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Insights from Clinical Teaching: Learning About Teaching Legal Writing from Working on Real Cases

“In supervising students who are writing for a client, ethical dilemmas come up immediately, deadlines matter, and the faculty member has to be product-oriented.”

By Helen A. Anderson

Helen Anderson is an Assistant Professor at the University of Washington School of Law in Seattle.

I began teaching legal writing in 1994, but I've since had the occasional foray into practice through supervising students who represented clients in our state's appellate courts. I directed an appellate clinic for two years, and most recently I supervised two students who briefed and argued a case in the Washington State Supreme Court. These experiences have taught me some important lessons that I have brought back to my legal writing classes. The clinical cases have not only reminded me what writing for practice really entails, and how hard it is to follow our sage writing advice, but they have given me key insights into aspects of writing that we (or at least I) don't always address in first-year legal writing classes.

In supervising students who are writing for a client, ethical dilemmas come up immediately, deadlines matter, and the faculty member has to be product-oriented. The final product is important in a way that the final product of a legal writing assignment is not. We are forced to follow a piece of writing all the way through to the end and make sure it is right. Collaboration has to work. And in the end, when we realize the outcome of our efforts, we come face-to-face with our limitations. This last lesson, the limitations of “good” writing, is one of the most important lessons I learned from directing a clinic.

Passion and Pathos

One case that we lost in the clinic forced me to think hard about what really matters in advocacy. I've come to believe that the attorney's passion for the case and the ability to convey that passion may sometimes be more important than an academically good brief.

I was used to an uphill battle, having done criminal appeals for nine years before coming to the University of Washington School of Law. I was used to trying to distract the court from the bloody corpse, and urging it to look instead at the constitution or a court rule provision. When I undertook the appellate clinic, I arranged to represent otherwise pro se civil clients referred to us by the state court of appeals. I thought that in taking on civil cases, I would finally have the benefit of less politically unpopular clients. The Connor case, I thought, should be an easy win. It was a family law case, and family law issues usually enjoy a very deferential standard of review. We represented the respondent, and respondents usually have a great advantage. And to top it off, the appellant's brief was not well-written, with run-on sentences, no road map or thesis paragraph, very little citation to authority, and a weak equal protection argument. I think my student's brief was much clearer, better written, and correct on the law. Other lawyers and faculty members who reviewed the briefs and helped us moot the case agreed that ours was the better brief.

But what our opponent had that we did not was a real passion for his case. That passion came through, even in the badly written brief. At least it came through enough to persuade the writing judge, who persuaded the other two judges. It was also very clear at oral argument. My student, on the other hand, never seemed sufficiently enthusiastic about her arguments. I think she was persuaded by the opponent's brief. I sensed that at the time, but I just kept trying to buck her up with my own outrage on behalf of our client.

When we lost (actually we lost in part, won in part), I was furious at the travesty of justice. Now that several years have passed I am able to reflect more calmly. Of course, it is entirely possible that we would have lost the case no matter what we did—that something

beyond our control in the case appealed to the court. But I believe that storytelling and faith in your story (whether that faith arises naturally or is self-induced as part of the representation) are critical to winning—more critical perhaps than academically good writing. How you view the facts is critical: our client was either a smooth customer or one of the downtrodden working poor.

I have emphasized this lesson ever since in all my writing classes. I work a lot with facts and the emotional appeal of the argument. In my persuasive writing classes, I try to be very alert to when my students do not appear convinced by their own arguments and get them to talk about that. We can usually refocus the argument so that it is something they can endorse. I've found this technique works very well even with so-called "objective" memo writing. When students come to my office and describe their struggles with the analysis, I ask them: Does this make sense to you? Are you convinced this is really the law? What is not being addressed? What is bothering you? Often these questions lead to important insights. As novices with little confidence in their abilities, students may at first bury their own reactions to the soundness of an argument. Yet those reactions usually suggest an analytical weakness that needs to be confronted, or a student who does not really understand the law. These buried reactions might also indicate an emotional aspect to the case that has been ignored, but needs to be addressed. To write most effectively, students must believe in the arguments they are making, whether in a persuasive brief or an objective memo.

