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Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course

Kate O'Niell

ADDING AN ALTERNATIVE DISPUTE RESOLUTION (ADR) PERSPECTIVE TO A TRADITIONAL LEGAL WRITING COURSE

Kate O'Neill[*]

I. INTRODUCTION

This essay describes a modest effort within a traditional first-year legal research and writing course to sensitize students to the importance of alternative dispute resolution (ADR) processes. Without sufficient resources to adopt a full-scale "lawyering" program that might be able to add significant lecture time and role-plays devoted to ADR, we tried to infuse an ADR perspective into the traditional core of legal writing courses: basic legal method, research, and composition skills. We relied less on exercises in defining parties' actionable claims and defenses and more on exercises that encourage students to see the analysis of claims and defenses as only one component of effective representation of a client's interests. The traditional model of legal writing courses can be faulted for implying that the only business of lawyers is litigation; I think our course now avoids that implication. The course still does not provide students with an in-depth understanding of ADR processes, much less significant

* Assistant Professor of Law, Director of Basic Legal Skills Program, University of Washington School of Law.

practice in relevant skills. We do hope, though, that the shift inspires students to further study ADR theory and practice skills available in our upper-level curriculum.

I need to explain what I mean by a "traditional legal writing course" and distinguish it from other, more comprehensive skills curricula. The traditional course teaches students to research and write one or more memoranda of law in the Fall semester and an appellate (or possibly trial motion) brief in the Spring.[1] Credit loads range from 2 to 6 with the majority of schools offering 3 or 4 credits for the year.[2] The ABA Section on Legal Education recommends that the student/faculty ratio not exceed 45/1,[3] though many do. In addition to research and writing skills, the traditional course emphasizes basic legal method skills: identifying the holdings of cases, case synthesis, and statutory interpretation.[4]

A different model is the "lawyering" or "law office" course, which may add any or all of the following to the traditional legal writing agenda: increased attention to fact investigation and analysis, interviewing, counseling, negotiation, transactional planning and drafting, trial advocacy skills, and ethical issues. These courses tend to earn more credit hours and they typically have lower student/faculty ratios.[5] While I am not aware of any law school that has adopted such an expanded skills program for the express purpose of furthering ADR, plainly such programs would afford significant opportunity to incorporate ADR theory and skills. For various reasons, such an expanded program was not an option at my school.

Without more credit hours, I had two options: find something to cut from the existing curriculum or find a way to alter what we did to incorporate ADR without adding significantly to the work load for students or faculty. I already felt that the course's six credit hours, divided across three quarters, were barely sufficient to teach the minimum acceptable package of legal method, research, and writing skills. I was forced to examine whether our existing material could be retooled to diminish an unintended and undesirable bias toward litigation and to increase students' exposure to ADR.

That effort resulted in four changes: 1) the other legal writing faculty

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1. *See* Ralph L. Brill, *et al.*, ABA, SOURCEBOOK ON LEGAL WRITING PROGRAMS (1997).
2. *See id.* at 56.
3. *See id.* at 74.
4. *See id.* at 16-19.
5. Lawyering-type programs vary widely from first-year courses with a litigation-orientation—such as New York University's Lawyering Program—to a two-year program that integrates legal writing, professional responsibility, interviewing, counseling and negotiation in both transactional and advocacy simulations, such as The Legal Skills Program at the College of William and Mary. *See, e.g., The Real World Comes to the Classroom,* New York University, THE LAW SCHOOL MAGAZINE p. 51- 53 (1993); James E. Moliterno, *The Legal Skills Program at the College of William and Mary: An Early Report,* 40 J. LEGAL ED. 535 (1990).

and I use a new approach to teaching introductory case analysis and briefing; 2) all first-year students observe students in an upper-level mediation clinic mediate a simulated employment dispute that was the subject of a first-year writing assignment; 3) some of the other legal writing teachers and I assign students to prepare a substantial memorandum of law about legal issues relevant to particular ADR processes; and 4) all first-year students participate in a negotiation role-play and, on occasion, a drafting exercise related to a memorandum assignment. This essay will focus on the writing assignments, particularly the assignment on case briefing.

