A BETTER BEGINNING: WHY AND HOW TO HELP NOVICE LEGAL WRITERS BUILD A SOLID FOUNDATION BY SHIFTING THEIR FOCUS FROM PRODUCT TO PROCESS

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Miriam E. Felsenburg & Laura P. Graham

I. INTRODUCTION

Several years ago, we set out to discover why early legal writing is so difficult for many beginning law students and what we can do to make it easier. In a wide-ranging study of the early experiences of beginning legal writers, we confirmed our anecdotal observations that beginning law students were too confident about both their general writing strengths and their ability to learn legal analysis and legal writing. In our prior article describing the study, we described several key factors that contributed to this overconfidence and illustrated how this overconfidence impeded students’ progress in both legal analysis and legal writing. In this follow-up article, we suggest strategies for better orienting students to law school learning and better managing their goals for legal writing at the beginning of the first-year course.

In August 2007, we surveyed 265 first-year law students at two diverse schools, which we designated School X and School Y, asking a broad range of questions about their experiences and expectations as they entered law school. When asked how confident they were about their general writing ability, they reported dramatically high levels of confidence. On a more specific level, when asked about their confidence in their ability to learn legal writing, 70% reported that they were “confident”

1 © 2011. All rights reserved. Miriam E. Felsenburg and Laura P. Graham are Associate Professors of Legal Writing at Wake Forest University School of Law.
2 Our study, its results, and our conclusions based upon the study are described in detail in a previous article. Miriam E. Felsenburg & Laura P. Graham, Beginning Legal Writers in Their Own Words: Why the First Few Weeks of Legal Writing Are So Tough and What We Can Do About It, 16 LEGAL WRITING: J. LEGAL WRITING INST. 223 (2010) (hereinafter In Their Own Words).
3 Id. at 273-77.
4 Id. at 277-82.
5 Id. at 240, Figure 9. We found these numbers surprising; the data generated by other survey questions suggested that few of the students had done significant writing as undergraduates, and those who had were not usually evaluated on the quality of the writing, but rather on the content. See id. at 273-77 (discussing our findings and conclusions about the surveyed students’ writing experiences prior to law school).
or “very confident.” Remarkably, only about 5% said they were “not at all confident” in spite of their novice status as law students.

We repeated this survey in August 2009 at School X with similar results. Sixty-two percent of the respondents reported that they were “extremely confident” or “very confident” in their general writing ability; an additional 32% were “moderately confident.” At that time, 56% of beginning law students said they were “very confident” or “confident” about learning legal writing; again, only a few -- 7% said they were “not at all” confident.

Not surprisingly, when we surveyed these same students two months into their first semester, they reported dramatically lower confidence in their ability to learn legal writing. In October 2007, less that 25% of the students at Schools X and Y were still “very confident,” with a substantial majority -- 62% -- falling in the center of the traditional bell curve. Similarly, in the October 2009 School X survey, only 17% said they were “very confident,” with a full 10% reporting they were “not at all confident” in their ability to learn legal writing.

Thus, through our study, we confirmed that many students are unprepared for the demands of learning legal analysis and legal writing and are deeply discouraged when they do not experience immediate success. In fact, some students even become resentful and distrustful. If they are unable to rebound from this early disappointment and frustration, their receptivity to the entire process of legal education may be reduced, often for

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6 Id. at 241, Figure 10.
7 Id.
8 New Law Student Survey, Aug. 2009 (survey and results on file with authors).
9 Id.
10 In Their Own Words, supra n. 2, at 253, Figure 21.
12 See generally In Their Own Words, supra n. 2, at 282-90. For example, when asked whether their experiences in the first eight weeks of law school had altered their view of their strengths as writers, many students responded affirmatively. Some of the responses conveyed deep frustration: “Yes, I feel like I don’t know anything anymore!”; “Yes. Law school has made me realize I’m horrible at writing like a lawyer.” Similar frustration emerged in students’ responses to the companion question about whether their views of their weaknesses as writers had changed: “YES! I can’t write simple!”; “I feel it has emphasized my weaknesses.”; “My apprehension about writing has been strengthened; my confidence has been shaken [sic].”
the remainder of their law school career.13

The legal writing classroom is usually the place where students are first introduced to the foundational process of legal analysis. It is also usually the place where students receive their earliest feedback on how well they are learning this process. Therefore, it is of utmost importance that legal writing professors design “a better beginning” for their first-year students. In Part II of this Article, we discuss the importance of giving students a fuller, clearer orientation to the study of law in general; this orientation should emphasize the process of legal analysis as the foundation for all other law school learning. In Part III of the Article, we suggest three specific ways that legal writing professors can design their courses and teaching practices to facilitate students’ receptivity to this process: (1) setting clear, realistic goals and objectives for the first semester of legal writing and communicating them transparently; (2) deliberately encouraging students to be more active metacognitive learners; and (3) providing more opportunities for students to pre-write and to “write to learn” before asking them to “write to communicate” to a legal reader.

II. ORIENTING STUDENTS TO WHAT “LEARNING THE LAW” IS REALLY ABOUT

Perhaps the most important step in giving students a “better

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13 In an important article about the need for effective law school orientation programs, Paula Lustbader noted that “the typical first-year [law school] classroom is a foreign experience for most students.” Paula Lustbader, You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly Over the Rainbow, 47 WASHBURN L.J. 327, 344 (2008). Lustbader noted that many students, especially those who have different learning styles or diverse backgrounds, “have a harder time” and often “begin to doubt whether they are meant to be lawyers.” Id. Lustbader also emphasized the need for law schools to “confirm student self-confidence” from the beginning of the students’ experience, since “a lack of confidence or an inflated confidence can impair students’ motivation and academic performance.” Id. at 361. In the same vein, Ruth Ann McKinney has noted:

The task for educators who want to maximize our students’ performance becomes clear: increase the self-efficacy of our students in relation to a specific task necessary for their ultimate success and we will increase the chance that they will not only succeed, but will excel. Without any additional effort on our part, students will become more likely to seek help when they need it, take logical steps to accomplish their goals efficiently, try harder, experiment more, be persistent in the face of early failures, and be tolerant of constructive criticism.

