HEINONLINE

Citation: 63 J. Legal Educ. i 2013-2014

Journal of Legal Education

Contents

From the Editors

This issue of the *Journal of Legal Education* contains a number of highly practical articles designed to solve challenging pedagogical issues. For balance, we have a short but also highly practical guide to the legal scholarly world for new legal academics, a thoughtful analysis of the "crisis of law schools" from the perspective of higher education more generally, and two quite learned but very different book reviews.

The first article is by Jessica Clark and Christy DeSanctis, "Toward a Unified Grading Vocabulary," which makes an important contribution to first year writing courses by showing how and why "grading rubrics" can both help students learn to write better and—perhaps more significantly—make evaluating that writing more systematic and fair. Janet Weinstein, Linda Morton, Howard Taras and Vivian Reznik next take on the challenge of "Teaching Teamwork to Law Students." They describe vehicles for developing this increasingly valued skill and how law students react to the unusual—for them in law school, but not in the real world—situation of being evaluated for their team's output as opposed to individual achievement.

Martha Minow's pithy guide to the categories of legal scholarship has served many law professors over the years, and we are happy now that she has chosen to publish it and make it generally available. It allows those who wish to join the legal scholarly world to understand what may be very mysterious for new scholars—what the existing categories of legal scholarly work are, and how they relate to each other.

Next is an innovative guide by Adam Rosman on how to use diagrams in a variety of ways to make briefs stronger—seemingly obvious but only after he shows the power of representations that are now relatively easy to construct. Then Art Hinshaw takes up the daunting task of getting students to understand and see the virtue of negotiation ethics all too often neglected in practice.

Robert Ehrenberg adds a thoughtful voice to the often tendentious but quite important debate about the so-called crisis of law schools and legal education. Writing from the perspective of a scholar of higher education generally, not just law schools, Ehrenberg takes his address to the AALS and makes it available more generally as "American Law Schools in a Time of Transition." Among other topics, he examines why tuitions have gone up, potential implications of more part-time instructors, and the actual contributions of diversity to effective education.

In our last article, part of "At the Lectern" series, Paul Figley explains how he enlivens first year torts classes with an event that introduces students to neglected issues of damages in personal injury claims.

The two book reviews are quite different in topic, but each reviews an interesting book, and also sets the book within rich interdisciplinary scholarly approaches. Peter Huang reviews *Why the Law is So Perverse*, by Leo Katz, which draws heavily on the literature on social choice. Huang analyzes the examples Katz uses to show how general problems raised by "multiple criteria decision-making" relate to the law and then goes on, in an impressive appendix, to give readers a primer on the social choice literature.

Finally, Dean Spade provides a tour de force review of *The Law is a White Dog* by Colin Dayan. Situating the book within a deep literature on race, criminal justice, and national security, as well as examples from his personal experience, he clarifies the way that legal categories—fictions—are used to "justify and rationalize the cruelty that has been an ongoing feature of American law and law enforcement."

This issue of the journal provides a range of approaches, ambitions, insights, and helpful hints. As always, the editors welcome suggestions and observations about this issue or the JLE generally.

Bryant G. Garth
Gowri Ramachandran
Molly Selvin

Toward a Unified Grading Vocabulary: Using Rubrics in Legal Writing Courses

Jessica Clark and Christy DeSanctis

I. Introduction

"But, assessing writing is so subjective." This is a common, knee-jerk reaction to the notion that a legal writing class should be graded. It is also likely the sentiment underlying the charge that writing classes teach students to write for only one person—the professor—and that a uniform standard for grading writing cannot be established across sections taught by different professors or across multiple classes, courses, or writing programs. Yet, recent presentations at regional and national legal writing conferences indicate that we are all marching to a beat that does not sound very different to a growing number of writing professors. More broadly, conversations about law school assessment measures already are occurring. In fact, on this topic the legal academy is well behind the curve. With respect to writing, questions remain not only about how it should be assessed, but whether it can be measured with uniformity and consistency: How should writing, one of the most critical skills for the legal profession, be assessed? Can writing be integrated into larger doctrinal courses and graded with some measure of objectivity and consistency?[1]

In this article, we suggest that there can and should be uniform standards for writing, primarily in each law school's writing program—in part because

Jessica Clark is Visiting Associate Professor of Legal Research and Writing at Georgetown University Law Center.

Christy DeSanctis is Professor of Legal Writing and Director of the Legal Research and Writing Program at George Washington University Law School.

1. The June 2011 Institute for Law Teaching and Learning Conference was devoted to topics in assessment. A wealth of presentations at that conference focused on assessment measures for writing including how to assess writing in a non-writing course. *See e.g.*, Engaging and Assessing Our Students: Welcome to the 2011 ILTL Conference, *available at* http://lawteaching.org/conferences/2011/welcome/index.php.

these standards already are there, though not always explicitly, and in part because establishing them assists in combating the notion that legal writing assessment is a purely subjective enterprise. We suggest that this simply is not the case and, moreover, that using fairly explicit, detailed grading score sheets—which we call grading rubrics—can assist in establishing these standards. Our discussion also can help professors who teach other subjects and want to integrate writing exercises into their courses. The critical thinking that informs the development and implementation of such assessment standards provides an example of what legal writing professors can offer the larger legal academy in terms of establishing the kind of outcome assessment measures promoted by the 2007 Carnegie Report.[2] Thus, if assessment in law schools was "knocking at the door of American legal education"[3] in 2000, it must be kicking that door down in 2013. In fact, there has been an undeniable recent trend in law school assessment scholarship[4] and assessment-themed conferences.[5]

2.   The Carnegie Foundation for the Advancement of Teaching issued its most recent report on legal education in 2007, entitled: Educating Lawyers: Preparation for the Profession of Law. William M. Sullivan, Anne Colby, Judith Welch Wagner, Lloyd Bond & Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass 2007) [hereinafter Carnegie Report]. The study initiated widespread discussion among members of the legal academy, especially in its recommendations concerning experiential learning. While the report credits the work of legal writing professionals for their recognition of the importance of integrating teaching that is interactive and experiential in nature, some commentators have suggested that, for this segment of the legal academy, the report may not go far enough in recognizing its potential contributions to the larger enterprise of law teaching. *See e.g.*, Christine N. Coughlin, Lisa T. McElroy & Deborah S. Gordon, The Carnegie Report and Legal Writing: Does the Report Go Far Enough?, 17 J. Legal Writing Inst. 279 (2011).

3.   Gregory S. Munro, Outcomes Assessment for Law Schools 3 (Gonzaga Univ. Press 2000).

4.   For example, the Legal Writing Institute's newsletter, The Second Draft, recently published an entire volume on assessment in legal writing. The call for submissions asked for articles about "effective use of outcome measures and assessments in the teaching of legal analysis, writing and research." Legal Writing Inst., 24 The Second Draft, Fall 2010, *available at* http://www.lwionline.org/the_second_draft.html. This volume includes 11 articles about outcome measures and assessments.

5.   "The University of Denver hosted the first law school conference dedicated to assessment of learning outcomes. Entitled Legal Education at the Crossroads v. 3: Assessment, this conference took place on September 11-13, 2009." David I. C. Thompson, AALS 2011–LWRR Section Presentation: How LRW Faculty Can Contribute to Their Law School's Assessment Plan, *available at* http://www.law.du.edu/thomson/AALS2011.htm. More recently, the Institute for Law Teaching and Learning advertised its summer 2011 conference, called Engaging and Assessing Our Students, as designed to provide "workshops on techniques for generating student engagement, and for improving assessment of students to enhance their learning." Institute Conferences, *available at* http://lawteaching.org/conferences/. Professor Lori Roberts of Western State University College of Law gave a presentation entitled "Assessing Student Learning Outcomes in a Legal Writing Course: A Simple, Efficient, and Valuable Process" at the 2011 Capital Area Legal Writing Conference in Washington, D.C. Professor Roberts published a related article on assessment in law school. *See* Assessing Ourselves: Confirming Assumptions and Improving Student Learning by Efficiently and Fearlessly Assessing Student Learning Outcomes, 3 Drexel L. Rev. 457 (2011).

This article offers an introduction to a methodology for assessing legal writing informed by several years of analyzing how writing professors grade—and what criteria they use—before and after our own institution began awarding letter grades for legal writing.[6] In addition, the article describes several primary and secondary benefits of employing rubrics to assess writing. Any professor teaching writing or integrating a writing component into another course should find this discussion pertinent.