This work highlighted some assumptions underlying traditional legal writing pedagogy that make it difficult to devote substantial attention to ADR in the first-year writing course absent broader curricular change, such as the adoption of a lawyering program. To a degree that might surprise teachers of other subjects, legal writing pedagogy in the first semester in most schools focuses narrowly on teaching students to form an "objective" conclusion about the law in a hypothetical situation (usually a dispute) and requires students to justify that conclusion in writing by appropriate reference to authority: the classic memorandum of law. An important goal is to build students' skills in what is loosely termed "formal" legal reasoning techniques, i.e., the ability to induce legal principles from multiple common law sources, to reason by analogy, and to deduce the effect of legal principles on various factual situations.[6] The traditional legal writing assignment, like the traditional exam question, has come to rely on litigation-oriented hypotheticals simply because those hypotheticals provide the most direct and efficient way to assess students' mastery of formal legal reasoning. Unfortunately, the common assumption that the legal writing course represents "practice," coupled with minimal class time for discussion, means that an exclusive reliance on these kinds of hypotheticals in that course tends to validate an extremely reductive form of case analysis, aimed primarily at identifying claims and defenses. The repeated focus on this reductive skill—however essential the skill may be—can send the undesirable message that the purpose of legal education, and the signal skill of a lawyer, is the ability to predict the outcome of litigated disputes. This pedagogy seems fundamentally at odds with an

6. The fundamentals of this kind of reasoning are well-articulated in STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (2d ed. 1995), and form the approach of all leading first-year legal writing textbooks. *See, e.g.*, CHARLES R. CALLEROS, LEGAL METHOD AND WRITING (3d ed. 1998); LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION (1996); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING (3d ed. 1998); LAUREL CURRIE OATES, ET AL., THE LEGAL WRITING HANDBOOK (2d ed. 1998); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS (3d ed. 1998); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW (3d ed. 1995).

ADR emphasis because it focuses not on the parties' interests, nor the dispute resolution process, nor the lawyer's role in that process, but almost exclusively on the precedential effect of judicial decision.[7]

A serious commitment to infuse alternative dispute resolution theory and practice into the first-year writing curriculum challenges the primacy of the case method and formal reasoning from cases. An ADR perspective in the first-year skills curriculum suggests instead that formal reasoning from cases is merely one of a lawyer's tools and should share air time with other lessons.[8] To provide more than a nod to ADR theory and practice would require shifting credit hours away from the case method.

I had to decide whether the program could do more to reinforce ADR without jeopardizing students' acquisition of traditional legal method, research and writing skills. Those skills are essential to successful study in law school, exam-writing, and law practice. My experience is that students need more, not less, practice in them. On the other hand, I had long been skeptical that the traditional legal writing pedagogy was particularly efficient. With its early emphasis on memoranda of law, traditional legal writing pedagogy requires a level of abstract reductionism that can confuse and alienate beginning law students. Far from being an easy introductory exercise, a memorandum of law on any issue worth analysis requires a complicated mix of skills in interpretation, reasoning, and composition that first-year students need to work on singly before they can put them together effectively.[9]

Accordingly, I was open to possible reforms. For example, basic composition skills, such as organization, precision and brevity, could be practiced in writing up a client interview. Similarly, encouraging students to identify parties' underlying interests prior to and during a dispute could provide a more accessible context for beginning legal study than would an

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7. It seems clear that this type of legal writing curriculum is a direct descendant of the case method of instruction. In fact, one reason for intensifying the focus on legal reasoning and method in the legal writing textbooks is that legal method is rarely taught anymore in a stand-alone class. *See* Richard B. Cappalli, *The Disappearance of Legal Method,* 70 TEMPLE L. REV. 393, 395 (1997). If the legal writing course is the only course in the first-year curriculum that provides systematic lessons in formal legal method, and it bears only three or four credits, most teachers will feel pressed to accomplish that mission and teach students to research and write. These teachers may feel reluctant to set any additional goals.

8. I doubt anyone would dispute that legal reasoning is but one component of lawyering skill. Even those who question whether legal reasoning has any provable validity by any fixed or objective criterion concede the utility of being able to engage in the techniques of formal or traditional reasoning. *See, e.g.,* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 J. LEGAL ED. 518 (1986). The debate about the content of the first-year curriculum seems more focused on the appropriate timing and relative emphasis of lessons that nearly everyone agrees need to be taught.