Ruth Ann McKinney, Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?, 8 LEG. WRITING: J. LEGAL WRITING INST. 229, 236 (2002).
beginning” is to help them understand what it is that they will be learning in law school. We should assume that beginning law students are like most other “lay persons” when it comes to understanding what lawyers know and how they come to know it. Even well-educated, sophisticated lay persons often misunderstand the true nature of what lawyers must be able to do. For example, the popular spy novelist Ken Follett once described the experience of an amnesiac character as follows: “Accessing the memory was not like opening the refrigerator, where you could see the contents at a glance . . . . If he were a lawyer, would he be able to remember thousands of laws?”14 In other words, Follett seemingly understood the work of a lawyer as simply “remembering thousands of laws.”

More recently, in a New York Times column, Nobel Prize-winning economist Paul Krugman explored how “technological progress is actually reducing the demand for highly educated workers.”15 He specifically cited “the growing use of software to perform legal research,” stating, “Computers, it turns out, can quickly analyze millions of documents, cheaply performing a task that used to require armies of lawyers and paralegals.”16 While it is true that computer software can now assist lawyers in managing documents, producing deposition summaries, and other data reviewing tasks, these are not the equivalent of legal analysis, as Krugman suggests. For the foreseeable future, it will still take a trained lawyer to identify legal issues, analyze the relevant legal authorities, and predict or advocate a certain outcome. Thus, even as sophisticated a lay person as Krugman demonstrates a misunderstanding of the nature of legal analysis.

As our earlier research with new law students convincingly showed, many 1L students share this lay understanding of what law school will teach them. They often mistakenly equate “learning the law” with “learning laws.” For example, on the August 2007 survey, we asked students to describe what they thought the study of law involved.17 Here are a few illustrative responses: "Studying what the law is and how to work with it"; "Knowing rules and knowing how to research to find rules if you do not know them"; "Being able to articulate laws and express their purpose"; "I think it is studying . . . the laws that we will be required to work within"; “[L]earning what both federal and state laws are and how to apply those

14 Ken Follett, CODE TO ZERO 146 (New American Library, 2000).
16 Id. (emphasis added).
17 In Their Own Words, supra n. 2, at 302.
laws.”

We cannot fault our students for this misunderstanding. Law, after all, is unlike the other “learned professions” of medicine and the clergy. A first year medical student, for example, is likely very familiar with the work of a doctor and with the kinds of knowledge a doctor must have. Likewise, a first-year clergy student is likely very familiar with the work of a priest, rabbi, minister, or imam and with the kinds of knowledge those persons must have. In contrast, while beginning law students may have some basic familiarity with the work of lawyers, they may not be as familiar with the kinds of knowledge lawyers must have to do that work. They often mistakenly think that they will be studying specific laws in various subject areas and that once they “learn enough laws” they will be competent to practice law.

Moreover, they assume that in law school, they can be successful if they do the same kinds of things that led to their success as undergraduates. Most likely, in many of their undergraduate courses, these students worked with definable bodies of knowledge, assisted by expert teachers whose goal was the students’ mastery of the particular subject area. Thus, the students were typically asked to read and discuss the content of the subject area, to memorize the content of the subject area for examinations, or to write research papers identifying and commenting on the trends and themes of the subject area.

For example, a typical English major might take a course on

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18 Id. at 255, 260; see also New Law Student Survey, Aug. 2007 (survey and results on file with authors).

19 See Melissa H. Weresh, I’ll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences, 61 S.C. L. Rev. 337, 339 (2009) (reiterating that the law is one of the learned professions, along with medicine and clergy) (citing Edward D. Re, Professionalism for the Legal Profession, 11 Fed. Cir. B.J. 683, 684 (2001-2002) (”[l]awyers have derived great pleasure and pride in being members of one of the historic and learned professions along with the clergy and medicine, which have been traditionally regarded as professions throughout the centuries.”)).

20 One student who responded to the August 2007 survey stated that he believed the study of law entailed “[a] mastery of the basic skill required of the profession.” New Law Student Survey, Aug. 2007 (survey and results on file with authors).

21 In fact, the prevalent learning theory in many of their undergraduate courses was likely the “mastery learning” approach. This learning theory posits that “under appropriate conditions virtually all students can learn well, that is, can ‘master’ most of what they are taught.” James H. Block & Robert B. Burns, Mastery Learning, 4 REV. RES. EDUC. 3, 4 (1976).
American poetry. As part of the course, the student might be asked to select a specific American poet and to write a research paper about that poet’s body of work. Let’s imagine the student selects the poetry of Emily Dickinson as the subject of his paper. In his research, he learns that Dickinson published exactly 597 poems that scholars have commonly divided into five categories. He then narrows his topic to the Nature poems, of which exactly 111 were published. He then systematically reads every one of the 111 Nature poems as well as several commentaries on those poems by experts on Dickinson’s poetry. At this point, he is ready to begin writing his research paper, in which he demonstrates his knowledge of and his personal reactions to the Nature poems. Assuming he does a capable job, he will likely receive a high mark on the paper, thus indicating his mastery of the Nature poems of Emily Dickinson. Further, his mastery is permanent, in the sense that the body of knowledge is fixed; the content of Dickinson’s Nature poems is never going to change.

Law students often expect learning the law to be like learning the Nature poems of Emily Dickinson. They expect the law to be simply a new subject area, which they will be able to read in full, understand, memorize, and recall, just as they have successfully done with many other subject areas they have encountered in their academic lives. In short, they believe that by the end of law school, they will have been exposed to, and will have mastered, the contents of the law.

Of course, the law is not a “content area” with a finite amount of material to be learned. Not even the most advanced torts scholar, for

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22 In one volume of Dickinson’s complete poems, the categories are: life nature, love, time and eternity, and “the single hound.” EMILY DICKINSON, THE COMPLETE POEMS (Little Brown 1924), available at http://www.bartleby.com/113/.

