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Integrating Legal Writing Into Civil Procedure

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INTEGRATING LEGAL WRITING INTO CIVIL PROCEDURE

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I. INTRODUCTION

Law teachers increasingly recognize that practical skills training deserves a place in traditional courses throughout the curriculum.[1]

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This Article is adapted from the paper I presented in Washington, D.C. as a panelist at the Association of American Law Schools (AALS) Mini-Workshop on Legal Writing Throughout the Law School Curriculum (1991). Five of my University of Missouri School of Law colleagues provided valuable insights: Melody R. Daily, Carl H. Esbeck, Timothy J. Heinsz, Nanette K. Laughrey, and Leonard L. Riskin. I also thank J. Dennis Hynes, Chair of the Mini-Workshop's Planning Committee, for his valuable insights.

I heartily join the University of Connecticut School of Law's recent tributes to Associate Dean Peter A. Lane on his retirement—or more accurately, on his semi-retirement. When Dean Lane announced plans to retire after the 1990-91 academic year, the School of Law persuaded him to remain on a part-time basis. When Dean Lane finally does retire, the school and students will lose an educator of the first rank.

1. Concerning the place of practical skills training in traditional courses generally, see, e.g., DAVID H. VERNON, CONTRACTS: THEORY AND PRACTICE vii (2d ed. 1991) (casebook with problems requiring counseling, settlement, negotiation, drafting, fact investigating, research, preventive law, or litigation skills) ("[E]ven the small measure of reality experienced by playing the lawyer's role contributes appreciably to what students learn about legal theory and legal analysis."); Ruth Bader Ginsburg, *Law School Applicants in the 1980s: Numbers, Quality, and Mix by Race and Sex*, *in* AMERICAN BAR ASS'N SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, CONFERENCE ON LEGAL EDUCATION IN THE 1980s 48 (1981) ("Experimental, problem-solving exercises can be provided to complement conventional courses even in the first year; drafting problems in contracts, negotiation problems in property or torts, counseling problems in criminal law and procedure, for example."); Eric M. Holmes, *Education for Competent Lawyering — Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 566-72 (1976) (urging integration of practical skills training into traditional second- and third-year courses, or into third-year courses only); James E. Moliterno, *The Secret of Success: The Small-Section First-Year Skills Offering and its Relationship to Independent Thinking*, 55 MO. L. REV. 875, 875 n.1 (1990) (describing a small-section first-year legal skills course and discussing the student needs that such a course satisfies) ("[T]hese same needs could certainly be fulfilled in any small section first year course in which individual attention could be provided and early student work could be generated, critiqued, and returned."); Gene R. Shreve, *Bringing the Educational Reforms of the* Cramton Report *into the Case Method Classroom — Two Models*, 59 WASH. U. L.Q. 793, 793 (1981) (advocating that practical skills training "not be confined to the so-called 'skills' courses but be

The literature regularly reports proposals to integrate practical skills components into both first-year and upperclass courses. The array of skills includes mediation,[2] negotiation,[3] interviewing and counseling,[4]

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considered with reference to all law school courses, including those employing the traditional case method approach"); Joseph P. Tomain & Michael E. Solimine, *Skills Skepticism in the Postclinic World*, 40 J. LEGAL EDUC. 307 (1990). The Tomain and Solimine article discusses the integrated curriculum model of practical skills instruction, which the authors conclude is "common, although not touted as such." The model includes the efforts of "some faculty [who] regularly use skills techniques in their substantive courses. Courses in contracts, evidence, civil procedure, and property, although not traditionally associated with skills courses, can employ simulations, role playing, drafting, problem solving, and other techniques freely borrowed from clinicians or skills faculty." *Id.* at 308. *See also American Bar Association's National Conference on Professional Skills and Legal Education*, 19 N.M. L. REV. 1 (1989) (discussing practical skills training, including the integrated curriculum model); Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 413-14 n.4 (1986) (" '[S]kills' can and should be taught not only in traditional skills courses, such as trial advocacy and negotiations, but also throughout the entire curriculum.").

Professor Weistart notes:

> [M]ost of the traditional first-year courses are adaptable to new methodologies. As a number of teachers and casebook writers have found, the grasp of the appellate case method can be loosened with relative ease. The subject of contracts, for example, rather steadily admits of the introduction of techniques in problem solving and, for the more venturesome, a first look at clinical approaches.

John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317, 321. *See also* Committee on Curriculum, Association of Am. Law Schools, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 369, 374 (Karl N. Llewellyn chairman, 1945) ("[W]hat we are training for is not mere knowledge of the law, it is the practice of law.") (discussing integration of practical skills training into various courses, including Civil Procedure); Frank R. Strong, *Pedagogical Implications of Inventorying Legal Capacities*, 3 J. LEGAL EDUC. 555, 560-61 & n.4 (1951) (discussing "allocation to old-line subject-matter courses of responsibility, not only for imparting knowledge of the specific material but also for training in the skill or insight which can best be developed through employment of that particular subject matter").