9. *See* Kate O'Neill, *Formalism and Syllogisms: A Pragmatic Critique of Writing in Law School,* 20 LEG. STUD. FORUM 51 (1996).

exclusive focus on holding and dictum. In sum, there *is* room to incorporate some ADR perspective into a legal writing course, but realistically, a sustained consideration of ADR would require additional credit hours.

II. GENESIS

I was skeptical when my colleague, Lea Vaughn, approached me in 1995 to say that the Fund for the Improvement of Post-Secondary Education was supporting an effort to integrate ADR into the law school curriculum. In particular, she wanted to know whether I would consider integrating ADR into our first-year legal research and writing course, Basic Legal Skills (BLS). I had taught legal research and writing for nearly a decade before becoming director of the BLS program at the University of Washington. In my first two years as director, I had worked hard to design a coherent curriculum that squeezed as much instruction and practice in legal method, research, and writing as possible into a year-long six credit course. In particular, I had focused on improving our legal method instruction and on designing sustained simulation exercises that would permit students to write about a client matter at different stages and for different audiences. For example, students wrote a memorandum on an issue of contract law, then drafted the relevant clause of a contract and then prepared pleadings and a motion for a dispute related to the clause. I was pleased with both the course and student response and felt quite invested in its design. Finding room for another agenda worried me. Nonetheless, I agreed to participate in the experiment. Professor Vaughn had been both a friend and mentor. I respected her dedication to teaching and her educational values and was glad for a reason to collaborate.

In the near term we both understood that changes would be confined to our classrooms and would be limited to what we could accomplish with existing resources. I had just participated in a failed committee effort to revamp the whole first-year curriculum. The committee proposal would have reconfigured a significant portion of the first-year credit hours into a lawyering module in which students would work in small groups of 10 to 15 students on simulated client matters with a faculty member acting as supervising attorney. The goal had been to increase ethics and skills instruction, including interviewing, counseling, and negotiation, and to provide some exposure to transactional work, as well as some motion practice. The proposal had failed because of a mixture of curricular objections and fiscal constraints. I felt that it was not the time for me to approach the administration or faculty for yet another curricular reform.

In the first year, Professor Vaughn and I shared a small section of first-year law students. She taught Civil Procedure and I taught BLS. We collaborated on simulations, assigning different aspects in each of our

classes. The synergy between the two classes allowed the students to cover more ground than they might have in two separate courses. It helped that both of us were experienced teachers, easily able to generate simulations that worked for both of our courses. In the succeeding years, we refined our approach and began to offer it as a model and stimulus to other teachers, especially the other BLS teachers.

The results have been modest but worthwhile, nonetheless. Now, all first-year students are introduced to case analysis from an ADR perspective. All witness a mediation and engage in a negotiation exercise. Most do some transactional planning and drafting. So far, about half the first-year class writes at least one memorandum of law about an issue relevant to ADR, such as the enforceability of an arbitration clause in an employment contract. Depending on section assignments, students may also benefit from additional spin-off exercises in their substantive courses.

III. THE FORMER LEGAL RESEARCH AND WRITING CURRICULUM AT THE UNIVERSITY OF WASHINGTON

ADR was not easily fit within the traditional first-year legal research and writing curriculum. First, the traditional paradigm progressed from pre-litigation memoranda to appellate briefs. Persuading other busy legal writing faculty to change was the first challenge. Second, the curriculum already strained what students and faculty could reasonably accomplish within the credit allocation. Students needed ample time to research and write; faculty needed time to edit and to confer with students.

One obvious way to achieve more time would have been to eliminate the moot court brief-writing and oral advocacy exercise at the end of the first year. It was an obvious candidate for change if only because, as the capstone of the first-year writing program, it certainly reinforced a "litigation bias." While the exercise has some utility in teaching persuasive writing techniques and oral presentation skills, I already believed that those skills could be developed through more modest exercises, such as a motion. Moreover, from a practical standpoint, learning to draft a motion would probably be more useful to most students in practice.

