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The Rhetoric of Email in Law Practice

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From: Kristen K. Tiscione*
Sent: December 1, 2013
To: The Legal Writing Community
Subject: **The Rhetoric of Email in Law Practice**

Dear Colleagues:

We have known for some time that email messages are often used in lieu of traditional memoranda to convey objective legal analysis both to attorneys and clients.[1] As a result, many legal writing professors have incorporated professional email into their first-year courses. Two questions now present themselves: How do we effectively teach email analysis? And for how long should we continue to teach the format of a traditional memorandum?

These questions were the subject of a presentation that Kirsten Davis,[2] Charles Calleros,[3] and I gave in June 2013 at

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[1] *See* Charles Calleros, *Traditional Office Memoranda and E-mail Memos, in Practice and in the First Semester*, 21 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 105 (2013), *available at* http://info.legalsolutions.thomsonreuters.com/pdf/perspec/2013-spring/2013-spring.pdf; Ellie Margolis, *Incorporating Electronic Communication in the LRW Classroom*, 19 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 121 (2011), *available at* http://info.legalsolutions.thomsonreuters.com/pdf/perspec/2011-winter/2011-winter.pdf; Kristen K. Robbins-Tiscione, *Ding Dong! The Memo is Dead. Which Old Memo? The Traditional Memo,* SECOND DRAFT (Legal Writing Inst., Macon, Ga.), Spring 2011, at 6, *available at* http://www.lwionline.org/uploads/FileUpload/SecondDraft251.pdf; Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32 (2008), *available at* http://scholarship.law.georgetown.edu/facpub/798/.

[2] Professor Davis's presentation and her new article in this issue inspired me to write mine. *See* Kirstin K. Davis, *"The Reports of My Death are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. ___ (2013).

the Biennial Conference of the Association of Legal Writing Directors (ALWD). My friend, Kirsten, would probably say I am asking the wrong questions. She might say that analysis is analysis, regardless of its form; that as teachers of critical thinking and analytic writing, our focus should be on substance and the adaptability of the traditional memorandum to new formats. If we create a new category of legal writing for professional email, then what's next? Text memos?

The more I think about Kirsten's concern about elevating form over substance, the more I am inclined to agree with her. She's right. We must be careful not to mislead students into thinking that objective legal analysis differs based on the nature of the document.[4] Or that the technology used to write or the mode of delivery changes the nature of analysis.

Or does it?

The rub, as I see it, is that technology is changing—has already changed—the substance as well as the form of law practice. Email seems to have changed the nature of legal analysis as well as the ways in which attorneys and clients relate to it. As Marshall McLuhan might say, the medium of email is, in itself, a message worth considering, separate from the content it conveys.[5] According to McLuhan, new technologies act as extensions of man that have "psychic and social consequences."[6] "[A]s they amplify or accelerate existing processes," they change "designs or patterns" of thought.[7] The content conveyed by new technologies is

[3] Charles Calleros is a Professor of Law at Arizona State University's Sandra Day O'Connor College of Law.

[4] The nineteenth-century modes of discourse—narration, exposition, description, and argument—fell into disfavor precisely because they elevated form over substance. *See, e.g.*, Robert J. Connors, *The Rise and Fall of the Modes of Discourse*, 32 C. COMPOSITION & COMM. 444 (1981), *reprinted in* THE WRITING TEACHER'S SOURCEBOOK 24 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988); *see also* JAMES L. KINNEAVY, A THEORY OF DISCOURSE 28–30 (1971).

[5] McLuhan was a Canadian philosopher/rhetorician, active from the 1950s through the '70s, interested in the effects of emerging technologies and social media on human interaction and cultures. According to McLuhan, "in operational and practical fact, the medium is the message." MARSHALL MCLUHAN, UNDERSTANDING MEDIA 7 (1964).

[6] *Id.* at 8.

[7] *Id.*

equally important, but it "offer[s] no clues to the magic of these media or to their subliminal charge."[8] This article qua email explores the psychic and social consequences of email in law practice, how email has affected both the pace and pattern of legal analysis, and the implications for legal writing professors.

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Psychic and Social Consequences of Email

Prior to the invention of the Internet, the invention of the typewriter (and then electric typewriters and personal computers) had the most profound impact on the process of writing.[9] All kinds of writing. These inventions certainly made the process faster and easier.[10] As a young lawyer, I found that composing on a keyboard eliminated the distractions associated with a page full of crossed-out lines and looping arrows. No more crumpled balls of yellow, lined paper in the wastebasket. And it significantly helped to reduce my writer's block.

