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Motions In Motion: Teaching Advanced Legal Writing Through Collaboration

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MOTIONS IN MOTION: TEACHING ADVANCED LEGAL WRITING THROUGH COLLABORATION

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Legal education is at a crossroads. Practitioners, academics, and students agree that more experiential learning opportunities are needed in law school.

In 2007, the Carnegie Foundation report, *Educating Lawyers: Preparation for the Profession of Law (Carnegie Report)*,² called for law schools to provide apprentice experiences to better prepare prospective attorneys for the world of practice. That same year, the *Best Practices in Legal Education* advocated for “experiential education” and “encourage[d] law school[s] to expand its use.”³

More recently, in August 2011, the American Bar Association adopted a resolution sponsored by the New York Bar Association summoning law schools to “focus on making future lawyers practice ready.”⁴ This move was followed by the front-page New York Times article provocatively entitled *What They Don’t*

¹ The authors, who are listed in alphabetical order, received a 2011 ALWD Teaching Grant to develop the course design discussed in this article.

² William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

³ Roy Stucky et al., *Best Practices for Legal Education* (Clinical Legal Education Association 2007) at 122.

⁴ www.nysba.org/abaresolution.

Teach Law Students: Lawyering which criticized legal education for failing to provide students with “much practical training.”⁵

Many efforts are underway to create a learning environment in law school that will better prepare graduates for the practice of law. Not surprisingly, legal writing professors have led the way in designing courses to make students more practice-ready.⁶ One approach involves creating a course that replicates the law firm setting, so that students better understand what it is like to be a junior associate.⁷ Another approach involves legal writing professors collaborating with casebook or clinical professors.⁸

At our law school, upper level writing courses present an opportunity for legal writing professors to engage in experiential learning. With extensive experience in the civil litigation context, both in front of and behind the bench, we created a “trio” of upper level legal writing classes that simulate the three stages

⁵ David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. Times (Nov. 20, 2011) at A1.

⁶ Although the legal writing field has long been concerned with providing students with the effective lawyering skills, several recent conferences have focused on better preparing students for practice. Some of these conferences are identified at http://lwionline.org/other_conferences.html.

⁷ In 2011, Duquesne University School of Law sponsored a conference entitled “The Arc of Advanced Legal Writing: From Theory through Teaching to Practice.” Julia Glencer, Erin Karsman, and Tara Willke of Duquesne spoke about having developed a team-taught advanced legal writing “law firm simulation” supported by an ALWD Grant; *see also* Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 J. Legal Educ. 96, 99 (1994) (describing a course where students are assigned to one of two “law firms” and represent either a plaintiff or a defendant in a year-long legal dispute).

⁸ Sarah Ricks & Susan Wawrose, *Comment: Survey of Cooperation Among Clinical, Pro Bono, Externship and Legal Writing Faculty* 4 J. Ass'n Legal Writing Directors 56 (Fall 2007).

of motion practice: motion, opposition, and ruling.⁹ We collaborated to link three separate writing classes into an integrated course that requires students to step into the role either of counsel or judge and interact with one another on a professional level.

This article summarizes how we coordinated our trio of classes to create a simulated litigation experience. We first describe our various goals in designing such a course. We then explain the practical considerations involved in creating and coordinating the trio of classes, each of which assumes a different role in the litigation process. Finally, we assess the success of the course design, using both our self-evaluation as teachers and our students' feedback.

Our Course Goals

At our law school, legal writing professors traditionally have taught a one-credit hour upper-level "drafting" or writing course designed to enhance the students' legal writing beyond the first-year curriculum. In 2010, we collaborated to link our three, previously autonomous, courses together such that each class of students took on the role either of plaintiff's counsel, defense counsel, or judge.

⁹ The Best Practices report identifies three types of experiential learning: simulation-based courses, in-house clinics, and externship. Our course is a simulation-based course because "students assume professional roles and perform law-related tasks in hypothetical situations." See Stucky, *supra*, note 3, at 122.

We had three primary goals when we embarked on this new course design. Our first goal was to have the course simulate the actual practice of law within the somewhat limiting confines of the classroom setting. Our second goal, consistent with the traditional purpose of our writing courses, was to improve our students' legal writing. Our third goal was to expose our students, most of whom will practice in Ohio, to our state court civil procedure rules, local court rules, and customs of our local bar.