In the short term, though, it was not appropriate to dismantle the moot court tradition altogether (though I do hope to move advocacy instruction into the second year eventually). Moot court has many student, faculty, and alumni loyalists. The end-of-the-year rite of passage was staffed by upper-class students and served as the screening device for first-year students' election to the moot court honor society. First-year students were often energized by the competition and frequently came away from their brief-writing and oral argument exercises feeling newly confident about their lawyering abilities. However dubious I was that the moot exercises justified the time and energy expended on them, I could not abandon a

grand tradition unilaterally. On balance, the best choice was to limit the moot court exercise to a motion. That change shaved a week (two class hours) from the students' preparation time, which we now devote to a negotiation exercise.

That was a modest improvement; moreover, it came late in the year. So, I set to thinking about whether there was any way that I could re-orient existing writing exercises to draw some attention to ADR.

If additional academic credit had been available, I would have considered a more far-reaching reform to focus on the client's situation and goals. In this model, interviewing skills could be taught first and initial writing assignments might be interview notes. Students could then attempt to identify the client's full range of interests, which would include analysis of available formal legal remedies. At that stage, students could be required to prepare a memorandum of law. Subsequent exercises could involve contract negotiation and drafting, or dispute resolution exercises.

Plainly, such a course would be quite different from the traditional legal writing course because presenting a formal written analysis of legal authority would be only a component, not the focus. Even with more credit, this model raises two concerns for me: 1) whether students could effectively perform some role-plays, such as a client interview, prior to knowing any relevant law and without much instruction on theory or technique; and 2) whether this model would provide sufficient practice in legal method, research, and writing.

IV. ADR-INSPIRED MODIFICATION OF TWO TRADITIONAL LEGAL WRITING ASSIGNMENTS

I focus here on the changes we adopted for writing exercises because those are unique to legal writing while the role-plays in mediation and negotiation can be adapted from other courses such as interviewing and counseling, negotiation, and mediation.

A. *Introductory Case Analysis and Briefing*

Like many legal writing courses, BLS begins by teaching students to brief an appellate case. The traditional paradigm for briefing anticipates our focus on formal legal reasoning and is basically aimed at defining the precedential scope of the opinion.[10] Briefing focuses on the end product of the dispute: the judgment on the material facts. The goal is to define the parameters of the holding for use in predicting the outcome of other similar disputes.

We modified this traditional paradigm to shift toward a richer

10. *See supra* note 6 for texts adopting this approach to briefing.

assessment of a decision as a more or less successful resolution of a dispute. In the first weeks of school, students are explicitly encouraged to think about the original "interests"[11] of the parties and the extent to which those interests were recognized, met, or altered by the litigation. Students quickly see that some interests may not be met, indeed may not be acknowledged, by the appellate decision. They begin to grasp a crucial and novel idea that appellate opinions do not generally identify or weigh the parties' full range of interests but only those interests that the attorneys were able to translate into cognizable legal claims and preserve for appeal.[12] This approach plants the concept that a client's interests are not necessarily coterminous with any legal right and that part of the art of lawyering is distinguishing between those interests that can or should be pursued through litigation and those that cannot or should not. We encourage students to evaluate the attorneys' decisions to litigate in light of the outcome.

Happily, we discovered that this new approach even enhanced students' understanding of issues and holdings. Explicitly recognizing that a fuller story lies behind most opinions, we help students distinguish opinions from narratives and understand that the substantive and procedural rules filter, circumscribe, and even distort what the court will consider and what issues it can decide.

This approach to teaching case briefing is relevant to ADR in three ways: 1) it supports the message that litigation is and should be a rare dispute resolution mechanism because (by its nature) it can only recognize a relatively narrow range of interests or possible solutions; 2) it encourages students to analyze cases not just as pronouncements of "law" but as products of "lawyering" choices that may or may not have been sound or efficient; and 3) it reinforces the message that other dispute resolution

11. We do not attempt to teach students "interest analysis." Our working definition of "interest" is something like needs and goals. For a discussion of "needs" in a negotiation context, see, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754 (1984).

