PROCEEDINGS

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NEW IDEAS FOR WHAT'S NEXT

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This is the second issue of Proceedings with essays from the 2024 Western States Legal Writing Conference, hosted by Seattle University School of Law in September 2024. The conference theme, "Coming Back to Where It Started," recognized that school's role as the host of many of the first legal writing conferences and the role of its professors in founding the Legal Writing Institute.

The essays here mostly address the impact of AI and the NextGen bar exam on the teaching of legal writing and research. The final essay looks back to pivotal historical moments to teach social justice today.

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ESSAYS

WILL THE NEXTGEN BAR TRULY TEST LEGAL RESEARCH? A CRITICAL EVALUATION OF SAMPLE QUESTIONS

ASHLEY ARRINGTON[1]

The upcoming transition from the Uniform Bar Exam to the NextGen Bar Exam will be significant, in large part due to the new, heavy emphasis on practical lawyering skills. Indeed, the percentage weight allotted to the not-yet-before-seen "foundational skills" portion of the NextGen exam is anticipated to be 50-60% of the exam.[2] Of the foundational skills to be tested, legal research stands to be the most heavily weighted skills area on the exam.[3] This weight is in part due to the NCBE's plans to test legal research as both a skills area and a knowledge area where skills are applied.[4]

While the National Committee of Bar Examiners places considerable importance on the distinction between knowledge and skills, a critical evaluation of the released sample questions for the NextGen Bar Exam not only fails to evince the presence of both knowledge and skills testing, but more importantly, an overall failure to effectively test legal research.[5]

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[1] Ashley Arrington is the Head of Instruction and an Associate Librarian of Law at Texas Tech University School of Law. This essay is drawn from her presentation at the Western States Legal Writing Conference held at Seattle University School of Law in September 2024.

[2] *Final Report of the Testing Task Force*, Nat'l Conf. of Bar Exam'rs, 18 (Apr. 2021), https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf.

[3] *Id.* at 16.

[4] *Id.* at 16-17.

[5] This evaluation looks closely at the multiple-choice and integrated question sets that have been released. While the NCBE plans to also incorporate short answer questions and modified

Multiple Choice Questions

Let's look first at the four sample multiple-choice questions that attempt to test legal research. In three such questions, the call begins with, "Which of the following questions are most important for you to research . . . ?"[6] Two are then followed by "before advising the client?" and one "to determine the likelihood of success on a [specified motion]?"[7] The fourth question is similarly structured and asks, "Which of the following search term(s) would be the most likely to produce resources that will answer the client's questions?"[8] Each question is preceded by a hypothetical fact pattern that implicates various doctrinal topics and asks the examinee to identify which of those concepts are relevant. For example, in a contracts-focused question, the answer choices include accord and satisfaction, consideration, novation, and offer and acceptance.[9]

The words "research" and "search terms" are included in the questions above, yet use of the terms does not alone make those questions true research questions. In each of the multiple-choice questions that arguably attempts to test legal research—whether by way of knowledge or skills—the examinee is tasked with identifying the relevant doctrinal topics. Thus, the examinee in actuality is tested only on their knowledge of doctrinal concepts.

Integrated Question Sets

The sample integrated question sets are only slightly better. Of the first released integrated question set, three of the six questions are intended to test legal research. One asks the examinee to identify the facts providing the most support for a specified cause of action; another asks the examinee to list two claims they could bring on behalf of their

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performance tasks, at present, it has provided little information regarding what those question types will look like.

[6] *Sample NextGen Bar Exam Multiple-Choice Questions*, Nat'l Conf. of Bar Exam'rs, https://nextgenbarexam.ncbex.org/multiple-choice-questions/.

[7] *Id.*

[8] *Id.*

[9] *Id.*

client.[10] The former begins its hypothetical with "After discussing your research with the client and assisting the client in setting goals . . ."; the latter example begins with "Your legal research since the client interview supports a [specified finding]."[11] Again, the word "research" is used, yet in both instances the examinee is informed that the research process has concluded. The examinee is not asked to demonstrate research knowledge or skills but instead to identify relevant doctrinal claims and then predict the likelihood of success for those claims.

The remaining of the initial set of integrated questions, after noting the omission of a definition within a statutory code section, asks the examinee to "advise the law clerk on two specific legal sources that are the most likely to provide a controlling definition" of a specified legal term.[12] Regrettably, this is the first and only instance in which examinees are asked to demonstrate some knowledge of legal sources.

The more recently released integrated question set, after providing various relevant excerpts, asks examinees to find five mistakes in a complaint, including mistakes of fact, substantive law, or violations of procedural rules.[13] It does not ask the examinee to identify any mistakes in the research process or sources used during such process. It also fails to ask how any of the identified mistakes impact the legal research process.

Performance Tasks

The revised, forthcoming performance task in the NextGen bar exam is intended to assess an examinee's research and written analytical skills.[14] Further, research-focused performance tasks "will consist of a series of multiple-choice and short answer questions followed by one extended-response question."[15] At present, we know little about what these embedded questions will look like; the single sample performance

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[10] *Sample NextGen Bar Exam Integrated Question Sets*, Nat'l Conf. of Bar Exam'rs, https://nextgenbarexam.ncbex.org/integrated-question-sets/.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Sample NextGen Bar Exam Performance Task*, Nat'l Conf. of Bar Exam'rs, https://nextgenbarexam.ncbex.org/performance-task/.

[15] *Id.*

task provided only a sample answer outline.[16] We do know that, as with past Multistate Performance Tasks, the examinee will be provided a file and library and not asked to conduct their own research. And, while examinees will be "expected to recognize when facts are inconsistent or missing or to identify sources of additional facts," there's no mention of additional research-related questions, such as recognition of how those facts might impact the research process.[17] Further, the sample answer outline makes no mention of legal research or sources.

The Failure to Test Research Knowledge and Skills

In looking at the released sample question types together, it is evident that such questions fail to make any real distinction between research knowledge and research skills. More problematically, the questions fail to truly and effectively test legal research by way of either knowledge or skills. In a comprehensive review of the available sample questions, just one question tests an examinee's knowledge of basic legal sources, and none truly evaluates an examinee's ability to conduct research—or illustrate competency of such—on their own.[18]

So, where do we go from here?[19] The solution, I believe, lies with a focus on legal research analysis. If we cannot ask examinees to demonstrate competency in conducting research themselves, we should ask them to demonstrate an understanding of the types of analysis involved throughout the legal research process. Without an understanding of the relevant analytical considerations, a newly licensed lawyer cannot be effective or efficient with legal research in practice. Below, I suggest some ways the released sample questions might be improved upon.

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[16] At present, there are no embedded sample multiple-choice or short answer questions to be reviewed.

[17] *Sample NextGen Bar Exam Performance Task*, *supra* note 14.

[18] While an articulation of the research process could easily be incorporated as a knowledge question, there are currently no questions related to an examinee's knowledge of such process.[18]

[19] The NCBE was highly encouraged to incorporate a research database in the revised version of the exam, but ultimately decided not to do so. While we could certainly ask whether legal research skills can truly be tested without any research database, that is a question for another time. For now, we must assume that, as in line with current plans, the exam will omit any real or faux research database, and instead ask what can be done to improve the released sample questions.

Solution: Multiple Choice Questions

Looking back to the sample multiple choice questions, the most frequently used language, included in three of the four "research" questions is, "Which of the following legal topics are most important for you to research . . . ?" That prompt is followed by (i) "before advising the client?" or (ii) "to determine the likelihood of success on a [specified motion]?". Here, the use of "legal topics" should be replaced with "doctrinal concepts" and thus demonstrate a failure to test legal research. A simple modification of (i) or (ii), however, could resolve this issue and actually focus on research knowledge. Consider these modifications:

Which of the following legal topics . . .

