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NEW IDEAS FROM OUR ORIGINS

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Seattle University School of Law hosted the 2024 Western States Legal Writing Conference in September. The theme was "Coming Back to Where It Started," recognizing that the host for this conference was also the host of many of the first legal writing conferences and that Seattle University professors founded the Legal Writing Institute.

Published here are essays from six conference presentation. The topics range from the challenges of teaching legal writing and research with generative artificial intelligence to the developing and central role of legal writing in the modern law schools. The essays provide insights for teaching a variety of essential skills.

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ESSAYS

Proceedings is an online journal published by the University of Oregon School of Law, beginning in 2020. Its aim is to amplify presentations made at regional and national conferences, workshops, and webinars, on topics relevant to teaching legal writing, legal research, and related areas, and to those teaching and writing in the discipline.

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RETAINING CRITICAL THINKING: PREPARING FOR THE TRANSITION FROM TRADITIONAL LEGAL RESEARCH TO GENAI RESEARCH

STEPHANIE DER[1]

While learning and performing legal research, students not only gain proficiency in tasks like navigating secondary sources or locating annotations, but they also simultaneously practice a number of "ancillary skills" that have broader applicability, such as issue spotting and analogical reasoning. The advent of generative AI-powered legal research platforms like CoCounsel and Lexis+ AI (hereinafter "Legal GenAI") promises to significantly reduce the amount of time lawyers and law students spend performing research.[2] How, then, will students develop these ancillary skills? This essay encourages legal research and writing professors to identify the ancillary skills their students have been learning through traditional legal research instruction and to make intentional choices about whether and how to teach these skills as students transition to Legal GenAI research.

This essay intentionally does not address two significant questions. First, it does not address whether legal research and writing professors *should* embrace Legal GenAI. It instead operates under the assumption

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[1] Stephanie Der is an Associate Clinical Professor of Law at LMU – Loyola of Los Angeles Law School. This essay is from her presentation at the 2024 Western States Legal Writing Conference at Seattle University.

[2] CoCounsel entered the legal market in March 2023 and Lexis+ AI in May 2023. Lexis+ AI is already available to law students, and CoCounsel is scheduled to become available to the academic legal market in January 2025. For more on both platforms, *see generally* Adam Allen Bent, *Large Language Models: AI's Legal Revolution*, 44 Pace L. Rev. 91 (2023).

that adoption of Legal GenAI research tools is inevitable.[3] Second, it does not comment on the quality of Legal GenAI research as compared to traditional research.[4] Instead, this essay focuses just on the ancillary skills students obtain or refine as they learn legal research using traditional methods versus using Legal GenAI.

1. Identifying Ancillary Skills: A Terms and Connectors Lesson

The following terms and connectors lesson illustrates how students learn ancillary skills as part of learning legal research. Different legal research lessons will teach different ancillary skills than the ones identified below; this sample simply serves as a vehicle for exploring how legal research and writing faculty can identify and address ancillary skills.

A Sample Terms and Connectors Lesson. Imagine a professor presents the following research hypothetical to students:

> *A judge dismissed Plaintiff's case in the Central District of California after Plaintiff's counsel failed to appear first at a scheduling conference and later at the order to show cause hearing about the failure to appear. One month later, Plaintiff filed a motion to vacate the dismissal under FRCP60(b)(1), arguing that the attorney's failure to appear constituted excusable neglect because a paralegal was responsible for*

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[3] In a 2024 white paper on e-discovery published by Everlaw, 34% of respondents indicated they were using (non-research specific) generative AI in their legal practice and over 50% of respondents had a "somewhat positive" or "positive" impression of generative AI. Everlaw, 2024 Ediscovery Innovation Report 10, 15. A study by LexisNexis Legal & Professional also found that, as of January 2024, 90% of surveyed legal executives from Fortune 1000 companies expected Generative AI usage to increase in the next five years, with 45% of survey respondents indicating they were already using Generative AI in some capacity for their legal work. Press Release, LexisNexis, New Survey Data from LexisNexis Points to Seismic Shifts in Law Firm Business Models and Corporate Legal Expectations Due to Generative AI (Jan. 31, 2024), https://perma.cc/GZ7E-5BU7.

[4] Little research has been done comparing GenAI Legal Research outcomes with traditional legal research outcomes, but one study, "the first preregistered empirical evaluation of AI-driven legal research tools," found that, while Legal GenAI "hallucinations are reduced relative to general-purpose chatbots . . . the AI research tools made by LexisNexis and Thomson Reuters each hallucinate more than 17% of the time." Marun Vagesh et al., *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, J. Empirical Legal Stud. (forthcoming 2024); *see also* Paul D. Callister, *Generative AI Large Language Models and Researching the Law*, 53 SPG Brief 18 (2024) (providing samples and critiques of legal issues researched using Legal GenAI), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4927675.

miscalendaring both the scheduling conference and the order to show cause hearing. You represent Defendant.

Students perform preliminary research before class, which includes using secondary sources, reading the Federal Rules of Civil Procedure, and looking at annotations. In class, the professor uses the hypothetical to teach terms and connectors searching. In this scenario, an initial brainstorming session on keywords likely involves students suggesting the following terms:

- FRCP 60
- Paralegal
- Miscalendaring
- Dismissal
- Scheduling Conference
- Excusable Neglect

Next, the professor digs into each of these terms with the students and, through discussion, students arrive at new ideas about each of these terms:

- **FRCP 60** – The professor reminds students of the secondary sources they ideally read and located before class. These sources state that the standard for assessing excusable neglect under Federal Rule of Civil Procedure 60 is the same standard used for evaluating excusable neglect under two other procedural rules—Federal Rule of Appellate Procedure 4 and Bankruptcy Rule 9006. Students realize that they can analogize to decisions relating to any of these three procedural rules and should not narrowly search for FRCP 60 cases alone.
- **Dismissal** – As they are asked to think more about these procedural rules, students see that all three are specific to dismissals. Students discuss whether they should simply search the term "dismissal" near "excusable neglect" or if they should additionally include the specific procedural rules as search terms. Though they will unlikely articulate it as such, they begin to think about ideas of recall versus precision.

- **Paralegal** – As students are pushed to articulate why it matters that a paralegal made the mistake in the hypothetical, they realize that any case where the mistake is made by someone *other than the attorney, court, or plaintiff* might be potentially analogous, with cases specifically involving paralegals or individuals in paralegal-like roles being the most persuasive.
- **Miscalendaring** – Similarly, students realize they can think about the type of error more broadly as well. They may brainstorm other types of excusable errors.
- **Scheduling Conference** – In thinking more about the four factors evaluated when assessing excusable neglect (danger of prejudice to other party, length of delay, reason for delay, and whether the movant acted in good faith), which they learned from their prior secondary source research, the students realize that, although a scheduling conference was the root of the judge's eventual decision to dismiss, the scheduling conference itself is not highly relevant to an inquiry about excusable neglect and that term should be excluded from a search.
- **Excusable Neglect** – Students may initially want to brainstorm synonyms for "excusable neglect" but eventually learn that this is a term of art.

After fleshing out these terms, determining which are unnecessary, which require synonyms, and which must be searched "as is," students then discuss how to connect the words. They evaluate how helpful a case would be that required multiple concepts (an AND search) versus only some of the concepts (an OR search). They think about which concepts are required (AND) for effective analogy versus which ones are preferable but not necessary (OR). Finally, the students arrive at one or more useful searches to run. Once they run their searches, students are presented with a large number of cases to read through to find relevant legal authority.

Ancillary Skills Practiced in the Terms and Connectors Lesson.

In the hypothetical lesson, the primary learning objective focuses on effectively using terms and connectors to identify relevant case law.

However, outside of this stated learning objective, students learn other skills as well. As the time spent on traditional legal instruction decreases, those who teach research should systematically think through and articulate what these ancillary skills are. For example, as students brainstorm their keywords—thinking carefully about which to retain, which to reject, and which to search more broadly or narrowly—they are also issue spotting, applying law they have learned from secondary sources to their more specific research problem, and making decisions based on anticipated analogical reasoning.