See generally, e.g., TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP. AMERICAN BAR ASS'N. TENTATIVE DRAFT: STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES 4-5, 8-77 (1991) (setting forth "the fundamental lawyering skills essential for competent representation:" problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR. AMERICAN BAR ASS'N. LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 9-10 (1979) (the "Cramton Report") (stating that fundamental skills of lawyer competence include ability to analyze legal problems, perform legal research, collect and sort facts, write effectively, communicate orally with effectiveness in a variety of settings, perform important lawyer tasks calling on both communication and interpersonal skills, such as interviewing, counseling and negotiation, and legal organizational and managerial skills); Wangerin, *supra*, at 411-15 (distinguishing "dialectical" skills, which concern learning how to read and analyze cases, statutes and regulations, and how to construct legal arguments, from "practical" skills, which concern how to do legal research, to collect and sort facts, to interview, counsel and negotiate, and to organize and manage legal work).

2. *See, e.g.*, Edward A. Dauer, *Expanding Clinical Teaching Methods into the Commercial Law Curriculum*, 25 J. LEGAL EDUC. 76, 76 (1973); Jacqueline M. Nolan-Haley & Maria R.

writing and drafting,[5] case management,[6] and advocacy. In the advo-

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Volpe, *Teaching Mediation as a Lawyering Role*, 39 J. LEGAL EDUC. 571, 571-72 (1989); Leonard L. Riskin, *Mediation in the Law Schools*, 34 J. LEGAL EDUC. 259, 263, 264-67 (1984) (describing arbitration/mediation exercise for use in first-year and upperclass courses) ("Mediation deserves a place in many parts of the curriculum and should not be taught in special courses alone . . . ."); Frank E.A. Sander, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229, 233-34 (1984). *See generally* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (INSTRUCTOR'S MANUAL) 74-81, 361-433 (1987) (mediation exercises and activities for first-year courses).

3. *See, e.g.*, Stacy Caplow, *Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law*, 19 N.M. L. REV. 137, 138 (1989); Paul D. Carrington, *Civil Procedure and Alternative Dispute Resolution*, 34 J. LEGAL EDUC. 298, 300 (1984) (suggesting use of negotiation exercise in Civil Procedure course); Dauer, *supra* note 2, at 76, 81; Kenney Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. LEGAL EDUC. 534, 542 (1981); Joseph W. Little, *Skills Training in the Torts Course*, 31 J. LEGAL EDUC. 614 (1981); Joel Rabinovitz, *Negotiation and Drafting in a Substantive Course in Acquisitions and Mergers*, 23 J. LEGAL EDUC. 470 (1971); Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509 (1989); Sander, *supra* note 2, at 233-34; Philip G. Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. LEGAL EDUC. 555, 557 (1989); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 258-59 (1988) [hereinafter, Spiegelman, *Integrating Doctrine*]; Paul J. Spiegelman, *Civil Procedure and Alternative Dispute Resolution: The Lawyer's Role and the Opportunity for Change*, 37 J. LEGAL EDUC. 26, 28 (1987). *Cf.* Nancy A. Coleman, *Teaching the Theory and Practice of Bargaining to Lawyers and Students*, 30 J. LEGAL EDUC 470 (1980) (practitioner author). *See generally* RISKIN & WESTBROOK, *supra* note 2, at 183-360 (negotiation exercises and activities for first-year courses).

4. *See, e.g.*, Louis M. Brown, *Teaching the Low Visible Decision Processes of the Lawyer*, 25 J. LEGAL EDUC. 386 (1973); Elliot M. Burg, *Clinic in the Classroom: A Step Toward Cooperation*, 37 J. LEGAL EDUC. 232, 235 (1987); Caplow, *supra* note 3, at 143-44; Committee on Curriculum, *supra* note 1, at 374-77; Dauer, *supra* note 2, at 76; Samuel J.M. Donnelly, *Materials on Commercial Transactions: Back to the Curriculum Committee*, 25 J LEGAL EDUC. 94, 103-04, 119 (1973) (book review); Hegland, *supra* note 3, at 542-43; Robert L. Misner, *Teaching Contracts with Contracts*, 28 J. LEGAL EDUC. 550 (1977); Elizabeth N. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41, 44 (1987); Schrag, *supra* note 3, at 557; Spiegelman, *Integrating Doctrine*, *supra* note 3, at 258-59. *See generally* RISKIN & WESTBROOK, *supra* note 2, at 82-182 (interviewing and counseling exercises and activities for first-year courses).