23 See Anne Enquist, Talking to Students About the Differences Between Undergraduate Writing and Legal Writing, 13 NO. 2 PERSP. 104 (Winter 2005). In this piece, which can be described as an “open letter” to new law students, Enquist articulated some of the writing habits of successful undergraduates that may not translate into legal writing success: “You got the ‘A’ by making the ‘creative’ point, by offering up the unusual insight, maybe even something that professor had not already thought about or read about. The unwritten rule that most successful undergraduate writers have absorbed is that the secret to getting good grades on papers is to dress up your ideas; make them seem more sophisticated than they really are. In short, make simple things seem complex. . . . Overquoting during one’s undergrad days had the double benefit of bringing lots of expertise that the writer doesn’t have into the writing all while adding length! . . . It is no secret that many undergrad writers pad their writing to meet the length requirements of assignments. . . . The longer the paper, the more likely it is to garner a high grade.” Id. Significantly, the qualities that likely earned students high grades on their undergraduate writing are not always synonymous with the qualities of good legal writing.
example, will or could ever “learn” the contents of every torts case. And even if he could, there would be new cases and new statutes the next day, and the next, ad infinitum. The content of tort law (and indeed every other area of the law) will never be fixed. Thus, when a first-year student undertakes to “learn torts,” he is soon forced to accept that no matter how diligently he works, he will never conquer the field of torts as he once did American poetry.

Broadly put, “learning the law” is more about becoming comfortable with the process of analyzing and applying the law – in traditional phraseology, learning to “think like a lawyer” – than it is about learning the actual content of any particular laws or bodies of law. New law students should be deliberately taught that “learning the law” is not going to be like learning other subject areas – that is, that they will never learn all of it or master it. They also should be deliberately taught to become comfortable with the inherent ambiguity of the law – that is, that arriving at a “right answer” is not always possible or even expected. If they are not exposed to these truths very early on, and if they do not embrace them, their confidence in their own learning abilities will likely take a drastic plunge. We believe

24 In her article about the knowledge required to learn law, Michelle Harner described the "key analytical skills" of law students as: "spotting and dissecting issues, identifying applicable tools and potential barriers, embracing ambiguity, and thinking creatively to resolve issues." Michelle M. Harner, The Value of "Thinking Like a Lawyer," 70 Md. L. Rev. 390, 392 (2011). These skills, she said, "form a solid foundation from which a lawyer can excel and serve the interests of her clients." Id. See also GERALD F. HESS & STEVEN FRIEDLAND, TECHNIQUES FOR TEACHING LAW 7 (1999) (acknowledging in the first chapter that "the basic nature of education" is “not the transmission of knowledge, but the transformation of the learner. This view of education as transformation is consistent with the dominant conceptualization of legal education, which consistently identifies ‘thinking like a lawyer’ as a major goal of legal education.”).

25 In a widely-cited 1985 article, Jay M. Feinman & Marc Feldman argued in favor of the widespread adoption of mastery learning in legal education: “Mastery learning dictates that educational excellence be our goal, and it provides an approach to teaching and learning by which this goal can be attained.” Jay M. Feinman & Marc Feldman, Achieving Excellence: Mastery Learning in Legal Education, 35 J. LEGAL EDUC. 528, 528 (1985). Moreover, they explicitly stated that “. . . any subject matter [within the law school curriculum] is suitable for mastery.” Id. at 551. We certainly do not take issue with the overall goal of expecting and encouraging excellence in all students, and we recognize that certain “mastery learning” techniques can be useful in the law school classroom. However, we believe strongly that the process of legal analysis is not capable of being “mastered” in a single semester of law school, in three years of law school, or ever.

26 “[T]he learning strategies needed to excel in law school are not like those from other academic settings. Many students are, figuratively, hit in the head with an apple when they realize that they must do much more critical thinking and learning on their own. Class time is no longer a lecture that clarifies readings. Rather, more often than not, class time obfuscates the readings. Thus, what worked for students in the past may not work as
this plunge in confidence is entirely counterproductive to many students’ early law school adjustment.

To achieve this recasting of students’ expectations about law school, we must correctly describe the nature of law school learning beginning the moment the students enter their first law school class. Legal writing professors are often uniquely situated to begin this early intervention. We are often the first law school professors our students meet; we typically spend significantly more time with them in the early weeks of law school than their other professors do; and it is usually our early feedback that first alerts them to the difficulties that they will face in adjusting to law school learning.

Thus, to give our students the “better beginning” they need, we must emphasize from day one that the focus of law school learning, including learning legal writing, is on the process of legal analysis rather than on “learning laws.” We must be intentional about conveying that the process of legal analysis is foundational to everything they will ever learn in law school and everything they will ever do as lawyers. We must also be candid about the fact that even the best students will find the process of legal analysis difficult to learn, will have to practice it constantly, and will never master it. Once we successfully help our students adjust their expectations in this way, they will be more receptive to specific strategies designed to foster their early success as legal writers.

III. THREE EARLY INTERVENTIONS

At this point, we will describe three specific interventions in the legal writing classroom designed to enhance our students’ early
development as legal thinkers and writers. Because of the newness of the legal environment, the three specific interventions we recommend all have a common theme: emphasizing the *writing process* over the *written product* by allowing time for students to practice and absorb the fundamentals of legal analysis in a more deliberate, step-by-step fashion. These interventions should be the focus of the first few weeks of legal writing instruction.

A. Clear Communication of Course Goals and Objectives

As we have discussed, the law, and by extension legal writing, are not subjects that can be mastered. Thus, when articulating our goals and objectives for the first semester of legal writing, we should avoid using any language that suggests to the students that mastery is the goal. We need to carefully choose our words to convey to our students that as novices in the law and in legal writing, they should not expect immediate success.29

Especially where introductory legal writing course names do not include any reference to analysis, students will naturally expect that the courses will be primarily focused on learning the conventions of legal writing format and style. As our study showed, many students were stunned to find that early legal writing was not about learning mechanics but rather about learning legal analysis -- i.e., identifying issues, understanding the law, and carefully applying the law to new facts.30 Further, they were frustrated by the fact that their professors would not give them a “fill-in-the-blank” template for legal analysis.31 We need to clearly

29 The American Bar Association’s current emphasis on outcomes and assessments makes this a particularly opportune time for legal writing educators to re-evaluate our goals and objectives and to revisit how we communicate them to our students. See ABA Section of Legal Education and Admissions to the Bar, *Report of the Outcome Measures Committee* 1, 54 (July 27, 2008), available at http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final %20Report.pdf (recommending that the current ABA accreditation standards be “re-examine[d] . . . and reframe[d] . . . to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.”); *see also* ROY STUKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* 49, 55 (2007) (encouraging law schools to “shift the focus of legal education from content to outcomes” and advising law schools to “describe the specific educational goals of each course . . . in terms of what students will know, understand, and be able to do, and what attributes they will develop” by completing the course).