II. Grading Writing: Not Why, but How

Not surprisingly, employers and judges regularly report that a law student or graduate's writing skills are among the most important skills—if not the most important skill—that he or she could bring to the job. Underscoring that importance, most legal writing courses are graded on a traditional letter (A to F) scale. Of the law schools ranked in the top 25 by *U.S. News & World Report*,[7] 16 grade legal research and writing consistent with other first-year courses. Fifteen use traditional letter or numeric grades and calculate the legal writing grade into the student's GPA: Boston University, Chicago, Cornell, Duke, Emory, Georgetown, George Washington, Northwestern, Notre Dame, Texas, UCLA, USC, Vanderbilt, Virginia and Washington University in St. Louis. UC Berkeley uses modified grades for all first-year classes and thus does not treat legal writing differently. Significantly, there are four adjunct-based programs on this list (BU, Notre Dame, GW, and USC) leaving only one other adjunct-based program in the top 25 that does not use traditional letter grades (University of Minnesota).[8] The 2012 survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute reveals even more extreme pro-grading statistics: 160 out of 184 responding schools (87 percent) grade legal writing and include that grade in the student's GPA.[9]

6.   We and our legal writing colleagues have used detailed grading rubrics to assess more than 6000 papers (predictive memoranda, trial briefs, and appellate briefs). Our thesis and analysis in this article are rooted in the data we have collected with these thousands of papers, associated scores and sub-scores, discussions with legal writing teachers about their application of the rubrics, and anecdotal student feedback about how the rubrics inform their understanding of achievement in the legal writing course.

7.   U.S. News & World Report, Best Law Schools, *available at* http://grad-schools.usnews. rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings.

8.   The practices of the schools not already mentioned are: Yale has no separate legal writing program, and Michigan counts legal research and writing grades in the GPA if the grade is a C- or below. Columbia, Harvard, NYU, Stanford, University of Illinois and University of Pennsylvania use modified pass/fail grades for legal writing. Wisconsin, ranked 28th, is the next adjunct-based legal writing program on the U.S. News list. There, like BU, Notre Dame and USC, legal writing is letter-graded and that grade counts in a student's GPA. In other words, four of the five other top-tier law schools that employ adjunct professors to teach legal writing use traditional grades and count those grades in the GPA.

9.   Association of Legal Writing Directors / Legal Writing Institute, Report of the Annual Legal Writing Survey, 2012, at v, *available at* http://www.lwionline.org/uploads/ FileUpload/2012Survey.pdf [hereinafter 2012 ALWD/LWI Survey].

If grading writing is the norm, it follows that there should be some set of standards on which students are assessed that can be reduced to a narrative that is both informative and transferrable. If not, then we are doing something wrong. If we cannot point to specific reasons why one memorandum or brief is better than another one—if it is solely based on personal preference, then we are limited to teaching by simply stating: "just do it first, and then I will explain"—an all-too-common charge for courses that teach practical skills, such as legal writing.

Our assessment of students, after all, is not typically based on a multiple-choice exam that simply tests adherence to arcane rules of grammar. Attending to rules of grammar and punctuation, to font and formatting expectations, to appropriate citation format—certainly, these considerations are vital to the enterprise of good writing.[10] Yet, most legal writing professionals would doubtfully say that compliance with these details, as important and meaningful as they are, form the centerpiece of their classes or comprise the bulk of their grading expectations. Rather, legal writing courses teach and assess legal analysis. There are points of agreement about how this legal analysis is done effectively—establishing and explaining rules, and drawing close analogies or making effective distinctions between present and former case facts. While different textbooks may use different vocabulary to explain these concepts, and assignments may vary in the percentage value accorded to their successful execution, there is more uniformity than difference in our approaches. For example, we point our students in the early classes of the fall semester to a useful, nuts-and-bolts essay by Lurene Contento, in which she writes:

> Although most of the students have read about IRAC or at least heard of it, they come to the [beginner's] workshop confused about how to use it. They also want to know why they should use it when friends in other classes are using SIREAD or CRuPAC or TREAT or some other funny-sounding acronym. . . . The students begin to see that while IRAC and kin have different names, their elements match up. . . . Because we all know what IRAC is, whether you call it Issue, Conclusion, Sub Issue, Topic, or Thesis, you have to tell your reader what the issue is before you write about it. . . . Then, you need to set out the general Rules [ ] so that the reader understands the law before you apply it.[11]

Given that factors such as these—articulating the crystallized legal issue and announcing the rule that governs it—are identifiable factors and, moreover, present objective criteria for measuring the strengths of legal analysis, legal writing courses should employ rubrics along the lines that we advocate to communicate these qualities and expectations in advance of grading. This should be true regardless of the size and structure of the program.

10.   Fonts actually may be far more important than we realize. *See* Richard Neumann, Jr. & Ruth Anne Robbins, Presentation Materials for "Font Wars," given at the 2011 Capital Area Legal Writing Conference, Feb. 26, 2011, Washington, D.C., *available at* http://wiki.lwionline.org/images/5/5c/Font_Wars_OCR.pdf.

11.   Lurene Contento, Demystifying IRAC and its Kin: Giving Students the Basics to Write "Like a Lawyer," 21 The Second Draft 8, Dec. 2006.

Indeed, legal writing programs vary in many ways, from number of credits devoted to them to the staffing models that they employ.[12] In most legal writing courses, a single professor is responsible for grading a student's writing throughout a semester or year-long course. But, given that writing is, as we teach, always audience-driven, the same sentiment translates to grader-driven. The issue remains whether there are any objective measures to which a writing professor can turn to assess a piece of writing and while perhaps also giving weight to subjective interpretations of how the writing measures up to his or her standards. Even though personal or stylistic preferences may play some role in evaluating writing, these preferences are never the sole measure of assessment. Or, such preferences should not be. However, if grading legal writing is not a matter of pure preference, then what exactly is it? And, how do we as legal writing professors assess it fairly, consistently, and accurately?

III. Crafting Rubrics: Balancing Predictability and Flexibility

When several years ago we proposed moving to a letter-graded instead of a modified pass-fail system[13] one of our central concerns was how to ensure that our cadre of 45 legal writing professors would use the same standards to assess papers. Would it be possible for a professor to give a B grade to a paper primarily because he or she over-valued, for example, the statement of facts in a trial brief, awarding more points to that section than to any other section and more points than other professors? Would the same brief score a B+ or A- in another section where the professor assigned fewer points to the statement of facts and more points to effective use of argument headings? Would a creative use of policy argument in an appellate brief stand out to one professor but strike another as a throwaway argument?

Up against these concerns, we knew we needed to institute a system of detailed grading rubrics to set standards and create a methodology for consistent evaluation throughout the first-year class. A rubric is a set of detailed grading guidelines used to determine a numerical score or letter grade through

12.   According to the 2012 ALWD/LWI Survey, "virtually all writing programs had required courses in both the first and second semester of the first year of law school. The average number of credit hours in fall 2011 was 2.44 (up from an average of 2.38 credit hours in fall of the 2010-2011 academic year); the average in spring 2012 was 2.36 credit hours (up slightly from an average of 2.31 credit hours in the spring of the 2010-2011 academic year)." 2012 ALWD/LWI Survey, *supra* note 9, at iv. As an example of the variations, nine schools reported 1 credit in the fall semester; 90 reported 2 credits in the fall semester; 72 reported 3 credits in the fall semester, and 8 reported 4 credits in the fall semester. *Id.* at 7. The credit variations reported for the second semester of the first year were similar. *Id.* The survey also reported that "most programs continued to use full-time non-tenure-track teachers (82 programs, or 44.5 percent of respondents), or a hybrid staffing model (62 respondents, or 33.7 percent)." *Id.* at iv; *see also id.* at 5-6.

13.   Our former grading system allowed four types of grades: a "High Pass," for grades which would otherwise earn an A or A-; a "Pass" for a B-range grade; a "Low Pass," for C-range grades; and a "Fail."

application of articulated guidelines.[14] Using categories of expectations and associated point or letter-grade values, rubrics break down an assignment into identifiable components. Rubrics give detailed descriptions of how points are earned by explaining levels of sophistication that characterize a narrow point range within each component. The point values and descriptions may vary for each assignment by what is expected at each stage in the semester, and by what is emphasized and taught before each assignment. Most critically, a rubric must be sufficiently detailed to specify expectations and the number of points associated with each component. At the same time, a rubric must allow the professor the flexibility to distinguish between and among papers at a level of nuance that is impossible to capture with a purely objective methodology.[15]

We crafted the rubrics with the goal of standardizing the valuation of components of legal analysis and writing, thus offering predictability to students, and at the same time, allowing flexibility where appropriate. With these goals in mind, our first step was to demarcate what exactly it was that we were evaluating, which differs based on a particular assignment, and then to assign each piece of that puzzle a point value.[16] Whether that meant that a statement of facts was worth 5, 10 or 15 percent of the total score was of no particular relevance. The idea was to come to a uniform conclusion for each assignment about the value of each component related to the time spent teaching it. For example, we might value the statement of facts as 5 percent in a predictive memorandum where the facts were largely given as a narrative in an assigning memorandum. But we might value it as 10 or 15 percent in a trial court brief where the course focused more on the importance of constructing an effective story based on synthesis of several fact documents.

Next, we assigned a narrative assessment to a limited point spread designed both to describe to students and to graders what is excellent, versus mediocre, versus problematic and, as well, to tie the hands to some extent of graders such that there is only one possible point spread attributed to each category. Designed to announce to students in advance of grading what is expected, the narrative descriptions mirrored the material professors taught in classes leading up to completion of the particular writing assignment. Still, our

14.   For a more thorough description of rubrics, see Sophie M. Sparrow, Describing the Ball: Improving Teaching by Using Rubrics—Explicit Grading Criteria, 2004 Mich. L. Rev. 1, 7 (2004).