[8] *Id.* at 20. "The content of a movie is a novel or a play or an opera. The effect of the movie form is not related to its program content." *Id.* at 18.

[9] *See, e.g.*, Christina Haas, *How the Writing Medium Shapes the Writing Process: Effects of Word Processing on Planning*, 23 RES. TEACHING ENG. 181, 199–203 (1989) (reporting that computer writers do less advance planning and focus more on small scale concerns than hand writers); Luuk Van Waes & Peter Jan Schellens, *Writing Profiles: The Effect of the Writing Mode on Pausing and Revision Patterns of Experienced Writers*, 35 J. PRAGMATICS 829, 847 (2003) (reporting measurable differences between hand writers and computer writers in terms of the level of revisions made, the way revisions are distributed throughout the writing process, and the degree of fragmentation of the writing process).

[10] *See* Van Waes & Schellens, *supra* note 9, at 833 (noting the "ease with which the text on-screen can be manipulated").

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But typing on a keyboard also changed the nature of what people write—what they say and how they say it. The ability to write quickly makes it easier to link related ideas, to write long yet coherent sentences, and to get down on paper complex thoughts so ephemeral that by the time you get to them "by hand," they're gone.[11] The ability to see one's writing "in print" on the screen at the moment of composition seems to make a difference, too. Typed text takes on an authoritative, official quality that handwriting lacks. It's easier to distance oneself from the text and read with a more critical "reader's eye." Text that does not suit the writer as a reader can instantly be deleted.

Just as the typewriter transformed writing, email has transformed legal analysis. In McLuhan's terms, email has changed the "pace" and the "pattern" of the practice of law.[12] Traditional memoranda were first distributed in print form on paper, then perhaps via fax, then as attachments to a "cover email." I suspect McLuhan would describe traditional memoranda—even those sent as email attachments—as "hot" media. A hot medium is one that "extends one single sense," such as sight or hearing, in "high definition."[13] To be in high definition is to be "well filled with data" and requires little participation from the audience in terms of needing to fill in missing information.[14]

In contrast, email is a "cool" medium of "low[, or at the least, lower] definition."[15] A cool medium is "high in participation or completion by the audience" and "has very different effects on the user."[16] McLuhan considered the telephone a cool medium "because the ear is given a meager amount of information," and the listener needs to pay close attention to participate in the conversation.[17] As one link in the chain of conversation, each email requires more participation from the reader. Often less comprehensive, less

11 *See id.* (stating that computer writers "tend to write longer texts" than hand writers).

12 MCLUHAN, *supra* note 5, at 8.

13 *Id.* at 22.

14 *Id.* at 22–23.

15 *See id.* at 22.

16 *Id.* at 23.

17 *Id.* at 22–23.

repetitive, and less detailed, email may require the reader to fill in gaps created by leaps in logic or missing (but likely known) information.

The telephone was the first technology to demand a participant's "complete participation" in "an intensely personal" way.[18] In the early 1960s, before the advent of "Do Not Disturb" buttons and voice mail, McLuhan described telephones as "irresistible intruder[s] in time or place" that breed resentment with "such a heavy demand for . . . total attention."[19] Unlike traditional memoranda, email—like a telephone call—can be experienced as an "irresistible intruder." A "ping" often announces its arrival, much like a ring announces an incoming call. In a work context, the recipient may feel irritated or resentful about the intrusion, an urgent need to respond, or both. Whether or not the email contains awaited legal analysis, the impact of the medium on the psyche of the recipient is the same: it demands our attention.

McLuhan also thought telephones were unique because they introduced "a 'seamless web' of interlaced patterns in management and decision-making."[20] The instantaneousness of the telephone allows it "to by-pass all hierarchical arrangements, and to involve people in depth."[21] McLuhan noted, "Anybody can walk into any manager's office by telephone."[22] Even more so than telephones, email gives us instant access to anyone, anywhere—in a home, office, car, etc.—even if that person is a complete stranger, and unlike telephones, countless numbers of people can be contacted at exactly the same time. Although there are no comprehensive email directories, almost every business publishes its email address and many, like law firms, publish the direct email addresses of their employees. Practicing attorneys now have virtually unfettered, personal access to judges, clerks,

[18] *Id.* at 267, 271. Skype and FaceTime might be considered the second wave of "cool media" that demand complete participation (i.e., it is nearly impossible to do anything else of substance at the same time).