5. *See, e.g.*, Lloyd C. Anderson & Charles E. Kirkwood, *Teaching Civil Procedure with the Aid of Local Tort Litigation*, 37 J. LEGAL EDUC. 215, 218-20 (1987); Kathleen S. Bean, *Writing Assignments in Law School Classes*, 37 J. LEGAL EDUC. 276 (1987); Caplow, *supra* note 3, at 144-45; Committee on Curriculum, *supra* note 1, at 374-77; Dauer, *supra* note 2, at 76, 81; Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 164-68 (1987); Richard S. Miller, *A Report of Modest Success with a Variation of the Problem Method*, 23 J LEGAL EDUC. 344 (1970); Misner, *supra* note 4; Anita L. Morse, *Research, Writing, and Advocacy in the Law School Curriculum*, 75 LAW LIBR. J. 232, 256-57 (1982); Rabinovitz, *supra* note 3; Schneider, *supra* note 4, at 44; Schrag, *supra* note 3, at 562-63; Laurens Walker & Burton Goldstein, *After the Clinic What?*, 27 J. LEGAL EDUC. 614 (1975). *See generally* RISKIN & WESTBROOK, *supra* note 2, at 103-49 (drafting exercises and activities for first-year courses).

6. *See, e.g.*, Anderson & Kirkwood, *supra* note 5, at 221-23; Burg, *supra* note 4, at 239-41; Schneider, *supra* note 4, at 44; Schrag, *supra* note 3, at 558; Kurt A. Strasser, *Teaching Con-*

cacy realm, students experience civil and criminal litigation,[7] administrative representation,[8] and arbitration.[9] This Article describes three methods for integrating a writing skills component into the first-year Civil Procedure course.

Why make the effort to integrate a legal writing component into Civil Procedure? The most obvious reason is that law students can never receive too much instruction and practice in written expression. For years now, legal writing has been the target of scorn and ridicule by law professors,[10] judges,[11] the general public,[12] and even practicing

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tracts — Present Criticism and a Modest Proposal for Reform, 31 J. LEGAL EDUC. 63, 82 (1981) (discussing the Contracts course's pedagogical purposes, including the teaching of case handling, analysis, and synthesis skills).

7. *See, e.g.*, Anderson & Kirkwood, *supra* note 5; W.H. Bryson, *The Problem Method Adapted to Case Books*, 26 J. LEGAL EDUC. 594 (1974); Caplow, *supra* note 3; Edward D. Cavanagh, *Pretrial Discovery in the Law School Curriculum: An Analysis and a Suggested Approach*, 38 J. LEGAL EDUC. 401, 406-09 (1988); Robert P. Davidow, *Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing*, 34 J. LEGAL EDUC. 527 (1984); Patricia Brumfield Fry, *Simulating Dynamics: Using Role-Playing to Teach the Process of Bankruptcy Reorganization*, 37 J. LEGAL EDUC. 253 (1987); Lawrence M. Grosberg, *The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course*, 37 J. LEGAL EDUC. 378, 382-83, 385-86 (1987); Hegland, *supra* note 3, at 542; Charles W. Joiner, *A Judge Looks at the Teaching of Criminal Law*, 27 WAYNE L. REV. 405, 409 (1980) (the author, a federal district judge, was a former law professor and dean); Donald B. King, *Simulated Game Playing in Law School: An Experiment*, 26 J. LEGAL EDUC. 580 (1974); Little, *supra* note 3; Miller, *supra* note 5; Morse, *supra* note 5, at 256-57; Howard L. Oleck, *Adversary Method of Law Teaching, Summarized*, 27 J. LEGAL EDUC. 86 (1975); Schneider, *supra* note 4, at 44; Schrag, *supra* note 3, at 558; Shreve, *supra* note 1, at 802-06 (describing choice of law trial the author conducted in his conflict of laws course); Walker & Goldstein, *supra* note 5.

8. *See, e.g.*, Michael Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. LEGAL EDUC. 234 (1974); Burg, *supra* note 4, at 241-42; Joseph P. Tomain, *Lawyering in First-Year Property*, 33 J. LEGAL EDUC. 111 (1983).

9. *See, e.g.*, RISKIN & WESTBROOK, *supra* note 2, at 434-48 (arbitration exercises and activities for first-year courses); Dauer, *supra* note 2, at 76, 81.

10. *See, e.g.*, DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE xi (1982) ("Most law can be expressed in ordinary English. Most of it is. But by the time lawyers get through mushing up ordinary English, very few English speakers and only some lawyers can recognize it."); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 4 (2d ed. 1985) ("Good law schools have begun to stress simplicity and clarity in their legal writing courses. Yet much remains to be done. If you do not believe it, walk to the nearest law library, pick any recent book at random, open to any page, and read."); James Lindgren, *Style Matters: A Review Essay on Legal Writing*, 92 YALE L.J. 161, 161 (1982) (book review) ("Most lawyers—even many who have risen to the top of the profession—write badly."); William L. Prosser, *English as She Is Wrote*, 7 J. LEGAL EDUC. 155, 158 (1954) (discussing his students' "appalling lack of ability to organize a paragraph or even a sentence, to say simply and clearly what is meant").