- will require you to synthesize statutory law with relevant case law interpretations?
- would most benefit from in-depth research into both legislative history and judicial interpretation?
- requires an advanced research strategy involving both primary and secondary sources, such as case law, statutes, and scholarly discussion?
- would require evaluating conflicting court opinions to discern how different jurisdictions apply the same legal principles?
- demands a comprehensive research approach that includes codified law, administrative regulations, and case law?

With this revised language, rather than merely identifying the doctrinal concepts arising from a given set of facts, an examinee must demonstrate an understanding of the various types of analysis inherent in legal research. With these examples, for instance, the examinee must critically evaluate the hypothetical to identify not only which research issues are of concern but also which issues will require additional legislative, judicial, or policy analyses; expanded preliminary or issue analyses; or a more comprehensive research analysis involving multiple sources. The modified questions thus emphasize a more nuanced approach to legal research and encourage a deeper understanding of various primary and secondary sources.

With respect to the final sample multiple-choice question—"Which of the following search terms would be more likely to produce relevant sources?"—a focus on the actual search query would be more effective than asking an examinee to simply list two sources. Revised questions might include the following:

- Which of the following search queries would be the most effective?
- What steps can be taken to refine / narrow / expand the search query?
- What are some alternative search queries that could be used?
- How can we evaluate the effectiveness of different search queries?
- Compare the potential effectiveness of the following search queries.
- What are the best practices for optimizing a search query?
- What key components should be included in a search query?

Here, the revised questions expand the focus from merely choosing search terms—thus illustrating only recognition of the relevant doctrinal topics—to exploring the entire research process, including constructing, refining, and evaluating search queries. The revised questions also test legal research more effectively by assessing practical skills such as developing, modifying, and optimizing search queries. Moreover, they test legal research analysis by requiring deeper reasoning, such as comparing the effectiveness of search queries, evaluating search strategies, and analyzing how modifications impact search results.

Solution: Integrated Question Sets

Transitioning to the sample integrated questions, and specifically the question asking an examinee to list two claims they could bring on behalf of their client, as with the multiple-choice sample questions, this question calls merely for the identification of relevant doctrinal concepts given a provided fact pattern. Some improved questions might include the following:

1. For each claim, what is your research approach?
2. How does your research approach differ by claim, if at all?
3. Which issue do you anticipate being more difficult and/or requiring more extensive research, and why?

The first modified question tests legal research analysis by requiring an explanation of the research methodology used, which involves analyzing how different research approaches might be used to support each claim.

The second question tests an examinee's ability to adapt research strategies based on the nature of each claim. It incorporates analysis by requiring an evaluation of why different approaches might be necessary, thus asking the examinee to reflect on the nuances and complexities of each claim.

Finally, the third question asks the examinee to consider the complexity of various research tasks and analyze the relative difficulty of each claim, requiring them to reflect on the factors that influence both research scope and depth.

As a result of the above changes, each modified question requires a deeper analysis of research strategies and complexities, thus offering a more comprehensive evaluation of research skills and analytical thinking as compared to a simple listing of potential claims.

Moving next to the sample integrated question asking an examinee to "advise the law clerk on two specific sources that are most likely to provide a controlling definition," a revised question might instead ask the examinee to (i) identify and categorize distinct types of secondary sources, (ii) provide specific examples of each type of secondary source, (iii) explain how each source can contribute to an effective research approach, (iv) discuss potential challenges or limitations in using various secondary sources, or (v) suggest strategies for overcoming such challenges. These questions go well beyond the original sample question by assessing an examinee's ability to select and explain the use of relevant secondary sources, as well as their analytical skills in addressing potential challenges to the use of secondary sources.

With respect to the newly released integrated question set, which asks the examinee to find five mistakes in a complaint, the exam could instead ask this type of question: "Having identified mistakes of fact,

substantive law, and violations of procedural rules, how might each of these mistakes negatively impact or make more difficult your research process?"

This modified question is more effective in that it shifts the focus from merely identifying mistakes to understanding their implications on the research process. It requires the examinee to analyze how various mistakes—whether mistakes of fact, substantive law, or violations of procedural rules—affect the ability to conduct thorough and accurate legal research. Rather than simply identifying mistakes, the examinee must go a step further to analyze how such errors might impact the research process and results.

By integrating analysis into the released sample questions, the NCBE could more effectively test legal research, both as a knowledge area and skills area.

Conclusion

At present, the sample questions for the NextGen bar exam primarily assess doctrinal knowledge rather than true research skills. By shifting to questions that emphasize analytical skills, the exam could better capture the evaluative and decision-making processes essential for effective legal research. Additionally, a focus on analysis could improve knowledge questions simply asking examinees to identify legal sources. Instead of requiring only a list of sources, questions with an analytical component would prompt examinees to critically evaluate their research choices and consider the reasoning behind such choices.

While testing legal research skills without access to a database presents challenges, emphasizing analytical skills would allow for a more accurate and meaningful assessment of legal research and the critical thinking essential to legal research—skills that all newly licensed lawyers need to be successful in practice.

DESIGNING LEGAL WRITING PROBLEMS FOR THE NEXTGENERATION

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AMANDA KATE MAUS STEPHEN & DAVID ZIFF[1]

In July of 2026, Washington will be one of the first states in the nation to administer the NextGen bar exam, the exam that will replace the current Uniform Bar Exam (UBE).[2] The underlying goal of NextGen is to ensure newly licensed attorneys "possess the minimum knowledge and skills to perform activities typically required of an entry-level lawyer."[3] NextGen identifies four groups of foundational skills for entry-level attorneys: (A) issue spotting and analysis, investigation, and evaluation; (B) client counseling and advising, negotiation and dispute resolution, and client relationship and management; (C) legal research; and (D) legal writing and drafting.[4]

These foundational skills will be tested in three different question types: multiple-choice questions, performance tasks, and integrated

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[1] The authors are professors in the legal writing department and academic success department at the University of Washington School of Law. This topic was presented at the 2024 Western Regional Legal Writing Conference at Seattle University School of Law.

[2] *In re* Adoption of the NextGen Bar Exam & Reduction to the Passing Score for the Uniform Bar Exam, No. 25700-B-710 https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%2025700B710.pdf; *In re* Adoption of the Recommendations of the Wash. Bar Licensure Task Force, No. 25700-B-711 https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%2025700B711.pdf; *see also Implementing the NextGen Bar Exam, 2022–2028*, Nat'l Council of Bar Exam'rs, https://nextgenbarexam.ncbex.org/about/implementation-timeline/.

[3] *Overview of the Recommendations for the Next Generation of the Bar Examination*, Nat'l Council of Bar Exam'rs, https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf.

[4] *Bar Exam Content Scope*, Nat'l Council of Bar Exam'rs, 1–4 (May 2023), https://www.ncbex.org/sites/default/files/2024-11/NCBE-NextGen-Content-Scope-May-24-2023_0.pdf.

question sets.[5] Because the specifics of the NextGen bar are evolving, law faculty—particularly legal writing faculty—must collaborate with a law school's Academic Success Program and research librarians to ensure that the curriculum will teach these foundational skills.

The good news for the legal writing community is that our curriculum is already designed to teach many of these foundational skills. In fact, much of our curriculum looks a lot like two of NextGen's question types—the performance tasks and the integrated question sets. The performance tasks, modeled on the Multistate Performance Test on the UBE,[6] test examinees on their "ability to use fundamental lawyering skills in realistic situations."[7] Examinees are provided with a library of legal materials and a file of factual materials.[8] Using those materials, examinees are required to demonstrate their legal research and writing skills.[9] The integrated question sets give examinees "a common fact scenario and may include some legal resources" and/or additional documents, like a police report.[10] Examinees will either be asked to edit or draft a document or to address issues related to dispute resolution and/or counseling.[11]

When reviewing the legal writing curriculum at our school for these NextGen skills, we discovered that our primary class activities and assignments already provided our students with opportunities to practice NextGen's fundamental skills. This essay highlights some of our activities and describes how those assignments hone relevant NextGen skills.