After conducting their searches, students must then review the retrieved cases to determine their relevance. This skimming process fosters three additional skills. First, students simply become better at reading and understanding case law. This includes gaining familiarity with legal terminology and with the way courts analogize and persuade. It also includes gaining speed—being able to recognize relevant facts, holdings, and reasonings more quickly. Second, through immersion in legal writing, students pick up ideas that will help them become better writers. And finally, students practice their analytical skills by constantly comparing the cases they are reading to their hypothetical to determine relevance.

2. Finding New Ways to Teach Ancillary Skills

In my very preliminary exploration of Legal GenAI and the ways students use it, using Legal GenAI for legal research does not seem to develop ancillary skills in the same way or to the same extent as traditional research. [5] In large part, this is because Legal GenAI is doing exactly what it promises to do—reducing the amount of time needed to perform research.[6] Less time spent researching equals less time learning

[5] Given the relatively recent availability of Legal GenAI to the academic market, my observations are based upon my review of a limited number of student research logs, when students were given the opportunity to research in both LexisAI and through traditional methods.

[6] An April 2024 LexisNexis Press Release claimed Lexis+ AI enhancements would make research "faster" and more "efficient." Press Release, LexisNexis, LexisNexis Launches Second-Generation Legal AI Assistant on Lexis+ AI (Apr. 23, 2024), https://perma.cc/RD2G-QJLM. An August 2024 Thomson Reuters press release similarly promised that CoCounsel 2.0 would "accelerate and streamline entire workflows." Press Release, Thomson Reuters, Thomson Reuters Unveils

ancillary skills. In addition, however, the synthesized format of Legal GenAI search results seems to deter students from questioning what they have received or brainstorming additional search queries. As Paul Callister puts it, "[w]e will tend to believe generative AI because it is easier than assimilating and synthesizing the large volume of legal information that we confront."[7] Even students who want to verify the information summarized by Legal GenAI are likely to do it in a more cursory fashion, reading the cases directly cited by the Legal GenAI platform rather than looking broadly across the number of cases they would have encountered while performing a terms and connectors search.

That Legal GenAI is changing the way students research is not intrinsically "bad." Legal research methodology has always adapted to available technology.[8] And if Legal GenAI can help students and lawyers find answers of similar quality in a much shorter time, its benefits likely outweigh its costs. Therefore, this essay does not suggest that legal research and writing professors respond to the loss of ancillary skills by refusing to teach or intentionally minimizing use of Legal GenAI. Rather, this essay encourages professors to recognize that, by offering a significant shortcut to research, Legal GenAI inevitably diminishes the time students spend developing important ancillary skills. In response, we should proactively identify the ancillary skills we have been "inadvertently" teaching so we can make intentional choices about whether we want to more directly invest in those skills.

Of course, one valid decision would be to forego certain ancillary skills. In fact, as Legal GenAI and generative AI generally become a more normalized part of legal practice, some ancillary skills may simultaneously become outdated or at least less relevant. Professors may decide to reduce time on these ancillary skills, just as many childhood educators have decided to cut cursive from K-12 curriculum in light of the prominence of computers.[9] For instance, working with print secondary

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CoCounsel 2.0; Supercharged GenAI Assistant Combines the Power of Google Cloud AI, OpenAI, and Thomson Reuters (Aug. 12, 2024), https://perma.cc/74B6-B425.

[7] Callister, *supra* note 4, at 19.

[8] For a look back at changes in legal research methodology through the turn of the century, *see generally* Alvin M. Podboy, *The Shifting Sands of Legal Research: Power to the People*, 31 Tex. Tech. L. Rev. 1167 (2000).

[9] Since 2010, when the Common Core State Standards omitted cursive as a learning target, many schools have opted to forego cursive instruction as an unnecessary skill in light of current

sources helps students with ancillary skills related to issue spotting and indexing, but with the prominence of computer-assisted research, a professor could determine that gaining indexing skills is no longer valuable enough to factor in as an ancillary skill that needs practice. More controversially, because Legal GenAI is able to summarize cases, a professor may find that the ancillary skills gained from reading through large numbers of cases are also no longer valuable, as lawyers can depend upon case summaries rather than reading full cases in the future. On the other hand, professors may also decide that, while certain ancillary skills are important, they can be learned in other contexts, or at a slower pace, and therefore explicit coverage is not necessary. For example, a professor may believe that reading large numbers of cases is useful to a student and should not be replaced by Legal GenAI case summaries, but that the skill does not warrant additional, intentional coverage in legal research and writing class, as students will have opportunities to practice reading cases in clinics, internships, and other classes.

Professors may also choose to respond by taking the time saved on research and redirecting that time into more intentional exercises designed to teach the ancillary skills directly. Because many ancillary skills involve critical thinking—a competency that numerous law students are increasingly struggling to develop—I personally lean toward this approach for most ancillary skills.[10] How this plays out in the classroom will differ depending on the individual professor's choices as to whether and how to teach the skills. As an example, however, a professor might review the ancillary skills learned in the terms and connectors lessons and decide that two particular skills—analogical reasoning and issue

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technology. However, there appears to be a recent recognition of some unforeseen losses as a result of this decision, which has led to a resurgence of cursive education. *See* Howard Bloom, *Learning Cursive in School, Long Scorned as Obsolete, Is Now the Law in California*, L.A. Times, Jan. 8, 2024; Drew Gilpin Faust, *Gen Z Never Learned to Read Cursive*, The Atlantic, Oct. 2022.

[10] Gen Z (individuals born between 1995 to 2012) have been in law schools since roughly 2017. Olivia R. Smith Schlinck, *OK Zoomer: Teaching Legal Research to Gen* Z, 115 L. Libr. J. 269, 271-72 (2023). Research on Gen Z law students and undergraduates highlights that these students often face challenges with critical thinking due to their upbringing in a technology-driven, standardized testing environment. Laura P. Graham, *Generation Z Goes to Law School*, 41 U. Ark. Little Rock L. Rev. 29, 60 (2018) (discussing why "Gen Zers have access to enormous, almost unlimited amounts of information, but they do not know how to effectively sift through it or critically evaluate it.").

spotting—deserve additional reinforcement in the absence of a terms and connectors lesson. That professor could reinforce analogical reasoning by spending time on extended brainstorming of keywords as a part of creating or evaluating Legal GenAI prompts. The professor could move issue spotting into the writing classroom by providing students with mock client intake forms or short mock deposition transcripts and requiring students to spot issues before being provided with a writing assignment involving the documents. Countless avenues, limited only by professor creativity, exist for shoring up ancillary skills.

3. Conclusion

This essay, like the presentation upon which it is based, invites the legal research and writing community to work together to identify ancillary skills students are learning in our classes, intentionally decide which skills are worth our efforts to continue teaching, and creatively impart those skills through other avenues.

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HERE WE ARE, NOW ENTERTAIN US: ONE (ELDER) MILLENNIAL'S THOUGHTS ON METHODS AND MEANS OF CONNECTING WITH GEN Z IN THE LEGAL WRITING CLASSROOM

JOSEPH HUMMEL[1]

Introduction

Being an elder millennial somewhat close in age to many of my 1L students, the majority of whom qualify as Gen Z, I naturally assumed I would relate to and understand what they needed and wanted in legal education, and in the legal writing classroom, specifically. I was wrong. Gen Z members are unique, gifted, and complex—and in ways very different from my generation, or any generation before that. Who they are informs what they need, want, and expect in a legal education. It also informs how they prefer and need to learn. This presentation compiles research and information on Gen Z. It offers legal writing professors ideas for how to adapt teaching and assessments to effectively connect with Gen Z, all while maintaining substance in teaching fundamental legal writing skills.

Who is Gen Z?