15.   The basis for the design of our grading rubrics stems from the grading guidelines that the University of Maryland uses for its freshman writing course, English 101.

16.   Professors should evaluate assignments without knowing the author. Blind grading is fairly common, even in writing programs. The 2012 ALWD/LWI Survey Report data shows that 119 out of 184 programs grade at least one writing assignment anonymously. ALWD/LWI Survey, *supra* note 9, at v. By this practice, a professor is protected from the perception of favoritism, and is also unable to award points for effort when effort is not part of the rubric. In other words, a student might earn 36 out of 40 on an assignment, and if the professor knew this student to be the same student who scored 25 out of 40 on the immediately prior assignment, the professor might want to reward the student's improvement. Legal writing courses, however, generally do not award points for effort.

goal was to give professors sufficient room to be able to distinguish between, for example, two or even three papers that met the criteria of a particular subcategory but nevertheless were distinguishable from each other as more or less successful given those criteria. Based on the comparative success of the papers, we wanted professors to be able to assign different numerical scores related to the relative strength of the papers, but still identify the papers as within the top range of points. In other words, while we wanted to be specific and to impose some constraints, we recognized in advance that we could not associate a narrative with each individual point available, no matter what the total scale.[17] Rather, the idea was to develop narratives that could be associated with various point ranges.

A. Effective Rubric Language: It's All in the Details.

To illustrate how this works in crafting a rubric, consider the second memorandum assignment in the fall semester. Like in many other two-semester legal writing courses, the second assignment is an open-research memorandum that asks students to predict the outcome of a legal quandary. It is worth 72 of a possible 160 points for the semester; the statement of facts is worth 6 points, a little less than 10 percent of the total. The grading rubric for the statement of facts in the second memorandum is set out below. Note that our descriptions are directed to the professors as the primary target audience, but we circulate these guidelines in advance to all students, who thus form a secondary audience for this information:

STATEMENT OF FACTS 6 points

A detailed fact statement was provided in the assigning memorandum. Here, you should consider how well the student excerpts and presents the necessary facts. Ask yourself whether you have enough information in the SOF to understand the situation in the absence of the assigning memorandum.

17. We recommend that in drafting rubrics for writing assignments, one consider making assignments worth a point total other than 100. In our first year of using grading rubrics, each assignment was scored on a 100-point scale, and then weighted according to the appropriate percentage assigned as contributing to the final end-of-semester score. In the 100-point rubrics, there were several categories with point ranges of 20, 30 and even 40 points. These rather large point ranges were divided into sub-ranges with guidelines for each category, but it proved impossible to write guidelines for each, or even every other, point in the range. We had some trouble determining, for example, given a range of 20 to 30 points for use of analogies and distinctions, whether a professor was using those 10 points accurately or reliably. In that we recommended (and still do) first categorizing papers into a scoring range before assigning a score, we saw evidence of professors automatically going to the top of a 10-point category every time a paper met the criteria for that range, such that any paper that made it into the 20 to 30 point range received a 28, 29, or 30. That was not the intent, of course, to artificially limit scoring to a 3-point range within a broader range. Yet we saw this tendency and modified the narratives and point totals to inspire more confidence in using the entire range of points available. Not only that, but the deep point-total ranges resulted in scores never reaching below a certain threshold. Students "earned" points to some extent just for submitting the document, another unintended consequence of the deep point ranges.

6 points   Includes both sufficiently contextual background facts and the facts that are important to the analysis and conclusion. Is concise, yet without referring back to text of problem, reader has all necessary factual info. Is objective: SOF is free of legal argument, but narration of the facts is consistent with the legal conclusions.

4 points   Follows these general guidelines, but: includes legal conclusions or argumentative characterizations; includes factual inferences that are not supported. Generally, there are no key facts missing. Style-wise, it may lack a sophisticated tone and include some editorializing but it is still readable and understandable.

2 points   Lacks important substance, detail or context: a reader would have trouble (without the fact pattern) understanding the relevant details (in anticipation of the discussion section). Uses argumentative language or editorializing and/or exhibits stylistic deficiencies that render it difficult to follow (in tone or because it presents a confusing organization or rendition of events).

In contrast, our trial court brief, the first major writing assignment for the spring semester, which is worth 40 points of a total of 160 points for the term, follows. (Note that given the smaller point spread for the overall assignment, we have combined for this particular rubric the "basic" elements of the trial court brief.)

Basic Components:
CAPTION, INTRO, SOF, CONCLUSION   5 points

5 points: Assign 5 points if the caption, introduction, statement of facts, and conclusion are extremely well-executed by a second semester 1L. In particular, look for the following:

• The caption complies with GW Local Rule (LR) 11,[18] is error-free and does not include any extraneous information or formatting mistakes.

• The introduction complies with LR 12, is brief and, if taught by the professor, includes a theme to the party's overall position but does not include any of the party's specific arguments.

• The statement of facts complies with LRs 13 and 27, employs a clear organization method that works well with

---

18. We issue "GW Local Rules" each semester in part so that students are acclimated to how different courts, indeed, different judges, have specific rules that govern the submission of written work product. Though GW rules are based loosely on those in use in the D.C. District and Circuit Courts, they also incorporate an amalgam of institutional considerations, such as compliance with GW's Academic Integrity Code.

the facts and issues in the memo and demonstrates the student's ability to use persuasive techniques effectively by emphasizing favorable facts and deemphasizing unfavorable ones. The statement of facts may include inferences, as long as the given facts support the inferences. Characterizations of facts must be within the bounds of persuasiveness. A theme is evident in, or supported by, the statement of facts.

• The conclusion complies with LRs 15 and 30.

3 points: Assign 3 points if either (1) the caption, introduction, statement of facts, and conclusion are all fairly well-executed but lack crispness, sophistication or sufficient detail, or (2) some components are well-executed while others are deficient in places but the quality of the components as a whole does not detract from the overall strength of the paper.

1 point: Assign 1 point if the student included each of the components but the quality of one or more detracts from the overall strength of the paper. Things to look for include:

• A caption with errors such as a misspelled court name or party name, formatting mistakes and/or unnecessary information.

• An introduction that is missing one or more important elements, such as a brief summary of the nature of the case or the party's desired outcome.

• A statement of facts that includes mischaracterizations, unsupported inferences and/or legal conclusions throughout. Lack of persuasiveness in tone also warrants a score in this range when combined with other weaknesses. Facts may be generalized and even inaccurate; as a whole, the student failed to demonstrate an understanding of the purpose of a persuasive SOF.

• A conclusion that could have better stated the relief sought or desired disposition of the case. The conclusion perhaps includes, or fails to include, content that indicates that the student did not understand the purpose of the conclusion and/or the guidelines set out by the professor.

0 points: Assign 0 points if one or more of the basic components is missing from the memo.

As these examples illustrate, grading guidelines can be written without specifying unique qualities for each point value in a given range. Indeed, it seems artificial if not impossible to do so. These "in-between points"—for example, a 5 for the statement of facts of the open research memorandum (see

the first of the two above-provided rubrics) can be assigned when a student does better than the description of a 4, but does not quite reach the description of a 6. As another built-in tool for flexibility, these in-between points can, and should, also be used to distinguish between papers. For example, if two papers satisfy the language associated with 5 points in the second sample rubric above but one has a theme that is better developed than the other and both satisfy the requirement of "a theme is evident, or supported by," an in-between point can be awarded. Instead of awarding a 5 to both papers which would suggest that they are equal, the paper with the better developed theme should be assigned a 4 and the other paper assigned a 4 or even a 4.5, if half-points are allowed in the scheme.[19] This kind of flexibility is often necessary.

Additionally, as seen in the 5-point range description for the trial court brief in the above sample, allowing room for professors' preferences is entirely manageable, using "as taught by" or similar language in the grading guidelines. For example, there is no question that having a theme or theory of the case is part of a good trial brief. But the placement of the theme or the extent to which it is present throughout the brief may be open to preference. The rubric's specific language, therefore, need not be so precise as to suggest a particular choice for something that is stylistic and should be taught as such. Rather, the concept of the rubrics as we use them is to identify whether a particular component or concept belongs in a brief or other piece of writing and to articulate what is generally required for such a component. Then it is up to the professor to determine whether that component has been executed in accordance with course instruction. Though the particular number of students per section of a course may impose some institutional constraints on exactly how much pure relativity in scoring can be tolerated, there is no question that professors tend to prefer flexibility. For example, multiple papers may fall into a particular category that spans a range of 5 total points. Ideally, a professor still will be able to differentiate at the margins among the papers. If 3 out of 12 seem to meet the standards for a top category worth, say, 6 to 10 points, one would expect that the professor could still assign different point totals where possible in that 5-point range among those top papers. In our experience, however, some professors reported always choosing the highest score in a given range, the logic being that if some aspect of a paper was "qualified" for a certain range, then the maximum number of points for that range must be warranted. Other professors reported always choosing the middle score, applying similar logic but reaching a different conclusion. And still other professors reported nuanced comparisons of the papers that fell within that range and assigning points according to the relative strengths of the papers. The latter is what we imagined, but the former examples were not isolated instances.