[19] *Id.*

[20] *Id*. at 271.

[21] *Id.*

[22] *Id.*

members of Congress, co-counsel, opposing counsel, and clients in ways they never did before.

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Changes in Patterns of Thought

In addition to pace, email has changed patterns of thought. In rhetorical terms, it has altered the social construct of legal analysis. Traditional memoranda, often addressed to the client, in-house counsel, a supervising attorney, or "the file," feel more permanent than email. They need to stand on their own, independent of context, and are written so that whoever reads them soon after they are written—or even years later—will be able to understand the reasoning behind the analysis or advice given. In that sense, they are contained creations that do not invite much audience participation.[23]

The audience for the traditional memorandum is, in Lisa Ede and Andrea Lunsford's terms, more invoked than addressed.[24] The writer, who may not know or anticipate interacting with any or all of the memo's ultimate readers, must construct the audience in her mind and adapt her writing to meet its needs.[25] The skilled, experienced legal writer "uses the semantic and syntactic resources of language to provide cues for the reader—cues which help to define the role or roles the writer wishes the reader to adopt in responding to the text."[26] When a writer writes to an invoked audience, a multiplicity of known and unknown readers, she "must use a vocabulary, style, logic, and rhetoric that anybody in that mass audience can understand and respond to."[27]

[23] Certainly, the recipient may need to respond in some fashion to the memo, but the response is more likely to take the form of making a decision based on the content of the memo rather than responding to the memo itself.

[24] Lisa Ede & Andrea Lunsford, *Audience Addressed/Audience Invoked: The Role of Audience in Composition Theory and Pedagogy*, 35 C. COMPOSITION & COMM. 155 (1984).

[25] *See id.* at 160; *see also* Walter J. Ong, *The Writer's Audience is Always a Fiction*, 90 PMLA 9, 12 (1975) ("[T]he writer must construct in his imagination, clearly or vaguely, an audience cast in some sort of role . . . .").

[26] Ede & Lunsford, *supra* note 24, at 160. For example, the writer might pose the question of whether to move to dismiss a particular cause of action filed against the law firm's client. If the writer believes such a motion is likely to fail, she will use the *logos*, *pathos*, and *ethos* of legal writing to convince the reader not to file the motion and hope her analysis stands the test of time.

[27] JAMES MOFFETT, TEACHING THE UNIVERSE OF DISCOURSE 38 (1983).

Email, on the other hand, is usually written to a specific person or small group of people. As part of an ongoing conversation (often in response to a request for information), it feels less permanent than traditional memoranda. The writer, focused on the present and her specific audience, experiences very little of that same demand to compose a text that stands independent of its context for an indeterminate period of time.[28] Like a telephone call, email feels more intimate than the traditional memorandum, affecting its structure, sentence length, and word choice. As James Moffett might say, email is "dialogue-at-a-distance, an exchange of written monologue between parties too small to require publication . . . and known enough to each other so that more personal rhetoric, allusion, etc., is appropriate."[29]

Accordingly, the audience for professional email is more addressed than invoked. Because the addressed audience is actual, real, and concrete, the writer of the email is in a better position to anticipate its beliefs, attitudes, and expectations.[30] This difference affects the content of the writing. When a writer corresponds with a known audience, the writing is "spontaneous . . . and reflects the transient mood and circumstances in which the writing occurs."[31] The shift from audience invoked to audience addressed permits the legal writer "to allude to ideas and things that only [the intended recipients] know about."[32]

But it's more than just differences in permanence, context, audience, style, and tone that distinguish email from traditional memoranda. When a lawyer writes an email—as opposed to a traditional memorandum—her analytical process changes. I struggle to articulate it, yet I have experienced the change in

[28] Electronic writing and document storage have made "central files" virtually obsolete. The attorneys I've interviewed more or less assume responsibility for storing email in electronic folders in their inboxes or for posting documents to a firm-shared file, such as Dropbox or another online data storage program. Attorneys often admit that they do not post documents as regularly as they file email in folders (but they hasten to add that they have no good system for keeping up with email either).

[29] MOFFETT, *supra* note 27, at 41 (describing written correspondence). For example, as demonstrated in this article qua email, contractions and similar writing informalities do not feel out of place.

