

1997

# Selecting and Designing Effective Legal Writing Problems

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## Recommended Citation

Tonner, Grace C. "Selecting and Designing Effective Legal Writing Problems." D. Pratt, co-author. *Legal Writing: J. Legal Writing Inst.* 3 (1997): 163-73.

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# Selecting and Designing Effective Legal Writing Problems<sup>1</sup>

*Grace Tonner<sup>2</sup> and Diana Pratt<sup>3</sup>*

## INTRODUCTION

Legal research and writing courses are unlike most substantive first year law school classes in that they teach using the problem method. The success of a legal writing course depends on the quality of the problems. The purpose of this article is to provide some guidance for legal writing professors in designing legal writing problems. The article addresses (1) general considerations in problem design, (2) designing expository problems, (3) designing persuasive problems, and (4) sources of problems. In the first section, we discuss problem design as it relates to the overall goals for teaching the basic forms of legal analysis, legal writing, and research. In the section on designing expository problems, we discuss how to achieve these goals in the predictive section of the course, the section where students will master basic legal research and analysis. The persuasive writing section discusses the options in level of court, choice of jurisdiction, problem structure, and the materials necessary for a successful persuasive problem. Finally, we present a variety of sources for problem issues. The article presumes that the first half of the course is devoted to expository writing and the second half to persuasive writing skills.

## GENERAL CONSIDERATIONS IN PROBLEM DESIGN

Legal writing problems are effective only in the context of the overall course design. Begin with the skills you want the students to achieve in research, analysis, organization, predictive writing, and persuasion.<sup>4</sup> In research, students should learn

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<sup>4</sup> See LAUREL CURRIE OATES, ANNE ENQUIST, and KELLY KUNSCH, *THE LEGAL WRITING*

to use the basic research tools effectively and efficiently, and they should learn to develop effective strategies for choosing the most fruitful approaches to researching individual problems and issues. Consider, too, the timing and sequence of book and electronic research. The analytical goals are numerous. Students must learn to identify issues and break the problem into its smallest analytical components. They need to become adept at defining general principles precisely and accurately, and they need to be able to present cases to set up the analogies and distinctions they will draw in analyzing a legal problem. They will learn inductive reasoning to define general principles from one and later a group of cases. They will learn deductive reasoning and the use of syllogisms to prove their analysis to the reader. The organizational goals include developing judgment about what is most important, learning IRAC and its variations, and learning to arrange issues and arguments. Finally, our students should learn to write precisely and directly in both a predictive and a persuasive mode tuned to the particular audience. The sequence of problems should allow the students to learn the basic skills and master them as they reappear in later and more complicated problems.<sup>5</sup>

Plan the number and type of assignments before you design specific assignments. Because you are building on skills, identify the skills that need to be taught throughout the semester or course and how you can best assist the students in mastering those skills through the use of the problem. For example, if the goal is to teach students to use precedent facts effectively in drawing analogies and distinctions, a short case comparison exercise is an effective introduction. Keep the problem or issues simple at the beginning as students often have difficulty in mastering two tasks at once and, in fact, may even lose some of their skills as they adjust to new law school skills.<sup>6</sup>

Once you have decided on a sequence of skills, you have to decide if you are going to have a series of problems connected to

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HANDBOOK : RESEARCH, ANALYSIS, AND WRITING, 1-42-44 (Prof. ed. 1993); RICHARD K. NEUMANN, JR., TEACHER'S MANUAL, LEGAL REASONING AND LEGAL WRITING, STRUCTURE, STRATEGY AND STYLE, 179-182 (2d ed. 1994); DIANA V. PRATT, TEACHER'S MANUAL TO ACCOMPANY LEGAL WRITING: A SYSTEMATIC APPROACH, 42-44, 47-48 (2d ed. 1993); HELENE S. SHAPO, MARILYN R. WALTER, AND ELIZABETH FAJANS, TEACHER'S MANUAL, WRITING AND ANALYSIS IN THE LAW, 134-141 (3d ed. 1995).

<sup>5</sup> SHAPO, WALTER, and FAJANS at 134-135, 138-139, 140-141.