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[5] *NextGen Bar Exam Sample Questions*, Nat'l Council of Bar Exam'rs, https://www.ncbex.org/exams/nextgen/sample-questions.

[6] Marilyn Wellington, *The Next Generation of the Bar Exam: Quarterly Update*, The Bar Exam'r (Summer 2023), https://thebarexaminer.ncbex.org/article/summer-2023/next-generation-of-the-bar-exam-sum23/.

[7] *NextGen Bar Exam Sample Questions*, *supra* note 5.

[8] *Sample NextGen Bar Exam Performance Task*, Nat'l Council of Bar Exam'rs, https://www.ncbex.org/exams/nextgen/sample-questions/performance-task.

[9] *Id.* ("All performance tasks assess an examinee's skills in legal research and written legal analysis (Groups A, C, and D of the Foundational Skills), but some performance tasks emphasize some skills over others.").

[10] *Sample NextGen Bar Exam Integrated Question Sets*, Nat'l Council of Bar Exam'rs, https://www.ncbex.org/exams/nextgen/sample-questions/integrated-question-sets.

[11] *Id.*

A. Using a Predictive, Closed Universe Memo to Teach NextGen Skills

Our opening assignment finds our 1Ls navigating the demands of a new internship and immediately drops them into the action: Our new recruits have just returned from a short coffee break or are preparing to power down on a Friday afternoon when an email strikes. A long-time client (or desperate prospective client) needs our help—and time is of the essence. Students understand we need a predictive, closed-universe memo as soon as possible (or rather, in four weeks).

Our purpose in setting the scene is two-fold. First, we want to ensure students take a client-centered approach to lawyering from the earliest stages of their law school career. Second, it's an excellent on-ramp to the practical skills they'll use for NextGen bar preparations.

To prepare this assignment, we provide students with many of the same resources they'll see in a NextGen performance test or integrated question set:

- Formal memo assignment instructions;
- A case file containing an e-mail from the partner and relevant client exhibits;
- Six slightly edited Washington cases;
- Reading questions; and
- An analysis workshop.

As the students build their memos week-to-week, they work through each of the NextGen foundational skills. First, they practice skills in Group A: issue spotting while working through relevant and irrelevant facts. To closely model real-world practice and the NextGen bar, we also enjoy adding a twist—implicit fact identification.

For example, we often use a problem that explores the public disclosure of private facts, which is a common law tort under Washington law. Under this tort, the element of publicity requires a review of audience size and circulation. Rather than feeding this specific information to the students in the assignment memo, the memo provides only basic details, such as telling students that a social media post was made on an individual's private account with some number of followers. That claim

will be followed by a short note to review an attached exhibit. We then reveal additional relevant specifics in the exhibit itself, which is a fake social media post we create using an online tool.[12] Students must therefore review the entire file and cross-reference resources—much like the anticipated performance tasks[13]—to identify whether the audience is public or private, large or small, and whether the relevant information has spread by inference from the social media post exhibit itself.

Next, students practice Group B skills by assessing the client exhibits and the provided sources of law during an in-class workshop. The workshop requires them to work in groups to draft short format responses, similar to the integrated question sets[14] they may experience.

Third, students exercise their legal research skills—Group C—performing case selection and assessing their sources' authoritative weight. In addition to providing precedential opinions from the highest court and appellate court, we typically provide a compelling, but unpublished opinion—allowing students to further test Group C and their citation literacy skills.

Finally, students move to skills in Group D—Legal Writing and Drafting—and prepare their supervising attorney for a subsequent client meeting by composing their first memo.

The exercise outlined above is neither novel nor revolutionary. The legal writing community has opened classroom instruction this way for decades because it prepares students for practice. But now we can add that pedagogy also helps prepare students for licensure.

B. **Teaching NextGen Statutory & Administrative Research Skills Using a Presentation Activity**

When the students begin learning research, we use a relatively simple and very enjoyable activity that allows them to practice researching statutes and regulations, while also stepping into the role of client counselor. This activity involves NextGen skills in Groups A, B, and C. In short, a client asks two questions that the students address with a

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[12] Tweetgen, https://www.tweetgen.com/.
[13] *Sample NextGen Bar Exam Performance Task*, *supra* note 8.
[14] *Sample NextGen Bar Exam Integrated Question Sets*, *supra* note 10.

short presentation. The client is coming to the office the following week and, working in small groups, students must complete the research, prepare their substantive advice, create the presentation, and then actually present to the fictional client.[15]

Research questions. The activity starts with a short message that includes two client questions: First, the client wants to rent out his townhouse for a year, but he doesn't want to allow pets. Does he have to allow *service* animals? And what is a service animal anyway? Second, after the rental period, the client wants to sell the townhouse, but he wants to avoid selling to wealthy developers or outside gentrifiers. Instead, he wants to give his neighbors the first opportunity to buy the property. He's drafted an announcement to post on various online neighborhood groups, offering the townhouse for sale before listing it, telling his neighbors that they have the power to "control" who moves in, and expressing his desire to uphold the "longtime standards" of the community. Can he post that announcement?

The research questions require students to experiment and struggle with several sources of information. For the first questions, students start by locating the specific Washington statutory provision that addresses real estate transactions and discrimination based on use of a service animal.[16] The relevant provision, however, does not define "service animal." The students must therefore locate the Chapter's general definitions section, which—good news, bad news—*does* include a definition of "service animal" but specifically states that the definition *does not* apply to the relevant provision.[17] So we're back at square one.

To fill this definitional gap, the students then look to case law[18] and implementing regulations.[19] Both sources provide clear answers, but the students stumble upon something odd: The case law uses a different

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[15] Thank you to Professor Erika Nicole Pont, who sparked the idea for this presentation activity at a previous conference.

[16] Wash. Rev. Code. § 49.60.222 (2020) (prohibiting rental discrimination based on "the use of a trained dog guide or service animal").

[17] Wash. Rev. Code § 49.60.040 (2024) (providing a definition of "service animal" but stating that it "does not apply to RCW 49.60.222").

[18] Timberlane Mobile Home Park v. Wash. State Hum. Rights Comm'n, 95 P.3d 1288 (Wash. Ct. App. 2004).

[19] Wash. Admin. Code § 162-36-001 (2024); Wash. Admin. Code § 162-38-040 (2024).

section number when discussing the relevant statutory definition. Perhaps the judges got it wrong? Nope. The legislature has amended the definitions (and changed the numbering) since the opinion was issued. By looking back through the historical statutes, the students can see that the opinion's definition of "service animal" was based on a now outdated version of the statute. And the implementing regulations have the same problem. What a mess.

The client's second question—regarding the neighborhood announcement—presents different problems. No statute or case law directly addresses the question. But the students don't know that, of course. So, they get to experience what it's like when there's just no case law on point. Fun.

The applicable regulations, however, directly address the client's question. A provision entitled "Content and Language of Solicitation" specifically states that sellers should not use discriminatory phrases like "standards of the community" or imply that the neighbors have "the power to control the type or character of the person or persons" who might buy the property.[20] The client's proposed language, therefore, should not be used.

Preparing advice. Having completed the research, the students are faced with two somewhat-knotty problems: How to answer the client's "service animal" question when the legal sources are a mess of inconsistency and silence? And how to answer the client's "solicitation" question when his proposed language is clearly discriminatory, at least in the eyes of Washington regulators?

