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Teaching “Scholarly Writing” in the First-Year LWR Class: Bridging the Divide between Scholarly and Practical Writing

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Teaching “Scholarly Writing” in the First-Year LWR Class: Bridging the Divide between Scholarly and Practical Writing

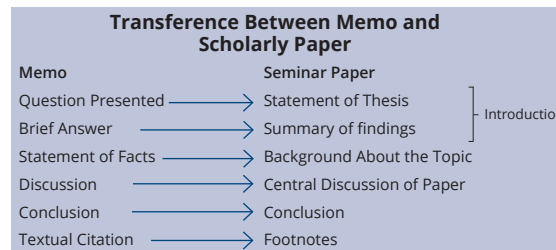
By Adam G. Todd¹

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At a time when there are calls to make legal education more practical and less theoretical, this essay bucks the trend.² This piece proposes that there is a need to include an appreciation for “academic” or “scholarly writing” alongside the “practical writing” taught in first-year legal writing classes.

While I usually teach first-year legal writing classes, a few years ago, I taught an upper-level law school seminar that required a scholarly paper.³ In that class, I successfully incorporated first-year legal writing pedagogy to teach students about scholarly writing. A rather simple thing I did, that I thought was particularly effective,

was to use a legal memorandum as part of the scholarly paper-writing process.⁴ I found that, for the student, the process of writing a memorandum on the topic of the student’s proposed paper facilitated the paper-writing process because it allowed for the transfer of the writing skills learned in the student’s first-year legal writing classes to the student’s upper-level law classes.



“[T]here is a need to include an appreciation for ‘academic’ or ‘scholarly writing’ alongside the ‘practical writing’ taught in first-year legal writing classes.”

In this seminar, once the students had written their memoranda on their chosen topics, I encouraged them to transform their memos into rough drafts of their academic papers.⁵ Specifically, I asked them to think of the “Question Presented” and “Brief Answer” of the memo for this seminar class as the “Introduction” of the paper, which would articulate a statement of their thesis and provide a brief summary of their arguments and findings. I pointed

¹ This essay comes out of a presentation I gave at the Third Annual Empire State Legal Writing Conference on June 23, 2012. Thanks to for Sheila Miller for her comments during the drafting of this piece.

² See e.g., Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 *S.C. L. Rev.* 105 (2010); Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 *Drexel L. Rev.* 399 (2012).

³ For the class, I defined “scholarly paper” as requiring independent research of a high caliber and that the paper format be that of a law review comment or article with footnotes; that it have a length of not less than 25 pages; and that the process of developing it include discussion and review by me of written notes, outlines, and drafts, as well as the final product. Specifically, the class required (1) a 3- to 5-page memorandum on the paper topic early in the semester; (2) a 15-minute oral presentation on the memo; (3) a 25- to 30-page paper based on the memo and presentation; and (4) a portfolio that was handed in at the end of the semester containing in- and out-of-class writing exercises.

⁴ The idea of using a memorandum for this class came from Professor David Epstein who used this method for a course taught at Southern Methodist University’s Dedman School of Law.

⁵ Students were guided in the form of the papers by the excellent textbooks: Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students, Seminar Papers, Law Review Notes and Law Review Competition Papers* (3d ed. 2005); Eugene Volokh, *Academic Legal Writing* (3d ed. 2007). I also assigned Ruthann Robson, *Law Students As Legal Scholars: An Essay/Review of Scholarly Writing for Law Students and Academic Legal Writing*, 7 *N.Y. City L. Rev.* 195 (2004). Since I taught the class the following text has also come on the market: Jessica L. Clark & Kristen E. Murray, *Scholarly Writing: Ideas, Examples and Execution* (Carolina Acad. Press 2010).

“The divide between ‘academic writing’ as is found in seminar papers or law journal articles and writing found in practice is often overstated.”

out that the memo’s “Statement of Facts” is similar to the “Background” section typically found in scholarly papers. The “Discussion” section of the memo mirrors the central discussion section of the paper, which is broken down into subsections with subheadings. The memo’s “Conclusion” section also closely resembles the “Conclusion” section of the paper. Finally, the citations used in the text of the memo are to be reformatted into footnotes. I was pleased with the students’ final written products that came out of this process, and, in fact, some of the students were able to subsequently publish their papers in law journals.⁶