12. For example, we have used a case where a driver suffers an epileptic seizure and crashes into a shop, injuring the owner and damaging property. *See* Hammontree v. Jenner, 97 Cal. Rptr. 739, 740 (1971). The issue on appeal was whether the trial court had properly limited the case to a negligence claim by refusing an instruction on absolute liability. *See id.* at 741. The opinion dryly analyzes state law, finding no authority to extend absolute liability to drivers absent legislation. *See id.* at 742. With a little coaxing, students readily identify "interests" that the court did not address. For example, the epileptic driver was also injured and suffered property loss. *See id.* at 740. He may have lacked reasonable alternative public transportation in California in the 1970s. Students ponder whether the driver had appropriate medical care prior to the accident, and whether the state licensing body adequately monitored drivers' abilities. Students perceive that the litigation did not include all relevant "stakeholders" and that the "problem" may have prospective "solutions" that the court could not reach.

techniques are worth studying.[13]

Care must be taken in selecting cases for briefing. Ideally, the case should be one for which a good deal of background information is available but is not evident from the opinion. In addition, the case should be relatively short and simple. Some older cases can work well. For example, scholarship on *Hadley v. Baxendale*[14] and *Pennoyer v. Neff*[15] has produced good background information. Alternatively, a teacher can use a contemporary case if press coverage is available or if she can contact the lawyers for background.

B. *Researching and Writing About Legal Issues in ADR*

A more obvious reform simply involves directing research and writing assignments to legal issues about ADR. The possible issues are numerous. I find employment simulations especially useful. For example, I have asked students to analyze whether a blanket arbitration clause in an employment contract barred litigation of a civil rights claim. In another exercise, I asked students to analyze whether an employer could amend an existing employment contract to include a mandatory arbitration clause without providing any additional consideration to the affected employee. Students have examined whether a threat to discharge an employee during a negotiation over a non-compete clause would make the clause unenforceable because procured through duress. These assignments pose interesting legal issues and they suggest useful topics about overreaching, negotiating strategies, and ethics. Each of these assignments can readily support an additional negotiation exercise and a drafting exercise, if time permits.

C. *Mediation and Negotiation Role-Plays*

The mediation role-play, performed by upper-class students from our mediation clinic, is very successful. The students are well-prepared, and the first-year students get a vivid example of how many "interests" can emerge during the mediation that are as, or more, central to the parties' concerns than the legal claims that the first-year students analyzed in an earlier memo.

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13. For a fuller description of this teaching effort, see Kate O'Neill, *Using an ADR Perspective to Teach Introductory Case Analysis in a Legal Writing Class*, in LEONARD L. RISKIN ET AL., INSTRUCTOR'S MANUAL WITH SIMULATION AND PROBLEM MATERIALS TO ACCOMPANY RISKIN & WESTBROOK DISPUTE RESOLUTION AND LAWYERS 258 (2d ed. 1998) [hereinafter INSTRUCTOR'S MANUAL].

14. 156 Eng. Rep. 145 (1854).

15. 95 U.S. 714 (1877).

I am less confident about the negotiation exercise.[16] Over three years, students have consistently praised the exercise, avidly discussing the various strategies and outcomes that different teams adopted. The exercise is reportedly fun, and may be worthwhile for that reason alone. Because we have only one hour in class to teach any negotiation theory and one hour to de-brief the exercise, though, I worry about "bad" messages.

Legal writing teachers should ensure that they have ample time to evaluate and de-brief any assigned exercise, whether written or role-play. It is tempting to add a client interview or a negotiation exercise to a memo assignment but, unless the exercise is evaluated, students may infer as many poor lessons as positive ones. In particular, if students are asked to negotiate without sufficient understanding of negotiation theory or techniques, they are likely to conclude that whatever occurred in their negotiation is representative of typical professional work, or worse, that their performance is good. In addition, teachers must take care that fun exercises do not accidentally undermine their message. If all written exercises are graded, but the occasional role-play is not, teachers may accidentally convey that the skills necessary to the role-play are less important.

V. CONCLUSION

These modest reforms of traditional legal writing exercises alone will not integrate alternative dispute resolution theory and practice into the first-year curriculum, but they do represent a practical accommodation for those legal writing programs which lack the time to add significant instruction in ADR theory or skills but wish to minimize "litigation-bias." They can, in addition, support other first-year or upper-level courses that address ADR.

16. *See, e.g., The Medi-Lab Case: A Negotiation Exercise for a Legal Writing Course,* in INSTRUCTOR'S MANUAL, *supra* note 13, at 282.