These relative inconsistencies in application were most problematic where scoring categories were too wide. And, it was within these wider ranges where

19.   Half-points allow additional differentiation among papers, though on a smaller scale. Quarter or less than quarter points are not recommended because of the decimals necessarily involved in the points calculation.

confusion and frustration among students and professors tended to boil over. This experience contributed to our restructuring rubrics off the 100-point scale, in large part because we wanted to infuse the process with some additional precision. Nevertheless, we remain skeptical that larger point ranges are necessarily fraught with such issues. We therefore transition professors over the duration of our year-long course toward rubrics that entail greater flexibility and less exacting descriptions in each category. When we focus on persuasive writing in the spring semester, for example, we find that there must be some room in the rubrics to accommodate recognition of the *je ne sais quoi* that one advocate brings to the endeavor while another does not. Of course, this is not the same as saying anything goes; chaos is not the result. The idea is simply to limit the possible number of points implicated by judgment calls.

Crafting rubrics with maximum predictability and flexibility where appropriate, we have been able to answer the questions presented at the outset. In terms of whether professors value different components of a paper in different ways, which would potentially create unpredictability for students, we have successfully avoided that in the grading scheme by setting up points-based categories for assessment. The rubric's limits on the range of value for a particular category does not stop professors from writing more qualitative feedback in balance with her own ideas about how important or valuable the component is to the paper, but the limits do stop professors from overvaluing one component in a way that is unbalanced with other professors. Including flexible language to account for what a professor has emphasized in class still achieves predictability because students know what the professor has emphasized in class, and can even ask for clarification based on the language in the rubric to ensure understanding. Finally, we craft the rubrics in a way that captures all possibilities without setting false constraints. In describing what to assess for the content of an appellate brief argument, for example, the rubric delineates various types of arguments that may be included, such as rule-based, analogical reasoning, or policy, and asks the professor to assess the effective employment of those arguments. This comprehensive approach helps thwart professors from automatically discounting policy arguments and encourages an open-minded approach (with limits, of course, as set by the rubric) to evaluating a student's argument.

B. Completed Rubrics as Feedback: That's Just the Beginning.

In her 2004 article, Sophie Sparrow wrote that one advantage of rubrics is that professors can provide detailed feedback on students' work by filling in and returning the rubric to them.[20] Providing completed rubrics can give students a good sense of where they missed points,[21] but many focus at least initially on wanting to know exactly where they lost a half point. This is unproductive and it often is impossible to articulate. If there are five points

---

20.   Sparrow, *supra* note 14, at 8.

21.   *Id.* at 23-24 (providing examples of how students used completed rubrics to self-identify their weaknesses in exams).

available for the statement of facts and two students get a 5 and two get a 4 it may be hair-splitting to explain the difference—other than that the 5s were "better than" the 4s. The leeway that a professor has in determining the "in-between" scores is not something that should fall by the wayside. Rather, it speaks to the essence of grading legal writing. There will always be some subjectivity at the margins and that is neither surprising nor problematic. The goal is simply to articulate expectations and benchmarks for evaluating any segment or aspect of legal writing.

But students need more than a completed rubric alone, however specific it may be, to identify where they went wrong and how to improve their writing. In an exam course with an issue-spotting mandate, a rubric may list the ten issues the professor anticipated as requiring discussion. The lack of checkmark or circle on one of the issues communicates "you missed this issue" to the student. This is tangible and sought-after information. Though students may learn how to perform better on future exams by reviewing the scoring metric for that exam, they may not be able to learn how to specifically improve that exam's answer, if only because they will never take the same test or course again. The same is not true for a legal writing course, which at its best attempts to teach skills transferable to any summer job or legal practice. In a writing course, students write multiple assignments generally intended to build upon each other. In most fall curricula, students learn the building blocks of a memo, such as how to structure a question presented and a brief answer. They learn these pieces often before writing an entire memorandum, and they learn how to write predictively before writing persuasively. Writing assignments, especially in the first semester, are often submitted in partial drafts on the way to a complete document.[22] The idea that providing a completed score sheet with subsection totals might be a substitute for—or the equivalent of—providing detailed written feedback on a draft or final version of an assignment, does not square with the practice of most legal writing professionals. A marked-up score sheet might help students understand where they lost points on a particular writing assignment but students really need explicit and formative comments. Such comments, divorced from any associated score, should be designed to guide the student not only in understanding the strengths and weaknesses in his written work but how to improve the next major writing assignment. Such formative comments may be most important and useful in a legal writing course because students write assignments throughout the year and the final grade is based on all of those assignments. The result may be radically different from the score earned for a class based solely on one three-hour exam.[23]

22. According to the 2012 ALWD/LWI Survey, 170 legal writing programs "require rewrites on at least some major assignments, with 53 of those requiring rewrites on all major assignments[.]" 2012 ALWD/LWI Survey, *supra* note 9, at v.

23. The Carnegie Report recognized how important feedback is in legal writing courses: "students learn primarily by being led, coached and given abundant feedback directed to improve their ability to practice legal reasoning in specific contexts." Carnegie Report, *supra* note 2, at 108. The report also noted the importance of feedback from the students' perspective: "One student's comment summed up many others. She noted, 'It is the

The all-too-common yet largely uninformative comments on a student's paper, such as "great job!," should become obsolete in a system with a more informative vocabulary dependent on the specificity of an appropriate grading rubric. For example, in response to a statement of facts that falls just short of the grading guidelines for 6 points, a professor could provide information a student can use when drafting her next statement of facts.[24] Such a comment could look like this:

> You have presented a smooth, organized narrative with the appropriate background and legally significant facts. The reader can easily understand factual context after reading your statement of facts, though there is a bit of non-objective presentation, especially related to the choice of clothing.

For a lower scoring paper, the rubric can provide essential help in crafting feedback that will help students move forward, again by avoiding comments like, "Yikes!" or "???" or "You missed the boat here." Using the rubric as a guide in commenting—even copying and pasting language from the rubric—makes it possible for professors to comment more effectively by giving students specific, tailored information about how to improve their writing. Though students may be focused on how to earn more points the next time around, earning more points should translate to strengthened writing, the ultimate goal of using rubrics and providing comments. For example, a comment on a 3-scoring statement of facts could say,

> Remember your reader. Your reader will not review the fact documents or assigning memo before reading your memo. That means it is up to you to provide the complete contextual picture and all facts you will use in the discussion section. Here you are missing a few of the contextual facts and the second half is confusingly organized.

Completed rubrics or subsection scores should not be the sole source of feedback on writing assignments because the qualitative comments professors write in response to students' work are a more effective way of providing feedback. Indeed, providing solely the completed rubrics is an invitation for over-reliance on the numbers themselves. The rubric is an efficient vehicle for identifying strengths and weaknesses but it alone is not enough.

---

feedback you receive from the teachers, as opposed to just so much reading' in her doctrinal courses that made the writing course so important for her in learning the law." *Id.* at 104. The report concluded that "[f]ormative practices directed toward improved learning ought to be the primary means of assessment." *Id.* at 189.

24. Note that commenting on students' papers may be dead, at least in the form of written comments, as George Gopen said in his address at the 2011 Capital Area Legal Writing Conference, *available at* http://128.164.132.16/wmvideo/watch2.asp?directory=public&filena me=249615.

IV. Using Rubrics: Worth the Time and Effort

Detailed grading guidelines at once offer productive vocabulary that professor-graders can use in their substantive comments and, as well, the guidelines announce in advance to student-writers exactly what elements are required in a given assignment, and on what basis each will be evaluated at a defined value. Both aspects have proved to be as useful and productive as having implemented a standardized scoring system in the first instance. No doubt a decision to employ rubrics to grade writing assignments requires commitment to a time- and labor-intensive process. That process, though, will pay off in various ways. Rubrics set student expectations and promote consistency; they lead to more effective teaching, more efficient grading, and improved opportunities for student learning.[25] There are secondary benefits as well—rubrics can be used as a staffing tool and as an assessment tool, for both students and professors.

A. Setting Expectations

One of the primary benefits of implementing a rubric grading system communicated in advance is that students have at their fingertips a checklist that outlines parameters for assessing their papers. Thus, if, for example, a student does not understand what an appropriate question presented should look like in an office memorandum, she can review the language in the rubric. But a rubric also helps her make a strategic decision: if she knows the question presented is only worth 4 points of 40, she might decide not to spend as much energy crafting that section to perfection as on organizing her legal argument, which in this hypothetical situation might be worth 12 points. That is not to suggest that a lower points-earning section is unimportant but simply that it is worth less to the student's grade than the more substantial components, which likely received greater focus in class.

Consulting a rubric before completing a paper, especially while drafting, can also help direct student questions. Students can give their questions priority based on the values set forth in the rubric. This means the language must be clear and understandable. Using language consistently and as specifically as possible are keys to an effective rubric. Use of consistent language creates a common vocabulary for professors and students, reinforcing the rubric and classroom instruction. Also, students can better understand how to frame their questions using the common vocabulary identified in the rubric.