11. *See, e.g.*, J. Clifford Wallace, *Wanted: Advocates Who Can Argue in Writing*, 67 KY. L.J. 375, 379 (1979) ("My own personal observation at both the trial and appellate levels is that, with some welcome exceptions, the level of written advocacy leaves much to be desired."). *See also, e.g.*, Slater v. Gallman, 339 N.E.2d 863, 864 (N.Y. 1975) ("[U]nfortunately it is not always the

lawyers.[13] Written expression is such a staple of lawyering that writing has a place in nearly any course in the curriculum. Because few lawyers write more than civil litigators, writing finds a natural place in Civil Procedure.

Integrated writing instruction, however, does not come cost-free. To justify the expenditure of faculty resources, integration should do more than merely offer students experience that complements the basic first-year writing course and any upperclass writing requirements of a law school. There are three additional reasons for making legal writing a component of the Civil Procedure course.

II. REASONS TO INTEGRATE

A. *Cues*

In any field of learning, students are sensitive to their teachers' cues, both positive and negative. Frequently these cues are wholly unintended. First-year law students inevitably sense negative cues that the basic writing course is not to be taken as seriously as other courses. As a corollary, students may sense that writing is not to be taken as seriously as other lawyering skills.

The basic writing course, for example, normally is the only first-year offering taught by adjunct rather than tenure-track faculty. The course typically carries less academic credit than any other first-year offering, and students frequently consider the credit insufficient in light of the substantial time and effort the course requires. In some schools

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rare case in which we receive poorly written and excessively long briefs, replete with burdensome, irrelevant, and immaterial matter.").

12. *See, e.g.*, RONALD L. GOLDFARB & JAMES C. RAYMOND, CLEAR UNDERSTANDINGS xiii (1982) ("[O]ne reason lawyers suffer a bad public image . . . is their atrocious and pretentious prose."); Jay Wishingrad & Douglas E. Abrams, *The Lawyer's Bookshelf*, N.Y.L.J., Dec. 12, 1980, at 2 (reviewing RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (1979)) ("How often have we heard it said that someone 'writes like a lawyer'? How often have we heard it meant as a compliment?").

13. *See, e.g.*, TOM GOLDSTEIN & JETHRO K. LIEBERMAN, THE LAWYER'S GUIDE TO WRITING WELL 3 (1989) (in response to the authors' survey, lawyers described modern legal writing as "flabby, prolix, obscure, opaque, ungrammatical, dull, boring, redundant, disorganized, gray, dense, unimaginative, impersonal, foggy, infirm, indistinct, stilted, arcane, confused, heavy-handed, jargon- and cliche-ridden, ponderous, weaseling, overblown, pseudointellectual, hyperbolic, misleading, incivil, labored, bloodless, vacuous, evasive, pretentious, convoluted, rambling, incoherent, choked, archaic, orotund, and fuzzy"); Robert L. Clare, Jr., *Teaching Clear Legal Writing — The Practitioner's Viewpoint*, 52 N.Y. ST. B.J. 192, 192 (1980) (the author, a senior partner in a prominent Wall Street law firm, stated that many associates' memoranda are " 'mystery stories' [that require] a great deal of time and effort . . . be spent reading and rereading them to discover the ideas meant to be conveyed.").

that confer number or letter grades, the basic writing course is the only first-year offering graded pass-fail.

By integrating a writing skills component into Civil Procedure, the professor transmits early positive cues. Integration should involve inclusion in the Civil Procedure syllabus of a written argumentation exercise based on the model presented below in Part III.A. As Part III.B discusses, the Civil Procedure professor should also elicit writing pointers during casebook analysis throughout the year. Part III.C discusses the professor's contribution in designing a civil procedure problem for the basic writing course. The Civil Procedure professor's initiatives at integration do not go unnoticed. Students recognize that the bulk of first-year writing instruction and practice remains with the basic writing course. But integration also fosters the healthy perception that basic writing courses merit careful attention, and that quality writing is indeed central to a successful career in law.[14]

B. *Combination*

At some stage of their law school careers, students should be encouraged to begin combining the lessons they learn in their various courses. If a first-year examination question concerns Sam Smith, who falls in an apartment's common area and suffers injury, the content of the student's answer depends on whether the examination is given in Civil Procedure, Torts or Property. If Sam Smith retains the former student ten years later, however, the lawyer applies what he or she learned in all three courses, and probably in others as well.