To answer these questions, the students must embrace the role of client counselor. How much of the research mess does the client care about? Despite the underlying conflicts, how confident should the students be in their definition of "service animal"? What should they advise the client to actually *do* regarding service animals? As for the solicitation, how do you tell a client—who seems to be a good man concerned about gentrification—that his proposed wording is legally

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[20] Wash. Admin. Code § 162-36-020 (2024).

discriminatory? What advice do you give him? How do you frame it? Of course, there is no one right answer to any of these questions.

Creating a presentation. The students must answer these questions, not by drafting a responsive email or memorandum, but with a slide-based presentation to the client. We tell the students that the client is coming to the office next week. During that meeting, the students must give a digital presentation (like a PowerPoint) for the client, with legal answers and advice. Each presentation must be shorter than six minutes. To help students prepare for the presentation, we assign Professor Jonah Perlin's piece on digital presentations,[21] together with Professor David Ziff's practitioner-focused review of Professor Perlin's piece.[22]

Presenting to the client. Presentation day is always an engaging experience. We give the students a bit of last-minute preparation time at the start of class. Then each small group presents to the class as if the class were the client. The presentations always reflect unique styles, strategic decisions, and points of emphasis. And by watching four or five other groups give presentations, each student can see how different peers answered those questions differently. After the presentations, we always have a lively discussion about those choices, what worked, what didn't, the reasons behind the decisions, etc.

In sum, this activity prepares students for multiple NextGen skills. In Group A, they are investigating, analyzing, and evaluating legal questions. The develop Group B skills like client counseling, advising, and relationship management. In Group C, they are developing legal research skills in a realistic setting. And, they enjoy taking on the role of a real lawyer advising a client.

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[21] Jonah Perlin, *Making Your (Power) Point: An Introductory Guide to Digital Presentation Design for Lawyers*, 18 Legal Commc'n & Rhetoric 81 (2021).

[22] David J.S. Ziff, *Say Goodbye to Bad Digital Presentations*, Wash. State Bar News (June 9, 2022), https://wabarnews.org/2022/06/09/say-goodbye-to-bad-digital-presentations/.

C. Using a Predictive, Open Universe Memo to Teach NextGen Skills

Once students have had the chance to practice a short statutory research problem, we typically assign a longer research and predictive memo assignment as their final assignment of the term. One problem that works particularly well is an analysis of whether a student loan is dischargeable in a Ninth Circuit bankruptcy proceeding.[23] The problem is designed to hit all four of the NextGen foundational skill groups.

First, the set-up is meant to be realistic, similar to the NextGen bar: The student is a first-year associate in a law firm, working with both a partner and a senior associate to assist a low-income client who they met as part of a free bankruptcy law clinic. The students practice their Group A skills by finding the applicable law, assessing the probable outcome of a bankruptcy petition, and evaluating potential counterarguments. Like the writing problem described above, this one also includes a case file, and we make a point to give students the kinds of materials they might find in a NextGen Performance Task, such as internal emails from a law firm partner and a senior associate, an email from the client, client interview notes, and copies of some of the client's bills (like utilities, car insurance, and cable and internet). We then help students grapple with the case file, the research, and the drafting process through a research workshop, a group presentation of their research findings, and a faux senior partner meeting designed to evaluate whether their research and analysis are on track.

The problem also includes a bit of Group B client management skills. In addition to the possibility of a full discharge of the student loan debt, students also find that the case law includes examples of partial discharge of debt. Additionally, students may decide that the client could do things (e.g., give up certain expenses, look into a payment plan with the lender) that will increase the chances of full or partial discharge. The problem gives students a chance to practice communicating that advice to the client in a written memo.

Group C's legal research skills are also a big component of the

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[23] This problem was originally developed by a colleague, Professor Ben Halasz.

problem. As part of the research process, students have to make a research plan that identifies both the research question and efficient strategies for finding information. They must also identify ambiguous language in the bankruptcy code; for example, the definition of "undue hardship," a key term in the statute, is not statutorily defined. Further, students have to grapple with the weight of authority for case law they come across as many decisions are from the federal district courts but only Ninth Circuit Court of Appeals cases will be binding.

Finally, students practice Group D legal writing and drafting skills as the final work product is a formal predictive memo advising the supervising attorneys and the client on the probable outcome of the bankruptcy petition.

D. Using Persuasive Writing to Teach NextGen Research, Drafting, and Negotiation and Settlement Skills

In the spring, our students transition from predictive writing to persuasive writing. Our persuasive writing curriculum finishes the year by reinforcing and teaching additional skills students need to develop for the NextGen bar and their future legal practice. We give students a large case file at the beginning of the term—much like one they would receive if they were new to a case—and we base all activities for the term on the materials in the case file. The case file might include a complaint, exhibits, a deposition transcript, and a student-created client interview document. Students experience what it might feel like to litigate a real-life case and gain many of the skills needed to move through a litigation process. At the end of the term, their final assignment is to write a dispositive motion for one side, usually a motion for summary judgment or a motion to dismiss, and a supporting declaration.

Many different types of legal problems can work well for persuasive writing, but one we have used successfully is a fictional case that uses the fair use doctrine. Students are externs at a local law firm, and they receive an email from an attorney that outlines the case: Our client has been sued for copyright infringement for using a photograph in their environmental nonprofit materials. This case file includes the complaint, exhibits of the original photograph, the infringing photograph, and the copyright registration. We typically create a sympathetic plaintiff, an artist trying to

protect their intellectual property, and a sympathetic individual defendant representative, who is the executive director of an environmental nonprofit. Students can generally imagine representing either side.

Over the course of the next ten weeks, students learn important lawyering and NextGen skills in Groups A, B, C, and D. One of the students' first tasks is to think about the questions they would like to ask the client in an upcoming client interview. To do this, they work in small groups to better understand the basics of the fair use doctrine and the facts of the case and then brainstorm questions to ask the client (usually another professor dressing up for the part). The students eventually use that client interview as the basis for the client declaration to support their motion. This activity teaches them the Group A skills of issue spotting, identifying relevant facts, and determining which facts are still needed. It also teaches students how to identify relevant parts of the fair use rules to inform which facts are relevant. The interview activity also provides an opportunity to practice Group B skills—effective client relationship-building skills, including the process of interviewing a client sensitively and effectively—skills they will need in legal practice.

By week five, students are ready to outline their motions and prepare an oral argument—NextGen Group B and C skills that help students conduct legal research and think candidly about the strengths and weaknesses of their case, as well as which arguments and defenses to raise. While the students write their motion representing only the defendant, we assign them randomly to a side for oral argument and have them each present argument on an issue. While some students are eager to argue, others are more hesitant, and we help them to overcome their public speaking nerves by providing structure and practice in a small group. These persuasive argument Group B skills help students see the connection between a client's goals, the merits of a case, and their own professional responsibilities to provide zealous, ethical representation.

In week seven, students practice negotiation and settlement drafting skills—Group B and D skills. We tell them that the parties' attorneys have worked out some basic settlement terms to resolve the case, and we ask them to brainstorm and negotiate the other details and

aspects of a deal. The entire activity can be finished in a two-hour class. By the end of class, their task is to write the draft of a settlement agreement using principles of contract drafting we cover in class that week. All these client counseling, negotiation, and resolution skills are valuable for legal practice, and simultaneously preparation for the skills tested on the NextGen bar. The final weeks of the class are spent editing, peer-reviewing, and revising their final motions for summary judgment, helping them practice Group C and D research and drafting skills.

Conclusion

Given the foundational, practice-ready skills taught in most legal writing classrooms, many of the demands of the NextGen bar are likely being met by your current activities. And, to the extent our sample activities could enhance your curriculum, please feel free to adopt them. While much remains uncertain about the NextGen bar, we feel confident that by keeping a practice-ready curriculum in focus, legal writing professors can ensure that students will be prepared for licensure and lawyering.