Student expectations are only half of the equation here. Rubrics also give professors the advantage of setting expectations for writing assignments. In developing a rubric, professors are forced to articulate how points are earned. This can aid the professor in course development and lesson planning. Students often ask writing professors "what are you looking for?" Rubrics provide detailed answers in familiar language based on what students are learning in class. Rubrics also require professors to think about course objectives and how to attain them, teach to them and measure success.

25.   *See* Sparrow, *supra* note 14, at 27.

B. Promoting Consistency

Ensuring that professors generally score papers the same way is a concern that rubrics can address but it is not the one that we suggest here. Rather, rubrics can achieve consistency by setting a uniform standard for each component's value. Should, for example, proofreading alone be a factor that could result in a C grade? Some professors might say yes and others would vehemently say no. This type of inconsistency—differences in value decisions— should be avoided in a first-year writing program. Crafting and implementing a scoring system that would require all graders to give proofreading errors the same value is something that rubrics easily address. This type of consistency is exactly what makes rubrics so effective. Stated another way, rubrics can tie professors' hands to some extent by imposing caps on what each category of a writing assignment is worth. If the statement of facts is worth 10 of 72, and grammar/style is worth 8, then, bound by the rubric, no professor can under- or overvalue any one component of the assignment relative to any other. This consistency is essential to avoid an impression of a professor teaching only how to write for him instead of how to produce good legal writing for any audience.

Of course, rubrics can and should be even more nuanced than simply stating that 10 points are available for the statement of facts. Instead, each approximately 2 points can be associated with a different qualitative performance assessment. For example, "includes facts and inferences necessary to support arguments," and "is organized in a meaningful way given the side for which it is written," might be associated with a score of 10, while "is well organized generally but perhaps too neutrally," and "includes relevant facts but is not presented as most effective narrative," might warrant an 8. In this respect, graders' hands are tied by more than end-of-semester grade parameters, but are held to program standards, goals and expectations for each assignment. This hand-tying can help a professor deliver a consistent message throughout his course and can help promote consistency among multiple professors teaching within the same program if all use the same rubrics.

Familiarity with the rubric and using its language in class reinforces how the rubric will assess what students have learned. It also gives professors a ready-made framework for teaching concepts and identifying strengths and weaknesses.[26] The specificity of qualitative descriptions can be tailored to particular assignments and it can vary based on the timing of the assignment. We do not mean to suggest that quality standards should never vary—of course that will be the case as the semester or year progresses and higher expectations are established. We also mean that, from the professor's standpoint, more

---

26. Professors can use rubrics as an aid to identify and describe advanced legal writing and analysis. On the continuum of legal writing projects, a less sophisticated analysis in the first memo is likely to earn more points than the same level of sophistication in a second memo. Crafting rubrics to identify these different levels of sophistication helps guide professors in their teaching because they are forced to articulate what makes a paper more advanced or sophisticated on the continuum of first-year legal writing and incorporate that into their lessons.

flexibility might be incorporated. Perhaps the narrated descriptions associated with each point are reduced in length and in detail. Perhaps a greater percentage of the description is attributed to the fallback "as the professor taught." For example, "effective use of point headings" might be specifically associated with a 3-point category and the description of the maximum total for the first memo assignment is explicit: "Effective use means that the heading articulates the reason(s) for the given conclusion in a full sentence." Perhaps the second memo assignment, a maximum of say 5 points, could be the more flexible, "the use of point headings in accordance with the professor's instruction."

C. Consistency with a Twist

The question of grade norming is inexorably related to this discussion of consistency. The ultimate goal is for a program to be able to say that its professors not only value the same components equally but that they make the same or similar judgments about what counts as strong versus weak. Subsection breakdowns along the lines just discussed do some of this work. In other words, defining a statement of facts worth a 10 as including a meaningful organizational structure helps to ensure that this important feature of a statement of facts is valued. That the highest available point total for the statement of facts category is associated with this narrative underscores the importance of this factor to the students and to the professors. It also enables us to say that we are valuing the same thing in the same way. The only variable is one of interpretation—how a particular statement of facts strikes a reader/grader is not something that the rubrics can control. Professor A might decide that a chronological organization of facts works well for the plaintiff but that a thematic organization works better for the defendant. Professor B might decide the opposite. Using grading rubrics, even those as substantively specific as the ones we suggest, does not ensure that Professor A and Professor B are going to come to the same conclusion about what "effective organization" is.

On this point, we have two somewhat conflicting answers. One is that rubrics alone do not teach classes: they are not self-executing. So, for example, Professor A might spend more time in class emphasizing the merits of chronological factual organization and Professor B might spend more time discussing how to veer from chronology to thematic. Professor B might even say that a thematic approach is more useful for one side, given the specific fact pattern on which the students are working. The imposition of grading rubrics does not necessarily capture these teaching differences, but rubrics can be flexible enough so that they also do not forbid these differences. Indeed, the very nature of a writing class is subjective, but not in the sense that any student's statement of facts will determine her grade. Given the point limits on each component within a paper, that is not the reality.

Nevertheless, the possibility remains that one person's style is another's worst nightmare. Since writing professors are ultimately teaching students how to make choices when their writing classes are only a memory, the primary concern here is that purely stylistic choices are not embedded in the rubrics.

Rather, the goal is to devise a set of written expectations that limit variations but accommodate both professor and student stylistic choices. Of course, that is not the same as saying "anything goes." And it is on this point that teacher training is necessary to reinforce (or enforce) the idea that legal writing professors should be teaching legal writing for any audience. A professor who teaches how to write to his personal preferences is doing his students a disservice.

D. Staffing Tool

A secondary benefit of establishing uniform grading guidelines as we have discussed is that they can be used to help screen, hire and train new professors on grading expectations. They also can be used to refresh expectations for long-time professors. As we said at the outset, even though there are various models for teaching legal writing and different acronyms for the basic paradigm, legal writing professors are all teaching the same basic skills: legal analysis meaningfully and effectively communicated in writing. In any staffing model, rubrics help ensure consistency and focus on teaching legal writing and analysis while discouraging a professor from teaching merely how to satisfy his predilections or idiosyncrasies.

One perhaps unsurprising point is that newer writing professors, especially if they have spent time in practice, will tend to grade on the lower side. Establishing a baseline is an important component of grade norming and a unified, agreed-upon grading rubric can serve multiple ends. For example, a new professor can be given the rubric and asked to grade one or more papers to assess how he or she will apply the rubric (*e.g.*, too harsh, too easy or too flat). Asking the professor to both assign a score and provide written comments creates useful data for those responsible for hiring decisions. One common disconnect we have seen for first-time teachers is comments that suggest a mid-range paper but the scores of a low-range paper. Through grade training, we can discuss how to check the score by stepping back from the rubric and looking at the comments and the paper as a whole. For example, we often ask new hires to score on the rubric and also assign a holistic letter grade, although we use only numerical scoring for major writing assignments. The most common response was a low letter grade, but a letter grade higher than the result of translating the numerical score to a letter grade, further complicating new teachers' overall low assessment of student papers. The letter grades were generally lower than the papers merited, and the numerical scores translated to even lower letter grades, often reflected by new teachers' unwillingness to score papers in the high ranges. This is a discussion point we can use in teacher training and it helps us refine the rubric to make sure professors believe that they can fairly and accurately assess a paper under the rubric. For example, adding language such as "by a second semester 1L," as seen in the example statement of facts rubric above, is a reminder to professors that they are not evaluating legal writing as informed by their practice experience, but rather in the first-year student or novice legal writer construct.

New teachers also often struggle to provide written comments. They can fairly quickly identify weaknesses in a paper but find articulating what is wrong and how to improve it challenging—without actually rewriting the text. We train our professors to use the rubric as a starting point for drafting comments and encourage them to copy and paste language from the rubric. We have seen this work; it gives professors a level of self-confidence knowing that they are commenting on or saying the "right" things because they use the rubric as a guide. Writing rubric-based comments also helps professors avoid teaching personal preferences and instead focus on good writing standards. As a way to measure professors' success in providing comments, we review high, middle and low papers for new professors. Using the rubric as a guide is also informative in giving us direction for evaluating professors' comments in terms of describing ways to improve.

E. Self-Assessment Tool

Rubrics can be used by students in a variety of other ways. For instance, a student can review a draft of his paper against the rubric and identify potential weaknesses before meeting his professor in conference. Discussing those weaknesses in conference with the rubric as a guide, the student and professor can look for and discuss ways to improve the draft. And after a student receives her score on an assignment, she can use the rubric to identify areas where she needs to improve, giving her a strategy for the next writing assignment. If she had lost points in the analysis section because she used too few cases (a highly valued section of the rubric), for example, but scored perfectly on citation of those cases (a minor portion of the overall score), she could decide to spend more time on research for her next paper or more deliberately choose a variety of authorities to cite.

Students also could score a writing assignment with the rubric in a peer review exercise or a modified peer review exercise using a sample drafted by the professor or a student not in the class. The exercise could give students the perspective of the professor—the reader—and could help them understand how small differences matter in scoring. A professor could use this exercise to focus on weaknesses she has seen in her class.