<sup>6</sup> Joseph M. Williams, *On the Maturing of Legal Writing: Two Models of Growth and Development*, 1 LEGAL WRITING 1 (1991).

the same factual pattern or if each assignment will be based on a different fact pattern. There are pros and cons for both approaches. By using different factual patterns, you have an opportunity to expose your student to a variety of subject areas. However, this approach also means that the students may only develop a cursory understanding of the topic. It can also mean more time and work for the students (and you) as they struggle to learn a number of new topics. By using one factual pattern you are able to simulate what lawyers encounter in dealing with one case and the variety of issues, procedural and substantive, that develop in that case. There is a danger that you and your students may get bored using one factual pattern. You can, however, vary the factual pattern or legal questions in an interesting way. For, example, you may assign a sexual harassment memorandum problem and then add a procedural issue, such as the availability of a motion to compel a mental examination. Finally, you could conclude with a memorandum on the feasibility of filing a summary judgment motion. By blending procedural and substantive issues, you give the students a better idea of legal practice and how lawyers develop successful strategies for achieving the best result for their clients. One factual pattern is also useful in creating a bridge between predictive and persuasive writing; an open memorandum problem can form the basis for a later persuasive problem.

When you are designing problems or choosing topics you need to think about rewriting. Your overall course design should include rewriting some or all of the assignments. To make the rewriting particularly effective, have your students rewrite a small portion of the assignment based on the class discussion and your critique of their paper and bring that mini-rewrite to a conference. The focus of the conference is then the student's process of incorporating the critique. This efficient double-rewrite leads to a more successful rewrite of the whole assignment. Or you can have students rewrite a portion of the assignment and then apply what they have learned to a new section(s) of the assignment.

In drafting problems, we must also consider the wider audience. Although students tend to think of us as the audience for their papers, students use their first year writing assignments as writing samples for employment. The memos and briefs should be ones that students can proudly show to perspective employers. With this wider audience in mind, consider the following three things as you design problems. Choose issues that

routinely occur in practice; it will provide prospective employers with material for an interview on a topic where the student has some expertise. Avoid using "cute" names in problem design; they will be distracting to the reader and create an unintended barrier for the student between law school and practice. Finally, avoid topics that may cause a student embarrassment. A problem involving the sexual transmission of AIDS, for example, may be inappropriate if it requires the student to use graphic detail. There are two potential problems. First, the student may be reluctant to use the paper as a writing sample and may not have an alternative. Second, the student may not feel comfortable discussing the paper in an interview. While all lawyers should be able to discuss any issue, the first interview with a perspective employer is not the place to learn.

### DESIGNING EXPOSITORY PROBLEMS

Three different types of expository assignments are used in first year legal writing courses: a briefing exercise and analysis memo, a closed universe memorandum, and an open research memorandum. Typically, the analysis memo will involve a fairly simple subject area while the succeeding assignments require increasingly difficult analytical skills. These assignments are usually given in the students' first semester of law school.

An analysis memo usually consists of one, two, or three cases for the students to use in analyzing a simple factual situation. The students are asked to read and brief heavily edited cases, synthesize their holdings, and apply them to the facts. The students are introduced to analytical structure - issue, rule, application, conclusion, and they are asked to use this organization in their memo. Typically the assignment is short, about two pages, and involves only the discussion section of a memo. These problems are fairly easy to design because you choose and edit the cases, there is no research involved for the students, you can choose cases that have slightly different holdings, and you can set the facts so the students must analogize to and distinguish the cases. Some topics that work well are service of process, specific performance, burglary, dog bites, one element of false imprisonment, and one element of negligent infliction of emotional distress.<sup>7</sup>

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<sup>7</sup> You can build a peer editing exercise into this assignment as a way of teaching students to edit their own work. The students are paired and critique their partner's

The closed universe memorandum assignment is usually a six to twelve page memorandum that requires the formal structure of an office memorandum. These problems involve either common law or statutory topics with discrete elements. By choosing a subject with elements, you can teach the students the organization of issues. Usually only one of the elements requires extensive use of analogy and distinction, while the others require minor or minimal analysis. This teaches the students to focus on what is important and to weight their treatment of the elements according to their importance. Torts or criminal law issues work the best as the law is fairly simple and because the issues are heavily fact based. Because these problems involve a closed universe, you can create simple problems by omitting cases that might be confusing at this early stage in the student's analytical development. You cannot make these problems too simple because you are asking students to learn a number of new skills at once.<sup>8</sup> If the legal issues are fairly easy for them to understand, they will have time to concentrate on drawing an analogy, working with the organization, and writing clearly and explicitly. Some of the favorite topics are false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, statute of frauds, implied or express warranties, adverse possession, easements, personal jurisdiction, and statutes of limitations.