[30] *See* Ede & Lunsford, *supra* note 24, at 156.

[31] *See* MOFFETT, *supra* note 27, at 38.

[32] *Id.*

my own process. As Nelson Miller and Derek Witte explain, certain "thoughts would not have been formed, or would have been formed differently, if it was not for the technological means within and through which they are captured and expressed."[33]

Many practicing attorneys have also told me that writing email feels easier and less burdensome. They think they accomplish more via email than by traditional memoranda. I believe they are referring to the change in their process, and that change is a function of the change in medium. With the change in medium comes a change in "patterns of perception steadily and without any resistance."[34] Formal or comprehensive patterns of analysis common in a traditional memorandum give way to a more telegraphic form of communication due to the ongoing conversation between writer and intended reader.

I am also convinced that email feels more generative. New rhetoricians believe all writing is generative,[35] but I am more *aware* of creating meaning in the process of composing email. It is like writing an exam answer: I am not exactly sure what the answer is until I have written it.[36] Perhaps the generative nature of writing is more obvious when the writer and reader are engaged in an ongoing conversation that occurs naturally and without much time for formal prewriting. Maybe that is why it feels easier; less time is devoted to conforming the facts, research, and analysis to a set format, leaving the writer free to create her own schema.

Email analysis rarely looks exactly like a traditional memorandum typed into an email message screen. Nor is it merely a summary of the analysis akin to the Brief Answer or

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33 Nelson P. Miller & Derek J. Witte, *Helping Law Firm Luddites Cross the Digital Divide—Arguments for Mastering Law Practice Technology*, 12 SMU SCI. & TECH. L. REV. 113, 119 (2009).

34 MCLUHAN, *supra* note 5, at 18.

35 *See, e.g.*, Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 156 (1999); JAMES A. BERLIN, RHETORIC AND REALITY: WRITING INSTRUCTION IN AMERICAN COLLEGES, 1900–1985, at 166 (1987).

36 Sondra Perl describes the process of discovery in writing as "see[ing] in our words a further structuring of the sense we began with and . . . recogniz[ing] that in those words we have discovered something new about ourselves and our topic." Sondra Perl, *Understanding Composing*, 31 C. COMPOSITION & COMM. 363, 368 (1980).

Conclusion sections of a traditional memo. Without the encumbrance of a preordained format, email writers draw freely from the facts, law, and ideas that would appear in separate sections of a traditional memorandum. Based on my review of many samples from practice, email writers often combine these components into something more synthetic, accessible, efficient, and appropriate to the circumstances of the medium.[37]

Almost unconsciously, practitioners often combine the Question Presented, Brief Answer, and significant facts to create a more coherent introduction. A detailed analysis often follows, but it tends not to have the same rigid internal or external text structures of a Discussion section.[38] Where the writer uses visual cues or markers such as lists, bullets, or headings to highlight parts of the text, they are arguably more effective because they have been created specifically for that email.

Assume an Ohio attorney is asked to research a negligence claim against a local grocery store for failing to warn its customers that a wet floor was slippery. Assume also that the employee was acting within the scope of her duties and there is no issue as to the store's liability if she was negligent. A traditional memorandum would open with a Question Presented or Issue and Brief Answer that might read as follows[39]:

[37] Samples available for inspection are on file with the author; practicing attorneys are understandably concerned about confidentiality and privilege issues even for redacted email and are therefore generally unwilling to publish them.

[38] Elements, factors, claims, defenses, etc. are often combined in unusual ways, in a unique sequence, or given more or less priority in email.

[39] This is a hypothetical case. Having conceived of the problem, I did some research on Ohio negligence law and then wrote these Question Presented and Brief Answer sections as I would teach students to do.

QUESTION PRESENTED

Under Ohio law, is Heinen's Fine Foods, Inc. liable for negligence when one of its employees, thinking no one else was in the store, failed to erect a "wet floor" sign after she mopped the floor late at night, and a customer entered, fell, and broke his leg?