Challenges persist in trying to define a generation. While many of our students—and especially those recently or immediately out of college—may technically qualify as members of Gen Z, that fact is not to

[1] Joseph Hummel is an Assistant Professor of Law at the UNT Dallas College of Law. This article is based on a presentation he made at the Western Regional Legal Writing Conference at Seattle University School of Law on September 13, 2024.

suggest that all members of Gen Z are the same, or share the same attributes, or exhibit the same traits or characteristics. Far from it. Nor would it be fair to assume that all of our students, in terms of age alone, *are* Gen Z students. So while it may be inaccurate to assume all of our students are similar, or more alike than not, we can still explore who these students are using some broad criteria that studies have shown apply to a significant segment of Gen Z.

Gen Z are those born between approximately 1995 and 2010.[2] They are diverse, with almost half of Gen Z members identifying as non-white.[3] They are also "digital natives," most of whom have never not known the internet.[4] At home and in the classroom, they are tethered to technology and devices. iPhones, iPads, laptops, and multiple screens—these are often as much appendages as they are tools for learning. As such, they are highly visual learners.[5] But that technology has also created ill effects. In part because of their reliance on technology, Gen Z members have short attention spans, which some estimate to be about only 8 seconds.[6] That reliance on technology, coupled with the way they were taught to learn as children, has hampered their critical thinking skills.[7]

Gen Z has also been through an awful lot. The oldest Gen Z members would have grown up in a post-9/11 world, practiced active shooter drills in school, consumed a flood of often negative images from a 24-hour news cycle, navigated youth in a social media-infused world, and possibly watched their families struggle economically in the aftermath of the Great Recession.[8] And that is to speak nothing of the many members of Gen Z who spent considerable time—semesters, if not longer—of their education in a covid and post-covid world. Perhaps it comes as no surprise that they are also financially conservative.[9] Having navigated their youths

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[2] Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. Ark. Little Rock L. Rev. 29, 37 (2018).
[3] *See id.* at 40.
[4] Robert Minarcin, *OK Boomer – The Approaching DiZruption of Legal Education by Generation Z*, 39 Quinnipiac L. Rev. 29, 31 (2020).
[5] *See* Olivia R. Smith Schlinck, *OK, Zoomer: Teaching Legal Research to Gen Z*, 115 Law Libr. J. 269 (2023).
[6] *See* Graham, *supra* note 2, at 52.
[7] *See generally id*. at 57-66; *see also* Kimberly Carlton Bonner, *What do judges need to know about Gen Z?*, 106 Judicature 56, 58 (2024).
[8] *See generally* Minarcin, *supra* note 4, at 54-55.
[9] *See id.*; *see also* Graham, *supra* note 1, at 41-42.

and educations in a time of growing macro- and microeconomic financial instability, as well as in an era where education has never been more necessary, or expensive, Gen Z necessarily sees law school as an investment that must deliver and pay dividends.[10]

In spite of all Gen Z has been through, or perhaps because of it, Gen Z is also "altruistic" and "civic minded."[11] They want the world to be a better place, and they see themselves as agents of positive change.[12] For Gen Z, social justice is a necessary goal. Many enter law school intending to pursue work in the public sector and "do good." Ideas like mental health, safe spaces, and work-life balance aren't just corporate buzzwords, but are worthy, necessary, and achievable ends.

How Does Gen Z Prefer to Learn?

Knowing who or what Gen Z is, what then does that suggest about how they want or prefer to learn? Studies support my experience that who Gen Z is very much informs their pedagogical preferences. One anchoring principle is that Gen Z wants and needs to see value and purpose in their education.[13] Considering the financial and time investments they are making in their education, Gen Z needs to know that what they are learning is practical, applicable, and translatable to the real world. They want learning and experience in law school to reflect learning and experience in the real world. Esoteric concepts like "learning how to think like a lawyer" are less relevant than being able to do the actual work and make a meaningful impact. Given they are highly visual learners familiar with technology, they welcome and thrive on technology in the classroom. They find group work effective but see group work differently than do many older generations. For Gen Z, a mixture of individual, small group, and larger class work can be effective means of learning.[14]

Gen Z also wants frequent and thorough feedback. And not unlike many millennials, they might resist negative or punitive feedback.[15] They want to know how to improve, and they see their professors as "guides

[10] *See* Minarcin, *supra* note 4, at 54.
[11] *See* Bonner, *supra* note 7, at 58.
[12] *See* Schlinck, *supra* note 5, at 283.
[13] *See id.* at 287.
[14] *See* Graham, *supra* note 1, at 85-89.
[15] *See* Schlinck, *supra* note 5, at 286-87.

rather than authorities" on that journey.[16] Conferences and one-on-one, in-person feedback are paramount, but they don't see the need for lengthy meetings.

Lastly, as an altruistic and civic-minded group who has lived through much, Gen Z also craves an academic environment that accounts for their mental health and well-being. They want engaged professors who create classrooms that are accepting, accessible, and reflective of the real world.

Adapting the Legal Writing Classroom to Account for Gen Z Without Sacrificing Substance

Taking stock of who Gen Z is and how they prefer to learn, what does that mean for our work in the legal writing classroom? It would be a mistake to change everything we do to account for a single generation or their learning preferences. Still, we can make simple yet effective changes and retain the core of all we need to teach while doing the most to account for the characteristics and learning preferences of one of our largest student demographics. By looking at six criteria, we can more effectively connect with Gen Z without compromising the core and substance of legal writing we need to teach.

Demonstrate Real World Applicability. First, legal writing professors should work to connect course material and assessments to the real world. By using real cases and transactions as the basis for assessments, and by incorporating our own experience into the classroom, professors can best demonstrate how an assessment (1) relates to actual practice and (2) will help prepare students for the work they will do once they graduate. Taking course material out of the realm of the abstract can do much to show students that their investment in their legal education will meaningfully and quantifiably deliver in the near future.

Revisit Traditional Assessments. Professors should also explore revisiting "traditional" assessments. For instance, rather than assigning just a memo in draft and final form, professors can incorporate

[16] *Id.* at 286.

scaffolding assignments, shorter assignments (including pass/fail assignments), and reflection or journaling assignments into the standard curriculum of any given semester. Doing so would accomplish much while sacrificing little. First, giving students more and varied assessments would reflect trial and error in learning that lawyers encounter in practice. The real world rarely assesses lawyers on a single task, and the legal writing classroom should be no different. Second, adding these assignments would afford students more opportunities for writing. Scaffolding assignments—those where a student writes and receives a grade and feedback for a smaller part of a larger assignment—give students practice and opportunities to learn in a low-stakes setting. Lastly, and anecdotally, students want more assessments and more opportunities for practice. Going beyond "just the memo" would do much to get students practice ready and meet the learning needs and desires of Gen Z.

Diversify Feedback and Promote Communication. If professors use multiple, smaller assessments as noted above, they will necessarily provide opportunity for more feedback. Gen Z wants to improve, and they look to their professors as guides to help them become capable attorneys. Offering more feedback on a variety of assignments will accomplish much at minimal cost. Frequent feedback allows students to know the professor's goals and how students can improve. Varied forms of feedback, including written and oral feedback, as well as individual conferences, can help show Gen Z not only how they can improve, but that we as professors are invested in that process and their success.

Incorporate Technology. Having grown up with technology, Gen Z is comfortable using and expects to use technology in the classroom. Moreover, given their short attention spans, using technology in the classroom will likely keep them more engaged. PowerPoint is an obvious baseline. And covid teaching nightmares aside, Zoom is an effective and easy tool that we can incorporate with ease. Using Zoom for things like prerecorded lectures allows students to learn on their own and at their own pace. Using Zoom for assessments, such as a mock client interview, will give students experience working with an increasingly prevalent

communication medium they will need to master in the real world. Other tools like iClicker and Socrative can also break up monotony and foster engagement.

Foster Classroom Engagement. Enthusiasm goes far in the eyes of Gen Z. While a "boring" professor can still be a "good" professor, Gen Z believes that if they are making the investment in their legal education, those guiding them through the process must be engaged and committed to their learning and their success. Lecture, by itself, is often ineffective. Assuming the material is relevant and relatable, incorporating video, live polling, pictures, and even memes can be an effective way to change pace and create classroom engagement.