The open research memorandum assignment is generally a little longer, eight to fifteen pages, and involves the added wrinkle that students must find and select the best authority for analyzing the problem. The research skills should be those the students have already learned and practiced in a variety of library assignments.<sup>9</sup> The analysis at this stage is more complicated. It normally requires identifying and synthesizing rules from a number of cases. It can involve a statute that has been con-

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memo. Because this assignment is short and the students are very familiar with the facts and cases, they feel comfortable critiquing their partner's work. Topics the students understand readily facilitate peer or self-editing.

<sup>8</sup> See, LINDA HALDEMAN EDWARDS, *TEACHER'S MANUAL, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION*, 38 (1996); OATES, ENQUIST, and KUNSCH at I-42-44; PRATT at 42-44.

<sup>9</sup> It is useful to have your research assistants troubleshoot the problem. As a professional, you are too far removed from the first year experience to anticipate all the blind alleys your students will explore or to accurately predict the time it will take them to conduct the research. Based on your research assistants' experience, you can fine tune the problem to make it more effective and to decrease the level of frustration your students will experience. See, OATES, ENQUIST, and KUNSCH at I-43.

strued in several ways. It may involve a jurisdictional conflict and require students to evaluate different authorities. It may involve a balancing test or a test with elements where one of the elements has become pivotal to a court's decision. The open memorandum should also develop deeper organizational skills by requiring the students to deal with counter arguments and weaknesses in their case. For this assignment, use a record to present the facts because it helps students to understand fact-gathering. You can include pleadings, depositions excerpts, contracts, and other documents so the students will have to isolate the relevant facts and organize them into a coherent statement of facts.

In designing expository problems of any of these three levels of complexity, it is best to use first year topics.<sup>10</sup> They are more accessible to the students, and your problems can enhance the learning that is occurring in other courses. In choosing the topic, you should meet with the substantive professors in your students' sections to determine the topics that will be covered in their classes and the sequence of those topics. Often the professors will make suggestions about areas they do not intend to cover in detail and that would make good choices for your problems. This collaboration can enhance the relationship between the legal writing and substantive professors; it can also help prevent unintended difficulties. Be careful if you teach students from different sections who have different professors for the same doctrinal courses. If they use different casebooks or treat the topics in a different order, you may create real or perceived advantages for one group.<sup>11</sup> Also you may want to combine two first year topics, such as contracts and torts, in a problem to demonstrate that client problems often involve a number of legal topics.

### DESIGNING PERSUASIVE PROBLEMS

You can teach persuasive writing and argument formation with a problem set at either the trial or the appellate level. The choice depends on the dictates of your program. Trial level advocacy problems are easier to develop and easier for the student to write because there are fewer formal requirements to distract

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<sup>10</sup> See, SHAPO, WALTER, and FAJANS at 136.

<sup>11</sup> If your law school has an evening program, the evening students will have fewer first year courses in addition to having different professors and possibly different casebooks and sequencing.

the students from the important goals of the assignment. Trial level problems are also more realistic; in real appellate cases, the advocate works with an extensive record from below and studies it to identify potential issues for appeal. Most law school writing courses have neither the time nor the resources to provide this experience for their students. In most legal writing courses the process begins after the issues have been identified.

Although any persuasive problem can be set at the trial level, there are good reasons for choosing an appellate setting. Some law schools have an active student-run moot court program. First year students need the experience of working at the appellate level as preparation for the moot court experience in the second and third years. Other law schools use the first year appellate oral arguments as a way of keeping alumni actively involved in the life of the law school. In these days of strained budgets, alumni support, both financial and in kind, may be essential to the operation of the law school.