Combining lessons from several courses is understandably difficult and sometimes frustrating in the first year, but first-year students can begin to struggle with combination. By integrating the basic writing course's subject matter into Civil Procedure, the professor takes one opportunity to send the early message that in legal practice, no course's learning stands alone.

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14. A few law schools integrate the basic writing course into one or more of the other first-year courses by general faculty determination. *See, e.g.*, Daan Braveman, *Law Firm: A First-Year Course on Lawyering*, 39 J. LEGAL EDUC. 501 (1989). I address the curricula in the overwhelming majority of schools which maintain the basic writing course as a distinct first-year offering. Where the course is integrated by general faculty determination, the Civil Procedure professor nevertheless should elicit writing pointers suggested by casebook reading. The general determination, however, presumably would displace the individual professor's written argumentation exercise and his or her contribution to designing a basic writing course problem outside the determination.

C. *Enhancement*

By providing even relatively modest exposure to written expression, an integrated writing skills component enhances students' understanding of the Civil Procedure course's own core concepts. Law professors know that writing is a learning experience that sharpens thinking, even if the writer has general understanding at the outset.

The Civil Procedure professor, for example, can rely on casebook analysis to demonstrate that judicial discretion permeates the Federal Rules of Civil Procedure. The professor, however, also may integrate a written argumentation exercise that enables students to wrestle with a motion to transfer or a motion to amend a pleading. If students themselves fashion written arguments for and against transfer or amendment on facts that invite close decision, they inevitably emerge with enhanced appreciation for the impact of judicial discretion. Thus, Civil Procedure comes alive in a way that pure casebook analysis does not duplicate.

III. Ways to Integrate

The Civil Procedure professor can integrate writing and procedure in three ways: (1) by conducting a writing exercise in which the students argue a motion in the Civil Procedure class, (2) by eliciting writing pointers during class discussion of casebook reading throughout the year, and (3) by collaborating with the basic writing course's professors to develop a Civil Procedure problem for the basic course.

A. *Argumentation Exercise*

At one point during the year, I divide my Civil Procedure class into groups to argue a motion in writing and at an oral hearing. Each group consists of a judge and two law firms. One firm represents the plaintiff and the other represents the defendant. Depending on class size, firms can range from two to four members. Each group produces its own argument and decision, but all groups receive the same problem.

Civil Procedure argumentation exercises achieve the best results with motions to dismiss for lack of personal jurisdiction, motions to transfer, or motions to amend a pleading. Motions challenging personal jurisdiction require students to synthesize material they typically find imposing in Civil Procedure courses that begin with the study of jurisdiction. I prefer transfer motions, whose arguments focus not only on jurisdiction, but also on an openly discretionary standard. Amendment

motions also highlight the impact of judicial discretion, which is a central theme of the Civil Procedure course and its study of the Federal Rules of Civil Procedure. The theme provides grist for an argumentation exercise because many students initially resist judicial discretion if they arrive at law school with the conception that "rules" should yield answers from mechanical determination. The argumentation exercise helps condition students to perceive the Federal Rules not as mechanical determinants, but as tools for seeking an outcome.[15]

The professor should schedule the argumentation exercise for a time shortly after the class finishes studying personal jurisdiction, transfer, or amendment, as the case may be. Avoid periods when students are consumed with a basic writing course project or with exam preparation. If the class completes the exercise before the first Civil Procedure examination, however, students cut their teeth on written expression when performance determines only a small percentage of the final grade.

To prevent the argumentation exercise from interrupting the students' ongoing work in other courses, I limit preparation to one week. Even during this abbreviated period, the professor should contain the time students are required to devote to the exercise. When I distribute the exercise's materials, I discuss motion practice and the hearing process with the class. The distributed materials provide the motion's stipulated facts and the necessary notices and affidavits. The professor can help guide the class by placing two sample memoranda on reserve in the library. If the pair consists of a quality memorandum and a mediocre one, students can seek to distinguish between them and then can explore the distinctions with the professor in the post-exercise class discussion.

To help hone understanding of the law and facts, I hold two short strategy sessions—one with the plaintiff's firms and the other with the defendant's firms. At this early stage, the professor should also announce the percentage of the final grade the lawyers' and judges' written submissions will assume. I set the percentage at ten percent, a figure which I find encourages meaningful participation without diminishing the final examination's importance.

The student lawyers write a five-page memorandum. The professor must decide whether each law firm member writes individually, or

15. *See* Walter E. Oberer, *On Law, Lawyering, and Law Professing:* The Golden Sand, 39 J. LEGAL EDUC. 203, 204-05 (1989) ("Tools, not rules.").

whether firm members craft a joint submission which yields the same grade for each member. In allocating student responsibility, the professor should consider class size and the number of memoranda individual writing would generate. The professor may feel constrained by the amount of time he or she can devote to critiquing and grading the student submissions. Quite apart from this constraint, however, I opt for joint submissions because they introduce students to the satisfactions and strains of ongoing professional collaboration.