ASSESSING LEGAL WRITING SKILLS
IN THE
NEXTGEN & AI WORLD

KIMBERLY Y.W. HOLST[1]

Memos and briefs covered in feedback. Live grading with students watching their professor read and react in real time to what they have submitted. When we think about assessing our students' writing, these are the hallmarks of legal writing pedagogy. Quizzes and exams are the stuff of casebook colleagues; to the extent they "work" for legal writing, quizzes and exam are reserved for research and citation assessment.

Given the convergence of rapidly developing generative artificial intelligence tools and the looming implementation of the NextGen Bar, it may be time to rethink whether the gold standard of assessment and feedback used by most legal writing professors is sufficient in assessing student skills. Or, rather, it may be time to rethink whether other means of assessment can serve a beneficial function in teaching legal writing. First, this essay examines the rapidly changing state of legal practice. A major impetus for this change is the advent and accessibility of generative artificial intelligence tools. Ignoring AI[2] is not an option. Assessment in light of AI may require changes to our well-worn practices. Second, this essay takes into account that the way applicants are assessed to

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[1] Kimberly Y.W. Holst is a Clinical Professor of Law at Arizona State University, Sandra Day O'Connor College of Law. She made this presentation at Seattle University School of Law during the 2024 Western States Legal Writing Conference.

[2] This essay uses AI to refer to generative artificial intelligence, which employs large language models (LLMs) to predict text. In very simplified terms, LLMs are a form of predictive text—analyzing vast amounts of data to determine the most likely pattern of text to satisfy a particular prompt. For more on the development of LLMs, *see* Harry Surden, *ChatGPT, AI Large Language Models, and Law*, 92 Fordham L. Rev. 1941 (2024), *available at* https://scholar.law.colorado.edu/faculty-articles/1639.

determine whether they should be admitted to the bar is changing. The NextGen Bar proposes to move away from an emphasis on memorization and towards an assessment of skills relevant to legal practice. While current assessment methods likely prepare students for practice, other forms of assessment may provide greater preparation for the newly formatted bar exam. Finally, this essay evaluates our current assessment practices and offers suggestions for how additional assessment may be incorporated.

AI and Legal Practice

AI is already a part of legal practice. As of January 2024, nearly half of Am100 firms stated that they subscribed to some form of AI designed for legal practice.[3] An October 2024 study found that 79% of legal professionals are using AI in their practice.[4] And, the number continues to grow. The development of AI tools in legal databases such as LexisNexis and Westlaw have meant that they are integrated in resources that attorneys and law students have comfort and familiarity with. Additionally, tools like Spellbook are prevalent in the drafting context. Even law professors are tempted with AI tools designed to assist with the law review writing process.[5]

However, the concerns related to the use of AI in practice are apparent. Most people have heard about or read stories about attorneys using AI without checking the cases—only to have the courts find that those submissions contained hallucinations (made-up information).[6] Both current attorneys and law students worry that AI will replace the work of attorneys in legal practice.[7] Additionally, access to AI tools is impossible to police. Non-law-specific AI is easily accessible through any

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[3] Justin Henry, *We Asked Every Am Law 100 Law Firm How They're Using Gen AI. Here's What We Learned*, The American Lawyer (Jan. 29, 2024), https://www.law.com/americanlawyer/2024/01/29/we-asked-every-am-law-100-firm-how-theyre-using-gen-ai-heres-what-we-learned/?slreturn=20241112174141.

[4] *The Future of Artificial Intelligence in the Legal Industry*, Clio, https://www.clio.com/guides/ai-legal-trends/ (accessed Jan. 1, 2025).

[5] Claudius Scholar and Scholar Sift are examples of scholarship focused tools.

[6] *See* Matthew Dahl et al., *Hallucinating Law: Legal Mistakes with Large Language Models are Pervasive*, Stanford University: Human-Centered Artificial Intelligence (Jan. 11, 2024), https://hai.stanford.edu/news/hallucinating-law-legal-mistakes-large-language-models-are-pervasive.

[7] Niels Martin Brochner, *Will AI Replace Lawyers?*, Forbes (May 25, 2023), https://www.forbes.com/councils/forbestechcouncil/2023/05/25/will-ai-replace-lawyers/.

web browser, and it is likely that current law students already access them. AI tools on LexisNexis and Westlaw are already or will soon be made available on all law school accounts. The reality is that that both law students and legal practitioners are already working in a world where AI is a part of law practice—it's our job to teach in that world.

If surveyed, most (if not all) legal writing faculty would likely agree that to use AI ethically and effectively, law students and attorneys need to be competent in their own writing skills. They must understand how to both create and evaluate legal writing in order to effectively prompt and evaluate AI-generated text. This underscores the need for faculty to be able to assess students' mastery of the skills underlying their written product, which also begs the question—are summative assessments of student writing (e.g., via a memo or brief) the best way to assess mastery of analytical writing skills?

The NextGen Bar

As of January 1, 2025, twenty-nine jurisdictions have adopted the NextGen bar, with the first of those jurisdictions beginning to administer the revamped exam in July 2026.[8] The NextGen Bar holds itself out as focused on assessing skills that are essential for practicing attorneys.[9] Chief among these skills is legal analysis.

In addition to multiple choice questions, the NextGen Bar will incorporate integrated question sets and performance tasks (described to be similar to the current Multistate Performance Test, or MPT). The integrated question sets will be based on a common fact scenario and will include a mix of multiple-choice questions. These integrated question sets will test both doctrinal knowledge and skills related to editing or drafting a legal document or client counsel and dispute resolution.[10] These proposed changes suggest that skills typically taught in first-year legal writing classes may appear on not only the performance task section but also the integrated question sets. This means that the Bar Examiners

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[8] *NextGen (July 2026)*, Nat'l Council of Bar Exam'rs, https://www.ncbex.org/exams/nextgen (accessed on Jan. 1, 2025).

[9] *About the NextGen Bar Exam*, Nat'l Council of Bar Exam'rs, https://www.ncbex.org/exams/nextgen/about-nextgen (accessed on Nov. 12, 2024).

[10] *NextGen Bar Exam Sample Questions*, Nat'l Council of Bar Exam'rs, https://www.ncbex.org/exams/nextgen/sample-questions (accessed on Nov. 12, 2024).

will be assessing skills in prompts that require both short form and long form responses.

Reassessing How We Assess

In light of these changes, legal educators are in a kairic moment—an opportune time to reassess how we assess and determine what will best serve this generation of students.[11] One of the main methods for assessing student writing in first year legal writing courses is through a legal document—most often, an office memorandum or a persuasive brief.[12] These methods require the professor to rely on the document as a representation/manifestation of the student's skills. However, if a student attempts to use AI to create the document, faculty may find it difficult to assess competency in foundational skills such as rule synthesis, analogical reasoning, and other analytical skills.

Rather than changing the entire structure of the legal writing curriculum, we could use additional types of assessment in combination with traditional forms of writing assignments to assess student mastery of skills applied to a written legal document.

Reflective Assessment

For many legal writing professors, reflective assessment will not be a new concept. Many faculty already include some type of reflection in their legal writing andragogy and most agree that there is great value in self-reflection for adult learners.[13]

Reflective assessment can be incorporated into a legal writing course in many ways. Some include journaling (a practice common for our clinical peers),[14] directive questions that require self-assessment and explanation of why choices were made in writing a legal document, or

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[11] For a more in-depth discussion of why this is an opportune moment to reassess assessment and how legal writing faculty may do that—particularly in terms of designing assessments that assess student knowledge in relation to learning outcomes, *see* 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).

[12] *See* Am. Bar Ass'n, Legal Writing Sourcebook 134 (J. Lyn Entrikin & Mary B. Trevor eds., 3d ed. 2020).

[13] *See* Jason S. Palmer, *"The millennials are coming!": Improving Self-Efficacy in Law Students Through Universal Design in Learning*, 63 Clev. St. L. Rev. 675 (2015).

