Teaching Written Advocacy

The *Yale Law Report* recently spoke with Noah Messing ’00 who, with Rob Harrison ’74, teaches legal writing at Yale Law School. The following Q&A is excerpted from that discussion in which Messing spoke about the teaching of legal writing and his new book, *The Art of Advocacy: Briefs, Motions, and Writing Strategies of America's Best Lawyers*.

Photographs by Harold Shapiro

Example 3.6

Takeaway point 3.6: Use legislative history in your Statement of Facts to make the legislature's motives, statements, or process part of your client's story.

Legislative history can appear in your Statement to help readers grasp a statute's purpose. And that purpose should, of course, favor your client's position.

In 1996, the Massachusetts legislature passed a statute that effectively withheld lucrative government contracts from most companies that conducted any business with Burma/Myanmar, a country with a poor human rights record. During the lawsuit, Massachusetts maintained that the law was intended to "dissociate" Massachusetts from Myanmar; it disputed that the law was intended to pressure Myanmar in any meaningful way. A business group (NFTC) challenged the law and sought to show that the law both infringed on the exclusive power of the federal government to regulate foreign affairs and tried to influence foreign policy, which the Supreme Court had previously restricted states from doing.

Source: Statement of Facts from the brief challenging Massachusetts's law, from *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Massachusetts' avowed purpose in enacting the Law was . . . to condemn Myanmar and to affect the domestic policies of that nation. The Law's legislative history, wholly ignored by Massachusetts' brief, is revealing. Its sponsor called the Law a "foreign policy" initiative whose "identifiable goal" was "free democratic elections in Burma." Pet. App. 9a; J.A. 39-40. Other Massachusetts legislators described the Law as Massachusetts "engag[ing] in their own little version of foreign policy" (J.A. 35), "set[ting] up some foreign policy business guidelines" (J.A. 46), "dabbl[ing] in foreign affairs" (J.A. 50), and "promot[ing] and stand[ing] for civil and human rights" in Burma. J.A. 53. The Law's proponents lauded it as a vehicle for pressing the federal government to alter its foreign policy toward Myanmar. J.A. 47, 102. The Governor's signing statement said the Law "ma[de] a stand for the cause of freedom and democracy around the world"; he expressed hope that "Congress will follow our example." J.A. 57. Neither the sponsor of the bill, nor the legislators who debated it, nor the Governor who signed it into law mentioned any economic benefit to Massachusetts, its agencies, or its citizens. *See* Pet. App. 10a. The purpose, as Massachusetts conceded below (Pet. App. 9a), was "'to apply indirect economic pressure against the Burma regime for reform.'"

A
B C
D

A This phrase suggests that Massachusetts either (1) failed to research the case diligently or (2) misrepresented its intentions. Either conclusion hurts Massachusetts.

B Notice that the source of these statements might not be legislative debates: these quotes might have come from speeches on the campaign trail or a quote in a newspaper. Nevertheless, this brief weaponizes these great quotes to show that Massachusetts legislators all but make the NFTC's case: they envision the law as their own version of foreign policy.

C Not only is the legislative history substantively helpful, but it also furnishes colorful language that makes the point more effectively than the NFTC could have otherwise done. For instance, the word "dabbling" implies a lack of seriousness, an encroachment into unfamiliar territory, or both.

D The double "nor" serves as a lovely rhetorical flourish. Moreover, this sentence shows that silence in the legislative record can suggest that certain issues did *not* motivate the legislature. One of Massachusetts's alternative arguments was that it was acting as a "market participant"; this sentence anticipates that argument, and suggests that Massachusetts's concerns about participating effectively (or ethically) in the market are an after-the-fact rationalization by the Commonwealth.

Excerpted from The Art of Advocacy: Briefs, Motions, and Writing Strategies of America’s Best Lawyers *(Aspen Publishers, 2013).*

YLR: How is legal writing taught at YLS?

Messing: Students complete writing assignments in one of the four substantive courses the first semester—either contracts, torts, civil procedure or constitutional law. We've supplemented this "small group" experience in recent years by having a number of "fifth hour" programs. Right now, Rob Harrison and I give five sessions about legal writing and advocacy and analysis, and then the librarians provide a number of others. Along with the Coker Fellows, the small group professors, and the Walker Plan, students get a lot of feedback from a lot of different sources.

Tell me about the Walker Plan.

It's an innovation by Dean Post. I think some first years have a brief moment of shock when they realize how extraordinary it is that a sitting Second Circuit Judge, John Walker, is going to comment on their work. It's one of the great benefits of a clerkship to get feedback from a Judge, and most of our students get that opportunity in their first semester.

What makes legal writing a distinct specialty and what's the goal, besides good prose and good legal arguments?

Justice Scalia was given an award a couple of years ago for legal writing, and he bit his thumb at the crowd by saying, 'I don't believe that legal writing exists. It's just good nonfiction writing in general and if you're good as a legal writer you'd be just as good as a writer in history or some other general social sciences field.' The difference—and I think what Justice Scalia perhaps overlooked—is that there are different conventions about how you communicate, the duty that you owe to the court, and the tone you need to strike. Also, you need to weave various authorities into your general story, such as cases, regulations, statutes, and so on. And the process by which you weave these together to convince judges of your position—there is something unique to that.

Who's involved in the writing instruction here. It's you and Rob Harrison?