A persuasive problem will require students to use the basic forms of legal analysis: inductive reasoning, deductive reasoning, analogies and distinctions. It may require that students use syllogisms to construct their arguments. The analysis required runs on a continuum of difficulty. The easiest problems require students to apply an existing standard to facts lying on a spectrum of cases that reach favorable and unfavorable results. A slightly more difficult problem involving inductive reasoning requires students to synthesize a rule from existing cases and characterize it so it can be applied to achieve a favorable result.<sup>12</sup> A different and slightly more difficult type of problem involves a choice of rule (or test), where the focus is on advocating one rule and distinguishing another. These problems involve primarily legal rather than factual issues.<sup>13</sup> Circuit splits can also

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<sup>12</sup> A problem based on the "Discretionary Function Exception", 28 U.S.C. §2680(a) (1994), to the Federal Tort Claims Act, 28 U.S.C. §1346(b) (1994), set in the Ninth Circuit, illustrates this type of problem. On June 6 and June 8, 1995, the Ninth Circuit decided two factually similar cases but reached opposite results. *Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995); *Valdez v. United States*, 56 F.3d 1177 (9th Cir. 1995). See also *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990); *Childers v. United States*, 40 F.3d 973 (9th Cir. 1995), *cert. denied* 115 S. Ct. 1821 (1995).

<sup>13</sup> There is a series of New Jersey beach cases that illustrates this type of problem. *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978); *Matthews v. Bay Head Imp. Ass'n*, 95 N.J. 306, 471 A.2d 355 (1984). In each case, a shoreline community wanted to restrict use of the town beaches to residents only. The next logical step in the sequence - to apply the rule to privately owned land - depends on whether the cases are characterized as anti-



form the basis for this type of problem. The most difficult problems require students to persuade the court to create new law. This may require an extension of an existing rule to create a new cause of action or a new remedy. In its most difficult form, students must break new ground either by interpreting a virgin statute or creating a cause of action where none has existed before. Because this involves drawing on other statutes or substantive areas, these problems are probably too difficult for first year students. Most of these problems involve policy as well as legal arguments.

A persuasive problem, like a predictive problem, can be set in a first year course area. This has all the advantages discussed above for predictive problems. By restricting yourself to first year subject areas, however, you may overly limit your options and give your students an unrealistic picture of legal practice. Our law is increasingly statutory, but most first year courses concentrate primarily on the common law. By the second semester, students can handle some other substantive areas. The issues, however, should be readily accessible and fairly straightforward. If the students spend too much time getting up to speed in the area, they will not have time to concentrate on constructing their arguments; neither you nor the students will be pleased with the results. Most constitutional issues are too difficult; "takings" problems, however, work well. Choose an area you love; your enthusiasm will engage the students in the topic, and you will be in a better position to help them focus on the relevant authority.

The design of a persuasive problem depends on the structure of your program, the level of court you are using, and the choice of jurisdiction. The structure of the problem depends on whether your students will all be arguing from the same side or whether they will have opponents. It is easier to design a problem with the students all representing the same client. It is also easier to set up an objective grading system if the students are writing from the same perspective. The briefs, however, are more interesting to read and critique if there are opposing versions. If oral argument is a component of your course, you will need the competitive model; unlike the competition for grades, students enjoy competition in the structure of the problem. If you opt for the competitive model, problems with one issue, two

students are easier to design than the two issue, four student problems used in national moot court competitions. It is extremely difficult to design an equally balanced problem with two issues that require carefully crafted legal and policy arguments on both sides. In addition, two issue, four student problems create unnecessary difficulties for you and your students; you will have difficulty grading the briefs, and the students may encounter unnecessary frustration with work allocation and timing. To keep the students focused on the problem you designed and save yourself for the substance, draft a one or two sided problem.<sup>14</sup>

Once you have decided on the structure, consider the level of court. If, for the reasons mentioned above, you opt for an appellate court, there are three reasons to prefer an intermediate level appellate court. First, your students will be writing briefs to intermediate level appellate courts sooner and more frequently than they will be writing to the courts of last resort. Second, the format and structure is easier at the intermediate level; your students will spend more time on substance and worry less about form. Third, although generations of first year students have written moot court briefs to the United State Supreme Court, most of the issues are too complex and you will overly limit your choices if you confine yourself to pedagogically viable issues in that forum.<sup>15</sup>

The third choice is that of jurisdiction. Real jurisdictions are better than hypothetical ones.<sup>16</sup> They come with procedure and the students will have to consider the effect of *stare decisis*. You can control the level of difficulty by selecting a jurisdiction with an appropriate number of cases and that either includes or does not include unique features that add complexity. The terms of the appellate rules may also influence your choice.