BRIEF ANSWER

Under Ohio law, the plaintiff is likely to prove negligence. The first element is a duty of care to the customer, which is likely to be proved because the grocery store is a business that owes its invitees a duty of reasonable care in maintaining the premises in a safe condition. The second element is breach of that duty, and it is likely to be proved because it was foreseeable that a customer might enter the store without the employee's knowledge, fall on the wet tile floor, and be injured. However, if the danger was "open and obvious" to the customer, the plaintiff's claim will fail. The question of whether the danger of the wet floor was open and obvious is an objective one that depends on the circumstances, including any signs or other distractions at the scene of the fall. Without more information about the specific circumstances at the store that night, it is difficult to conclude whether the danger was open and obvious, thus precluding a claim of negligence. As for the third and fourth elements, causation and damages, there are no facts indicating that anything other than the wet floor caused the fall and that the fall caused the plaintiff's damages. Thus, the plaintiff is likely to prove these latter elements of the claim.

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The writer of this memorandum would then state the specifics of the accident as she knew them in the Statement of Facts and follow that with a detailed Discussion of the elements of the claim under Ohio law. A well-written Discussion would likely begin with a paragraph setting forth the elements of a negligence claim (a sort of roadmap of the discussion itself) and then address each element in turn. Each element would then be defined or explained as established in binding authority, illustrated, and applied to the facts of the case using analogical reasoning where helpful. The writer would also anticipate any troubling counter-arguments before concluding.

In contrast, if the attorney conducted the same research but, instead of drafting a traditional memorandum, sent her supervisor an email, it might begin as follows[40]:

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[40] After drafting the Question Presented and Brief Answer sections as they would appear in a traditional memo, I took a break. Then, I wrote the email in my Outlook account to get an authentic sense of the differences between memoranda and email in terms of the act of composing and the end product.

Dear Julia,

You asked me to research a potential negligence claim for Mr. Leary due to his falling on the slippery floor at Heinen's Foods at roughly midnight on January 12, 2013. The elements of a negligence claim in Ohio are the standard duty, breach, causation, and damages. *Meloy v. Circle K Store*, 2013-Ohio-2837, 2013 WL 3367058 (Ohio Ct. App. 2013). The only real element at issue is likely to be breach. Heinen's had a duty to maintain its premises in a safe condition, but if the danger of the wet floor was "open and obvious," he had a duty to protect himself, and Heinen's would not be liable for his damages. *See id.* at *2. Do we have any specific information about the aisle where he fell or where the employee was at the time? I couldn't find any in your notes. If not, I would be happy to give Mr. Leary a call.

Elements of Negligence under Ohio law

1. Duty of Care – A business owner owes a duty of care to reasonably maintain its premises in a safe condition. *Id.* at *1; *Estate of Mealy v. Sudheendra*, 2004-Ohio-2505, 2004 WL 1486497 (Ohio Ct. App. 2004). In *Meloy*, the plaintiff sued a convenience store after she tripped over a sign on the sidewalk in front of the store and fell. 2013 WL 3367058, at *1. In reversing summary judgment, the court assumed without discussion that the store owed its customer a duty of care. *Id.* at *2.

2. Breach of the Duty of Care – Given the slippery nature of the floor, Heinen's likely breached its duty to Leary. However, if the danger was open and obvious, Leary had a duty to protect himself. *See id. ; Armstrong v. Best Buy, Co.*, 788 N.E.2d 1088, 1089 (Ohio 2003). In *Armstrong*, . . . [A brief discussion of *Armstrong*, an application to Leary's case—albeit missing information—and a tentative conclusion would follow.]

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Notice the differences between the memorandum and the email. First, they look and feel different from each other. The

memorandum is formal in appearance, compartmentalized, and detached in tone. References to "employee" and "customer," instead of specific individuals, make it feel impersonal. The reader to whom the writing is addressed could be any reader. In some traditional memoranda, the analysis could apply in the future to any similar legal question. Carefully chosen words like "failed," "foreseeable," "without more," and "precluding" provide the cues the reader needs to adopt the role (or reach the conclusion) that the writer (who may not interact further with the reader) wants the reader to adopt (i.e., concluding that the cause of action looks promising but for the unknown circumstances of the wet floor). Here, charged with responsibility for deciding whether a negligence claim might succeed, the writer is appropriately cautious in signaling that although the store employee "failed" in some way to perform, it will be difficult, "without more," to reach a definitive conclusion.