[14] *See, e.g.*, J.P. "Sandy" Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 Clinical L. Rev. 55 (1996).

reflection through example and explanation that requires students to identify skills concepts from an example and explain what was done well or could be improved.

Peer assessment may also be used to reflect on writing skills. In this context, determining whether a student has mastered a particular skill may require assessing the student's assessment of their peer's work product. In other words, the professor determines how well a student identified and commented on the skills they recognized in the other student's work.[15]
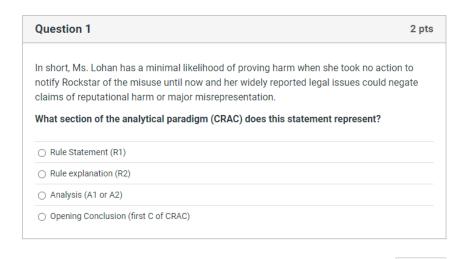
Quizzes and Exams

Incorporating quizzes or exams in a legal writing class may be another way to assess students' mastery of a skill and to provide timely feedback to students about that mastery. There are different types of questions that a professor may want to consider when designing a quiz or exam to assess skills. Some questions may be related to identification, for example can the student identify what part of the paradigm a portion of text is or can the student identify what makes writing good/bad or effective/ineffective. Other questions may be evaluative and demonstrative. These questions could determine, for example, whether the student can identify three problematic items in the writing and then make changes to resolve the issues. With a short answer question, the student can be asked to revise a small section of a document like a rule illustration or a statement of an analogical argument to improve upon the text they are given.
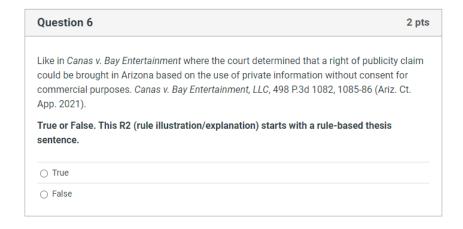
The following examples show questions that are designed to assess specific skills.

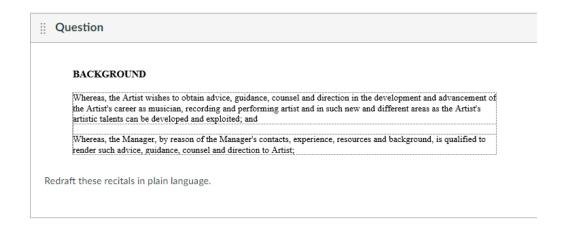[15] Williams, *supra* note 11, at 65-67.

1) To assess the student's ability to identify parts of the analytical paradigm.

Question 1   **2 pts**

In short, Ms. Lohan has a minimal likelihood of proving harm when she took no action to notify Rockstar of the misuse until now and her widely reported legal issues could negate claims of reputational harm or major misrepresentation.

What section of the analytical paradigm (CRAC) does this statement represent?

○ Rule Statement (R1)

○ Rule explanation (R2)

○ Analysis (A1 or A2)
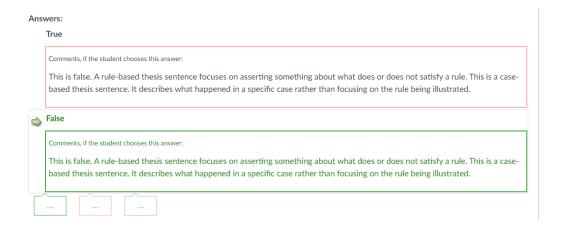
○ Opening Conclusion (first C of CRAC)

2) To assess the student's ability to recognize a particular manner or substantive style convention for presenting a portion of the analytical paradigm.

Question 6   **2 pts**

Like in *Canas v. Bay Entertainment* where the court determined that a right of publicity claim could be brought in Arizona based on the use of private information without consent for commercial purposes. *Canas v. Bay Entertainment, LLC*, 498 P.3d 1082, 1085-86 (Ariz. Ct. App. 2021).

True or False. This R2 (rule illustration/explanation) starts with a rule-based thesis sentence.

○ True

○ False

3) To assess a specific contract drafting skill in a very discrete section of the contract.

Another benefit to using a quiz is to provide instant feedback to a student, as demonstrated below:

A quiz or exam format for assessment has a variety of potential benefits but may also present some challenges. Some have been mentioned earlier, but a more complete list if benefits and challenges is set out below.

Potential benefits include the following:
- The professor can design questions to simulate the Integrated Question Sets of NextGen Bar (to help prepare students for that exam);

- The professor can provide students with feedback faster (possibly immediately) than traditional feedback on memos or briefs;
- Students can refer to a quiz as a guide for future assignments;
- A quiz can be a tool to train students to be evaluative about good/bad writing (which will be helpful as students begin to incorporate AI tools in their practice);
- A quiz has the potential to identify student issues on a micro-level because skills may be assessed discretely;
- A quiz can be designed to be more simple or more complex based on course needs (e.g., the timing of the quiz within the semester or assessing knowledge around a newly introduced concept v. a concept that has been practiced and should be mastered);
- Quizzes can be interspersed throughout the semester—even while students are writing a longer assignment—and the feedback gained the process can be used to improve those longer writing assignments; and
- The professor can invest less time grading (particularly with multiple choice questions or short answer questions).

Potential challenges should also be considered:
- Quizzes and exams may take more time to create (and probably while the professor is still creating a writing assignment as well);
- Feedback on quizzes and exams is not holistic, meaning the professor may still need to grade skills within the context of a longer writing assignment;
- A student may be able to identify skills but not execute them (i.e., the student performs well on a quiz where skills are disaggregated but is unable to execute all the skills in context);
- Quizzes and exams can raise administrative concerns such as accommodations (e.g., time limits, format or presentation of the quiz or exam); and
- The timing and location of quizzes and exams must balance dedicating class time against unauthorized use of AI (i.e., is it proctored in class—which will alleviate concerns about using AI tools or is it taken at home where it may be more difficult to determine if the student is working independently?).

Conclusion

The landscape of law practice is changing. Presently, those changes include the rise of AI tools and the looming implementation of the NextGen Bar exam. However, it is likely that we will continue to see changes in law practice as technology and the needs of legal practice rapidly advance. By taking the time to reassess our traditional methods of assessment, we can evaluate whether there are better or additional ways that we can help ensure that our students are developing and mastering the skills they need to be successful in practice. This will also help us to keep abreast of changes that arise in the future and allow us to think flexibly about assessment, so we can more readily adapt to those changes.

SOCIAL JUSTICE AND THE LEGAL WRITING CLASSROOM: TEACHING KAIROS THROUGH IMMERSIVE EXPOSURE TO CURRENT AND HISTORICAL STRUGGLES FOR CIVIL AND HUMAN RIGHTS

RACHEL CROSKERY-ROBERTS[1]

Those of us who teach legal writing do so much in the legal writing classroom,[2] and yet it may not be enough if we ignore the world the students are living in as we teach them the fundamentals. Introductory legal writing, analysis, and research skills can feel rote or formulaic to students, which can be a real disadvantage if we hope to get buy-in as we ask them to spend hours and hours mastering difficult skills.

This buy-in is particularly important given our current student population and political climate. Nearly 70% of respondents in a 2022 Law School Admission Council survey indicated that "social justice, helping others or uplifting their community" motivated their decision to come to law school.[3] As Traci Yoder has observed, "Many people come to law school because they believe a legal education will provide the tools to

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[1] Rachel Croskery-Roberts is the Associate Dean for Lawyering Skills at the University of California, Irvine School of Law. This essay is based on her presentation at the Western States Legal Writing Conference at Seattle University in September 2024.