Professors, too, can use rubrics as a self-assessment tool. After a semester of teaching, professors should review overall scores and sub-scores on each set of writing assignments. Looking for patterns and outliers, professors can identify concepts that appear to have been more and less effectively taught. For example, if a set of scores reveals that an entire class scored in the 3 to 4 point range of a 6-point total category, the professor may want to review how that concept was taught. The fact that not a single student scored in the top 5 to 6 point range suggests that something was lost in the classroom.

Professors also can use rubric scores to identify effective teaching techniques. Using the same example of a 6-point category, if an entire class scored 5 or 6 points on a particular component, the professor should think about what methods he used to teach that concept. A group exercise, for example, may

be well-suited to his class. Or pointing students to a textbook that is uniquely good on the concept may have shown them how to approach that part of the writing assignment.

Reviewing the score data also can give the professor a sense of whether parts of the rubric need revision. In either case described here—all scores in the mid-range or all scores in the highest range—the data may lead the professor to determine that the concept is difficult (the first example) and needs additional explanation in the rubric. Or, the data may lead the professor to decide a category is too easy. For example, if a point range on format resulted in all students scoring the top point value, perhaps there is a template floating around that students are using or there is otherwise no work required to satisfy the requirements, making the points meaningless (putting aside questions of academic integrity). Whatever the case, giving away points is not useful for students, nor is it a good use of a professor's time to cover something that is obvious.

V. Conclusion

Using rubrics in legal writing courses is the most effective way to grade students' writing assignments. Though no system of rubrics may be perfect, the benefits of understanding expectations and setting common standards outweigh constraints on their utility. In the legal writing community, specifically, a move to rubric-based grading can contribute to the greater good. As we all work to teach good writing, we can also work to define good writing in rubrics. In the appendix, we provide two complete sample rubrics, one for an open-research predictive memorandum and the second for an appellate brief. In providing these rubrics, we hope to encourage other legal writing professors to create their own rubrics—and copy ours freely—in their effort to join us in defining and teaching good writing.[27]

APPENDIX

Open Research Predictive Memorandum Grading Guidelines

72 points total

(1) Initial Memo Elements (QP, BA, SOF)   18 points total

    a. The QUESTION PRESENTED   4 points

      i. Articulates the legal question.

      ii. Includes legally significant facts.

      iii. Excludes legal conclusions.

      iv. Uses an objective tone.

27. Terry Phelps said it best, "Good writing is good writing." ALWD Scholars' Forum, Capital Area Legal Writing Conference, Washington, D.C., Feb. 25, 2011.

Grading Guidelines:

4 points   The QP is well-constructed; it articulates the legal question, includes legally significant facts (LSFs), excludes legal conclusions and uses an objective tone. Perfection is not required! A "4" is not what an experienced legal writer would produce; it is what a 1L on a second writing assignment can be expected to produce.

3 points   The QP articulates the legal question correctly and uses an objective tone; however, one or two legally significant facts are missing or could have been better stated (by a 1L). Still, the reader understands generally what is at stake and the QP gets the job done with some room for improvement even by a 1L.

2 points   The QP is overly conclusory and/or deficient in LSFs such that it isn't just one fact that's missing. Though confusing, it is still sensibly written such that the reader has a basic understanding of what is at stake. Similarly, a 2 should be assigned if the QP is simplistic and under-informative such that the reader cannot ascertain from the QP what is at stake in the memo.

1 point   A QP deserves a 1 if the student included a QP for the sake of discharging this memo requirement, but the QP does not do any part of the job for which it is designed.

0 points   There is no QP in the memo.

b. The BRIEF ANSWER   6 points

i. Answers the question/predicts the outcome.

ii. Contains a brief statement of the rule.

iii. Explains reason for the expected outcome.

Grading Guidelines:

6 points   The BA clearly and effectively answers the question/predicts the outcome. The BA contains a brief statement of the rule and explains the reason(s) for the expected outcome using legally significant facts. The BA is overall objective in tone, and is useful and informative to the reader in providing a good preview of the discussion section. Perfection is not required; as stated above, a 6 corresponds to excellence by a 1L on a second memo assignment.

5 points   The BA answers the question/predicts the outcome, but falls short in that it could have better explained the reasons for the expected outcome or been better articulated/more to the point. Look here for an overall well-written BA that perhaps leaves out a step, e.g., the rule or rationale for the outcome needs better articulation.

3-4 points   The BA is missing an important or significant component, such as a statement of the rule or its anticipated outcome, its key elements or principles from controlling authority. Alternatively, even a substantively well-constructed BA warrants a 4 if it is confusingly written and a 3 if you have to work particularly hard to understand it.

2 points   The BA is missing one or more important components and is poorly or confusingly constructed. The student may not have understood the purpose of the BA.

1 point   The BA is seriously deficient in style as well as substance. The student did not understand the purpose of the BA, and this is reflected in its deficiency of information.

0 points   There is no BA in the memo.

c. The STATEMENT OF FACTS   8 points

8 points   Includes both sufficiently contextual background facts and the facts that are important to the analysis and conclusion. Is concise, yet without referring back to text of problem, reader has all necessary factual info. Is objective; SOF is free of legal argument. However, a good SOF, even for an office memo, will match in tone and message with the outcome (i.e., narration of facts is consistent with legal conclusions).

6 points   Follows these general guidelines, but includes legal conclusions or argumentative characterizations; includes factual inferences that are not supported. Generally, however, there are no key facts missing (that are important to the analysis). Style-wise, it may lack a sophisticated tone and include some editorializing, but it is still readable and understandable.

4 points   Lacks important substance, detail or context; a reader would have trouble (without the fact pattern and its relevant documents) understanding the relevant details (in anticipation of the discussion section). The SOF uses argumentative language or editorializing and/or exhibits stylistic deficiencies that render it difficult to follow (in tone or by presenting a confusing organization or rendition of events).

2 points   There is no evidence of thoughtful selection or, importantly, presentation of legally significant facts and key details are certainly missing. Facts appear to have been cut and pasted from the problem statement with no regard to meaningful organization.

0 points   No SOF is included.

(2) Discussion Section–Structure of Argument; Case Synthesis   21 points total

In this section, you are looking at the structure of the argument. As opposed to (2)(b) and (3), you are less concerned with substance here. You should consider primarily the following:

a. Overall TREAT / IRAC (structure of argument)   6 points

i. An adequate thesis is in place for each issue.

ii. Rules are articulated where you expect them to be.

iii.Structurally, the student is following up rule statements with a synthesized explanation of cases, and then proceeding to application.

iv. A conclusion is reached on each issue and sub-issue.

Grading Guidelines:

6 points   Each issue is well-organized (by issue and sub-issue), and follows the TREAT / IRAC formula. Thesis sentences are "in place,"* rules are stated clearly and then explained through selected cases. Applications demonstrate fact sensitivity, and a conclusion is reached on each issue and sub-issue. Perfection again is not necessary; you are looking for excellent production in a 1L memo.

*Some of you teach that the thesis sentence belongs (only) in the heading; some teach that it goes both places. Either is fine, and you should grade it as "in place" based on what you taught.

5 points   A concerted effort has been made at organization and the TREAT / CREAC / IRAC paradigm is obviously attempted and generally followed. However, some issues/elements could be better placed, and there is an overall lack of crispness either between issues or between rule explanation and application (the two blur).

3-4 points The paper overall is confusingly structured. There may be sections of excessive rambling, and no clear pattern of organization is discernible in many sections or subsections. For example, there is likely no distinction among the rule, explanation and application sections throughout the paper.

2 points   The student has not grasped the organizational paradigm at all; the paper thus is seriously deficient in its deployment of TREAT (repeatedly and more pervasively than noted above).

0-1 point   The paper not only demonstrates a failure to follow TREAT but a distinct lack of effort to do so. Failed efforts to follow the TREAT / IRAC paradigm should warrant a higher score than instances where there has been no such effort at organization at all.

b. Rule Statements, Synthesis, and Explanation   12 points

In this section, we ask that you look more specifically at the quality of the students' rule statements and the associated explanatory synthesis, not just that they are doing it (covered above structurally), but the extent to which the student is synthesizing case law effectively. We realize that there is some natural overlap but the points available here go directly to the substance of the synthesis, not just the structural fact of doing so. You should evaluate the information contained in parentheticals where these are used to provide details that go to explanation (and whether that info should be in the text instead).

Grading Guidelines

12 points The paper contains accurate, effective and well-articulated statements of the rule on each issue or sub-issue. In addition, the rule is explained (illustrated or interpreted based on its use in prior cases), chiefly through the process of explanatory synthesis. This means that the paper generally avoids paragraphs beginning with "In X case . . ." because the writer has done the work of digesting and synthesizing the cases so that the reader doesn't have to. In addition, the synthesized explanation is both well-reasoned and well-written (clearly presented in that the student moves from broader concepts to narrower ones effectively). Information contained in parentheticals is useful and appropriately placed as a matter of substance (info is not so central as to be required elsewhere, in the RE or A).