Acknowledge and Promote Diversity. Lastly, though significantly, professors should work to acknowledge and promote diversity in the classroom. Gen Z's world is diverse, and the legal writing classroom should reflect that. Where possible, professors should explore ways of advancing discussions of larger social, political, or racial issues beyond just the mechanics of legal writing. Professors can broach issues that may be at stake in topics students write about, even if those issues are not the main focus. For instance, students writing a memo on the shopkeeper's privilege defense to a claim of wrongful imprisonment can discuss how the law has developed around what courts say constitutes a "reasonable belief that a theft has occurred." While still learning to write, students can explore how race or socioeconomics informs this area of law. These might be sensitive subjects, but experience has shown students are eager to have the discussion.

Conclusion

In our evolving academic world, Gen Z's distinctive approach to life and the law presents both challenges and opportunities. Their unique attributes demand that we blend innovation and substance to rethink our "traditional" methods. By adapting thoughtfully, we can better teach and connect with Gen Z while maintaining the core tenants of legal writing.

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PURPLE ZONES AND TRAFFIC CONES: NAVIGATING BLUEBOOK & REDBOOK OVERLAPS

DEREK H. KIERNAN-JOHNSON[1]

The Bluebook is a legal citation manual.[2] The Redbook is a legal "style" manual, aimed at "the stuff that comes in between citations . . . sentences and their relationship to the authorities cited."[3]
That distinction seems clear. Yet citation and style manuals drift into one another's lanes and even drive squarely though them. These overlaps create "purple zones," where both a Bluebook rule and a Redbook rule apply. One can embrace a purple zone, by following a Bluebook rule that applies to text or a Redbook rule aimed at citations, or keep the manuals' domains distinct, by cordoning off the overlap with traffic cones.
These overlaps have concrete consequences. Students graded on "Bluebook compliance" might want to know which Bluebook rules governing text they should follow when citation rules conflict with Redbook rules. So too with competitors in writing competitions and those tasked with scoring their submissions. Lawyers faced with court rules recommending the Redbook or requiring them to "follow the Bluebook" face similar dilemmas.

These overlaps can be used as teaching opportunities. Clear-sounding rules in these manuals might seem to offer certainty to 1Ls

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[1] Derek Kiernan-Johnson is a Teaching Professor of Law at the University of Colorado Boulder. This essay is based on his presentation at the Western Regional Legal Writing Conference (Sept. 2024, Seattle University). It benefitted greatly from discussions at that conference and from a meeting of the Rocky Mountain Legal Writing Scholarship Group (RMLWSG).

[2] *The Bluebook: A Uniform System of Citation* (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). Other citations manuals include the *ALWD Guide to Legal Citation*, currently written by Carolyn V. Williams. While the color metaphor doesn't work as nicely with other reference texts, such as the ALWD Guide, a local style guide, or, to add a third layer of complexity, manuals governing layout, such as Butterick's *Typography for Lawyers*, the same principles, challenges, and opportunities discussed in this essay arise using those resources.

[3] Bryan A. Garner, *The Redbook: A Manual on Legal Style* xi (West Acad. Pub., 5th ed. 2023).

adjusting to law's complex, contingent texture, but instead echo the law's complexity and require some of the same difficult judgment calls. How to resolve conflicting rules can lead to rich discussions of informal hierarchies of authority, the importance of context and rhetorical situation in legal writing, and the role of prestige in perceived authority.

Overlap Examples[4]

Although subtitled "a uniform system of citation," the Bluebook has many rules that explicitly or implicitly apply to text.

The *explicit* rules are those that openly state they govern text, often in contrast to rules that apply to citations. They apply to things like:

- **How to indicate ordinals** in text (write "2nd" and "3rd," not "2d" and "3d," which is just for citations), 6.2(b)
- How to craft **short form** references in text, whether for case names, 10.2, regulations, 14.5(a), or statutes (this last one even includes a chart showing how short forms for text differ from those for citations), 12.10(a)
- Which words to **capitalize**, both in a document's title or heading, 8(a), and in a document's body text, 8(b)&(c)
- **How far to spell out numbers** before switching to numerals (do so up to "ninety-nine"), 6.2(a)
- Which **typeface** styles to set text in, whether in a court document, B2, or a law-review article, 2.2
- What to **abbreviate** in court documents, B8 & B10.1(vi)
- When to use **symbols**, such as ¶, $, or %, in text, 6.2(c)&(d).

Examples of *implicitly* purple Bluebook rules—those that don't openly state they apply to text, but strongly imply they do—include:

- Italicizing words "**for style**," 7
- An exception to the rule for spelling out numbers that applies when numbers "**begin a sentence**," 6.2(a), B6
- Capitalizing party designations but not generic references (thus "Defendant" for your client but "defendant" for a party in a precedent case), B8

[4] All citations in this essay are to the current editions of the Bluebook, *supra* note 2, and the Redbook, *supra* note 3.

- And, finally, an **entire chapter on quotations**, 5, B5.

The Redbook also drifts, with rules that explicitly apply to citations, such as:

- What **punctuation** to use in citations, whether colons, § 1.27(a), semicolons, § 1.18(c), or em dashes, §§ 1.55(c) & 6.3(a)
- When to use **numerals** in citations, §§ 5.3(c) & 5.10
- How to format **plurals** in citations, whether for word abbreviations, § 7.10(f), or symbols, § 6.3(a)
- When to use italicize **case names**, §§ 3.5 & 3.8
- And, finally, **an entire chapter on citations**, §§ 9.1–9.23.

Concrete Consequences

Yes, some rules in a citation manual apply to text, and some rules in a style manual apply to cites. This overlap has concrete consequences, in at least three different legal writing contexts: classrooms, writing competitions, and litigation.

First, teaching. Some law professors require students to format papers consistently with a particular reference manual, such as the Bluebook, and then assess student performance in part based on how well they do so.

A student in such a class—especially a student with academic or professional writing experience in a different field—might puzzle over the Bluebook rule 5.3, which governs how to form an ellipsis to indicate an omission in a quotation. According to the Bluebook, the student does so not by using the ellipsis character ("…"), which is built into modern font files and which word-processing programs create automatically, but instead by inserting a space (ideally a "hard-breaking" space), then a period/full-stop, then another hard space, then another period, again and again three or four times (". . . ").

This rule made sense in the age of the mechanical typewriter, when the number of mechanical keys was physically limited and there wasn't

room for a key with a true ellipsis. Today, it's anachronistic and confusing.[5]

A student might then wonder, and raise their hand to ask: (1) do I *really* have to do format quotations this way, just because (2) a *citation* manual says so?

The professor might want to have an answer ready. The answer could be yes, do embrace that purple zone, do honor the Bluebook rule for formatting ellipses in text. Or the professor could say no, putting "traffic cones" around that purple zone to mark a detour around it. Rather than address such issues piecemeal as they arise, the professor might want to decide how to handle all non-citation rules in the Bluebook (or ALWD guide), and, if assigned, what to do with the Redbook or other reference style, usage, or grammar text. Whichever approach the professor takes, they might want to be ready to explain the reason for their approach, and do so preemptively in their syllabus or assignment directions.

Similar concerns apply outside the classroom, in writing competitions. Making things worse, that context offers fewer opportunities for clarification or discussion. Competition writers aren't seated together, like students in a classroom, but scattered across the country or world. And it isn't just one professor evaluating the papers, who can make judgment calls as they arise and apply them consistently, but dozens of competition judges working asynchronously.

Thus, both competitors and judges alike might appreciate knowing whether "Bluebook compliance" as a scoring criteria means following things like that book's distinction between how to format ordinals in text ("2nd & 3rd") versus how to do so in citations ("2d & 3d").

The consequences of overlap extend to a third field: litigation. Court rules often state, without much elaboration, that motions, briefs, and other papers filed with that court must comply with the Bluebook.[6]

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[5] When a Bluebook-style ellipsis is combined with a period/full stop, it also invites ambiguity, as it could indicate any of four different kinds of omission. *See* Matthew Butterick, *Typography for Lawyers* 52–53 (2d ed. 2018), *available at* https://typographyforlawyers.com/ellipses.html.