At the oral hearing, each firm's lawyers argue as a firm. The student judge conducts the group's hearing and, within a few days, writes a five-page opinion explaining the decision.

To permit everyone to prepare for the hearing a day or more in advance, law firms file their memoranda with the student judge and the professor and serve copies on the opposing firm. The oral hearings should be held during a regular or extended class period. About ninety minutes usually accommodates the hearings and the later class discussion. At the beginning of the period, the professor should randomly select one group to conduct its hearing in front of the entire class. To enable the class to observe how district judges conduct hearings, the professor should conduct this initial hearing jointly with the group's student judge.

At the end of the initial hearing, the student judge and the professor reserve decision. The other groups then conduct their hearings simultaneously. If the classroom is large enough, four groups can disperse to the corners. Other groups move to nearby rooms or other areas of the law building. By keeping the groups in close proximity, I can move among them and observe segments of each hearing. The students' oral presentations are ungraded because the professor does not observe any presentation in its entirety.

The hearings are limited to a half-hour. When the class reassembles, I ask each student judge, including the one who jointly conducted the initial hearing, to submit a signed one-sentence statement of his or her decision on the motion. A few days later, each judge submits the full opinion to the group's law firms and the professor. Because the American legal system requires trial courts to decide without benefit of the formal conferencing that marks appellate decisionmaking, I do not allow student judges to change their decisions after the ensuing class discussion.

I begin class discussion by asking the student lawyers to assess their own performance in the exercise. What, if anything, would you do

differently if you could reargue the motion? What would you do the same? At the hearing, did you adequately defend your written arguments? What was your reaction to the opponents' written and oral arguments? If any of their arguments caught you by surprise, did you respond adequately? If you were the judge, would you have been convinced by the arguments you made?

Then I read the student judges' decisions aloud, one by one. Because the facts enable each side to advance strong arguments, the decisions normally are not unanimous. Conflicting decisions are instructive because they enable the class to experience the dynamism of judicial discretion. In the argumentation exercise, as in actual litigation practice, the outcome may be influenced by the parties' written and oral submissions and by the judge's perception of the merits. I also explain that if the decision is one that appellate courts review only for abuse of discretion, none of the student judges' disparate decisions would likely suffer reversal.

To help probe judicial discretion, I ask the student judges to identify the arguments they found most persuasive, and to explain why they reached a particular decision. Were you persuaded more by the parties' memoranda than by their oral presentations? Did the quality of the writing affect your decision-making process? Normally, some student judges candidly report that they had the motion all but decided once they finished reading the memoranda before the hearing. At least some report that the written submissions sharpened the hearing's focus by providing the critical first impression of the parties' respective positions. I explain that because many pretrial motions receive no oral argument, the judge's first impression frequently is the last.

The argumentation exercise proceeds smoothly in Civil Procedure classes of varying sizes. The exercise is particularly convenient if the professor has the luxury of a small section. In any setting, however, latitude exists for individual innovation to suit the professor's style, goals, and calendar. Some professors might prefer to have all students be law firm members; judges then could be recruited from among upperclass students, particularly the interscholastic advocacy teams. Other professors might dispense with the exercise's oral segment because of time constraints; judges then would decide the motion on the papers, which of course is not uncommon in today's busy courts.

This description, however, has assumed my own dual preference to involve only the Civil Procedure class and to conduct oral argument. When the professor draws judges from the class itself, these students

write as decisionmakers. Judicial writing provides instructive contrast for students conditioned to argue both sides of an issue. The exercise's oral segment complements the written by requiring students to test and defend their memoranda in the crucible of the adversary process.

B. *Writing Pointers*

Because a law professor's hours are at a premium, the Civil Procedure professor might be unable to devote class sessions to the written argumentation exercise. Even if the professor chooses not to conduct the exercise, writing still should be an ongoing skills component of the procedure course. In any Civil Procedure casebook, many decisions invite writing pointers, which the professor can elicit by having students engage in role playing during class discussion of assigned reading. In the order in which they appear on the syllabus, these are four of the opportunities presented in my course, which uses the Landers, Martin and Yeazell casebook.[16]

1. Basic Research Technique

Our first case, *Pennoyer v. Neff*,[17] enables me to introduce basic research technique, which experienced lawyers might consider routine but most incoming students perceive as a mystery. Even in the first week or so of class, students understand why lawyers reading a case must research related subsequent decisions, particularly when the case is more than a century old. With an initial sense of "why," students turn to curiosity about "how."

