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LR&W Should Begin at the Beginning: Reading Legal Authority

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If you are at the high end of the range, your survey is just as important. We need to show that low salaries in legal writing are not the norm and are not inevitable. The more high-end salaries that are included, the higher the salary averages go, and the better able we are to get that message across.

I'm a case in point on the importance of the surveys. As many of you know, I will move from a staff position to a tenure-track faculty position at Ohio State this summer. When this issue came before the faculty, the question I heard most often was, "is anybody else doing this?" Perhaps because lawyers rely so much on precedent, law faculties frequently want to know if there is any precedent for actions they are taking. It was great to be able to hand them Jan Levine's latest compilation of Legal Writing program structures and the latest LWI survey.

Even those of us with only a rudimentary knowledge of statistics know that the bigger the survey, the more useful the results are. So, no matter where you are, no matter what your salary or your status, PLEASE COMPLETE AND SEND IN YOUR SURVEY AS SOON AS YOU CAN! I thank you, and your colleagues thank you.

I can't let this issue of The Second Draft go to press without a big thank you to the people who have put it together for the past six years. This is the last issue of The Second Draft to be published by the Boston College Law School Legal Writing faculty. The next issue will be published by Barbara Busharis at Florida State University and Suzanne Rowe, who is moving from Florida State University to direct the legal writing program at University of Oregon.

Jane Gionfriddo and Joan Blum have done a fabulous job with The Second Draft, working on it since 1994. In recent years, they have been assisted by their Boston College colleagues, Judy Tracy who joined the staff in 1998, and Lis Keller who joined in 1999.

Jane and Joan's continuation of the idea of "theme issues" has made The Second Draft an invaluable resource for new legal writing faculty. They have given many of us our first published piece, and perhaps the courage to send an article in to a law journal.



The next President's column will be written by Jane Gionfriddo. Even as she gives up the responsibility of publishing The Second Draft, she will assume the presidency of the Legal Writing Institute. I know that LWI will be in great hands.

Regards,

Mary Beth Beazley
President, Legal Writing Institute
Director of Legal Writing
The Ohio State University College of Law

Essays by Members of The Institute on Teaching Analysis

Reading Critically is the Foundation for Legal Analysis

LR&W SHOULD BEGIN AT THE BEGINNING:
READING LEGAL AUTHORITY

Jane Kent Gionfriddo
Boston College Law School

We all know that many of our students come to law school with a fundamental problem: they don't read critically. Given this, each year I spend more time in class teaching students this important skill and its relevance to thorough and sophisticated legal analysis.

Throughout the first semester, when much of class discussion focuses on case analysis, I make students support their assertions with specific language from the relevant case or cases. At such points I ask

students, "on what page did the court discuss this idea?" When students locate the language, I make them read the phrase, sentence or passage aloud. Sometimes students find that the language of the case validates their ideas. Sometimes, though, students realize that what the court *did* state on the page is quite different from what they remember, or they realize that the language on the page (or lack thereof) indicates they drew an inference that was incorrect.

One of my classes toward the middle of the first semester illustrates this process. At this point, students are working on the analysis of a requirement in a common

law tort cause of action in Massachusetts that concerns the relationship between a direct victim and bystander. Students have read and analyzed the relevant cases on their own to prepare for class discussion. As students answer questions on the facts of each case and whether the court found those facts to satisfy the requirement, I require them to support their assertions by going back to the language of the case. Coming into class, students think they have read and analyzed the cases carefully; class discussion points out that in some instances they have not.

For example, students are excited about one highest appeals court case because it is

the only case they have located that “addresses” whether a sibling relationship is sufficient. In fact, the highest appeals court does describe how the *trial* court had found that a minor sibling of the direct victim satisfied the relationship requirement. What students have missed, however, is a quick, seemingly insignificant statement of procedural history: while the *mother* of the direct victim had appealed her cause of action to the highest appeals court, the *sibling* of the direct victim had *not*. Skipping over this piece of the procedural history, students fail to realize that the sibling relationship was never before the highest appeals court and that consequently, the case indicates nothing at all concerning whether a sibling will satisfy the relationship requirement. At that precise moment, students begin to comprehend the dangers of reading uncritically, especially because we go on to discuss a supervisor’s reaction to receiving an analysis based upon an erroneous reading of this case.