[6] Rules mentioning the Bluebook appear in all kinds of courts, from federal appellate courts like the 11th Circuit (Rule 28–1(k)), federal district courts, such as the District of Montana, (L.R. 1.5(d)), state supreme courts, such as Delaware (R. 14(g)), and in rules applicable to all state appellate courts, such as in Iowa (R. App. P. 6.904(2)(a)). They also appear outside court rules, such as in individual trial judges' submission guidelines or in court style guides, such as that for the Virgin Islands, which mentioned both the Bluebook and Redbook (V.I.S. Ct. I.O.P. Appx).

What does that mean? Does such a court want filings to comply with the *whole* Bluebook, not just the svelte, practice-focused Bluepages? Does such a court want just the *citations* in filings to be formatted in accord with the Bluebook, or headings, quotes, and running text, too? Does the court even know what its requirement means, or care how litigants interpret it? Is it enough for litigants to just make cites consistent and clean? What are the consequences for non-compliance?

Different courts might have different preferences. Some courts might want pleadings to conform to all Bluebook rules, whether they govern citation form or other things. Some instead might just want citations to be Bluebook-compliant (or just Bluepages compliant). Some courts' preferences might be strong, while others might be weak. To help litigants understand what they want and meet their needs, courts whose rules or guidelines currently just state, "comply with the Bluebook" may wish to clarify.

Teaching Opportunities

Aside from these practical implications, these purple zone overlaps can be used as occasions to teach students about the law.

For example, a professor might use the existence of a conflicting rule between the Bluebook and Redbook as an opportunity for the class to explore how to reconcile competing rules. One student might suggest a purposive approach: let the manual aimed at citations govern citations and the manual aimed at text govern text. A different student might impose a hierarchy on the sources: because the Bluebook is a required text in our class, while the Redbook is just on reserve, then for all conflicts the Bluebook should trump. A third student might also tip things in the Bluebook's favor, but based on perceived authority: everyone had heard of the Bluebook, and our journals require it, so for that reason it should control.[7]

Class discussion might move beyond absolute choice-of-law rules to an "it depends" approach, basing each decision on things like document context or rhetorical situation. For example, if, in a particular

[7] Such discussion could be informed by Amy J. Griffin's *Problems with Authority*, 97 St. John's L. Rev. 115 (2023).

place in a document, following a Bluebook rule for a citation but a Redbook rule for text might be noticeable, thus distracting the reader or even them wonder if the distinction was accidental, then pick one approach for both the sentence and the cite. Or, in a rhetorical situation where the audience is a well known Bluebook stickler, such as 2L student editors evaluating 1L write-on applications, aim for absolute Bluebook compliance.

Purple zones can also be used to help students develop comfort with legal uncertainty and confidence exercising judgment. The transition to law school can be unsettling; new law students may feel vertigo when faced with the complexity and contingency of American law. They might cling to the few absolutes they can find, such as clear citation or usage rules. When writing, they might spend too much time on matters of mechanical polish, rather than the more demanding work of rereading, rethinking, and rewriting. Revealing that even these manuals contain ambiguity, fuzzy standards, conflicts, and gaps may help students become more comfortable with this reality and refocus their energies.

These manuals' goals and crossovers also present an opportunity to critically examine the implications of standardization as a goal, as well as which kinds of people and organizations in legal society feel comfortable proclaiming such standards.[8]

Another tack would be to compare what both manuals claim to cover (citations, sentences) with how they're used on the ground, as a way of understanding why they might usefully stray from their stated purposes. For example, "cite-checking" a document involves more than just evaluating how its citations are formatted.[9] A cite-checker is also confirming other things, including substance and formatting. Checking a citation requires ensuring both that quotes are accurate and correctly formatted. When doing so, it might be natural for the cite-checker to reach for the same blue-colored manual they're using for other aspects of the cite-checking process.

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[8] Texts for such discussions might include Steven K. Homer's *Hierarchies of Elitism and Gender: The Bluebook and the ALWD Guide,* 41 Pace L. Rev. 1 (2020), Alexa Z. Chew's *The Fraternity of Legal Style*, 20 Legal Commc'n & Rhetoric 39 (2023), Richard A. Posner's *The Bluebook Blues*, 120 Yale L.J. 850 (2011), and Paul Gowder's *An Old-Fashioned Bluebook Burning*, 1 Nw. L.J. des Refusés 1 (2024).

[9] This idea, like many others, came from David J.S. Ziff, specifically, his article *The Worst System of Citation Except for All the Others*, 66 J. Legal Educ. 668, 671-74 (2017).

Similarly, how the Redbook is actually used might shed light on its scope. Unlike the Bluebook, which is likely to be kept within arm's reach while cite-checking, the Redbook is more likely to be pulled off the shelf occasionally. A writer might only open it to refresh their recollection or to resolve a particular grammatical or usage issue. When doing so, they might appreciate knowing how that principle might also apply (or not apply) in the context of citations.

Conclusion

These "purple zones" thus present questions: In the case of overlap, which rule should control, and why? Should that preference be absolute, as to all overlaps, or should it vary, either by overlap or situation? If one wants to direct traffic away from an overlaps, marking the detour with traffic cones, how should that choice be communicated, whether in a classroom, a competition, or a court rule? And how might these overlaps facilitate other kinds of discussions? That opportunity to discuss the complexities is alone worth embracing.

PROCEEDINGS

VOLUME 5 ISSUE 1

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.").

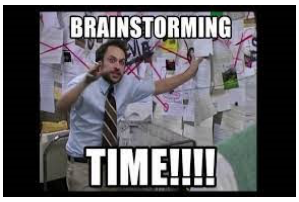
[15] We teach students for only one semester in Legal Writing and then rotate to a new group in the spring.

[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

[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.

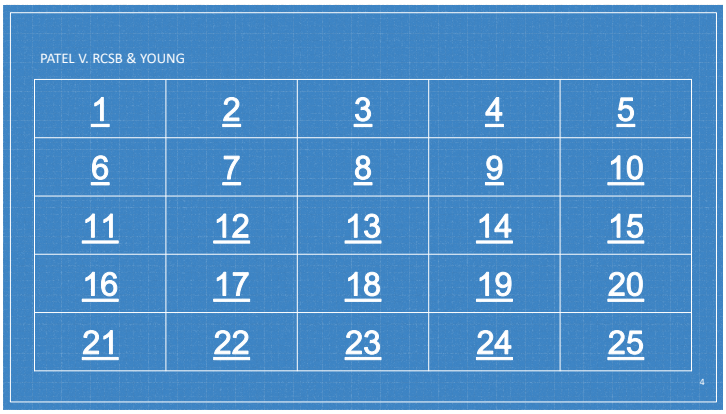
Of course, the *how* and *where* of drafting responses to potential counterarguments came later, but this exercise effectively provided common, relevant questions the students could keep coming back to while they were researching, outlining, writing, and refining their arguments.

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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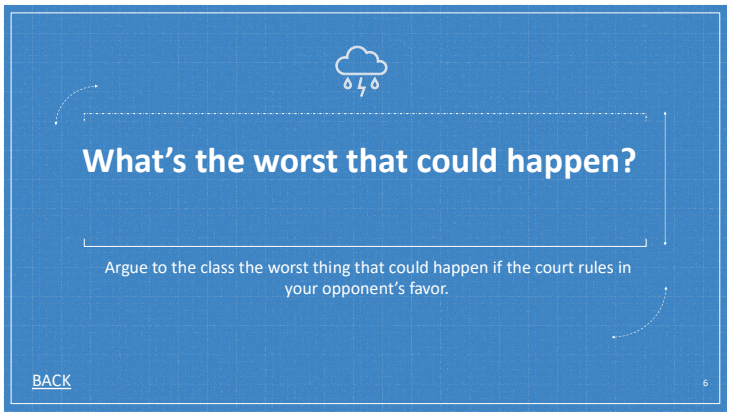
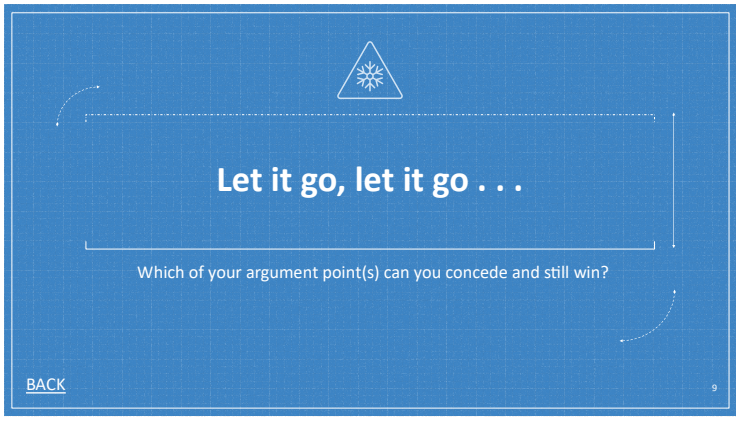