During our lengthy discussion of Justice Stephen J. Field's sometimes opaque opinion, I jump to the present by asking a few students to assume the role of lawyers in a civil action pending in the local federal district court. The court's personal jurisdiction is about to be challenged and counsel must write the parties' respective memoranda of law. I ask the students whether they would relish the prospect of spending months turning the pages of all federal and state reporters to uncover decisions that have cited *Pennoyer* in the last hundred-plus years. The students invariably respond that there must be a better way. Then I tell the class that the writing professor will teach shepardizing and the computerized retrieval systems, and I offer a preview of these basic research tools.

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16. JONATHAN M. LANDERS ET AL., CIVIL PROCEDURE (2d ed. 1988).
17. 95 U.S. 714 (1877).

2. Clear Expression

My favorite Civil Procedure "writing" decision is *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[18] We read the decision early enough in the first semester to formulate a basic message about effective advocacy.

The plaintiffs were survivors and representatives of four United States citizens who died in the crash of a helicopter owned by defendant Helicopteros Nacionales de Colombia, S.A. (Helicol), a Colombian corporation with its principal place of business in Bogota. The crash occurred in Peru during operations of a joint venture that used helicopters provided by Helicol. In their wrongful death actions filed in Texas state court, the plaintiffs alleged that Helicol had various contacts with the state. First, the company's chief executive officer had participated in a negotiation session there with the joint venture's representatives, leading to the agreement to provide the helicopters. Second, the company had received into its New York and Florida bank accounts over $5 million in payments from the joint venture drawn on a Texas bank. Third, for seven years Helicol had purchased helicopters (approximately 80% of its fleet), spare parts, and accessories for more than $4 million from a company in Texas. Fourth, Helicol had sent prospective pilots into Texas for training and to ferry the helicopters to South America. Finally, the company had sent management and maintenance personnel into Texas for "plant familiarization" and consultation.[19]

The United States Supreme Court held that Helicol had insufficient contacts with Texas to allow the Texas state court to assert personal jurisdiction over the company in a cause of action not arising out of or related to its activities within the state. It applied "general jurisdiction" analysis without reaching the issue of whether Helicol's contacts with Texas would have been sufficient to establish "specific jurisdiction."

The Justices disagreed about the content of the plaintiffs' written and oral submissions. The majority determined that the plaintiffs "concede[d]" general jurisdiction to be the dispositive question.[20] The majority stated that the plaintiffs "made no argument that their cause of action either arose out of or is related to Helicol's contacts with the State of Texas."[21]

18. 466 U.S. 408 (1984).
19. *Id.* at 409-11.
20. *Id.* at 415.
21. *Id.* at 415 n.10.

Justice Brennan thought otherwise, concluding that the plaintiffs in fact argued that a relationship existed between the cause of action and the contacts. The relationship would have been a predicate for exercising specific jurisdiction. "Although parts of their written and oral arguments before the Court proceed on the assumption that no such relationship exists," Justice Brennan concluded, "other portions suggest just the opposite . . . ."[22] From my own review of the briefs, I believe there was ground for confusion about what the plaintiffs meant to argue.

When I assign *Helicol* for the next class, I do not pinpoint the Justices' disagreement concerning the nature of the plaintiffs' submissions. I merely ask the students to consider and be prepared to discuss an open-ended question: "What do you think about the performance of plaintiffs' counsel?" The casebook contains the footnote and textual passages I have quoted in the immediately preceding two paragraphs. I offer no hint that my question is directed at the quality of counsel's writing, and the students' varied responses normally do not relate the quality of advocacy to the Court's open disagreement.

When the Justices' disagreement is pinpointed, the "writing" answer hits home. I tell the class that talented lawyers inevitably lose cases, so the client is not necessarily disserved because a court rejects counsel's argument. The client is indeed disserved, however, when counsel's presentation leaves the court unable to discern precisely what the argument is. I emphasize the distinction by calling on a student to assume the role of the plaintiffs' lawyer. I ask the student to draft aloud point headings for the brief, and to be clear in urging specific jurisdiction over Helicol as a primary or alternative argument.

3. Judging vs. Advocacy

We study the long-arm statutes by reading and analyzing *Markham v. Anderson*.[23] In *Markham*, the plaintiff suffered injuries when a commercial truck struck a New York Thruway toll booth. She brought a diversity action in New York against the physician who had examined the truck driver in Pennsylvania and had certified him as physically qualified under federal regulations to drive the truck. The physician maintained offices in a small Pennsylvania town bordering Ohio and conducted an extensive practice in both states. The Second Circuit

22. *Id.* at 425 n.3 (Brennan, J., dissenting).
23. 531 F.2d 634 (2d Cir. 1976).

held that the plaintiff's negligent misrepresentation claim was outside New York's long-arm statute. The court of appeals affirmed dismissal of the complaint without discussing whether an exercise of personal jurisdiction would have comported with due process.

