FIRST STEPS: USING QUESTIONS TO SCAFFOLD STUDENTS' APPROACH TO COUNTERARGUMENTS IN PERSUASIVE LEGAL WRITING

HEATHER M. KOLINSKY[1]

Scaffolding as a Teaching Tool in Legal Writing

Scaffolding is an educational tool that allows a professor to take parts of a complex process and create a bridge from one part of the process to the next in a form that does not entirely divorce it from the whole.[2] The most obvious example is a closed universe memo where the cases have been provided to the students, taking the research step out of the process but still requiring students to evaluate and engage in analysis of the cases provided. But scaffolding can also take the form of hints, prompts, thinking aloud, feedback, cue cards, checklists, or asking leading questions.[3]

Scaffolding was an outgrowth of Lev Vygotsky's concept of a zone of proximal development in learning.[4] This zone lies between a zone of tasks novice learners can master on their own and a zone beyond their capabilities. It is in this zone of proximal development where techniques such as scaffolding provided by knowledgeable others can assist the novice learner in broadening their skills.[5] Scaffolding should be scaled

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[1] Heather M. Kolinsky is a Legal Skills Professor at the University of Florida's Levin College of Law. She made this presentation at the Western States Legal Writing Conference at Seattle University School of Law in September 2024.

[2] Terri L. Enns & Monte Smith, *Take a (Cognitive) Load Off: Creating Space to Allow First-Year Legal Writing Students to Focus on Analytical and Writing Processes*, 20 Legal Writing 109, 114-15 (2015).

[3] *Id.*

[4] *See generally* David Wood, Jerome S. Bruner, & Gail Ross, *The Role of Tutoring in Problem Solving*, 17 J. Child Psych. and Psychiatry Disciplines 89 (1976).

[5] *See* Enns & Smith, *supra* note 2, at 114-15.

back over time once students have integrated the new practice effectively; to do otherwise can result in diminishing returns and potential regression of skills.[6]

One of the benefits of scaffolding is the reduction in the cognitive load placed on a novice learner when new, complex concepts are introduced.[7] Scaffolding can support the "development of [skills] that students will need to incorporate and use over the course of their professional lives"[8] while relieving some of the cognitive load acquisition of those skills creates for the novice learner in a first year legal writing class. Scaffolding, used in conjunction with Bloom's Taxonomy[9], "may be particularly appropriate for teaching legal analysis and writing skills."[10]

Scaffolding for Counterarguments

Counterarguments in an advocacy setting present a unique challenge as a site of skills development, increased cognitive load, and a new shift within the taxonomy of learning that can be addressed with scaffolding. Persuasive writing is generally introduced in the second semester of the first-year legal writing courses. Up to that point, students have usually learned only predictive writing. The considerations at play in persuasive writing are distinct from those a novice learner may have used in a predictive analysis setting, even when the evaluative skills are the same. Put simply, advocacy presents more moving parts that animate the

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[6] *See generally* Sean McPheat, *Vygotsky's Zone of Proximal Development and Scaffolding*, Skillshub, skillshub.com/blog/vgotskys-zone-proximal-development-scaffolding/ (discussing best practices).

[7] *See generally* Enns & Smith, *supra* note 2, at 113 ("Cognitive load theory has tremendous implications for 'complex learning.'").

[8] Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 Mercer L. Rev. 621, 635 (2006) (citing Benjamin S. Bloom, Max D. Engelhart, Edward J. Furst, Walker H. Hill, & David R. Krathwohl, *Taxonomy of Educational Objectives: Cognitive Domain* (New York, McKay, 1956).

[9] *See* Patricia Armstrong, *Bloom's Taxonomy*, Vanderbilt University Center for Teaching, cft.vanderbilt.edu. Developed in 1956, Bloom's Taxonomy is a framework for categorizing educational goals. *Id.* The framework consists of six major categories: Knowledge, Comprehension, Application, Analysis, Synthesis, and Evaluation. *Id.* The taxonomy is designed to support student mastery of learning. Venter, *supra* note 8, at 637. Knowledge and comprehension are considered lower-level thinking skills while analysis, synthesis, and evaluation are considered to be higher order thinking, and all of them are "recursive," not simply hierarchical. *Id.* at 637-38.

[10] *Venter, supra* note 8, at 635. Vetner makes the point that any taxonomy that has been carefully constructed to focus on the development of students' analytical skills may be appropriate. *Id.*

analysis and evaluation of the issues—particularly with respect to the development of counterarguments.

The idea of developing a client's appellate argument while at the same time addressing a parallel counterargument—with all the related policy, precedent, and practical problems—can be daunting for a student. The professor can bridge the gap with a discrete set of questions that can be revisited at every stage of the process, creating a scaffold to that higher order of analysis. In addition, this type of scaffolding allows the student to continuously exercise their own autonomy and discretion in the process because the questions serve as a framework for the students' development of their evaluative skills as they work through a legal problem.

A Problem in Real Time

A few weeks into the 2024 spring semester, I realized I was facing a challenge. My students were conducting their own research for the first time, to be used for a trial brief. Independent research was already a new cognitive load because their writing assignments in the fall were closed universe.[11] As we worked through that project, the students kept asking about drafting a section to address counterarguments, even though they had been writing counterargument sections in their predictive memos since at least their last few assignments in the fall.

Their textbook had a few solid pages on how to draft a counterargument section.[12] I also planned to rely on one of my favorite resources, Mary Beth Beasley's *A Practical Guide to Appellate Advocacy*, for drafting their counterarguments.[13] But as we turned from the first trial memo to the students' appellate brief, and they were tasked with finding their own cases, developing their own arguments, and considering potential counterarguments, they essentially asked me, "How do you do that?" Not the writing part or counterarguments, but the beginning. "Where do you start?"