What's the worst that could happen?
Argue to the class the worst thing that could happen if the court rules in your opponent's favor.
BACK
6


Let it go, let it go . . .
Which of your argument point(s) can you concede and still win?
BACK
9

PROCEEDINGS

VOLUME 5 ISSUE 1

TEACHING AROUND GENERATIVE AI PLAGIARISM RISKS

NANCY MARCUS[1]

Much has been written and said about generative AI's potential uses and misuses by lawyers and law students in the past year. This essay does not rehash the many ongoing discourses about whether, how, and to what extent, generative AI (GenAI) can be used for and taught in legal writing courses. Rather, this essay is written under the assumption that, at least to some extent early on in the law school experience, some professors don't want 1L legal writing students using GenAI to draft legal memoranda and briefs for them. As the American Bar Association's Formal Ethics Opinion 512 warns, it is important to develop human lawyerly intelligence first before engaging in and being able to assess artificial intelligence."[2] Despite the need for law students to develop that requisite lawyer intelligence required to meaningfully assess the value of any given AI-generated legal analysis, however, Lexis AI+ is now widely available to law students from their first month in school. That widespread access to GenAI may have its benefits, but not without also posing significant dangers of new AI-aided opportunities for plagiarism.

This essay begins by detailing the difficulty of catching elusive AI-generated plagiarism, as recently documented and discussed by a number of commentators. It then offers some potential solutions—not in the form of how to catch AI-generated plagiarism (a problem currently without a

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[1] Nancy Marcus, LL.M., S.J.D., is an Associate Professor of Law at California Western School of Law. She is grateful to Lindsay Adams for her help compiling studies on the inefficacy plagiarism-screening programs purporting to identify AI-generated writing. This essay was presented at the Western States Legal Writing Conference at Seattle University in September 2024.

[2] ABA Comm. on Pro. Resp., Formal Op. 512 (July 29, 2024) (providing guidance on ethical generative AI use).

good solution)—but rather, how to teach around it by modifying curriculum and scoring approaches.

The AI Plagiarism Problem

Assuming circumstances in which a law professor does not want their law students to use GenAI to create a draft a legal memorandum or brief, what can be done about the potential for AI-generated plagiarism in legal writing assignments?

The answer is tricky because AI-generated plagiarism is quite difficult, if not impossible, to catch. Recent studies have documented how TurnItIn and similar tools have not yet produced a sufficiently failproof way to catch AI plagiarism.

For example, the Medium article "*AI Detector 'Outsmarted' by AI Humanizer Software*" describes how AI-generated "humanizer" software, designed to circumvent AI detection, can mimic the human voice, making it nearly impossible to catch AI-generated plagiarism.[3] Documenting problems with both false positives and negatives by detection software, the article quotes what is generally viewed as the primary AI detection tool, TurnItIn, as itself conceding that its AI-detection tools "'may not be entirely dependable.'"[4]

The problem of TurnItIn's record of false positives in screening for AI-generated writing has some particularly troubling ramifications in various contexts. For example, one article documents TurnItIn's tendency to flag Grammarly-assisted writing as AI-generated potential plagiarism,[5] which could disincentivize well-meaning students from double-checking their grammar before turning in a memo or brief. Even more disturbing are studies demonstrating that TurnItIn is more likely to issue "false positives" to the writing of non-native English speakers, incorrectly identifying their writing as AI-generated.[6] Those findings are deeply

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[3] Joey Geller, *Is Turnitin AI Detector Accurate? Testing How Reliable Is Turnitin*, Medium (Apr. 24, 2024), available at https://medium.com/@JoeyGeller/is-turnitin-ai-detector-accurate-testing-how-reliable-is-turnitin-cb4f6a1d93f4.

[4] *Id*. (citations omitted).

[5] Jason Kieffer, *Grammarly Flagged as AI Plagiarism Poses Risks to Students*, The Pine Log (Mar. 28, 2024), https://www.thepinelog.com/news/article_c1329dd0-ed24-11ee-b37a-73d9baa3010b.html.

[6] *See* Andrew Meyers, *AI-Detectors Biased Against Non-Native English Writers* (May 15, 2023), Stanford Univ. Inst for Human-Centered Artificial Intelligence, https://hai.stanford.edu/news/ai-detectors-biased-against-non-native-english-writers.

disconcerting because they demonstrate the discriminatory effects that an attempt to monitor AI-generated cheating could entail.

Vanderbilt University issued a public statement commenting on these and other problems, and explaining why it no longer uses TurnItIn or similar AI-detection tools to try to identify AI-generated plagiarism.[7] Other problems noted by Vanderbilt in its statement include accuracy issues, the rapidly changing and evolving nature of the elusive GenAI plagiarism problem, and the inability to trace TurnItIn's footsteps, since TurnItIn doesn't disclose how it flags AI-generated writing.[8]

A Teaching Solution

Without reliable means of catching AI-generated plagiarism, the solution to the problem of such plagiarism's elusiveness, and even inevitability, is not to waste efforts fruitlessly attempting to catch AI-generated plagiarism, but rather, to teach around it. The remainder of this essay describes some adjustments that can be made to writing assignments and other formative assessments, as well as to scoring rubrics and grading weight allocations (including those I have made in my own legal writing courses), in response to GenAI developments.

In its statement titled "*Guidance on AI Detection and Why We're Disabling TurnItIn's AI Detector*," Vanderbilt did not stop at detailing the problem with TurnItIn's ineffectiveness in catching AI-generated plagiarism; it also offered some suggestions:

- "reformatting assignments to mitigate any concerns about AI usage";
- using in-class writing assignments;
- "requiring students to write about specific topics discussed in class"; and
- "focusing on current issues that AI tools are not trained on."

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[7] Michael Coley, *Guidance on AI Detection and Why We're Disabling Turnitin's AI Detector*, Vanderbilt Univ. (Aug. 16, 2023), https://www.vanderbilt.edu/brightspace/2023/08/16/guidance-on-ai-detection-and-why-were-disabling-turnitins-ai-detector/.
[8] *Id.*

Vanderbilt also refers to the Center for Teaching Excellence at the University of Kansas for a resource called "Adapting your course to artificial intelligence."[9]

The University of Kansas's Center for Teaching Excellence, in turn, sets forth even more specific guidance:

- Create assignments in which students start with ChatGPT and then have discussions about strengths and weaknesses.
- Have students compare the output from AI writing platforms, critique that output, and then create strategies for building on it and improving it.
- Use multistep, scaffolded assignments with feedback and revision opportunities.
- Emphasize assignment dimensions that are (currently) difficult for AI: synthesis, student voice and opinions.
- Use project-based learning.[10]

Approaches in Teaching Writing

Heeding these suggestions and warnings, I have adjusted my legal writing teaching approach, both as to types of assignments I use and how I score them. After performing a number of my own assessments of GenAI in the past year (focusing on Lexis+ AI, as the equivalent Westlaw legal drafting product was not yet available), I identified which types of formative assessments, and portions thereof, students were most likely to successfully use GenAI to draft, and which AI was less likely to pass for as student writing. With that information, I made assessment-related adjustments to (1) writing assignments, (2) other formative assessments and assignments, and (3) scoring, rubrics, and grading.