Standing alone, the goal of “simulating the practice of law” is so general as to provide little guidance for actual course design. This first goal thus required a number of initial considerations that would give it a more definite shape. For example, we know that real civil litigation often involves cases with both human drama and intellectual challenge. Therefore, the centerpiece of the course would be a hypothetical that stirred emotion, posed factual difficulties or contradictions, and offered complex legal issues for the students to address. Our student-advocates would have clients with whom they could empathize, while also recognizing some negative characteristics. Our student-judges would take on the somber responsibility of neutral arbiters of a dispute whose outcome would affect people's futures. The hypothetical thus would bridge the gap between students' understanding of abstract legal theory and their still-undeveloped sense of the human impact of a legal decision.

We also felt that the “actual practice” experience would be enhanced if we stepped away from the role as leader of the class and provided a more dynamic writer-reader context. Indeed, students often take a different approach when a writing assignment has an audience other than the instructor.¹⁰ We hoped that all of our students, by stepping into their professional roles, would consider their work as fulfilling a goal other than simply completing an assignment to earn a grade. Our students would begin to move beyond the purely academic concern of “cracking the professorial code” and instead consider how best to construct an argument and how a judge might weigh competing arguments.

We also wished to construct the course in such a fashion that the students would experience how actual litigation can be “messy” due to the unexpected factual or legal twists and turns that arise with most civil cases of reasonable complexity. As our litigation progressed, students might learn new facts, or previously-known facts might become more prominent or problematic, thus providing challenges to the students when advocating for a client or issuing a ruling.

Our second goal was to refine the legal writing style and techniques of our

¹⁰ Many students experience obvious intimidation when writing only for the teacher. Peter Elbow, *Closing My Eyes as I Speak: An Argument for Ignoring Audience*, 49 *College English* 50, 51-52 (1987).

upper-level students. In our first-year legal writing courses, the students' exposure to persuasive writing is in the form of an appellate brief. Therefore, judicial opinion writing would be a style of legal writing entirely new to the students in our judges' class. For our student-advocates, we sought to expose them to persuasive writing techniques specific to trial court litigation. For example, we wished to have our student-advocates practice the art of persuading a single judge of the merits of their clients' position by emphasizing different facts or legal issues as the litigation unfolded over time. In addition, unlike the appellate problem where students dealt with a great quantity of potentially relevant cases, students should construct legal arguments using relatively little on-point precedent. Finally, all of the students, advocates and judges, would need to consider how their writing style might need to be tailored based on the court's discretion and the standard of review.

Another aspect of our second goal was to reinforce the idea that quality editing leads to higher quality work product. To fulfill this second goal, we needed a robust peer review process. Cassandra L. Hill persuasively presented the benefits of peer collaboration in her recent article, which included proposed methodologies for implementing the approach in the legal classroom.¹¹ Through a good peer review process, "[s]tudents gain experience with cooperative and

¹¹ Cassandra L. Hill, *Peer Editing: A Comprehensive Pedagogical Approach to Maximize Assessment Opportunities, Integrate Collaborative Learning, and Achieve Desired Outcomes*, 11 Nev. L.J. 667 (Summer 2011).

supportive peer relationships; improve their editing, analysis, and writing skills; and develop increased self-confidence--all of which are important skills for being successful practicing lawyers.”¹²

Our third goal was to expose our students to Ohio civil litigation practice. Most litigation-based courses offered at our law school (Civil Procedure, Evidence, Pretrial Advocacy, and Trial Advocacy) focus on federal court practice. Because most of our graduates will practice law in Ohio, simulating Ohio civil litigation would give our students valuable, practice-based information. We intended to explain how Ohio civil procedure rules differ from federal rules, introduce students to the local rules of our county-specific state trial court, and emphasize other ways in which local litigation practices can vary. Judicious use of anecdotes from our own practice experience and guest speakers, including local judges, would help further this goal.