30 *See In Their Own Words, supra* n. 2, at 271-72 (describing students’ responses in October 2007 to the question of whether their opinion of what legal writing involved had changed since August 2007).

31 *Id.* at 270.
explain that effective legal writing depends far more on learning the process of legal analysis than on observing the particulars of format and style.\footnote{See Christine M. Venter, \textit{Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills}, 57 MERCER L. REV. 621, 622 (2006). Venter notes that “precisely how legal writing teachers are to teach analysis and precisely how students learn to ‘do’ analysis, remains somewhat mysterious, both to faculty and, more importantly, to students themselves.” \textit{Id.} at 623. In fact, “legal writing faculty have struggled to reach a consensus on how best to teach analysis, or even if they should teach it explicitly at all.” \textit{Id.} at 624.}

At Wake Forest University School of Law, where the authors teach, the most recent course description for the first-year legal writing course describes the objectives of the course very generally:

The Legal Analysis, Writing and Research course (LAWR) is designed to teach you how to think and communicate like a lawyer. Specifically, the course is designed to teach you \textit{basic} legal analysis, writing and research skills. These skills are the “tools of the trade” for the legal profession, and you will continue to use and develop these skills throughout your academic and legal career.\footnote{2010 Legal Analysis, Writing, & Research Course Description, Wake Forest University School of Law (on file with authors).}

While this may be a fair statement of the general thrust of the course, the phrase “teach you how to” may reinforce some students’ expectations that there is an easy, step-by-step approach to effective legal writing that we will show them and that they can master in the nine-month span of the course.

In fact, until recently, the authors themselves used terminology on their syllabi that likely created unrealistic expectations on the part of their first-semester students. In 2009, for example, we used the following language in describing our course objectives: “The primary goal of the Legal Research and Writing\footnote{In 2010, in a step toward emphasizing the importance of legal analysis to the students’ education, Wake Forest University School of Law changed the name of the first-year course to Legal Analysis, Writing, & Research.} course is to train you to be proficient (even excellent, perhaps!) legal researchers, readers, analysts, and writers.”\footnote{2009 Legal Research & Writing I Syllabus, Wake Forest University School of Law (on file with authors).} Imagine the first-year student’s reaction upon reading this; it would be perfectly natural for that student to expect to master the skills of effective
legal writing by the end of the course!

However, as a result of our study, by 2010 we had significantly revised our goals and objectives, to be much clearer about the fact that legal writing is not a mastery subject and that as novices, the students’ primary early goal is to begin to understand the process of legal analysis:

COURSE GOAL: The primary goal of the LAWR course is to help you advance from “novice” status as legal researchers, analysts, and writers to “advanced beginner” status. Analyzing, writing, and researching are basic “tools of the trade” for legal professionals, and our course objectives focus on these tools:

ANALYSIS: You will learn how to read various types of legal authorities (cases, statutes, etc.) efficiently and effectively, and you will learn strategies for taking notes on your reading. You will learn successful strategies for conducting sound legal analysis using various legal reasoning techniques. Legal analysis is a unique skill that requires careful reading and critical thinking. While you will probably not master legal analysis in this course (indeed, most lawyers never really stop “learning” legal analysis), this course will lay a solid foundation upon which you will continue to build your legal analysis skills throughout your life as a lawyer.

WRITING: You will learn the basic skills that are required to meet the needs and expectations of the legal professionals for whom you will be writing as a lawyer. We will begin by learning how to write an objective memorandum, which encompasses the key skill of writing about your analysis of a single argument. Then, we will build on that key skill throughout the remainder of the year. In the second semester, we will move to persuasive writing. Throughout the year, you will also learn basic methods of legal citation, and you will be exposed to several common formats for legal documents.\footnote{2010 Legal Analysis, Writing, & Research I Syllabus, Wake Forest University School of Law (on file with authors).}
While there is room for improvement even here (e.g. by eliminating the “you will learn” language), this statement at least acknowledges: (1) that the students are novices; (2) that they will not “learn how to” do legal writing (much less master it) in their first year; and (3) that legal analysis is the foundation and the starting point for everything they will learn about legal writing.

In sum, the specific words we choose to describe our goals and objectives are important and should be chosen with great care. We should incorporate more words that acknowledge our students’ novice status (such as “beginning,” “introduction,” “basic,” and “novice”), that emphasize the foundational skill of analysis (such as “analysis” and “process”), and that reflect the need for hard work and much practice (such as “practice,” “build on,” and maybe even “grapple with”). Such language will reinforce to the students that the first semester of legal writing is more about learning for themselves than about writing for someone else; it is more about process than product; it is more about beginning than finishing.

B. Encouraging Students to Be More Active Metacognitive Learners

In keeping with the explicit recognition of our students’ novice status, and with the early focus on the process of legal analysis as the foundation for law school learning, we should be deliberate about supporting and encouraging our students to consciously be metacognitive learners – that is, to “manage and control their [own] processes of learning.”

There is a growing body of advanced scholarship about what metacognition is and how law students can benefit from it. Put simply, metacognition is “thinking about thinking.” In the law school context, if the student expects to be a passive vessel for knowledge supplied by expert teachers, she is less likely to be successful than the student who carefully monitors her own learning process. As one author explains the need for metacognition in legal learning, novice law students are "unable to use . . .

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37 Donna Bain Butler, Ph.D., Use Metacognitive Strategies to Promote Learning and Advance Writing Proficiency, THE SECOND DRAFT (forthcoming Spring, 2011).