10 points Generally, rules are stated correctly, though occasionally could be more crisply or more informatively written. Synthesis is obviously attempted but is only sometimes successful because the student perhaps does not reconcile the cases as well as he might have or misses opportunities to elucidate thematic connections or provide helpful points of interpretation that likely would produce a more effective application. As well, you should note whether the student is perhaps "over-reliant" on case parentheticals at the expense of textual analysis, a determination that will certainly depend on the specifics of the cases and how you teach this skill.

8 points Synthesis is problematic or virtually non-existent; i.e., "explanation" of the rule is accomplished by laundry listing cases. As a result, the rule, though itself likely accurately albeit briefly stated, is not explained cohesively or coherently (look especially for seemingly conflicting propositions, which happens a lot when there is no synthesis). Alternatively, the rule and explanation are confusingly presented (in writing style or in substance) so it is difficult, but not impossible, to understand what is at issue.

6 points   The rules are generally weakly and confusingly written and, as well, largely unsupported both because of skimpy rule statements and lack of citation, or leaps in logic. As a result, the paper demonstrates a lack of understanding of what it means to state and explain a rule or controlling legal principle.

4 & below Assign grades in these low ranges only where a student's lack of effort produces seriously deficient (or erroneous) rule statements and the resulting presentation of the controlling law in both the R and E would be near sanctionable; i.e., the student has misrepresented the law (not just misunderstood the cases or how to synthesize a workable rule).

c. Headings   2 points

Here, we ask that you evaluate the I, II and ABC (and other) headings whether you taught that they should repeat the first sentence or stand in place of it. Your goal is simply to assess the strength of the headings and you are looking for clarity, concision and substance.

2 points   Headings are uniformly well written: informative, clear, generally employ active voice, are full sentences and contain elements of the student's conclusions on the issue.

1 point   One or more headings substantially lacks in the above qualities and/or headings overall are accurate but under-informative.

0 points   Headings are missing or do not match the substance of the sections.

d. (Final) Conclusion   1 point

You should comment on this element and score it in accordance with how you taught it. If the student executes it to your satisfaction, assign the point (consider both the information that is present, what is missing and how the information is articulated).

(3) Discussion Section—Substance (Content; Use of Cases)   18 points total

You are looking for two things here. (a) The first is an evaluation of the student's research results not in context of the written product. So, you are asked to evaluate whether the student has produced adequate research results (including, importantly: cases that are jurisdictionally appropriate; key/on-point cases (not "magic" ones on the list but ones that get the job done); good cases for analogy and cases that inform the outcome as specifically as possible). (b) Second, you are assessing how well the cases are applied to the facts of the problem. As compared to (2), you are looking primarily at application and you are concerned with the substance of the cases and how they are used to analogize and distinguish. NOTE that you may end up with a well structured brief (high points in (2)) that falls short here, in application, or vice versa, i.e., the numbers you assign in (2) and (3) need not be identical.

Look for how well the paper does the following:

   i. Shows evidence of thorough research.

   ii. Makes good choices among cases that are available.

   iii.Uses cases accurately (according to holdings, reasoning, policy, etc).

   iv. Cases are analyzed and not over-quoted (quotes are used to support the analysis, not as a replacement for it).

   v. Analogies and distinctions are made explicit and they are well-executed, meaning that fact-to-fact comparisons are made explicit in the writing (versus hoped-for on the part of the reader); fact sensitivity thus is important.

Grading Guidelines:

a. Production and Selection of Cases   4 points

4 points   The memo displays solid research skills in that the student has selected key cases and cases that work well with the analysis. The critical point here is to look at effort in selecting cases that are jurisdictionally appropriate, that adequately present and explain the rule and that are factually useful for drawing analogies and distinctions.

2 points   In contrast to above, identifiably better cases are available for supporting the rule components and their application, i.e., while cases may be technically on point, they are not authoritative, or not as useful factually as other known or available cases.

0-1 point   The student's selection of cases is substantially deficient in that a markedly limited number of cases are cited and those that are present are under-informative (of course this will affect analysis below). In short, there is no evidence of initiative to select supporting or useful cases.

b. Use (Application) of Cases   14 points

14 points   The array of cases demonstrates the ability to discern (and work with) key facts. Quoted language and case citations are used as support for analysis, not as a replacement for it. Cases are used accurately (in defining, explaining and applying the rule(s) and sub-rules). Fact sensitivity (attention to nuance) is apparent; i.e., analogies and distinctions are made explicit and are well-executed; they are expressly compared and contrasted to the facts of the case in specific and helpful ways. Again, perfection is not required; you are looking instead for excellent execution by a 1L in a second memo assignment.

12 points   Cases may be used accurately (they are appropriate given the propositions in question) but not as effectively as they might have been. Key cases are present and supportive of the

propositions stated, but: (1) they are quoted where analysis (or further explanation) would be more effective; and/or (2) factual analysis remains largely at the surface (whereas the cases could have been further pushed or probed). Similarly, analogies and distinctions are definitely made but they could be more nuanced, fact-sensitive or explicit (making fact-to-fact comparisons and tying assertions to conclusions more directly).

10 points The memo exhibits the same kind of deficiencies as noted above, but these deficiencies are more prevalent and/or egregious. The "A" section thus can be described by the following factors: (1) the student is just listing cases seriatim (and perhaps discussing a litany of facts therein); (2) analogies and distinctions between the case and the fact pattern under evaluation are not explicit (or are factually weak); (3) a student uses too few cases (despite a cohesive analysis) or misses a pivotal case; and (4) a student cites cases that do not support the stated propositions. (The more of these factors that apply, the lower the score).

8 points The paper demonstrates serious issues with respect to employment of cases and facts along lines described above. The student has likely missed key cases repeatedly and deployed others improperly. Fact sensitivity is especially problematic: analogies and distinctions are nonexistent and/or uniformly weak. Overall, it seems that the student has not gotten her "hands dirty" with the cases at all.

6 or less Assign grades in these low ranges only where a student's use of case law is noticeably incomplete and the answer to the memo question thus is so deficient that it would be near sanctionable, i.e., the student has misrepresented (not just misunderstood) the cases.

(4) Overall: Writing Style, Grammar, Punctuation   7 points

Here your focus should be on overall clarity, precision and conciseness. You also can use these points to judge paragraphing purely as a matter of writing style: do you generally see single-topic paragraphs with appropriate topic sentences? There is some natural overlap here with TREAT, which stresses these points, too, but that only means that there will be some correlation.

i. The writing uses clarity and precision and avoids idioms/colloquialisms.

ii. Sentences are well-structured, generally formulated with active voice and are clear and concise.

iii. It uses paragraphs effectively, contains effective transitions between sentences and paragraphs; paragraphs are single-topic.

iv. Shows evidence of meticulous proofreading.

Grading Guidelines:

7 points The paper contains few, if any, errors in style, grammar or punctuation. This means that the writing uses clarity and precision and avoids idioms/colloquialisms. Sentences are well-structured, generally formulated with active voice and are clear and concise. It uses paragraphs effectively (includes topic sentences, single-topic paragraphs), contains effective transitions between sentences and paragraphs and shows evidence of meticulous proofreading.

5 points The memo generally adheres to the rules of good written English (including style, grammar, and punctuation). However, the paper may suffer from some clarity/precision issues in that points could be better articulated and writing overall could be more concise. Some idioms/colloquialisms may be used. There is evidence of proofreading but the paper contains errors that would have been avoided with a more careful proofread. Some paragraphs seem disorganized, under-developed or inappropriately placed, though overall organization is strong, and these deficiencies on the whole do not detract from the overall substantive strength of the paper.

3 points The paper suffers from excessive use of idioms or colloquialisms, it does not employ paragraphs effectively and/ or it generally shows a lack of knowledge of rules of standard written English and/or lack of care in proofreading. These errors detract from the substantive strength of the paper.

0-2 points The memo is almost unreadable in grammatical style and/or the typographical errors so overwhelm the end product that it is similarly rendered not understandable as a practical matter.

(5) Citation and Local Rules Compliance   **8 points**

[provided separately based on different rubric]

Appellate Brief Grading Guidelines

64 points total

(1) Basic Brief Components   **12 points total**

Statement of the Issues (SOI)   **2 points**

2 points In accordance with LR 25, the SOI sets out the matters to be reviewed on appeal as one-sentence questions or statements. The questions use legally significant facts persuasively and do not include argumentation. The organizational choice of writing multiple statements reflects an understanding of the major issues in the brief and the separation of the issues mirrors the argument section.

1 point   The SOI falls short in that the questions could have presented the issues more persuasively. The questions may include some legal argument, leave out some legally significant facts or lack clarity.

Statement of the Case (SOC)   1 point

1 point   In accordance with LR 26, the SOC provides the reader with a clear understanding of the nature of the case, including both the proceedings and dispositions below.

0.5 points The SOC is included in the brief, but omits part of the procedural history and/or shows poor organizational choices.