Finally, while not a primary goal, we also intended to further our students’ developing sense of professional ethics. The *Carnegie Report* is viewed as challenging “law schools not simply to produce better-skilled practitioners, but rather to infuse lawyers with a highly developed sense of moral and ethical identity, which will then lead to a reform of the profession itself.”¹³ Our class of

¹² *Id.* at 671-72.

¹³Mark Yates, *The Carnegie Effect: Elevating Practical Training Over Liberal Education In Curricular Reform*, 17 Legal Writing: J. of Legal Writing Institute 233, 234 (2011).

student-judges would learn about judicial ethics. Our student-advocates would learn about the ethical issues that can arise in actual practice, particularly when representing multiple parties. The students thus would face the necessity of making pragmatic strategic choices while satisfying the requirements of professional ethics.

The Details of the Course Design

With these goals in mind, we then began to focus on the details of the course design. Our first task was to determine the number, type and length of our students' writing assignments. We quickly determined that the students' written work would consist only of pretrial motion practice. The motions would be filed by a class of plaintiff's counsel, opposed by a class of defense counsel, and ruled on by a class of judges. And so our "motions in motion" were born.

Our next task was to create a hypothetical lawsuit that would provide the basis for a number of interesting legal issues. After considering many options, we chose a medical malpractice action. In our view, the medical malpractice context had a number of advantages. First, a medical malpractice case would give us the human drama and factual complexities that we sought. We created a sympathetic plaintiff who had a few "wrinkles" in her past medical history. We created a breach of hospital protocol committed by hospital staff that, while perhaps

embarrassing, did not seem to affect the proper course of treatment.¹⁴ Indeed, while our defendants' conduct may have been less than stellar, we gave defense counsel some solid scientific evidence with which to mount a defense.

The hypothetical gave us the “real life” human aspects that we sought. Our class of plaintiff's counsel had a sympathetic client who should earn their loyalty. Plaintiff's counsel could also criticize the defendants' conduct on an “emotional” level based on the hospital snafu. And yet our class of defense counsel would also have plenty of facts with which to defend their clients. The plaintiff was vulnerable to some criticism of her own conduct. Defense counsel also could – as defense counsel in medical malpractice cases invariably do – assert a vigorous defense based on the science. Our class of student-judges would have to weigh the emotional aspects against the science to reach a just conclusion.

We also chose the medical malpractice context because it would expose the students to a specific area of tort law that is highly publicized and in which some of our students might practice. A medical malpractice case thus might help bridge the gap between the academics of law school and the “real world.”

Finally, Ohio medical malpractice law gave us the interesting legal issues for the pretrial motions we wished to set “in motion.” Ohio law requires a

¹⁴ Professor Strong has extensive experience in defending medical malpractice cases and was the primary drafter of our hypothetical. We would be happy to share our course materials.

plaintiff asserting a medical malpractice claim to attach to his or her complaint an affidavit of merit from a medical professional in support of the case.¹⁵ Ohio also has specific statutory provisions that govern a number of issues in the medical malpractice context, including the discovery of certain internal hospital documents and the admissibility of testimony of medical professionals. In addition, given the relatively unsettled state of the law in Ohio on some issues, we felt that both parties would have significant arguments in support of their respective positions.¹⁶

When selecting our particular issues and motions, one priority was to create equal workload between the three classes. We wanted our advocates to file or oppose motions of equal complexity and approximate length and our judges to draft an opinion of the same approximate length addressing the issues. We ultimately selected five pretrial motions for the classes to file, oppose, or rule on, as follows:

- A motion to dismiss the complaint for failure to attach a sufficient medical affidavit of merit to the complaint;

¹⁵ See Ohio Rule of Civil Procedure 10(D)(2).

¹⁶ For example, the requirement of Ohio Rule 10(D)(2) that a plaintiff attach a medical affidavit of merit to a complaint has been in place only since 2005, with relatively few cases that addressed the sufficiency of an affidavit.