We're the two full-time folks here. There are a number of judges and other faculty members who have been recruited, both by former Dean Koh and Dean Post, to help out. Some schools require a stand alone first-year writing course, but we have it built into a first-year doctrinal course as a requirement. The fifth hour training sessions add to that. There are now more upper-level courses than ever to make sure that students can get the instruction that they want. When Rob Harrison was the only one providing dedicated legal writing courses, there was so much demand for his courses that he was grossly oversubscribed. Now, instead of waiting until your third year to get off the waitlist, you can enroll quite easily in the various courses.

What do students do if they need help writing papers?

One of our optional sessions is called 'How to Write Your Substantial or SAW.' Those are the two big writing requirements that students need to complete before they graduate. Then there's also what's called boot camp. Each semester between fifty and eighty students pack into a room and work on their papers for most of the day. We gather the whole team of legal research and writing faculty to support them, to answer research questions, to workshop ideas, to sharpen papers, to organize arguments. Aside from those special events, students can call on their professors, or set up a meeting with me or Rob Harrison. Each semester, I meet with upwards of 100 students about papers, assignments, and ideas, to help them work through whatever they're wrestling with. In some cases it's just sharpening a topic a little bit or refining it. In others, it's figuring out how to organize a particular section. Other times it's wholesale: 'I have three weeks to complete a paper and I just realized that my idea has been completely preempted by another author. What do I do?' I help them work through that.

How is legal writing integrated with other courses?

It's happening more and more. For instance, the clinics do an extraordinary job of giving students, in real cases with real clients with real consequences, the chance to not only gain general lawyering skills, but also to write motions and briefs that they get feedback on, from both professors and from other students. And you're dealing with a real record rather than something that tends to be shorter and synthesized, as with a first-year course.

Why is legal writing instruction an important part of legal education?

Increasingly, employers aren't willing to train you on the job—you have to hit the ground running. It's not just that you have to, it's also that you get tracked, and so if you show up at your legal employer and you do a great job on your first project, you don't have to be a rocket scientist to figure out that your boss will give you better projects. On TV, most law happens orally; you just walk into a courtroom and start talking. In practice, most advocacy is conducted in writing, and so the mark of a great litigator these days is someone who writes really effectively. Most of the Supreme Court Justices have said that, and that's the court where, if anything, oral argument gets featured most prominently. So if you want to build a good career in law and impress your supervising attorneys, you simply need to be a good writer. It's just as true for corporate lawyers...having a sense of how to persuade, how to predict, how to draft. Few things make me happier than getting messages from my first- or second-year students during their summers saying, 'my boss told me that she loved my writing, thought it was terrific, and so I'm going to get more projects because of it.'

How are the courses structured? What do you actually do in your course?

I pick a different running case each year or each semester. The first assignment this semester, for instance, was writing a cease and desist letter in which another party used a trademark belonging to my students' hypothetical client. Students needed to wrestle with the law and with their prose, as well as with the tone and the overall business strategy toward the infringing rival.

"In practice, most law now is conducted in writing, and so the mark of a great litigator these days is someone who writes really effectively."

The course then continues to walk through a hypothetical dispute, so students get a sense of how a case moves along—where do we get documents, what documents do we need, how do we find them, how do we use the fruits of that discovery including simulated deposition transcripts that I create for them, to actually build our client's case, and to either win or fend off summary judgment.

Tell me a little bit about your new book. How did you get started writing it, what inspired it?

Most books about legal writing focus on one of two things: either on style, or on the word *writing* in legal writing. To an overwhelming degree I now focus on the word *legal* in legal writing. My take is that in order to get really good at something—really great at something—you need to study people who are great at it. So, if you're a blossoming opera star and you just hear that music should be passionate and that notes should be precise, you're never going to be a great singer—that's not how you get there. Similarly, if you are a talented high school quarterback, and you just hear that throws need to be accurate, that's not going to make you Tom Brady or Aaron Rogers. You need to watch the great quarterbacks and listen to great singers. So I basically decided to find great briefs and motions and then provide those to students and lawyers with some annotations so that they absorb these good examples. I also added annotations to help readers see more deeply the choices that the lawyers are making.

How many samples did you consider, and how did you cull that down to what you now have in the book?

I began by going through about 12,000 briefs and motions. From these 12,000 or so, I wound up with roughly 100 examples plus about thirty Questions Presented. I've tried to pick examples from hot cases, popular cases, controversial cases.

There are 100 individual take-away points and tips, which the book illustrates. The first three chapters are on facts and show different approaches to telling a client's story, including smuggling law into your facts, using legislative history in your facts, and weaving in extrinsic facts that don't relate to your case but that contextualize the dispute. For instance, the controversial Texas senator Ted Cruz had one brief in which he was basically arguing that the Ten Commandments outside the Texas courthouse were like a museum that just happened to display a Guttenberg Bible. And so the narrative tone that he takes in his brief is as though you are on a museum tour: 'the tour continues in the western quadrant' and goes on from there. The very tone hints at the theme of the brief.

Then I explore arguments. One of the top-selling books about briefs, which is a very good book written by probably the most prominent legal writer in the country, Bryan Garner, called *The Winning Brief*, only has two tips on arguments. I have seven full chapters. I think it's largely because it's hard to take and find universally applicable tips for how to build a good argument. So I haven't tried to do anything universal. Instead, I provide lots of short, good examples. Chapter four is devoted to how to use authorities, cases, statutes, regulations. Chapter five is about how to counter arguments. Chapter six explores how to use facts effectively in your argument. Chapter seven deals with textual arguments. Chapter eight deals with legislative history. Nine deals with policy, ten deals with history. It arms students and attorneys in a way that other books just don't quite do. ***Y***