First, as to writing assignments, I now assign more in-class and even group writing projects, working under the assumption that AI-generated plagiarism is more likely to occur when neither the professor

[9] Vanderbilt Statement, *supra* note 7.
[10] *Adapting Your Course to Artificial Intelligence*, Univ. Kan. Ctr. for Teaching Excellence, https://cte.ku.edu/adapting-classes-artificial-intelligence-era (bullets added).

nor classmates are in the room (as other students are Honor Code-bound to report any observed cheating). For out-of-class writing assignments—including memos and briefs in my legal writing class and student notes in my upper-level elective—the assignments now take a scaffolding approach. Instead of just having students turn in a good draft and then a final draft, I now also assign more graded research and outline projects. Through those assignments, I require students to turn in outlines of every written memorandum, to be able to walk me through the outlines, and to discuss the pieces of a writing assignment in detail in class. For open-universe memos and briefs, in addition to assigning more outlining and class-time and one-on-one presentation of their problem analyses, I include more graded research assignments and oral presentation of research leading up to the memo or brief.

Each of these additional graded scaffolding steps can help ensure that what the student is producing in the end is not a written product that was generated artificially, but rather, is a product resulting from several observable steps of organization, analysis, and research, explained by the student in various steps leading up to the final assignment.

Second, I have added and made adjustments to the non-writing assignments in my legal writing curriculum. I have increased the number of formative, in-class assessments, including more thorough in-class discussions of synthesis and analogical reasoning problems, more polling games and quizzes, and extra in-class research and citation exercises. In part to make students less tempted to cheat, I also assign a variation of a peer review exercise in which students "peer review" GenAI itself. Students receive a detailed grading rubric mirroring the one I use to score them, and they score the AI+ produced version of a previously completed memo they are intimately familiar with. So far, the GenAI-produced version has yet to receive a grade above a C.

Third, I have adjusted both the rubric and scoring of pieces of individual assignments and to the overall allocation of grading percentages for each assignment as a whole. I now accord more weight than I previously did to those assignments and parts of assignments that are less likely to be created by GenAI.

For example, as to overall allocations of grade percentages by type of assignments, I now accord less weight than I previously did to out-of-class writing exercises and more weight than before to the additional assessment exercises and assignments explained above, including outlining and research written assignments and oral presentations.

I also adjusted my rubrics for individual graded writing assignments by according less weight than before to those parts of an assignment that are more likely to be AI-generated and more weight to those that GenAI is not good at (yet). After running a number of memo and brief assignments through the Lexis AI+ platform, for example, I have concluded that, while AI+ is effective at turning a pretty phrase and describing rules, it is comparatively not as good at the following:

- Analogical reasoning through explicit case comparisons
- Following formatting instructions required by a professor (for memos) or court rules (for briefs)
- Deep issue statements
- Identifying the most relevant facts, whether in a problem for analogical reasoning and other legal analysis
- Citing the most binding or pertinent authorities and
- Providing the most accurate Bluebook cite (including a complete lack of pinpoint citations, or pincites).

Consequently, as illustrated by the chart at the end of this essay, in this AI world, I now allocate fewer points in my grading rubric to writing fluency and rule recitation, and more to the other aspects of memo or brief drafting that GenAI is less likely to successfully mimic as student writing. Furthermore, with pinpoint citations being essential for tracing a case explanation to its source, and the part of the citation that GenAI does not currently provide in its drafts, I award additional points on a rubric just for pinpoints.

Conclusion

Ultimately, my adopted methods of teaching around the GenAI plagiarism problem may or may not work for others. I have no data to prove its effectiveness insofar as accurately and appropriately awarding the work produced by students, as opposed to by GenAI. What I do know,

though, is that the very process of taking a step back to re-evaluate my legal writing teaching approach in light of evolving AI technology, and creating additional formative assessments that capture the more dynamic, interactive, in-class and face-to-face aspects of the pedagogical process has made me a more flexible, rigorous, and overall better teacher.

I may not catch all AI-generated plagiarism in my writing assignments. And the world of AI-threat-inspired, creative innovations is a constantly evolving learning and growing process. Teaching in the time of GenAI is not for the faint of heart. But that's one thing we will always have that AI does not: the hearts of committed and passionate teachers.

EXAMPLE PRE-and POST+AI+ GRADING RUBRICS FOR (First Graded, Closed Universe) MEMO ASSIGNMENTS
(w/detailed rubric descriptions deleted for sake of space)

CALIFORNIA WESTERN SCHOOL OF LAW | San Diego

Pre-AI+

Criteria	Excellent	Good	Needs Work	Total Possible Points
Organization	2	1.5	.5	2
Statement of Facts	2	1.5	.5	2
Discussion Intro	2	1.5	.5	2
IREAC Issue & Rules Sections	6	4.5	2	6
Explanation/Example Sections	6	4.5	2	6
Analysis/Application Sections	6	4.5	2	6
IREAC & Final Conclusions	2	1.5	.5	2
Writing (Grammar, Fluency, Clarity, Proofing)	8	6	2	8
Citation	6	4.5	2	6

Post-AI+

Criteria	Excellent	Good	Needs Work	Total Possible Points
Organization	3	2	1	3
Statement of Facts	2	1.5	.5	2
Discussion Intro	3	2	1	3
IREAC Issue & Rules Sections	3	2	1	2
Explanation/Example Sections	8	6	2	8
Analysis/Application Sections	8	6	2	8
IREAC & Final Conclusions	2	1.5	.5	2
Writing (Grammar, Fluency, Clarity, Proofing)	4	3	1.5	4
Pincites	4	3	1.5	4
Other Citation	3	2	1	3

PROCEEDINGS

VOLUME 5 ISSUE 1

FROM PERIPHERAL TO PIVOTAL: THE ROLE OF LEGAL WRITING IN THE MODERN LAW SCHOOL MISSION

KARIN MIKA[1]

Legal Writing, once considered peripheral to a quality legal education, has evolved into one of the most important components of the law school curricula and legal education. However, the journey from the margins to the forefront of legal education has not been straightforward. Prior to the 1980s, most law schools did not offer organized Legal Writing programs, dismissing the subject as little more than remedial grammar instruction.[2] This view diminished the role of Legal Writing and anyone who taught Legal Writing.

Legal Writing teachers, who were mostly called "instructors" (rather than professors) were often relegated to low-paying, part-time positions without job security or status. [3] Because the field was dominated by females who were doing part-time, low paid labor, Legal Writing began to be known as the "pink ghetto"[4] and not taken seriously by the legal academy.

Law schools often "capped" the contracts of Legal Writing teachers so that those teaching Legal Writing had to find other employment after two or three years.[5] This did not enable the development of any level of professionalism because few programs could develop consistency.

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[1] Karin Mika is a Senior Legal Writing Professor at Cleveland State University College of Law. She made this presentation at the Western States Legal Writing Conference at Seattle University School of Law in September 2024.

[2] *See generally* William A. Reppy et al., *Should Permanent Faculty Teach First-Year Legal Writing?: A Debate*, 32 J. of Legal Educ. 413 (1982).

[3] Mary S. Lawrence & Karin Mika, *Into the Spotlight: Ralph Brill*, 27 Legal Writing 157, 180 (2023).

[4] *Id.*

[5] Mary S. Lawrence, *An Interview with Marjorie Rombauer*, 9 Legal Writing 19, 29-30 (2003).

Moreover, because of the negligible status of Legal Writing, legal publishers found no need to publish Legal Writing textbooks. The concept of a Legal Writing course was considered transient and thus, not a profitable area in which to publish.[6]

Pressure for Change: The 1970s and 1980s

By the 1970s and 1980s, however, both students and practicing attorneys began voicing their dissatisfaction with law schools for failing to provide sufficient skills' training. Students did not like the inconsistent experience of having adjunct professors, many who were more available than others, and law firms complained that new attorneys were entering the profession without any practical skills.[7] There was a demand that law schools respond to this problem.[8] In 1979, the ABA commissioned the Cramton Report, which analyzed the curriculum of law schools and how the legal academy should respond to the growing demand for skills' teaching.[9] It was the first of several reports that started a shift in the way that legal education handled teaching skills.