The divide between “academic writing” as is found in seminar papers or law journal articles and writing found in practice is often overstated. Certainly there are some clear differences.⁷ As David S. Romantz points out in his cogent review of Fajans and Falk’s book, scholarly writing requires legal analysis without regard to advocacy or “the client,” but instead speaks to other “academicians” in the field of the topic being addressed.⁸ Romantz states the purpose of scholarly writing is not to predict or advocate but explore ideas and advance a critical dialogue about a topic.⁹ Finally, the subject matter of scholarly writing is typically selected and shaped by the writer in contrast to practical writing, which must conform to the needs and circumstances of the client.¹⁰

However, both scholarly and practical writing have many similarities in terms of style, form, and tone. Both forms of writing require thorough research, lucid analysis and argumentation, and

“uncompromising attention to detail.”¹¹ Both forms of writing have, while not identical, quite similar audiences.¹² Good scholarly writing, ideally, considers the practical aspects of the law.¹³ Similarly, good practical writing does not ignore but considers the scholarly sources on a given topic.¹⁴ Practical writing should be cognizant of theory and the issues raised by experts as reflected in scholarly writing. I believe teaching about practical writing while instructing a student about academic writing is not simply a useful teaching device but also a way to improve the quality of the writing itself. Concomitantly, when teaching students about practical writing, I believe it is important that students are familiar with the academic counterpart to this practical writing.

Thus, when I returned to my first-year legal writing courses, I decided to make small but significant changes to some of my class instruction to encourage my students to transfer the practical legal writing done in my class (and that they would do in practice) to the academic writing they would be doing in some of their upper-level classes. In some cases, however, I did not make significant changes because I found I was already covering these topics but not quite as deliberately or conscientiously. First, early in the first semester, I introduced academic writing when teaching students about sources of law and the hierarchy of authority.¹⁵ Then, in the middle of first semester, I revisited academic writing when teaching about legal research and when students

¹¹ *Id.*

¹² See Jessica L. Clark & Kristen E. Murray, *supra* n.4 at 10-11.

¹³ Deborah L. Rhode, *Legal Scholarship*, 115 *Harv. L. Rev.* 1327, 1329 (2002) (“[L]aw has done better than most fields in transcending rigid disciplinary boundaries and integrating theory and practice.”). See also Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 *Mich. L. Rev.* 1921, 1928 (1993) (“Perhaps the ultimate criterion of all scholarship is utility, but it need not be utility to a particular audience.”)

¹⁴ iKristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 *Washburn L.J.* 319 (2011).

¹⁵ At University of Dayton School of Law, legal writing is taught over two semesters in two three-credit courses. The first semester covers objective writing and requires the students to write and research law office memoranda. The second semester covers persuasive writing and has the students write trial briefs and other related documents.

⁶ Richard A. Kamprath, *Patent Reversion: An Employee-Inventor’s Second Bite at the Apple*, 11 *Chi.-Kent J. Intell. Prop.* 186, 213 (2012); Dolly Wu, *Timing the Choice of Law by Contract*, 9 *Nw. J. Tech. & Intell. Prop.* 401, 73 (2011).

⁷ Michael R. Smith, *Alternative Approaches to Advanced Legal Writing Courses*, 54 *J. Legal Educ.* 119, 126 (2004) (stating that scholarly writing is “completely (i.e., paradigmatically) different from memos and briefs.”)

⁸ David S. Romantz, *A Review of the Second Edition of Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers*, 30 *Stetson L. Rev.* 611, 612 (2000)

⁹ *Id.*

¹⁰ *Id.*

are required to locate journal articles as part of the research process. Towards the end of first semester, I encouraged students to cite to at least one law journal article in the research memorandum assignment.

In the second semester, I required students to read a case note or article on the topic of the trial brief assignment. And finally, in one of the final classes of the academic year, I discussed the scholarly legal writing done in law review and second- and third-year classes. In this end-of-year class, I set the groundwork for allowing the students to transfer the writing skills learned in my practice-oriented class to the academic writing they will perform in the future.

The transference of these skills from practical writing to academic writing and vice versa, in my opinion, holds the promise of improving their future legal writing in both realms. In addition, the transference erases lines between legal writing classes and the rest of a student's law school classes. Erasing this division adds to our credibility as law school teachers and the perception of importance of the legal writing class in the eyes of students.

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Another Perspective

Jessica L. Clark & Kristen E. Murray, *Scholarly Writing: Ideas, Examples, and Execution* (Carolina Academic Press, 2010), <http://ssrn.com/abstract=2153162>.