In another case, the relationship is between a mother and her son, who are residents of different states. The son dies in a plane crash. When I ask what specific relationship was before the court, students always answer parent/*adult* child and that this is important since the rest of the Massachusetts cases have only made clear that a parent-*minor* child relationship satisfies the requirement. I respond by asking the class to locate the specific place in the case where the court describes the son as an “adult,” and I give the class plenty of time to go through the case. Scouring the case, students can find no reference at all to an “adult” son even though coming into class they would have sworn that the words “adult son” were stated explicitly somewhere within the case.

Finding no explicit reference, students articulate the real basis of why they believe the son was an adult: “Well, the son was living in another state and traveling on an airplane, and thus he *had to have been* an adult.” Once this idea is out in the open, other students immediately recognize that the facts of “living in another state” and “traveling on an airplane” do not require

the resulting inference that the son was an adult. At this point, someone always brings up a hypothetical scenario, such as a minor child of divorced parents traveling to see a parent living in another state. In this manner, students come to understand that the case simply doesn’t give them sufficient facts to know one way or the other. They confront how reading uncritically allowed them to “infer into the case” the words “adult son” when in fact it was an unsubstantiated inference from other facts in the case. We conclude this scenario by discussing how it would feel to be arguing before a judge and have that judge point out to you that you had just “made up” a fact in a case. I point out that making up a fact in a case is completely different from synthesizing a group of cases together to come up with implicit reasoning.

Teaching students to read critically in this manner takes a great deal of time in class. Yet the benefits are substantial. Students are forced to confront just how well they have read each individual case. They see in a vivid manner how easy it is to miss key ideas and how missing those key ideas can seriously undermine their understanding of the case. In essence, it is this foundation of learning how to read well that prepares students for all the other analytical skills required in sophisticated legal problem-solving.



Case Analysis

ROLLING UP THEIR SLEEVES: USING A SINGLE CASE TO TEACH MULTI-FACETED CASE ANALYSIS

Maureen Straub Kordesh
The John Marshall Law School

I have found that a fundamental confusion among beginning law students results from their inability to recognize the rich legal analytical context within which each opinion is nested. An experienced attorney “sees” this context, which includes precedential and non-precedential analysis, statutory analogies, legal history, policy, and logical and inductive analysis. All

judicial opinions exist within this context, even when the printed word does not express it; attorneys are always, at least unconsciously, aware of it.

It seems an old idea, really, using a case to teach analysis, but to its credit, it is not gimmicky, and to students it feels “real.” On the other hand, it appears to be a very traditional method. However, I believe that it is not, and hope that, if you try it, you will be pleased with the results. I use this exercise early in the first semester, when students are most receptive to learning techniques for close case analysis. I recommend this approach for anyone who believes, as my father taught me, that the most competent engineers are the ones who take real engines apart and put them back together.

The trick is to find the right case. I use *Moore v. Regents of the University of California*, a famous biotechnology case in which the plaintiff was deceived into returning for tests and therapy for several years after he had been successfully treated for leukemia. Apparently, his cells were unique, and defendants used them to develop a patented cell line with a projected value over a billion dollars. The issue was whether his bodily tissues and fluids were property; if so, he could maintain an action in conversion and recover for their wrongful appropriation. *Moore* is a “sexy” case and students usually read it enthusiastically.

Moore lays bare various techniques of legal analysis. It also provides a response-in a concurrence and dissents-to each of the legal analysis techniques the majority uses. Thus, it gives students a uniquely rich view of the context of analysis on a single fact pattern. Two examples will, hopefully, suffice to illustrate the opinion’s usefulness in teaching students to recognize methods of analysis.

The first technique we discuss is precedential analysis, something they do in their other classes as well. The court explicitly states that “no reported judicial decision supports [his] claim” and rejects the law of privacy as a precedential justification for recognizing property