39 Butler, supra n. 37.
knowledge effectively because [they] will not know the structure of the discourse, the order in which to present ideas, when to emphasize different concepts, and what information [they need] to make explicit versus what information is understood implicitly."\textsuperscript{40} Thus, to be successful, early law students should be explicitly told to use metacognitive strategies, i.e., to not take shortcuts, to test themselves with their own questions, to read every word assigned slowly, to skip nothing, to take initiative to understand what they are reading, to know why they are outlining, to review as they go, to know the limits of study aids, etc.\textsuperscript{41} If they do these things, they will build a more solid foundation for legal learning by participating actively in their own learning processes.

In the context of legal writing, metacognition further emphasizes the focus “on students’ writing processes, rather than focusing on students’ writing product,” thereby helping them “develop professional proficiency in writing.”\textsuperscript{42} More specifically, metacognitive strategies for early legal writers enable them to engage in "'self-regulation,' a term that 'refers to learners' ability to make adjustments in their own learning processes in response to their perception of feedback regarding their current status of learning.'"\textsuperscript{43}

One might assume that most beginning law students already possess considerable metacognitive skills based simply on the fact that they have done well in their previous academic endeavors. However, our study suggested that on past major writing projects, many beginning law students had not routinely engaged in the kinds of strategies that would facilitate true metacognitive learning.\textsuperscript{44} Thus, it is critical that we incorporate into our courses devices that require students to consciously engage in metacognition.

Legal writing professors have already recognized the need to teach students metacognitive techniques;\textsuperscript{45} scholars have advocated using such

\textsuperscript{41} Bard & Gardner, supra n. 38, at 9-14.
\textsuperscript{42} Butler, supra n. 37 (emphasis added).
\textsuperscript{44} \textit{See infra} n. 49 and accompanying text.
\textsuperscript{45} \textit{See supra} n. 38.
techniques as the “private memo,” student portfolios, self-editing checklists, etc. to facilitate metacognition. However, most of these techniques come into play at some point during the production of a written product – at the drafting, writing, rewriting, and/or editing stages. Our review of the existing literature suggests that the use of metacognitive strategies to help students learn the process of legal analysis is not nearly as common. We propose two interventions that could promote metacognition at an earlier stage in the legal writing course.

1. Using examples more carefully

One common indicator that many students are not consciously using metacognition in early legal writing is their constant and fervent pleas for examples of successful legal memoranda and briefs. Of course, most legal

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46 Mary Kate Kearney & Mary Beth Beazley, Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process, 64 TEMP. L. REV. 885, 894 (1991).


48 See, e.g., LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING (5th ed. 2010); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 135-44 (3d ed. 2010); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (front & back inside covers) (6th ed. 2009). However, these checklists are designed for use after the student has completed a substantial draft of the written product. See, e.g., BEAZLEY, supra, at 135 (advocating use of her self-graded draft technique “[a]fter completing a good draft of your document . . . ”) (emphasis added); NEUMANN, supra, at front cover (“While rewriting your work to turn it into a final draft, consider these questions and the ones on the inside back cover.”) (emphasis added).

49 See, e.g., Butler, supra n. 37. In her forthcoming article in The Second Draft, Dr. Butler suggests several items students could “check off” as they prepare for writing their first draft, such as: “I have found primary and secondary sources . . . ”; “I have read through all my sources”; “I have evaluated my sources”; and “I have taken notes on my sources.” Dr. Butler’s checklists were developed while working with international students for whom English was a second language, id.; thus, her list may not translate neatly into the objective memo realm. Her work, however, could function as a significant starting point in thinking about how to encourage our students to become active pre-writers.

50 Beginning law students are expert mimics and teacher-learners. They have mastered the use of examples and forms, and they are nearly professionals at teasing out what the teacher is looking for and doing it exactly that way. See In Their Own Words, supra n. 2, at 269-71 (documenting some surveyed students’ requests for examples). One student wrote, “I wish that we had some real-world examples of what our writing should look like that had been vetted by the professor to be sure that they adhered to the standards that she sets.” Id. at 270. If we use samples carelessly, we run the risk “that students will try to artificially and mindlessly force their analysis into the form they see in the sample. . . .” Judith B. Tracy, “I See and I Remember; I Do and Understand” Teaching Fundamental Structure in
writing professors provide such examples, and students can benefit at some point from seeing how an objective memo or a brief should look. However, the temptation for students is to use these examples as “go-bys,” thus skipping the metacognitive process. Students want to be shown “how to do” legal analysis and then reproduce what they are shown. They do not realize that the best example memo in the world analyzing whether a home invasion constitutes “burglary” under the relevant statute and case law is completely useless in analyzing whether the “last clear chance” to avoid an automobile accident is a valid defense to a tort in a given jurisdiction.

Therefore, in keeping with the goal of encouraging metacognition, legal writing professors should be very transparent when providing students with examples of finished memos, briefs, etc. We should tell students up front that there is no “fill-in-the-blank” method for legal analysis; thus, while the examples may be helpful in illustrating the general content and format of a document, they will not be helpful at all in analyzing the specific issues raised by the assignment they are working on.

One way to satisfy our students’ desire to see examples of finished legal memos without sacrificing their engagement in the metacognitive process is to actively use an example memo to illustrate the process the author used in developing her analysis of the issues in that memo. In class, students could be asked to deconstruct the analytical process the writer used to (1) arrive at the narrow issue; (2) identify and articulate the applicable rule; (3) identify the determinative facts the writer emphasized in her analysis and why; and so on. This kind of critical deconstruction will help students focus on the analytical process the example-writer used separately from the actual written product itself. This exercise has the additional benefit of helping students recognize that legal analysis is issue-specific and fact-specific and must be performed anew on every issue raised in every legal writing assignment.51

2. Helping students see pre-writing as crucial to learning legal analysis

Another way to help students change their focus from the written product to the process of legal analysis is to concentrate more heavily on

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51 This is not to say that the examples could not also be used later to show good legal writing format and style, but we suggest waiting to use examples in this way until students are more experienced in legal analysis.
pre-writing\textsuperscript{52} as a metacognitive component of learning. In an early article encouraging more focus on the process of writing rather than the product, scholar Natalie Markman said:

More teachers of legal writing should make a clear and conscious choice to get themselves and their students to engage in writing as a process, rather than discussing format and analysis in class and then awaiting a final product or perhaps one draft when the deadline arrives. This involvement would result in more fruitful interaction among teacher, student, and the written work. Assignments should allow for revision, interchange, and thinking aloud. Writing teachers could forgo a lengthy memorandum or brief for several shorter documents to allow students to work on more drafts within the same limited amount of time, and to see writing as a process rather than just an end product. Teachers could condense lecture material into fewer class sessions and meet with each student more frequently to discuss the writing process. Ongoing teaching of analysis and expression would replace after-the-fact evaluation. Students would benefit by becoming more critical and effective legal writers.\textsuperscript{53}

On early assignments, law students are unlikely to recognize the importance of pre-writing steps to assess their own analytical process and the validity of their analysis of an issue before they begin drafting. Many students have not habitually engaged in significant pre-writing activities as undergraduates.\textsuperscript{54} If they do think about pre-writing, their understanding of that part of the process is probably limited to tasks such as researching, organizing information, and outlining.

\textsuperscript{52}“Pre-writing’ is a term, borrowed from composition theory, that denotes a stage in the writing process.” Terrill Pollman & Judith M. Stinson, IRLAFARC! Surveying the Language of Legal Writing, 56 ME. L. REV. 239, 284 (2004).

\textsuperscript{53}Natalie A. Markman, Bringing Journalism Pedagogy Into the Legal Writing Class, 43 J. LEGAL EDUC. 551, 560 (1993).

\textsuperscript{54}On the August 2007 survey, we asked students how often they had done certain tasks as part of their writing process on major products. In Their Own Words, supra n. 2, at 301. A full 14% of the respondents said they only “sometimes” did background reading, and more than 24% of the respondents said they only “sometimes” outlined. In contrast, when it came to post-writing tasks, the figures were higher: Almost 71% said they “always” proofread, and almost half said they “always” attended to formatting requirements. New Law Student Survey, Aug. 2007 (survey and results on file with authors).
In addition, pre-writing can be very challenging. Jill Ramsfield, a noted legal writing scholar, captured this well in describing her own writing process:

Here is something I know now that I wish I had known a lot earlier: how absorbing and demanding is the prewriting process. It takes about ten times longer than you think, requires excellent note-taking, patience, and careful connection among ideas. Never think you will remember something you've read; mark it, color-code it, and record it well enough to connect it to new ideas you are having as you read further.55

In spite of the complex, difficult nature of pre-writing, the legal writing textbooks that discuss pre-writing typically include only brief descriptions of the pre-writing stage – one to three pages at most – as part of an emphasis on the recursive nature of the entire writing process.56 And these descriptions focus very little on how students can pre-write effectively as a means of developing their analysis; they focus instead on such tasks as organizing and outlining, which we believe are really early steps in the writing process rather than in the pre-writing process. Organizing and outlining are tasks that presuppose at least a working understanding of the issues and the applicable rules and some effort to work through the analysis.57

55Jill Ramsfield, Professor of Law and Director of the Legal Research and Writing Program, University of Hawai‘i at Manoa, William S. Richardson School of Law (quoted in Linda H. Edwards, A Writing Life, 61 MERCER L. REV. 867, 891 (2010)).

56 See, e.g., CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 9-10 (5th ed. 2006); VEDA R. CHARROW ET AL., CLEAR & EFFECTIVE LEGAL WRITING 91-93 (4th ed. 2007); JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 211-13 (4th ed. 2010); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 212-14 (4th ed. 2004). For example, in his highly respected textbook, Prof. Charles Calleros describes "pre-writing" in the first few pages of the book: "[T]his process of 'pre-writing' may take the form of refining the issues that you intend to research, taking your research notes in an organized manner, and developing your analysis of the law as your research proceeds. The most important stage of pre-writing, however, is the process of organizing the points that you wish to express after you have completed your research. If you take this step seriously, you can develop an outline as a means of clarifying your analysis . . ." CALLEROS, supra, at 9-10. Thus, while recognizing the need to take some steps before beginning to draft, Prof. Calleros and the other authors quickly move from the thinking stage to outlining, which we believe is part of the drafting process and not part of pre-writing at all.

57 For example, Professor Pratt’s textbook, by its very organization, recognizes that the
It is likely the pre-writing process is too often given short shrift in the legal writing classroom. We think that legal writing professors can help students become better metacognitive learners by deliberately planning assignments to allow significant time for true pre-writing, which we believe is accurately defined as “the stage in the legal writing process where the assignment is organized, researched, and analyzed.” Pre-writing should be a process in itself, consisting of a number of recursive steps: (1) thinking through the analysis; (2) giving oneself the freedom to explore connections between ideas and to speculate about alternative approaches; and (3) accepting the inherent ambiguity that the law is not always going to provide a “right answer” but only a “best answer” under the circumstances and facts of the problem. We need to teach our students that it is okay – and in fact desirable – to spend some time literally or figuratively looking out the window and simply exploring the analytical possibilities broadly before deciding what their memo should say.

We know that there are various exercises that are used effectively to teach analytical skills. However, we suspect that these exercises are often used in a scattershot way, as opposed to a systematic way that facilitates pre-writing skills. While students might learn something useful from each individual exercise, they continue to struggle to connect what they learned from one exercise to the next slightly more difficult task. Thus, the exercises do not help them marshal their own metacognitive resources as they learn the process of legal analysis. Consequently, when they come to a “bump in the analytical road,” they often begin to question their ability to use their new knowledge and skills to get over the bump.