- A motion to compel discovery of certain documents potentially protected from production by Ohio law;¹⁷
- A motion for summary judgment on the ground that the plaintiff's medical expert failed to establish the requisite causation;
- A motion *in limine* to exclude some negative facts in plaintiff's past medical history; and
- A motion *in limine* to exclude statements from plaintiff's physician per Ohio's "apology" statute.¹⁸

We were pleased with this line-up of work. It exposed our students to both substantive and procedural issues specific to Ohio law, including additional requirements for filing a complaint and additional discovery and evidentiary provisions that are available under Ohio law. We also liked that the outcome of each motion was not predetermined. Most of the motions were a close call and our student-judges individually could grant or deny any particular motion based on the strength of the arguments made by specific student-advocates. In other words, each judge could rule for either party without dismissing the case in its entirety after only a few weeks of class.

¹⁷See Ohio Rev. Code Ann. §2305.253 (West 2012).

¹⁸See Ohio Rev. Code Ann. §2317.43(A) (West 2012).

Our next step was to determine how the students would file, oppose, and rule on the pretrial motions. We first considered whether students should know their opposing counsel and judge and whether that “trio” of students (plaintiff’s counsel, defense counsel, and judge) should remain the same throughout the course. Assigning students to a particular trio of known individuals had obvious advantages. With assigned counsel and judge in one trio, the students easily could exchange documents with each other via e-mail. That scenario also would most closely align with the actual practice of law.

On the other hand, we considered certain drawbacks of having a known trio and the same trio for the entire course. One drawback was that each student would be exposed only to the writing styles of the two other students in the trio. By mixing up the opposing counsel and judge for each motion, we could expose the students to a much broader range of writing styles. We also wondered whether students could engage in honest peer review of each other’s work if the students knew their opposing counsel and judge. Even if the students would produce honest peer review of the other members of a known trio, there was a possibility that the quality of peer review might decline over time if the students always reviewed the work of the same two students in a trio. We therefore determined that the students should be anonymous to one another and that the trio of students should shift with each motion.

Those decisions led us back to the issue of the mechanism for filing and exchanging documents. After discussing the matter with our law school's IT department, we chose to have the IT department create an electronic document-exchange site specifically for the course. Without delving into the specific workings of the site, we deliberately opted to make students responsible for retrieving the appropriate documents to complete their work, whether opposing a motion filed by the other party or ruling on a motion as to which an opposition had been filed. Among other considerations, this relieved us of the mechanical task of ensuring that each student had the materials needed to complete an assignment.

We next considered our grading system. We debated whether to assign points to each of the writing assignments or whether to grade most assignments as “pass-fail,” with only one assignment receiving a letter grade. In the end, we opted to grade four writing assignments as “pass-fail” with one remaining assignment – work on the motion for summary judgment – to receive a letter grade.¹⁹

¹⁹ The graded motion for summary judgment comprised eighty percent of a student's total grade with the remaining twenty percent reserved for class participation, attendance, and work on the pass-fail assignments.

We decided to use a “pass-fail” system for several reasons. First, the course is only a one-credit hour course. Given the time constraints both for the students and professors, we determined that the form of feedback could not mirror our first-year legal writing classes. Although we did all provide students with written, substantive feedback on their documents, we did not provide any opportunity to re-write an assignment or, with the exception of work on the motion for summary judgment, a conference to discuss work. Under those circumstances, we felt that it would be unfair to assign points to the earlier writing assignments.

More importantly, we hoped that, by grading assignments on a pass-fail basis, students would focus more on the writing process rather than the “product,” i.e., the grade.²⁰ We wanted students to read and apply our critiques (as set forth in our substantive written feedback) and not merely note the grade received on any particular assignment. We therefore decided that the pass-fail system would work well for us.

We next turned to the logistical considerations of class schedule, size, and timelines for due dates. We wanted students to experience the “ebb and flow” of

²⁰ See Jennifer Cupar, *Putting the Emphasis on Process over Product by Making the First Memo Ungraded*, 19 Perspectives: Teaching Legal Res. & Writing 181 (2011); Ellie Margolis, et. al., *Moving Beyond Product to Process: Building A Better LRW Program*, 46 Santa Clara L. Rev. 93, 123-24 (2005).

litigation, where the parties' work on a case may pause while awaiting a ruling from the court. However, students could not sit by idly while waiting for another class of students to prepare a responsive document. So we mapped out the semester in such a manner that, consistent with actual practice, two classes of students were kept busy even as they were awaiting a filing from the third class of students.²¹

Finally, we addressed the details of our peer-review process. We created a peer-review form that was usable for any of the documents drafted by students, whether a piece of advocacy writing or a judicial opinion. We intended to have students complete peer-review forms for the first two writing assignments so that the students would have the benefit of feedback from their peers before they began work on the motion for summary judgment.