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The email, on the other hand, begins with reference to a real person. Addressed to "Julia," it already feels more spontaneous and intimate. References to specifics, such as the client's name, the date and time of the fall, and the location as "*the* floor at Heinen's Foods," put this analysis in a real-life context in real time. The email is less static in feel and format because it is in the nature of a conversation, and it demands Julia's participation (i.e., response). Email allows the writer to allude to information relating to Mr. Leary's fall in a way that memos do not because the relevant facts and basic law are already known both to Julia and the writer (e.g., "the standard duty, breach, causation, and damages"; the "aisle where he fell"). We are less likely to fault the email writer as opposed to the memo writer for failing to state information on which the writer's ultimate conclusion is based. This may be because the email is part of an ongoing conversation where prior interactions are implied and future interaction is anticipated.

As for content, the Question Presented in the memorandum is well crafted. It includes the governing law, the legal question, and the writer's sense of the significant facts. But it says very little beyond what the intended reader (whoever requested the memorandum) already knows (i.e., we have a client involved in a slip and fall case in a grocery store who wants to sue). The Brief Answer does a good job of combining

the elements of a negligence claim in Ohio and their application to the facts to reach a conclusion as to outcome on each element. As is often the case, though, additional information is needed to reach a definitive conclusion, or the outcome is simply uncertain.

In contrast, the opening paragraph of the email combines the legal question, the ultimate conclusion, and the significant facts in a more coherent introduction, isolating almost immediately the critical element at issue and the specific, additional facts needed to resolve it. The interactive nature of email makes it natural for the writer to suggest at the outset the next steps needed to strengthen her analysis. By the end of the opening paragraph, the writer has ended up saying something very different from what she would have said—or been able to say—in a traditional memorandum. And the reader knows far more than the reader of the memorandum.

In the second paragraph, the headings better focus the reader's attention because they are consciously chosen by the writer, not by some preordained format (e.g., "Discussion"). Binding law is cited much sooner, giving the reader confidence in the email's credibility despite its brevity. In terms of the analytical structure, the analysis of the first element might be described as "RE," or Rule and Explanation. The writer states the Ohio rule relating to a business owner's duty and then supports it with a brief explanation of how the court in the cited case held. There is neither application of the law to the facts nor a conclusion, but the absence is not troubling to the reader; both are showcased in the opening paragraph. Because of the close juxtaposition of application, conclusion, rule, and explanation, the reader has no trouble connecting the dots to understand that Heinen's had a duty similar to that of the convenience store. In a traditional memorandum, this would be considered incomplete analysis.[41]

[41] I describe this structure in a memorandum as a "book report" because it provides information about the case, but fails to apply it to the facts, thus requiring the reader to do the analytical work. *See* Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 498–505 (2003). Richard Neumann and I call this a "conclusory explanation." *See* RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, LEGAL REASONING AND LEGAL WRITING 154 (2013).

The analysis of the second, critical element looks more like the traditional analytical paradigm. It opens with a combined conclusion and rule, supported by citation to authority. Then, as the bracketed text suggests, it's followed by an explanation of the rule as applied in *Armstrong*, and a more traditional application to the facts using analogical reasoning before the writer's tentative conclusion. The discussion of the remaining third and fourth elements, like the first two, would proceed as the writer deemed necessary, shape-shifting to fit the writer's and reader's needs under the circumstances.[42]

Although the memorandum and the email are different, they accomplish the same goal, leading to the same ultimate conclusion. But email can accomplish *more* than the memorandum in fewer words *without the loss of any significant information*. The rhetoric of email permits the writer to get past the Question Presented and Brief Answer and well into the Discussion of the second, critical element. The act of composing email seems either to force or to free the writer to synthesize related threads of the analysis in a way that is more fluid and appropriate to conversation.

Email is a fusion of correspondence and traditional Western logic. It's distinguished from traditional memoranda by its lack of format and the subsequent liberation of the writer to respond creatively to the particular circumstances. Email is the concentrate, the reduction, the essence, but by no means a summary of, a traditional memorandum. If the traditional memorandum is painted in oils, the email is painted in watercolors. The medium of the memo is thick, rich, opaque, and textured, but it takes a long time for the different layers to be applied, and it's costly. The medium of email is thinner and less textured, but it is translucent, bright, fresh, engaging, and less costly.

[42] This format might not work well for a more complicated issue; in that case, the writer would choose a format better suited to the nature and complexity of the issue.