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59 For example, several legal writing professors use a variation of “the fruit exercise” to teach analogy; see Kirsten K. Davis, “Take the Lime and the Apple and Mix ‘Em All Up”, 20 The Second Draft: Bull. Legal Writing Inst. 13 (2005) (describing this exercise and citing to several variations on it); see also Lurene Contento, Back to Basics: Retro Visual Exercises That Promote Active Learning, 22 The Second Draft: Bull. Legal Writing Inst. 5 (2008)(describing a “rule scramble” exercise to help students learn to “separate the irrelevant from the relevant and organize rules into a clear, coherent narrative”); Camille Lamar Campbell, How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class, 48 DUQ. L. REV. 273 (2010).
60 See Leah M. Christensen, Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students,
if legal writing professors spend more time on pre-writing skills, and approach pre-writing in a more structured way, we will help our students see the early weeks of legal writing as a time of experimentation and growth as legal analysts and not as a time of frustration and failure as legal writers.

C. Graduated Assignments Emphasizing Process Over Product

The current norm in many legal writing programs is to require students to produce a full-scale objective memorandum very early in the first semester. While the complexity of the requirement may vary,\textsuperscript{61} the goal of such an assignment, by its very nature, is to communicate legal analysis to a sophisticated legal reader – in other words, the goal is “writing to teach.” This goal seems to us to fly in the face of the students’ novice status; it asks them to communicate legal analysis to an outside audience before they have had adequate practice in performing legal analysis. We believe that a better practice is to graduate the assignments in the first semester to allow students time to pre-write and to draft -- to “write to learn”\textsuperscript{62} -- before we ask them to take any steps toward the production of a full-scale objective memo.

A helpful analogy is to how we would teach a novice to play tennis. We would not begin by asking her to play a complete match and then telling her everything she did wrong. We would begin by teaching her the most basic skills – how to hold the racquet, where to stand on the court, how to

\textsuperscript{33} Law & Psychol. Rev. 57 (2009). Christensen explained that many law students can be characterized as “helpless” learners: that is, when they “bump[ed] up against difficulty, they quickly [began] questioning their ability (and had quickly lost hope of future success).” Christensen contrasted these “helpless” learners with goal-oriented learners, who, upon encountering difficulty, “began issuing instructions to themselves on how they could improve their performance.” Id. at 78.

\textsuperscript{61} Some might be closed while others are open; some might be on a single issue while others are multi-issue problems; some might involve a statute while others might involve only common law; etc.

\textsuperscript{62} See Laurel Currie Oates, Beyond Communication: Writing as a Means of Learning, 6 Legal Writing: J. Legal Writing Inst. 1, 20-22 (2000) (discussing the evolution of the “writing to learn” movement). As originally conceived, the “writing to learn” theory assumed that “writing is a unique mode of learning because some of its underlying strategies promote learning in ways that other forms of communication do not. For example, unlike talking, listening, or reading, writing is, almost simultaneously, enactive (we learn by doing), iconic (we learn by depiction in an image), and representational or symbolic (we learn by restatement in words). . . . Moreover, writing is self-paced; it ‘allows for – indeed, encourages – the shuttling among past, present, and future,’ a process which, through analysis and synthesis, results in the production of meaning.” Id. at 2-3 (quoting Janet Emig, Writing as a Mode of Learning, 28 C. Composition & Comm. 122, 127 (1977)).
prepare for a forehand return, how to toss the ball for a serve, etc. To help her learn the basics of a forehand return, we would have her hit ball after ball after ball. And we would recognize that even after several lessons, she will not be ready to play a game of tennis, let alone a match. Asking a first-year law student to write a complete objective memo after only a few weeks of instruction seems to us to be like asking a novice tennis player to play a match in the U.S. Open.

Our counterparts in the medical school setting have seemingly recognized the need for novice students to progress through increasingly complex stages as they move toward application of their new skills. Medical schools therefore use the familiar “see one, do one, teach one” method. This method for acquiring medical skills is “based on a three step process – visualize, perform, and demonstrate.” Students are first shown how to perform a skill correctly, then they practice doing the skill themselves, and only then they are asked to teach the skill to another student (for example, students watch someone put on a splint, then they put on a splint, then they teach a fellow student to put on a splint). This model works well for “educating professionals in settings where theory and skill necessarily coincide.”

A recent article explores the advantages of introducing the “see one, do one, teach one” model into the legal classroom. The authors posit that this model could help law schools transform their curricula and better prepare students to enter law practice. Specifically, they suggest that law professors use examples more, and more effectively (the “see one”), assign in-class writing or drafting exercises (the “do one”), and use guided peer review sessions (the “teach one”) to reinforce students’ learning.

We agree that each of these strategies – using examples, writing in class, and peer reviewing – can serve law students well, but in the first few weeks of law school, they may be premature. Just as medical students must

63 See Christine N. Coughlin et al., See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum, 26 Ga. St. U. L. REV. 361 (2010).
65 Id. (citing Chick Moorman & Thomas Haller, See One, Do One, Teach One, Ezine.Articles.com (June 14, 2006) http://ezinearticles.com/?See-One-Do-One-Teach-One&id=219888).
66 Id. Surely this is applicable to the legal profession.
67 Id. at 378.
68 Id. at 379-414.
know the basics of anatomy and physiology before they can learn from “seeing one” (an arm being splinted properly, for example), beginning legal writers must know the basics of legal analysis before they can learn from “seeing one” (a well-written example memo). In fact, we think that the most beneficial approach to early legal writing would actually be “do many, see a few, and only then teach one.” Under this approach, the “do many” means practicing the steps of legal analysis over and over, with no intended audience other than the student himself. The “see some” means using example memos specifically to illustrate the process the authors used in developing their analyses, emphasizing that the analyses in the examples cannot serve as a “template” for future assignments. The “teach one” – which should not occur until well into the semester, when the student is a more skilled analyst – means writing a full objective memo to communicate an original analysis to an educated legal reader.

Writing an objective memo is a complex, difficult task. The objective memo has been described by Laurel Currie Oates, a leading scholar and teacher in the legal writing field, as “requiring students to write, and thus think, in the way that a lawyer writes and thinks.” She describes the task of objective memo-writing as follows:

The structure of memos and briefs forces students to think in a particular way. Students learn to set out the rules first, examples of how those rules have been applied in other cases second, the arguments third, and their conclusion last. In addition, in writing the memo, students are forced to assume a number of different roles. In setting out the rules and cases, they act as a reporter; in determining what each side is likely to argue, they act as an analyst; in predicting how the court is likely to rule, they engage in evaluation; and in advising the attorney about the next step, they become a strategist. In each instance, instead of simply telling what they know, the students are being required to monitor their comprehension, assess the importance of various pieces of information, recognize structures, and make connections between pieces of new information and between new information and previously acquired knowledge, all of which are acts that can result in knowledge transformation.