Statement of Facts (SOF)   5 points

4-5 points In accordance with LR 27, the SOF sets out the party's view of the facts in as favorable a light as possible without omitting or mischaracterizing relevant facts (e.g., negative facts) or making legal arguments. The SOF is logical, accurate, well-organized and persuasive; the SOF may include inferences, as long as the given facts support the inferences and characterizations of facts are within the bounds of persuasiveness. The SOF demonstrates the ability to use persuasive techniques effectively by emphasizing favorable facts and deemphasizing unfavorable facts. A theme is evident and supported by the student's SOF.

2-3 points The SOF includes the legally significant facts and is persuasive in tone, but could have better described the information in the record to craft an effective narrative and could have better used persuasive techniques. A score in this range is warranted if the organization weakens the reader's ability to understand the facts, even when the student included an accurate and persuasive description of the facts.

1 point   The SOF deserves a score in this range when there are mischaracterizations, unsupported inferences and/or legal conclusions throughout the SOF. Lack of persuasiveness in tone also warrants a score in this range, when combined with other weaknesses. Facts may be generalized and even inaccurate.

Summary of the Argument (SOA)   3 points

3 points   In accordance with LR 28, the SOA succinctly lays out the arguments advanced by the brief. It includes the conclusions of the arguments and a brief explanation of the analysis supporting those conclusions. It is clear, well thought-out, themed and persuasive

2 points   The SOA satisfies the basic requirements but merely restates the argument headings, includes citations and/or provides

too much detail of the analysis. It is adequately written but could have been executed more persuasively

1 point   The SOA fails to provide a brief explanation of the analysis and/or contains errors or misstatements. The student may not have understood the purpose of the summary.

Conclusion   1 point

1 point   In accordance with LR 30, the conclusion states only the relief sought or the desired disposition of the case. The conclusion does not restate or summarize the argument.

0.5 points The conclusion is present but either does not ask for the appropriate relief or includes some restatement or summary of the argument.

(2) Treatment of Opinion Below   1 point total

1 point   The brief appropriately incorporates the opinion below; it recognizes that this is the basis of the brief on appeal and references it as necessary in framing and organizing its arguments.

0.5 points The brief is appropriately appellate in stance but the reader does not get the sense that the student understands or embraces the fact that there is a specific judicial determination on appeal. This may be evidenced by lack of any reference to the opinion below.

(3) Argument: Content/Use of Authorities   21 points total

a. Selection of Cases (note: use is evaluated in (b))   3 points

3 points   The brief demonstrates superior research ability in its selection of cases: the breadth of cases demonstrates ample command of the legal issues and the selection of specific cases demonstrates a deep understanding of the key facts.

The brief does not rely on persuasive authority as mandatory but uses persuasive authority to support the logic of the arguments.

2 points   A wide range of authorities, including key authorities, is selected, but there are better authorities available for the major and more nuanced propositions.

There may be an instance where persuasive authority is given more weight than it should be given.

1 point   The brief does not include sufficiently productive or informative cases.

Persuasive authority is generally presented as if it were mandatory.

b. Synthesis, Analogies, Distinctions   **18 points**

16-18 points	The authorities are analyzed and not over-quoted, and are used accurately to define, explain and apply the rule(s) and sub-rules.

The authorities are synthesized to demonstrate an understanding of the legal arguments present in the brief.

Analogies and distinctions are made explicit and are expressly compared and contrasted to the facts of the case in specific and helpful ways and are used to support the legal arguments/conclusions.

Where appropriate, argument includes policy rationale and other non rule-based authority.

Counter/alternative arguments are persuasively addressed and analyzed to further support the party's position.

13-15 points   Authorities tend to be quoted rather than synthesized, though rules and sub-rules are explained to some degree (in that you do not feel like you have to read all the cases yourself).

Analogies and distinctions are made but they could be more explicit by tying directly to conclusions. Similarly, these comparisons may be overly conclusive versus being analytical and nuanced.

There is room for a more persuasive analysis of counter/alternative arguments.

10-12 points   The primary thing separating a brief in this range versus the one above is how well the authorities are synthesized and applied to the facts of the problem.

Factors that can result in a 10-12 score include many (but perhaps not all) of the following:

Student lists constitutional provisions and/or cases seriatim (and discusses a litany of facts therein) but makes the reader do most of the work to discern the synthesized rule.

Analogies and distinctions between a case and the fact pattern under evaluation are not explicit.

Student uses too few authorities (despite a cohesive analysis) or misses a particularly useful or pivotal case.

Student fails to identify or analyze one or more minor sub-arguments or elements.

7-9 points A brief in this range will demonstrate notable deficiency in use of authorities—most likely the result of an over-simplified view of the issues.

Because of its deficiency, the brief will fail to fully analyze the issues presented.

Unsynthesized rules will pervade the analysis.

Factual comparisons and distinctions may be gestured toward but will be uniformly weak and operating only at the most surface level.

Authorities present may be correct but there will be evidence of the student not getting her hands dirty with the cases.

Conclusory statements will pervade the analysis and generalizations will characterize the case comparisons.

Below 7 points	A brief in this range will demonstrate notable deficiency in authorities and evidence a lack of understanding of the central legal issues.

Factual comparisons and distinctions are not even gestured toward; instead application sections are characterized by "fact summaries" of the brief problem followed by conclusions citing the cases but no connections between the two are evident in the brief.

Factual comparisons and contrasts are narrowly structured— the student has not used the cases as broadly as possible. This narrow view of the facts in the precedent cases results in a shallow analysis.

(4) Argument: Structure   18 points total
a. Umbrella Paragraphs/Roadmaps   3 points

3 points	The argument includes umbrella/introductory paragraphs where appropriate and the umbrella paragraphs are used effectively to introduce the subdivided arguments immediately following the umbrella paragraph.

The umbrella paragraphs use roadmaps to identify which issues/elements are/are not at issue and outline the order in which they are analyzed.

1-2 points	Umbrella/introductory paragraphs are obviously attempted but lack clarity or fail to include a required roadmap.

The paragraph introduces the following section but the student fails to use the roadmap as another opportunity to state the argument(s).

A score of 1 is justified if there is a weak attempt to include an umbrella paragraph (it is confusingly written and/or does not appreciate the value of this component).

b. Organization of Legal Arguments 14 points

12-14 points	The argument is overall well-organized; it generally (viewing it as a whole) follows the TREAT formula in that:

Rules are synthesized and explained.

Lengthy factual recitations from cases are omitted from the rule explanation.

No paragraphs begin with "In X case . . ."

Fact-sensitivity is evident in application, thought has gone into fact selection and factual analogies and distinctions are clear.

Rule and explanation sentences/paragraphs are organized from general to specific;

Application sections are organized into paragraphs mirroring the organized RE principles (rather than case by case or fact by fact).

A conclusion is reached on each argument and sub-argument.

Any variations from the TREAT paradigm reflect strategic and persuasive rationale, and do not detract from the overall persuasive strength of the argument or sub-argument.

9-11 points   A concerted effort has been made at organization, and the TREAT paradigm as a whole is obviously attempted and generally followed.

However, some arguments/elements could be better placed and there is some blending among arguments (or sub-arguments) or between rule explanation and application. Some of the following factors are evident:

Rules could be better synthesized and explained.

Case comparisons are not as strong as they could be.

The application section puts the burden on the reader to discern the similarities and differences between and among the cases.

The application section is organized around facts or authorities, rather than by principle (following the RE).

Conclusions are reached on some but not all arguments/sub-arguments.

6-8 points There is evidence of organizational awareness but nevertheless a repeated failure to follow a coherent organizational structure.

Most or all of the factors listed above are evident.

Below 6 points   There are sections of excessive rambling.

No discernible pattern of organization is evident and none appears to have been attempted.

c. Point Headings   **1 point**

1 point   Argument point headings and sub-headings employ a parallel, one-sentence format and provide a succinct statement of the

party's position on the applicable argument or sub-argument. Headings follow "legal conclusion/argument-because-rationale" format and specifically refer to legally significant facts.

0.5 points   Headings are overall useful but vary in structure, fail to make positive assertions or exclude key facts. (Assign 0 if these criteria are not met).

(5) Style, Grammar And Punctuation   6 points total

6 points   The paper contains few, if any, errors in style, grammar or punctuation.

The writing is clear, precise and avoids idioms/colloquialisms.

Sentences are well-structured, generally formulated with active voice and are clear and concise. The student avoids first person.

The student uses topic sentences and single-topic paragraphs that contain effective transitions between sentences and paragraphs.

4 points   The brief generally adheres to the rules of good written English, including style, grammar and punctuation.

However, some sentences could be better articulated and the writing overall could be more concise.

Some idioms/colloquialisms are used.

There is evidence of proofreading but the paper contains errors that could have been avoided.

Some paragraphs may seem disorganized, under-developed or inappropriately placed, though overall organization is strong, and these deficiencies on the whole do not detract from the overall strength of the paper.

2 points   The writing style detracts from the overall strength of the paper.

The paper suffers from excessive use of idioms or colloquialisms; it fails to employ paragraphs effectively and/or generally shows a lack of knowledge of rules of standard written English and/or detailed proofreading.

(6) Citation and Local Rules Compliance   6 points total

[provided separately based on different rubric]