Although no one would mistake an oil painting for a watercolor or vice versa, neither one requires more skill than the other. Similarly, there is no reason why an experienced legal writer should write less competently in email than in memoranda.[43] Or to assume that email "requires less rigorous thinking and writing"[44] because it feels easier to write. Some attorneys actually resist using technology because "it forces [them] to form [their] thoughts more fully and to work harder."[45]

If an attorney is competent, the analysis will be competent, regardless of differences in medium, pace, and pattern of thought. The decisions that go into email are no less deliberative than those in memoranda; they are "mental operations requiring effort, motivation, concentration, and the execution of learned rules."[46] Email should thus benefit from the same "forcing function"[47] that memoranda do. The risks of hasty, intuitive decision-making or belief bias are associated more with the processes judges use—especially at the trial level—than with how attorneys create as they compose.[48] To the extent the speed of the writing affects the quality of the analysis—and I am not convinced that it does—I suspect the adversarial process goes a long way toward correcting inadvertent "slopping along."[49]

[43] *See* Davis, *supra* note 2, at ____, ____ (suggesting that traditional memos are better suited than email to fulfill the lawyer's ethical duty to act with competence and produce "solid, well-thought-out legal analysis."

[44] *Id.* at ____ n. 63.

[45] Miller & Witte, *supra* note 33, at 120.

[46] Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 7 (2007) (quoting Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25, 26 (2005)).

[47] Davis, *supra* note 2, at ____.

[48] *See* Miller & Witte, *supra* note 33, at 115 (stating that although email and instant messaging demand that attorneys develop an increased ability to respond to clients quickly, they may also teach them that "not every question requires an immediate answer. In that way, technology can push us to refine not only our skills, but also our judgment"); *see generally* Guthrie et al., *supra* note 46 (discussing intuitive and deliberative decision-making in the context of judicial decision-making, not law practice).

[49] Davis, *supra* note 2, at ____.

Implications for Teaching

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The advent of hand-held computers and broadband internet access has been described as an "epic technological transformation" in the fifth wave of computers.[50] Could we possibly think the technology that changed the world would not change the practice of law? The starting point for us is to recognize the impact on all aspects of the profession—reading, thinking, research, writing, modes of communication, content of communications—and on human interaction generally. Email in law practice is one product of that transformation; it's the legal profession's response to the amplification and acceleration of existing processes. And, for the most part, it has become the best way to fulfill the attorney's ethical duties, meet client demands, and stay in practice.

Before email, written, objective analysis was delivered in the form of a single medium: the traditional memorandum. With the emergence of email technology, there are at least two media for delivery. We're more aware of the pace and pattern of the content because email has altered it. Until now, the "medium" of the memorandum has been virtually invisible to us.[51]

[50] Wade Roush, *Computing's "Fifth Wave,"* MIT TECH. REV. (July 7, 2005), *available at* http://www.technologyreview.com/view/404408/computings-fifth-wave/.

[51] Recognizing the memo as a medium is similar to recognizing light as a medium only once it is used to create a message (e.g., a business advertisement in the form of a neon sign). *See* MCLUHAN, *supra* note 5, at 8–9.

Although I think experienced legal writers produce equally thoughtful and solid analysis in email and memoranda, I am concerned that the skill required to synthesize information in a fluid, readable, efficient email is that of an expert, not a novice. Email may feel easier for novices to write, but for the wrong reasons.[52] Inexperienced legal writers are generally less socialized than experienced writers, and their lack of familiarity with legal discourse shows in their writing.[53] Berger and others have suggested that experienced writers are also better at developing meaning intuitively as they write.[54] It stands to reason that an inexperienced legal writer would have a harder time composing email "on the fly" and under time pressure without missing any critical issues or analytic steps. Here, as with any legal document, intuitive thinking and belief bias can be problematic.

This is where legal writing professors come in. Although inexperienced writers don't "yet have the knowledge of an expert in a community or yet have the habits of thinking or the tone of voice,"[55] we can teach students to recognize the rhetorical differences between traditional memoranda and email and to understand how those differences affect content. Many legal writing texts now treat email as a distinct form of legal writing and articulate helpful text structures that can be imitated to improve novice writing.[56] Some of these go even

[52] It may be that for expert legal writers, writing email feels easier and more generative because the analytic process and writing paradigms of the legal discourse community have already been internalized.

[53] *See* Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 23–30 (1991).

[54] *See, e.g.*, Berger, *supra* note 35, at 160; Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 85 (1982).

[55] Williams, *supra* note 53, at 31.