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69 Thus, we would advocate a “do many, see some, and then teach one” approach to early legal writing.

70 See Oates, supra n. 62, at 21.

71 Id. at 21-22.
In light of the complexity of this task, asking our students to write an objective memo in the first two months of law school, when they are not yet skilled at reading and understanding cases, at identifying and articulating rules, or at analyzing how the rules apply to new fact patterns, may unwittingly set them up for disappointment and perhaps even failure. We believe that early writing assignments should be for the students’ own benefit, to help them learn the process of legal analysis. Students should not have to worry at that point about how to communicate the analysis to an outside reader. Put another way, the intended audience of our students’ early work should be the students themselves.

For example, one early assignment might focus strictly on issue formulation. We use just such an assignment. Students are given a fictional statute. The statute uses some legalese but may be paraphrased as: “It is illegal for a vehicle such as an automobile to go through a red light.” We then present the students with a fact pattern in which, as a case of first impression, a bicycle rider is ticketed for running a red light, and we ask students to identify the issue. The seasoned lawyer would immediately recognize that the issue is whether the statute applies to bicycles, which depends, of course, on whether a bicycle is “a vehicle such as an automobile.” However, it usually takes our novice students an entire class period to arrive at this fairly straightforward issue. A good extension of this class exercise might be to give the students a series of similar problems and simply ask them to write the issues. Then later, after the objective memo is introduced, we could build on this by teaching them that when communicating the specific issue to a reader, they should add key facts (such as how many wheels the bicycle has) to make the issue more useful and understandable to the reader.

Likewise, we might allow time in our course schedule for students to work specifically on rule formulation – not in the context of a particular memo assignment, but in a broader sense. For example, we build on the issue formulation exercise by giving students two short fictional cases – one about a moped and one about a toy scooter – and asking them to formulate

72 Assignment materials on file with authors.
73 Assignments such as this one could easily be done as “pair and share” assignments for peer learning in class. For example, after working through how to formulate the bicycle issue, the students could work together to formulate similar issues about airplanes or baby carriages or motorized wheelchairs. These exercises would not require grading or even reviewing by the professor, but would provide excellent prewriting tools for a formal memo assignment about yet another type of conveyance.
the rules of each case. The rules in these fictional cases are not complex, e.g. “The child’s toy scooter is not a vehicle such as an automobile because . . . .” Yet the students find it difficult to articulate even these carefully crafted, deliberately simplified rules from deliberately simplified cases.

It is likely that many legal writing professors are already using exercises like these in the early weeks of the first semester; however, we suspect that many of us are spending too little time on these individual components before assigning a full-scale memo. For example, we have typically asked our students to write a complete objective memo – Issue, Short Answer, Statement of Facts, Discussion, and Conclusion – analyzing whether a Segway® is a vehicle such as an automobile using the two simple cases referenced above as precedent. And this memo has typically been assigned after just two weeks of legal writing instruction. This has required us to introduce our students to the IRAC structure, as well as to legal citation and legal writing style, all without a thorough foundation in the process of legal analysis.

This fall we structured our courses so that for about four weeks, the students did not have to submit any writing that was in memo format. In fact, we did not make any writing assignments (other than case briefs) until we had spent more than two weeks discussing rule identification and practicing both rule-based reasoning and analogical reasoning. In the first writing assignment, we asked students simply to write down the steps they went through in analyzing the legal issue presented in the assignment. We did not specify any particular format; some students used a bullet format, others an outline format, and still others a narrative format. This allowed them to focus solely on the analytical process, without having to worry about the writing style or format that an outside reader would expect.

We were then able to introduce the memo format using the analysis they had just written about; we drafted a sample memo, and we talked with

74 Assignment materials on file with authors.
75 The IRAC/CRAC paradigm is useful when students are ready to communicate legal analysis to a legal reader, but it can be a hindrance to learning basic analysis if it is introduced too early. “Because most students see CREAC and its ilk as a formula they can plug in to write a memo, they fail to see the big picture of what is required for sound, lawyerly analysis. Students can then fail to understand that ‘legal reasoning is a dynamic, iterative process which must be adapted to the needs of a particular legal problem.’ They also fail to understand that ‘legal reasoning involves the structured manipulation and utilization of information, not the information itself.” Venter, supra n. 32, at 624-25 (quoting Kevin H. Smith, Practical Jurisprudence: Deconstructing the Art and Science of Thinking Like a Lawyer, 29 U. MEM. L. REV. 1, 2 (1998)).
the students about how *communicating* the analysis to an outside reader differed from *conducting* the analysis. The students thus learned the distinction between writing to learn and writing to communicate. The students’ first actual writing for an outside reader was not due until about six weeks into the semester, and we did see better results on that assignment, as compared to previous years’ assignments, for having allowed them to focus primarily on analysis for the first few weeks. Our approach is just one example of how early assignments could be redesigned to give novice legal writers more time to develop as legal learners.

IV. CONCLUSION

In this Article, we have urged legal writing professors to take a more deliberate approach to their early writing instruction in three ways: (1) by setting and communicating clearer, more realistic goals regarding our students’ early progress; (2) by deliberately encouraging our students to use their metacognitive skills, especially at the pre-writing stage; and (3) by slowing down the pace of early assignments to allow students to become familiar with and practice legal analysis without the pressure of producing a finished memo intended to educate a sophisticated legal reader. Each of these strategies will help our students reshape their understanding of the foundation of legal education by focusing them on the *process* of legal analysis rather than on the resulting written *product*. By avoiding the temptation to ask students to do “too much too soon,” we can help our students avoid the seemingly inevitable and damaging loss of confidence that affects so many of them, thus giving them the “better beginning” they need.

76 And that was only the discussion section; not until the final assignment of the semester, due in early November, were students asked to follow full memo format.