The Results

We had considered at the outset how we would assess the students' overall experience with the trio of courses and our success in achieving our goals. Naturally, we engaged in continuous self-evaluation throughout the semester. Yet we also had scheduled one day at the end of the semester for all three of our

²¹ So, for example, while the defendants prepared a motion to dismiss the complaint, the plaintiffs discussed written discovery and the possibility of filing a motion to compel discovery. While the judges drafted their opinions on the motions for summary judgment, counsel for both parties continued to prepare for trial by drafting motions *in limine*.

classes to meet jointly so that the students could comment on the class.²² In that joint meeting, we solicited feedback in two ways. Students filled out a questionnaire that targeted particular aspects of the class for specific feedback, including the value of the hypothetical, the course load, the peer-review process, and suggestions for focus on specific drafting skills. We then posed a number of questions to those students who were present at the meeting to solicit their immediate feedback on particular issues.²³

Our Evaluation of the Course.

Throughout the semester, we noted both some successes and some difficulties in the course design. We were very pleased to see that we had accomplished our first goal of providing a real-world experience. The hypothetical worked extremely well to further our students' abilities to advocate for a client. We sensed in our class discussions a developing sense of professional identity and a desire to obtain a "good result" within the context of our litigation – a good result obviously meaning distinct results for each set of

²² Gerald Hess & Sophie Sparrow, *What Helps Law Professors Develop As Teachers?—An Empirical Study*, 14 Widener L. Rev. 149, 162 (2008) (identifying the "gathering and reviewing feedback from students" as one of five most effective activities for teachers to improve teaching); *See also* Gerald Hess, *Student Involvement In Improving Law Teaching*, 67 UMKC L. Rev. 343, 344-47 (1998) (describing the different ways to gather student feedback, including feedback forms).

²³ The students' questionnaires are on file with the authors. The students completed the questionnaires anonymously, although we did ask them to designate themselves as having been plaintiff's counsel, defense counsel, or a judge.

students. We also felt that we had succeeded in re-creating the “messiness” and “ebb and flow” of actual civil litigation.

We were confident that we had strengthened our students’ writing abilities. Our student-judges experienced a great deal of growth in their understanding of judicial opinion writing. Our student-advocates began to think more strategically about their persuasive writing. They were more selective in using only those facts needed for the particular motion, rather than attempting to tell the entire story with each motion. They became more adept at writing concise introductory paragraphs that “teed up” the legal issue presented in the particular motion. They developed good persuasive arguments using little on-point precedent.

Finally, we were satisfied that we had exposed our students to local court rules and the customs and practices of our local bar. Guest speakers addressed our classes in order to give the students exposure to Ohio-specific customs and practices.

Our main difficulty with the course was mechanical, although the consequences were substantive. Early in the semester, we determined that our document exchange site was not working well. In general, the site did not provide clear direction for students to access the documents they needed. The result was that, for the first two motions, we had several motions that were unopposed or,

even if opposed, had no ruling from a judge. To solve this problem, we decided to pre-assign opposing counsel and judges for the three remaining motions.

Primarily because of the issues with document exchange, we knew that our peer review process had not achieved the optimal results. We did not begin the peer review process until after the document exchange issues had been solved. Students therefore did not get the benefit of their peers' comments and opinions about their work earlier in the semester, which they might have put to good use on the later assignments.

The Students' View of the Course.

With our own self-evaluation underway, we were anxious to hear from the students themselves. Using both the questionnaire they completed and their comments at the joint meeting, we assessed the feedback as follows.