[2] The course coverage in the typical legal writing class is vast, often overwhelming. Required legal writing courses, which may range from one to several semesters, must cover predictive and persuasive written and oral legal analysis; many courses also cover legal research. And these larger subjects break down into a multitude of smaller, more discrete skills, including case reading, case comparison, rule synthesis, analogical reasoning, and more. Furthermore, the recent trend has been to increase coverage, not decrease coverage, with many courses also teaching aspects of client counseling, client interviewing, fact investigation, or drafting.

[3] Andrew Bauld, *How Students' Motivations for Attending Law School Have Changed*, U.S. News & World Rep. (Sept. 13, 2023), https://www.usnews.com/education/best-graduate-schools/top-law-schools/applying/articles/how-students-motivations-for-attending-law-school-have-changed.

assist social movements as well as oppressed and marginalized individuals. Those coming from an activist background often hope that a law degree will offer them the opportunity to use the law for progressive social change."[4] Unfortunately, "the actual experience of being in law school," with its competitive focus on grades and future employment and its early pedagogical focus on analogical reasoning, "can quickly discourage a critical social justice perspective."[5] The reality is that students know the world is on fire, and we risk losing credibility and training underprepared advocates if we do not acknowledge that fire in the classroom.

A number of scholars have written about ways to infuse the curriculum with social justice issues, including in the 1L legal writing curriculum. For example, Sha-Shana Crichton has shown how well-suited legal writing classrooms are for introducing such issues, noting that "the positive impact on learning makes it a necessary addition to the first-year law school curriculum."[6] She offers examples of ways to incorporate social justice issues into the classroom, including through client letters, closed research memoranda, or simulations. She explains how she has introduced social justice issues into the legal writing course at Howard University School of Law, noting "that introducing the students to issues of social justice early in the law school program builds their confidence, stimulates their interest, motivates them to learn, and empowers them to think of, and use, the law as a vehicle for social change."[7] Others have suggested structural changes to the 1L curriculum by creating a hybrid doctrinal/writing course with a social justice focus.[8] These are just two examples of successful ways to introduce social justice issues into the 1L classroom.

This essay provides another way to do so—without overwhelming an already packed legal writing curriculum—by bringing interdisciplinary

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[4] Traci Yoder, Introduction, National Lawyers Guild, https://www.nlg.org/wp-content/uploads/2016/03/Introduction.pdf.

[5] *Id.*

[6] Sha-Shana Crichton, *Incorporating Social Justice into the 1L Legal Writing Course: A Tool for Empowering Students of Color and of Historically Marginalized Groups and Improving Learning*, 24 Mich. J. Race & L. 251, 293 (2019).

[7] *Id.* at 294.

[8] Rosa Castello, *Incorporating Social Justice into the Law School Curriculum with a Hybrid Doctrinal/ Writing Course*, 50 J. Marshall L. Rev. 221 (2017).

work on rhetoric and persuasion into the 1L classroom beyond the basic discussion of ethos, pathos, and logos. This modest but important intervention alters the curriculum without adding to it, infusing the 1L class with social justice issues and introducing more sophisticated rhetorical techniques to train more reflective, effective advocates.

Interdisciplinarity, Kairos, and Law

The critical role of interdisciplinarity in law is increasingly shaping U.S. legal education. Interdisciplinary perspectives bring a richness to legal education; law does not exist in a vacuum. Some interdisciplinary approaches have been a part of the legal curriculum for well over a century (think criminal law and psychology or philosophy).[9] Others, like the intersection between artificial intelligence and the law, are more recent.

Interdisciplinarity has the ability to touch and enrich the 1L legal writing curriculum beyond traditional approaches to the discipline. In particular, the interdisciplinary study of the intersection between law and rhetoric has provided a particularly powerful tool for teaching student advocates effective persuasive legal writing, analysis, and oral advocacy. While most in lawyering skills courses have taught the classical rhetorical concepts of ethos, pathos, and logos,[10] there are other sophisticated and nuanced rhetorical concepts that are under-explored.

Though other disciplines have more robustly addressed the role of kairos,[11] there is limited scholarship on kairos in the law in general or on the teaching of kairos in law school more specifically. Notably, Susie Salmon and Mark Hannah have explored the concept of kairos in studying

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[9] For example, almost every lawyer began the study of criminal law in the first year of law school not with a discussion of particular crimes but instead on theories of punishment. *See, e.g.*, Jeremy Bentham, The Rationale of Punishment (1830) (utilitarian theory of punishment); B. Sharon Byrd, *Kant's Theory of Punishment, Deterrence in its Threat, Retribution in its Execution*, 8 L. & Phil. 151, 151-52 (Aug. 1989) (discussing Immanuel Kant, The Metaphysics of Morals) (retributive theory of punishment); H.L.A. Hart, Prolegomenon to the Principles of Punishment, in Punishment and Responsibility: Essays in the Philosophy of Law (Oxford Univ. Press ed., 1968).

[10] Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the Science 5 (Routledge Press ed., 2018) (noting that "[m]any of the commonplace strategies and techniques used by today's legal advocates derive from Aristotle's *Rhetoric*").

[11] *See, e.g.*, Rhetoric and Kairos: Essays in History, Theory, and Praxis 199 (Phillip Sipiora & James S. Baumlin eds., 2002).

and crafting dissents;[12] Ruth Anne Robbins has discussed lessons her students learned about the power of kairos when drafting an amicus brief as part of a domestic violence clinic;[13] and Linda Berger and Kathryn Stanchi have theorized about the judicial creation of kairotic moments. [14] This essay attempts to build on that work and on my earlier work on kairos by focusing on how studying kairos can help students engage with social justice issues early and often in the 1L curriculum.

　　　　The ancient Greeks divided the concept of time into two categories: chronos and kairos. Chronos is what we typically think of when we talk about time—the sequence or chronology of events.[15] Kairos is a much more nuanced, qualitative concept of time that focuses on the "right" or "opportune" moment to make a particular argument.[16] Legal scholars and practitioners can use the tool of kairos both prospectively and retrospectively. Analyzing prospectively, "an advocate can (1) create a kairotic moment or prime the audience to be receptive to such a moment; or (2) identify and exploit existing kairotic moments based on the topic, the speaker, the audience, and potentially, the surrounding political or social circumstances."[17] In contrast, "[r]etrospectively, scholars, historians, and advocates can look to surrounding historical circumstances in conjunction with the rhetorical strategies of judges and advocates to better understand why particular arguments succeeded or failed in a given case or line of cases."[18]

　　　　Teaching the concept of kairos to students helps them see beyond the black letter law to better understand the law's positionality in the larger social structure, its moment in history. It encourages students to look beyond the four corners of the cases and statutes they are reading to

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[12] Susie Salmon & Mark Hannah, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 Nev. L.J. 935 (2002).

[13] Ruth Anne Robbins, *Three 3Ls, Kairos, and the Civil Right to Counsel in Domestic Violence Cases*, 2015 Mich. St. L. Rev. 1359, 1361 (2015).

[14] Berger & Stanchi, *supra* note 10, at 33-37; Linda L. Berger, *Creating Kairos at the Supreme Court: Shelby County, Citizens United, Hobby Lobby, and the Judicial Construction of Right Moments*, 16 J. App. Prac. & Process 147 (2015).

[15] John E. Smith, *Time and Qualitative Time*, 40 Rev. Metaphysics 3 (1986); John E. Smith, *Time, Times, and the 'Right Time': "Chronos" and "Kairos,"* 53 The Monist 1 (1969).

[16] *See, e.g.*, Berger & Stanchi, *supra* note 10, at 33-37.

[17] Rachel Croskery-Roberts, *It's About Time: Kairos as a Dynamic Frame for Crafting Legal Arguments and Analyzing Rhetorical Performances in the Law*, 33:1 S. Cal. Interdisc. L.J. 57 (Spring 2024).

