–1996*, 85 *Ky. L.J.* 243 (1996–97).

Kent Milunovich, *Designing and Maintaining Law Library Web Sites: Some Practical Considerations*, 94 *Law Libr. J.* 487 (2002).

“[E]xplores the design and maintenance of law library Web sites, describing a number of general design principles and identifying elements that are typically included in such sites.” *Id.*

William H. Putnam, *Legal Analysis and Writing for Paralegals*, 2d ed., 2003 [Florence, KY: Delmar Publishers, 450 p.]

Assists paralegals in understanding legal issues and providing written analyses of those issues. Part of the West Legal Studies Series.

Gail Levin Richmond, *Federal Tax Research*, 6th ed., 2002 [New York, NY: Foundation Press, 364 p.]

An excellent text for use in tax research or advanced research courses. Significantly expands the coverage of electronic sources, both subscription-based and those available without charge, and the coverage of treaties and international materials and of congressional and executive agencies. A *Teacher's Manual* is available.

Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 Ind. L. Rev. 399 (2002).

Argues that the court in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc) [leaving open the question as to whether unpublished opinions have precedential value] was correct that the practice of designating opinions as “unpublished” or “uncitable” should be banned.

Suzanne E. Rowe & Barbara J. Busharis, *Florida Legal Research: Sources, Process, and Analysis*, 2d ed., 2002 [Durham, NC: Carolina Academic Press, 240 p.]

Provides an introduction to research methods combined with an overview of primary and secondary sources, with an emphasis on Florida legal resources.

Johanna S. Schiavoni, Comment, *Who's Afraid of Precedent?: The Debate over the Precedential Value of Unpublished Opinions*, 49 UCLA L. Rev. 1859 (2002).

Analyzes the conflicting opinions of *Anastasoff* and *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), and proposes “a regime requiring official publication of all judicial opinions, thus giving all opinions precedential effect and replacing unpublished opinions with published precedential summary dispositions.” *Id.*

John Tessner, *Minnesota Legal Research Guide*, 2d ed., 2002 [Buffalo, NY: William S. Hein & Co., Inc., 479 p.]

A revision of the 1985 edition. Covers the historical beginnings of the Minnesota Constitution, legislation, executive and administrative law, the judiciary, finding aids and secondary sources, and institutions and organizations.

Kathryn M. Stanchi, *Feminist Legal Writing*, 39 San Diego L. Rev. 387 (2002).

Begins by summarizing “the traditions and conventions of persuasion and persuasive writing—how they are characterized in law and how they are taught in law school” and then moves to a discussion of a form of “antilanguage” intended to “persuade and to convey the author’s substantive (feminist) message.” *Id.*

Anne M. Stevens, *Finding, Reading and Using the Law*, 2002 [Albany, NY: West/Thomson Learning, 471 p.]

Designed primarily for paralegals. Includes sections on law libraries and how they are organized and a chapter on computer-assisted legal research.

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Robin S. Wellford, *Legal Reasoning, Writing and Persuasive Argument*, 2002 [Newark, NJ, LexisNexis, 300 p.]

Begins with instructing students on how to draft an office memorandum and then moves to discussions of client letters and persuasive arguments. Includes examples and exercises.

Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 *Law Libr. J.* 459 (2002).

"[C]ollects and annotates books and journal articles about the common doctrine of coverture, which held that a wife had no legal standing because her being was completely incorporated into that of her husband." *Id.*

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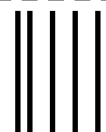


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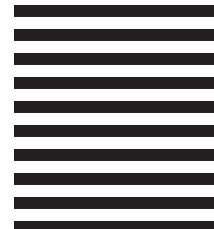
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