First, students liked the hypothetical very much. They found that the hypothetical worked well in generating interesting issues for motion practice. Many students enjoyed the medical malpractice focus, although their reasons differed. One student remarked that "medical malpractice is an area where few students have probably had any experience, so ... I got the impression that everyone was on an even playing field." Another student commented that the hypothetical "seemed to be more practical than some of the Const[itutional law]

type material” addressed in the first-year legal writing course. A third student described the hypothetical as “‘hands on,’ real-life, and because of the human component it was easier to add on policy arguments. Everybody can relate to such a case ... Also having several defendants is good practice.”

Students also agreed that the hypothetical was sufficiently complex that numerous motions could be generated from it and that the outcome of each motion was genuinely up for grabs with each motion. One student commented that the hypothetical “was realistic and involved many interesting topics both substantively and procedurally.” Another student stated that “the hypo was well set out so the judges really could rule any way, I liked that.”

We did ask students to identify any litigation drafting or writing skills that the course should have covered. Students largely agreed that the course appropriately focused on motion practice and advanced legal writing techniques. Of those students who suggested additional document drafting, the most common suggestion was for instruction in the drafting of discovery documents. Some students also recommended that students engage in oral argument.

While we appreciate the students’ interest in drafting discovery documents, we do not intend to add this topic to the course. Written discovery is a topic that is addressed in other courses, including both Civil Procedure and Pretrial Advocacy. In addition, it would be difficult to create an assignment for

our student-judges relating to the mechanics of drafting written discovery. We do agree that the course could involve an oral argument component. Presently, we are limited by the course's designation as a one credit hour course. If the credit hours do increase (which is currently under discussion), we likely will add an opportunity for oral argument.²⁴

Students shared our own view that the electronic site was not up to the task. One student remarked that the "system for uploading and downloading motions with the other classes was horribly confusing & distracting" and condemned the site as "worthless." And, surprising to us, the students did not appreciate one of the main purposes of the site, namely anonymity. To the contrary, students objected to not knowing their opponent or judge. They maintained that the secrecy had dampened their competitive spirit. Students in our group meeting stated that they would put more effort into each assignment if their names appeared on the documents. At present, we intend to follow the students' suggestions and make our trios known to each other, rather than anonymous.

²⁴Given the course's designation as a one credit-hour course, we asked students about the volume of work. Students' reactions were mixed. Some students said that the workload "wasn't bad" "was appropriate", "adequate" or "was just right." One student wrote that the course "was more than I expected for a one-hour class, but I learned a lot and felt it was a valuable experience." Other students complained strenuously that the workload was excessive. For example, one student commented that "the amount of work this course requires far exceeds the requirements of other one or two credit courses." Nearly every student agreed that the course credits should be increased to at least two credit hours.

Some students also suggested that the trios remain the same through the semester, although there were clearly mixed opinions among students on that issue. Students acknowledged that they did not want to be “stuck” in a trio with unmotivated students and that they would like to be exposed to a variety of their peers’ work. Yet they felt that the course would best simulate practice if opposing counsel and judge did not change with each motion. While keeping students in the same trio may look more like practice, we currently intend to continue to shuffle trios with each motion so that students have the advantage of exposure to a variety of writing styles.

Finally, students gave mixed reviews on the peer review process. Some students questioned the value of engaging in peer review at all. One student wrote: “I care what professors and practicing attorneys think of my writing style, not what students think.” Another student remarked: “I don’t think we are qualified enough at this point to be making the type of in depth critique asked of us.” Yet another student summed up peer review as “good for competition and pushing each other, but the professors are the ones whose feedback I want.” Other students indicated that peer review could have good value, remarking that “more feedback is always better” and that “peer review offers a different perspective which can be valuable.”

Although many students did not appreciate the peer review process, we will keep this piece of the course. With a better document exchange system, resulting in exchange of peer reviews early in the semester, we hope that students will benefit from the process. We also will better explain to students why they should take the opinions of their peers seriously.

Conclusion

Simulation of law practice is an obvious pathway to answer the Carnegie Report's call for the training of practice ready students. Effectuating that neat phrase within the traditional law school curriculum can be a bumpy road. We created an innovative course that furthered our students' professional growth from law students to lawyers while also strengthening their legal writing. A collaborative approach enabled us to put our goals into practice. On a personal level, working together was immensely satisfying, and an experience that we will repeat in coming years. We unequivocally recommend this form of collaborative course design.