I ask a few students whether they similarly would avoid the constitutional issue if they found themselves in the role of counsel arguing the dismissal motion. Almost instinctively, the students say no. Sometimes, however, they are hard pressed to articulate the reason why. The question distinguishes between the judge's role in avoiding discussion of grounds unnecessary to the decision and the advocate's role in crafting alternative arguments, even if a decision on one ground might seem likely or nearly inevitable.

4. Precision

Our first federal pleading case is *Rannels v. S.E. Nichols, Inc.*,[24] whose bizarre facts immediately engage students. The plaintiff's $2.8 million malicious prosecution claim stemmed from her purchase of an eight dollar pair of blue jeans at the defendant's store. After Ms. Rannels found the zipper defective, she returned the jeans for replacement or refund. When the store refused her request, she stopped payment on her check and paid two dollars elsewhere to have the zipper repaired. The store then declined her offer to pay six dollars for the jeans, and instead demanded $13.98, representing the original cost plus postage and handling. When Ms. Rannels refused the demand, the store filed a criminal complaint charging her with violating the state bad-check statute. Following her acquittal, she paid the store six dollars and commenced the federal diversity action.

The district court dismissed the Rannels complaint for failure to allege some elements of the malicious prosecution claim. The Third Circuit reversed. The court of appeals construed the complaint liberally and held that the plaintiff had sufficiently alleged the elements of a prima facie case, obliquely if not explicitly.

When we reach the case in mid-November, I ask a few students to take the role of plaintiff Rannels' counsel. First I ask them to assume that after hearing the client's side of the story, they conclude that a malicious prosecution claim is appropriate. If they could not recall the claim's elements, where might they look for the answer? The students usually hesitate before realizing that the basic writing course has al-

24. 591 F.2d 242 (3d Cir. 1979).

ready taught them the primary research tools necessary for answering the question—reporters, decennial digests, treatises, and the Restatement (Second) of Torts, among others.

Next I ask a student to extract malicious prosecution's elements from the Third Circuit opinion, and then to consider Ms. Rannels' allegations and redraft the complaint's statement of the claim. I suggest to the class that in most district courts, the inartful Rannels complaint would have satisfied Rule 8's simplified notice pleading standard. The defendants seemingly had fair notice of the claim and evidently moved to dismiss in an effort to stall the proceedings. Still, the court of appeals' opinion reveals that the plaintiff's lawyer could have drafted the complaint more tightly.[25] Sometimes with help from other class members, the student I call on produces a more precise product.

C. *Collaboration with Writing Professors*

Basic first-year writing courses typically require students to write at least an office memorandum and an appellate brief. Sometimes students must redraft their initial submissions after the writing professor critiques them.

If the writing professor agrees, the Civil Procedure professor can collaborate in designing a memorandum or brief problem that raises one or more Civil Procedure issues. I have collaborated in designing problems concerning the subjects that I believe produce effective written argumentation exercises—personal jurisdiction, transfer, and amendment to pleadings.

The nature and extent of the Civil Procedure professor's input is a matter for agreement with the writing professors. Collaboration enables the procedure and writing professors to share responsibilities that attend writing instruction, perhaps including responsibility for critiquing student submissions. To ensure that students do not receive mixed signals, the professors should agree on common approaches to legal issues that might be conducive to differing points of view.

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25. Under the applicable state law, the malicious prosecution claim required allegation and proof of three elements: the criminal proceeding's termination in Ms. Rannels' favor, lack of probable cause for the criminal proceeding, and malice. *Id.* at 244. The plaintiff's acquittal was not in question. *Id.* Her major difficulty was the probable cause element; the complaint alleged only that the store and its agents "knew the true reason for the stop order was a dispute over defective merchandise" and " 'knew that Mrs. Rannels had not committed any criminal act and had not attempted to defraud'." *Id.* at 245. The Third Circuit concluded that the complaint sufficiently alleged malice by alleging that the store's president " 'supported the malicious prosecution'." *Id.* at 246.

Collaboration can achieve many of the salutary results that the written argumentation exercise achieves in the Civil Procedure course itself. I have found that if the Civil Procedure professor discusses the memorandum or brief problem in class, and otherwise assumes a visible and cooperative role, the professor's participation sends positive cues about the basic writing course's educational mission and the importance of effective written expression. Students combine Civil Procedure concepts with writing practice, and they enhance their understanding of Civil Procedure.

IV. CONCLUSION

Similar to other courses throughout the curriculum, Civil Procedure has a vitality that depends in significant measure on student input. This input begins with participation in Socratic dialogue, but it need not end there. By enabling students to apply their Civil Procedure learning in practical settings, an integrated writing skills component enriches the course for professor and students alike.