[56] The extent to which terminology or approaches vary among these texts indicates the extent to which we are attempting to capture the nature of this evolving form. *See, e.g.*, CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 206–07 (6th ed. 2011); MARY BARNARD RAY & BARBARA J. COX, BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING 369–70 (3d ed. 2013); NEUMANN & TISCIONE, *supra* note 41, at 225–39; MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 136–41 (5th ed. 2010); WAYNE SCHIESS, WRITING FOR THE LEGAL AUDIENCE 33–44 (2003); HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 182–84, 342–47 (6th ed. 2013); MELISSA H. WERESH, LEGAL WRITING: ETHICAL AND PROFESSIONAL CONSIDERATIONS 34–37 (2d ed. 2009).

further, addressing how to manage email, the advantages and disadvantages of using email in lieu of memoranda, what precautions to take, and how to protect attorney-client privilege and work product.[57] By comparing the two analytical forms, students will better understand how one informs the other.

In the classroom, students can become familiar with memoranda and email by comparing and practicing both. For example, late in the fall semester, students can be given a short email assignment that requires them to conduct limited research and draft an email to their supervising attorney within ninety minutes.[58] At the ALWD conference, Charles Calleros described using email as part of an in-class final exam: he gave students a fictitious, new opinion that related to their fall memorandum assignment and asked them to compose a follow-up email in light of the new opinion.[59] Ellie Margolis has assigned email in a variety of contexts, including just before the students' traditional memorandum assignment is due, asking that their emails brief the partner for a meeting with the client.[60] As part of their final assignment of the fall semester, she has also asked students to draft an email that summarizes their analysis in the traditional memorandum.[61]

Despite their inexperience in the legal community, writing in email format may actually hasten our students' socialization. Although much is written about declining skill sets among high school, college, and graduate students, their

[57] *See, e.g.*, BARNDARD RAY & COX, *supra* note 56, at 369–70; MARK HERRMANN, THE CURMUDGEON'S GUIDE TO PRACTICING LAW 109–16 (2006); NEUMANN & TISCIONE, *supra* note 41, at 225–27, 232–34; LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK 255-60 (5th ed. 2010); BARNARD RAY & RAMSFIELD, *supra* note 56, at 140–41; SHAPO ET AL., *supra* note 56, at 339–41; ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS 319–31 (3d ed. 2011); WERESH, *supra* note 56, at 15–34.

[58] Based on a posting from the Legal Writing Institute Idea Bank, my colleague, Vicki Girard, and I give this assignment in class at the end of the fall semester to give students a chance to assess their research skills before the take-home exam and to introduce them to the differences between memos and email in law practice. *See Idea Bank*, LEGAL WRITING INST., http://www.lwionline.org/idea_bank.html (last visited Oct. 15, 2013).

[59] *See* Calleros, *supra* note 1, at 109–14.

[60] Margolis, *supra* note 1, at 123.

[61] *Id.* at 124.

ability to navigate, use, and program electronic devices (game consoles, iPods, DVRs, smartphones, and tablets, to name a few) seems to exceed that of most adults over thirty. These students manage multiple media, think more dimensionally, and create "electronically"—in texts, tweets, blogs, and other social media—in ways that many of us cannot comprehend. The pace and pattern of the digital age was imprinted on them at birth. In short, they relate to and process digital information differently.[62] Perhaps with email, they can focus more on content because they are so familiar with electronic communications.[63]

Although it is still useful to teach traditional memoranda as such, I'm not sure how long that will be true. Undoubtedly, drafting a traditional memorandum continues to be an excellent heuristic for formal legal analysis and detailed reasoning. If not for use in memoranda, lawyers are still required to engage in this form of reasoning when it comes to brief writing. At some point, though, teaching the traditional memorandum as objective analysis will feel like teaching Shepard's in print. When that happens, the traditional memorandum will have ceased to exist. We will no longer need to differentiate between traditional memoranda and email. Once again we will become blind to the medium and focus on content, unless and until a new medium takes email's place—perhaps one that does not even require us to write, just to think.

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[62] *See, e.g.*, JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 224–25 (2008) (noting that Digital Natives are "transforming businesses . . . in part [because of] their use of technology and their shifting relationship to information" and because "they know this hybrid analog-and-digital world extremely well").

[63] The irony is that once we establish a history of teaching the structure of effective email, some of the psychic benefits of the "free form" may dissipate.