[18] *Id.*

develop arguments or to conduct legal analysis. To effectively identify or create kairotic moments, they must become attuned to the audience, the argument's purpose, the current circumstances, and the timing in a much more nuanced sense, looking to the argument's effectiveness given the current trend of political and social values and norms, to the argument's role in developing history (to the extent that the advocate can predict it), and to its specific moment in the lawsuit.[19]

Kairos in the Legal Writing Classroom

I generally introduce kairos along with Aristotle's three major elements of rhetoric or persuasion and the concept of theme/theory of the case. This approach helps to avoid adding to the curriculum in unmanageable ways while still giving students exposure to kairos.

After a brief introduction to rhetorical concepts, I introduce political speeches of Malcolm X and Dr. Martin Luther King to help students understand competing views of kairos and begin to see how they might bring it into their advocacy. The particular arc of videos – beginning with Martin Luther King's *I Have a Dream speech* in 1963, continuing with Malcolm X's *Ballot or the Bullet* speech, and concluding with Martin Luther King's *The Other America* speech in 1967—allows students to see how kairos works and how the speakers' own views of time and its role in social and legal change evolved. It requires students to view the speeches in context and in conversation with the politics and social upheaval of the 1960s. I finish by tying to the role of kairos in current events or litigation.

Before I play historical speeches, I give students a brief introduction to ethos, pathos, logos, and kairos. In relation to kairos, although we analyze each video separately, we also look at the broader arc of the civil rights videos in the context of the audience for those videos and the political and social environment of the day to determine whether the speakers were able to effectively choose and amplify "right moments" for advancing particular civil rights narratives.

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[19] *Id.*

I begin with Martin Luther King's *I Have a Dream Speech*, as students typically have heard excerpts before.[20] But many students lack significant historical context for this speech. So, for example, after watching the video, when I ask the students to think about whether Dr. King identified or created a kairotic moment, they are often stumped. I then provide some context. Dr. King gave this speech at the March on Washington for Jobs and Freedom on August 28, 1963. He spoke in front of the Lincoln Memorial, powerful imagery on its own, to a crowd of well over 200,000. The March and this speech are credited with helping pass the Civil Rights Act of 1964.

The parts of the speech that students are most familiar with focus not on an existing kairotic moment, but a hope for a future kairotic moment for social change. It is a "dream" that "one day" the nation will reach a moment when it can live up to its ideals of equality under the law. But as I observed in my article on kairos for scholars and practitioners, other less familiar portions of the speech took the form of a clear call to create a kairotic moment for change, referencing "the fierce urgency of Now."[21]In short, Dr. King was seizing a moment when he had an audience made up of essentially the entire country to move towards a more just and free society and to create momentum and pressure for legislation.

I then transition to two excerpts from Malcolm X's *Ballot or the Bullet* speech that he gave on April 12, 1964, eight months after Dr. King's I have a dream speech.[22] Again, I put the speech in historical context to give the students an understanding of the chronology so they can unearth the kairotic moments. One of the key purposes of this speech was trying to get people to register to vote. The theme was action. This action would be peaceful if possible (through the ballot) or through violence if necessary (the bullet).[23] The other was to move beyond civil rights nationally to a more global view of human rights. In many ways, I see his speech as creating the window of opportunity for later kairotic moments.

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[20] *See* Ilya Gokadze, *Martin Luther King, Jr. I Have a Dream Speech*, YouTube (Aug. 28, 2013), https://www.youtube.com/watch?v=3vDWWy4CMhE.

[21] *See supra* note 17, at 85.

[22] *See* 1453malcolmx, *Malcolm X – Don't Sit-In, Stand Up; On Black Nationalism*, YouTube (Feb. 29, 2012), https://www.youtube.com/watch?v=ZzSgUDrZ60s

[23] *Id.*

He was part of the critical push for Black voters to register to vote and to take control of their communities and their fates.

Professor Ruth Anne Robbins discussed in her article about how even if the right people make the right argument at the wrong time, it may just be an opening for later kairotic moments.[24] It is unclear whether Malcolm X chose the wrong moment or whether he was the wrong speaker, but he definitely helped create the space for later kairotic moments. His speech came at a pivotal moment in history and arguably set the stage for later kairotic moments that caused the passage of the Voting Rights Act of 1965. I provide a timeline of those events for students and use additional archival video and photos to help immerse them in the history of the moment.

Finally, I turn back to another excerpt of a speech Dr. King gave in 1967. By 1967, Dr. King himself had come to recognize the importance of kairotic moments and not thinking of time as a chronology one just allows to happen. Although he never used the language of kairos, the speech he gave at Stanford made it clear that he had become convinced that true change involved identifying or creating space for kairotic moments.[25] I have students analyze the role of kairos in Dr. King's observations on time and compare it to his perspective in 1963 or Malcolm X's perspective in earlier speeches:

> I think there is an answer to that myth. And it is that time is neutral. It can be used either constructively or destructively. And I'm absolutely convinced that the forces of ill-will in our nation, the extreme rightists in our nation, have often used time much more effectively than the forces of goodwill . . . Somewhere we must come to see that social progress never rolls in on the wheels of inevitability. It comes through the tireless efforts and the persistent work of dedicated Individuals. And without this hard work time itself becomes an ally of the primitive forces of social stagnation. And so, we

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[24] Robbins, *supra* note 13.

[25] Reverend Dr. Martin Luther King, Jr., The Other America, Speech at Stanford University, YouTube (Apr. 14, 1967), https://www.youtube.com/watch?v=dOWDtDUKz-U.

must help time, and we must realize that the time is always right to do right.[26]

After students analyze the videos, I then draw the connections for students to see how the discussion of kairos ties to the work of lawyers. There are a number of ways to do so. One approach is through the use of viral videos from the Black Lives Matter movement and a study of the kairotic aspects of the prosecution of Derek Chauvin for the murder of George Floyd.[27]

Finally, I tie the concept to the student's work by challenging them to look for right moments to advance particular arguments, include particular facts, and the like depending upon the narrative they are weaving within the lawsuit for their client and in light of the outside current events, if relevant or helpful.

I encourage them to think about time more qualitatively. For example, when an advocate is weaving a narrative about the facts in a client's case, *why* did events happen when they did? Did they happen too slowly? Too quickly? Should they not have happened at all? Critically, students are encouraged to think about the timing of an argument given the situation. *When* do you make a given argument? And might an argument work in one time and place and not work in a different time and place, even if the facts are similar?

Student advocates who view kairotic moments as something you can identify or exploit in the moment can analyze whether the speakers properly harnessed the concept of kairos in choosing right moments to advance particular arguments. For student advocates who view kairotic moments as something you can only see in hindsight, looking at historical speeches allows students to see why particular speeches may have worked in the moment or might have been more or less persuasive in hindsight and with a full picture of the historical context of the speech.

Conclusion

This approach has paid dividends. The students are engaged and excited to learn. They feel immersed in the role of a real lawyer rather

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[26] *Id.*

[27] *See supra* note 17, at 58-61 for brief observations regarding the role of kairos in the trial and conviction of Derek Chauvin for the murder of George Floyd.

than trapped in the role of student pretending to be a lawyer. Students also learn the valuable lesson that winning arguments are not static. Right moments in popular culture, politics, or current events may arise that will change an advocate's view of the best arguments to make or the order in which to present those arguments. Related to that point, the concept of kairos, particularly when introduced through the lens of historical speeches and viral videos, helps students develop a more sophisticated understanding of the critical roles of audience, purpose, and rhetorical situation—both within the lawsuit and in the larger social or political context.

Finally, learning about kairos made students' arguments in their spring motion work more nuanced and thoughtful. The briefs were more sophisticated and interesting to read, in part because introducing kairos forced me as the professor to take a step back and let students have more flexibility in crafting their arguments and choosing which arguments to advance. I was less heavy-handed in identifying what the "right" arguments were and more willing to let students explore their own voices using the persuasive devices I had taught them.