You are now ready to draft the problem. For a trial level problem, you have a choice of procedural settings, and the materials required depend on the choice. For a Federal Rule of Civil Procedure 12(b)(6) motion, or its state equivalent, you need at a minimum to draft a complaint and a motion. You can attach affidavits/exhibits as additional sources of facts. For other issues, a motion for summary judgment is more appropriate. In this case the problem can include a complaint, an answer, excerpts from deposition transcripts, exhibits/affidavits, the mo-

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<sup>14</sup> PRATT at 70-71.

<sup>15</sup> *Ibid.* 71.

<sup>16</sup> *Ibid.* 71.

tion, and its answer. The variety of materials forces students to choose, organize, and give appropriate weight to the facts for the statement of facts. If you choose a motion for summary judgment in which it is alleged that there is no material fact at issue, make sure that the problem does not inadvertently create a factual dispute. Discovery and evidentiary motions work well as introductions to advocacy because they involve discrete issues the students can handle and you can critique in a relatively short time.<sup>17</sup>

An appellate problem requires an opinion from a lower court. To draft the opinion, you will have to set aside your personal sense of what a well crafted opinion should be. The opinion should provide the issue(s) and the basis for the appeal without giving away all of the arguments and the research. You can allude to the law with a reference to a circuit split while not providing the cites. Structure the procedural setting to eliminate unintended factual disputes and to set up your intended standard of review. You can structure the decision to help balance the problem. The opinion may be one source of the facts. You will probably want to include other sources of fact as well. You can draft a partial transcript of a trial or hearing with lay and expert witnesses from both sides; you can use affidavits and partial deposition transcripts; you can include exhibits: maps, diagrams, contracts, etc. to present the facts in a different style.<sup>18</sup> Finally, an appellate problem could include the appellate rules from your jurisdiction and a cover sheet with the caption.<sup>19</sup>

### SOURCES OF LEGAL WRITING PROBLEMS

Finding a suitable topic for an effective writing problem can sometimes be frustrating. The following is a list of sources we have found fruitful.<sup>20</sup> For topics based on first year courses, the faculty members who teach the courses can be particularly helpful. Treatises and looseleaf services in your areas of particular interest are a source of recent developments. United States Law Week provides recent and interesting cases you might use as a foundation for a problem. Advance sheets can also provide new issues. On a more popular level, try the news media: newspa-

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<sup>17</sup> *Ibid.* 64-65.

<sup>18</sup> NEUMANN at 181.

<sup>19</sup> PRATT at 72.

<sup>20</sup> See, OATES, ENQUIST, and KUNSCH at I-43; PRATT at 48, 71-72; SHAPO, WALTER, and FAJANS at 136.

pers, National Public Radio, Public Television, "60 Minutes" and its clones.

Fellow members of the bar or alumni are excellent sources of problems. Former students who are currently judicial clerks are particularly good resources. If you can obtain copies of the pleadings, discovery or motions in a real law suit, students are generally more interested in the problem. Alumni usually enjoy contributing to the law school by offering problems and materials from their practice. Their continued participation in the law school may lead to financial contributions as well.

For the simplest analogy/distinction problem, ALR can be a good tool. ALR annotations are arranged by issue and by cases that illustrate what is sufficient or insufficient to meet the test. The annotations include an outline of the topic and a list of jurisdictions matched to the points in the outline. The case descriptions are usually sufficient to give you a pretty good idea of whether the problem is potentially workable. For simple statutory problems involving torts or crimes, state statutes are a valuable tool.

Finally, you can always engage in an electronic research search where you can find authority with the following search: sy(split/s/authority/jurisdiction/court/circuit) and (date). This method will help you pick up splits of authority in an area which might be useful for problem development.

Whenever you are choosing a topic, you should be interested in or excited about the topic. Discussing and critiquing student papers on topics you do not enjoy will inevitably affect the success of your course. While selecting and designing legal writing problems is often the most difficult part of a legal writing professor's job, it is also one of the most rewarding, because good problems guarantee successful experiences for both the professor and the students.