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[11] Students completed some open research in their Legal Research classes, but as a guided exercise that was then adapted to a closed universe for Legal Writing. In effect, they always had the right cases on hand even though one or two might be less useful.

[12] *See* Joan M. Rocklin et al., *An Advocate Persuades* 120-22 (2d ed. 2022) (emphasizing the *how* and *where* of addressing your opponent's arguments).

[13] *See generally* Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* (6th ed. 2023). Despite the generation gap, I still teach the concept of Beazley's Six Steps of Kevin Bacon as part of written advocacy because I think helps develop more nuanced advocacy skills.

I realized that the way they addressed counterarguments for predictive writing was arguably much more about "observe and report" than "identify and develop" with respect to argument and counterargument.[14] That, in addition to the shift from predictive to persuasive writing more broadly, reflected a discrete shift in analytical skills and mindset.

So, there I was, with a group of students who were new to me, trying to figure out a way to give them a process for identifying and developing both argument and counterargument in an appellate brief.[15] They needed some guidance, and because we did not know each other as well yet, we also needed a common language.

In the end, I did what all good lawyers (and legal writing professors) do, I borrowed a fantastic idea from a colleague. In this case, I adapted an exercise that my former colleague Catlin Meade[16] created, entitled "Assessing Your Argument." After one or two preliminary descriptive slides, a numbered screen appears where students choose a number and answer one of several questions that then appears that are central to good oral argument preparation. Students are encouraged to consider, for example, which points they can concede and still prevail. (See the Appendix to this essay for samples.)

The questions were originally designed as an exercise for mooting students in class after the briefs were written. I knew Professor Meade had used her exercise earlier than mooting for oral arguments, though not necessarily this early. I wondered if these questions could help my students bridge the gap from predictive to persuasive arguments while actively engaging them in the evaluative process of developing counterarguments.

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[14] *See* Rocklin, *supra* note 12, at 120 ("The aspect of persuasive writing that is most different from objective writing is addressing weaknesses that give rise to an opposing analysis.").

[15] We teach students for only one semester in Legal Writing and then rotate to a new group in the spring.

[16] Professor Meade is currently teaching at George Washington University School of Law.

Scaffolding with Questions

First, I introduced the questions that served as the basis for the oral argument exercise. What helped this work better was that, by that time, the students were familiar with the facts and the two main Circuit Court of Appeals cases they would address because we used the same basic fact pattern for both the trial memo and the appellate brief. Also, helpfully, each student had represented the opposite side in the trial memo they wrote.[17]

The differences between the trial memo and the appellate brief amounted to a few added details in the record, a trial order, and a second issue that they had not addressed previously. It was an ideal situation to use scaffolding.
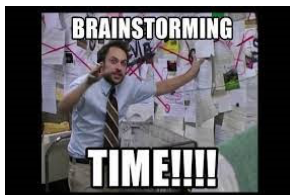
- What are the worst facts you must deal with? (I wish they hadn't done that. . .)
- How do you plan to deal with bad facts?
- What can you concede and still win?
- What can you not concede?
- What is the court worried about? (If you were the judge, what would bother you about your argument?)
- How can you reassure the court? (Limitations, nuance, etc.)

- What's the elevator pitch of your argument?
- Explain it to a layperson.
- What's the most persuasive theme for your client?
- What is your roadmap (think your five sentences)?
- What's the worst that could happen if the court ruled for the other side? (parade of horribles)

These were the questions I posed to the students the first day we began discussing the appellate brief after they had reviewed the new record. I gave them time in class to break into groups to discuss the questions (where each group represented one side or the other), then we

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[17] For those students having trouble switching to the other side, these questions helped them reset and focus on their new client's perspective.

spent the rest of class trying to answer them (playing the game as designed).

Not only was the exercise good practice in articulating arguments aloud from the outset, but it gave them a framework to carry into their research. They had questions they could use to guide their research and selection of cases, as well as the development of their arguments and counterarguments. We came back to these questions throughout the semester, and then used them again before oral argument preparation.

Of course, the *how* and *where* of drafting responses to potential counterarguments came later, but this exercise effectively provided common, relevant questions the students could keep coming back to while they were researching, outlining, writing, and refining their arguments.

The Results

This scaffolding exercise addressed students' questions about how to get started with counterarguments, and so much more. It gave students a sense of agency with respect to their research at the outset. It got them thinking early on about the bigger picture, and the questions engaged them in a way that was quite different from starting with just how to analogize or distinguish cases to benefit their arguments. I also think it gave them a better frame for understanding policy questions from the outset. Finally, I think it made the students more confident going into their oral arguments because these were familiar questions and served as the basis for many of the questions the judges asked. And it was fun.

I plan to continue using this scaffolding technique to bridge the gap between their approach to counterarguments in predictive and persuasive writing, but I hope to refine the questions somewhat to improve on the dialogue I would like to create for the students. I plan to use some of these prompts on the first day of class so that we can start immediately with a common dialogue. Then over the course of the semester, I can add the remaining questions and use the transition to appellate work as an inflection point for the even more subtle framework shifts to persuasive writing.

Appendix

1	2	3	4	5
6	7	8	9	10
11	12	13	14	15
16	17	18	19	20
21	22	23	24	25

4

What's the worst that could happen?

Argue to the class the worst thing that could happen if the court rules in your opponent's favor.

BACK   6

Let it go, let it go . . .

Which of your argument point(s) can you concede and still win?

BACK   9