Strategy

Last year, I learned another kind of lesson from representing real clients. The clerk of the state Supreme Court asked me to take a case on behalf of two life prisoners who had filed a civil suit. The prisoners claimed that a close reading of a statute entitled them to have less money deducted from their funds (for the most part money sent by friends and family) than other prisoners. The prisoners, who had done a good job representing themselves in the lower court, agreed to our offer

of assistance. I selected two very capable 3Ls from applications to work on the case.

As my students and I worked over multiple drafts of the brief, we faced a significant challenge in structuring the argument. We debated the transitions between arguments and about how to make different arguments compatible. So often in legal argument, one argument has the potential to undermine another, yet the advocate wants to make both. This was a statutory construction argument, and we wanted to create a linked chain of alternative/complementary arguments. We went back and forth on many of the connections.

For example, we had a plain text argument—was that incompatible with a legislative history argument? Our opponents had a legislative history argument, too. Should we tell the court not to look at anything but the plain text, or would that be putting all our eggs in one flimsy basket? Should we make the legislative history argument as an alternative, or as an "even if" argument?

These are challenging strategic writing decisions, and in thinking it over, I realized that we often succumb to student pressure and make these decisions for legal writing students rather than letting them wrestle with the argument chain themselves. Students frequently ask, should we argue X *and* Y or just X? Sometimes I will make the call in order to calm them down or in the interests of "fairness" in grading, but I realized how much we were taking away from their writing experience when we made those decisions.

These strategic decisions, and the risks that go with them, are a critical part of lawyering. Should we be doing more to encourage students to make these decisions for themselves in legal writing assignments? I now try to be more aware when students press me to answer strategic questions, and to hold off answering them. They sometimes think I am "hiding" the answer when I do this, but I do my best to explain the real reason: that determining the structure of an argument is an important legal skill, no less than fleshing it out in writing.

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My clinical experiences have taught me other lessons as well. I’ve been reminded how hard it can be at times to take constructive criticism without offense. I’ve seen the editorial “blindness” that sets in when one rereads one’s own work under a deadline. I’ve seen how difficult it can sometimes be to see the line between stylistic differences and mistakes that need to be corrected. Being on the receiving end of my student’s editing has reminded me of just how delicate writers’ egos can be.

I’ve spent the last few years doing mainly academic writing. I’ve learned a lot from academic writing, but working on a real case is quite different, and has provided me with some wonderful insights that I have been able to bring back to teaching my first-year students.

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Another Perspective

“As we move into the twenty-first century, teaching students lawyering skills has become an explicit goal of legal education at most schools. Some faculty still seem to view the teaching of skills as insufficiently intellectual, critical, or challenging, perhaps because skills can be defined in widely varying ways. Lawyering skills are often defined at the level of technique, which may seem ‘cookbook-ish’ and not intellectual. Commonly taught techniques include the technique of asking an open-ended question, or an unambiguous leading question. Such techniques can be valuable across a range of lawyering tasks, such as interviewing, mediating, taking a deposition, or performing a direct or cross-examination. Lawyering skills can also be conceptualized at a more general task-based level. Tasks commonly addressed in law school simulation and clinical courses include interviewing and counseling, negotiating, fact investigation, legal research, legal analysis and developing a case theory (for either a transaction or a litigated case), trial advocacy, mediation, appellate advocacy, and legal drafting. Teaching a task involves teaching techniques certainly, but not solely techniques, for in order to perform the larger task well, an individual must integrate the task into a larger framework encompassing goals, strategy, and interpersonal understandings. At the level of that larger framework, teaching lawyering skills can focus on placing the skills within a framework of case-theory or strategy. Clinical methodologies are without peer in teaching lawyering skills, from basic technique to sophisticated strategy.”

—Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 *Clinical L. Rev.* 123, 129–130 (2000).