Over the course of the following two decades, the ABA enacted new accreditation standards that pressured law schools to incorporate skills training into their curricula.[10] Legal Writing programs began to emerge and became a necessary part of first-year education. These programs were designed to provide students with the fundamental tools they would need to succeed in the legal profession. Nonetheless, skills teachers, including Legal Writing "instructors" and clinical faculty, still faced significant challenges in gaining recognition and respect within the broader law school community.[11] Most doctrinal faculty did not consider skills training to be integral to the law school's intellectual mission.

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[6] Lawrence & Mika, *supra* note 3, at 170.
[7] *Id.* at 159.
[8] *Id.* at 186-87.
[9] The American Bar Association's Section of Legal Education and Admission to the Bar commissioned the Cramton Report, also known as the Report and Recommendations of the Task Force on Lawyer Competency, in 1979. *See generally* Gene R. Shreve, *Bringing the Educational Reforms of the "Cramton Report" into the Case Method Classroom – Two Models*, 1981 Wash. U. L. Q. 793 (1981).
[10] *See* Martin H. Belsky, *Law Schools as Legal Education Centers*, 34 U. Toledo L. Rev. 1, 7-9 (2002).
[11] Lawrence & Mika, *supra* note 3, at 187.

The Fight for Status and Job Security: The 1990s

In the 1990s, the ABA increased its pressure on law schools to develop programs that integrated practical skills with traditional legal education. The new ABA standards encouraged law schools to place greater emphasis on experiential learning, which included legal writing, clinical work, and externships. Pressure from the ABA was particularly significant for Legal Writing programs because law schools began to recognize the importance of teaching students how to apply legal theory to practice.[12] Because of pressure on various fronts, first-year Legal Writing became a mandatory course.[13] As a consequence, the number of full-time Legal Writing teachers greatly increased as did the establishment of departments that developed cohesive programs.

Although some schools responded to these developments by increasing their full-time Legal Writing hires and granting Legal Writing faculty more status and stability, the shift was not uniform. Many schools continued to treat Legal Writing teachers as second-class citizens within the faculty hierarchy, offering limited job security, minimal pay, and little opportunity for advancement.[14] Despite these challenges, Legal Writing professionals pushed forward, advocating for greater recognition of their role in training competent, practice-ready lawyers.[15]

Legal Writing teachers, recognizing the importance of their work, began organizing themselves into professional organizations such as the Legal Writing Institute (LWI)[16] and the Association of Legal Writing Directors (ALWD).[17] These organizations provided a forum for Legal Writing teachers to share resources, develop best practices, and push for greater professional recognition. Over time, these efforts began to bear fruit, as more law schools acknowledged the essential role that legal writing played in preparing students for legal practice.

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[12] *Id.*

[13] *Id.* at 186. The requirement that Legal Writing be taught in the first year was adopted by the ABA in 2001.

[14] Melissa H. Weresh, *The History of American Bar Association Standard 405(d): One Step Forward, Two Steps Back*, 24 Legal Writing 125, 128-34 (2020).

[15] *Id.*

[16] *See* Mary S. Lawrence, *An Interview with Marjorie Rombauer*, 9 Legal Writing 19 (2003); *see also* Mary S. Lawrence, *The Legal Writing Institute, The Beginning: Extraordinary Vision, Extraordinary Accomplishment*, 11 Legal Writing 213 (2005).

[17] Lawrence & Mika, *supra* note 3, at 181-82.

The Modern Era: Legal Writing as a Core Component of Legal Education

Today, Legal Writing programs have become a central part of legal education, often regarded as the most important course that students take in law school.[18] Far from being a remedial course in teaching grammar and sentence structure, modern Legal Writing programs teach students how to think, write, and argue like lawyers. These courses provide a solid foundation in legal analysis, research, and advocacy, skills that are indispensable for any aspiring attorney.[19]

In many law schools, Legal Writing teachers are now full-time, tenure-track faculty members (or have long term contracts) who have a voice in the governance of the institution.[20] Although there are still disparities in status and compensation between Legal Writing faculty and traditional doctrinal faculty at some schools, the progress made over the past few decades is undeniable. Legal Writing teachers are no longer relegated to the margins; they are at the forefront of developing innovative curricula that respond to the evolving needs of the legal profession.[21] Legal Writing teachers, who are generally now known as professors, have also become integral to the life of the academy, engaging in scholarship, becoming deans of numerous schools, and becoming contributing members of the international legal community.

One of the key areas where Legal Writing programs have shown leadership is in the integration of technology and online learning into legal education. As law schools increasingly offer hybrid or fully online programs, Legal Writing professionals, who have always been at the

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[18] *See generally* Jessica L. Clark, *Grades Matter; Legal Writing Grades Matter Most*, 32 Miss Coll. L. Rev. 14 (2014).

[19] Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 562-68 (1997).

[20] In the most recent Annual Legal Writing Survey, 52 of the 182 responding schools (29%) reported that they employ legal research and writing faculty as tenured or tenure-track with traditional tenure. Faculty in this category often teach at least one non-LRW course. AALS*, Becoming a law teacher, Legal Writing and Research Faculty*, https://teach.aals.org/lrw/#:~:text=In%20the%20most%20recent%20Annual,least%20one%20non%2DLRW%20course.

[21] Mark Osbeck, *What is "Good Legal Writing" and Why Does it Matter?*, 4 Drexel L. Rev. 417, 417-20 (2012).

forefront of developing active learning exercises,[22] are at the forefront of expanding these techniques into the digital era. This expertise is critical as legal education adapts to new methods of delivery, ensuring that students continue to receive rigorous training in the core competencies of legal practice.[23]

Innovation and the Future of Legal Writing

Legal Writing programs have not only expanded in scope but have always been at the forefront of innovative and improved teaching methodology.[24] It was professors in Legal Writing who first incorporated tech tools, such as the early word processors that enabled the computer composition of assignments, grading assignments electronically, and even encouraging the integration of Lexis and Westlaw into the Legal Writing curriculum (often over the objections of doctrinal colleagues).[25] Today, they continue to innovate by incorporating new technologies and adapting assessments to meet the needs of a diverse student body.[26] This pioneering spirit has positioned Legal Writing faculty as key players in the development of online legal education.

As the legal profession increasingly relies on technology and artificial intelligence, Legal Writing courses are evolving to ensure students are prepared for this shifting landscape.[27] Legal Writing programs are pioneering the use of online simulations, virtual feedback sessions, and digital peer-review processes, enabling students to refine their writing and research skills in dynamic, tech-enhanced environments.[28] By embracing these innovations, Legal Writing programs

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[22] Eric Townsend, *Elon Law Administrator honored with Legal Writing Award*, Elon University: Today at Elon, Sept. 27, 2023, https://www.elon.edu/u/news/2023/09/27/elon-law-administrator-honored-with-legal-writing-award/.
[23] *See generally* Carolyn V. Williams, *Bracing for Impact: Revising Legal Writing Assessments Ahead of the Collision of Generative AI and the NextGen Bar Exam*, 28 Legal Writing 1 (2024).
[24] *See generally* Ruth Ann Robbins, Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents, 2 J. Ass'n Legal Writing Dir. 108 (2004).
[25] Lawrence & Mika, *supra* note 3, 172-73.
[26] David I. C. Thomson, *What We Do: The Life and Work of The Legal Writing Professor*, 50(2) J. Law & Educ. 170, 178-81(2021).
[27] *See generally* Tracy G. Crump, *Providing Virtual Legal Writing Support to Law Students Beyond the Classroom*, 34(1) The Second Draft 1 (2021).
[28] *See generally* Joseph Regalia, *From Briefs to Bytes: How Generative AI is Transforming Legal Writing and Practice*, 59 Tulsa L. Rev. 193 (2024).

not only remain relevant but are also leading the way in the broader transformation of legal education. [29]

[29] Kristin B. Gerdy et al., *Expanding Our Classroom Walls: Enhancing Teaching and Learning Through Technology*, 11 Legal Writing 263, 273 (2005).