

LEARNING FROM EXPERIENCE: ADDING A PRACTICUM TO A DOCTRINAL COURSE

*Elizabeth Fajans**

Several speakers this afternoon have described tried and true courses, courses that have successfully used writing to teach, reinforce, or provide a different perspective on doctrine or lawyering skills. The practicum I am discussing today is untried,¹ but it draws on the pedagogical strengths of a writing and skills course and embeds those skills in a doctrinal context. As such, it represents a novel, blended approach to law teaching that has much to offer students.

The practicum will be added to the administrative law class that Professor Kelly already teaches. It will be a two-credit, two-hour per week workshop course that will fulfill Brooklyn Law School's upper class writing requirement and be open to ten of the students taking administrative law. Although this is only a small percentage of the administrative law class, the entire lecture class will play a role in defining and critiquing the project the practicum students work on. First, the doctrinal class will sponsor the bill the practicum students will draft. Later, the doctrinal class will be divided into interest groups commenting on the practicum's proposed administrative regulations. This interplay between the doctrinal class and the practicum not only adds verisimilitude to the drafting experience, but it is also a practical way to expose a large number of students to the challenges of rulemaking prose.

I. BACKGROUND

For the past two years, Professor Kelly has incorporated a simulation into her administrative law class. It was intended to give students some hands-on experience with drafting legislation and regulations in the hope such exposure would teach them about

* © 2006, Elizabeth Fajans. All rights reserved. Associate Professor of Legal Writing and Writing Specialist, Brooklyn Law School. This Article was presented at a Brooklyn Law School symposium entitled *Teaching Writing and Teaching Doctrine: a Symbiotic Relationship?* The Author wants to thank Claire Kelly, who makes this practicum possible.

¹ My colleague, Claire Kelly, and I team taught this practicum for the first time in spring 2007, but we were preparing for it at the time of the symposium in 2006.

some of the challenges and pitfalls of the enterprises, and some of the differences between drafting statutes and drafting administrative regulations. She also believed that this exposure would enrich their understanding of the administrative state by placing the primary doctrinal concepts of administrative law into an appropriate practical context.²

Professor Kelly conducted the simulation throughout the entire semester, taking a few minutes from each class. She gave the students a problem to solve and the opportunity to write a law that would solve the “problem.” For example, one problem asked students to write a statute reforming a school’s grading policies and empowering a committee to create procedures for implementation and violations. The class debated the issues, took polls, and drafted legislation that empowered an administrative committee to implement its policy. Once enacted, some of the students were formed into groups within the committee to issue Notices of Proposed Rulemaking (NPRM) for several issue areas. The remainder of the class was divided into interest groups who commented upon the proposed regulations.

Students found this exercise both enjoyable and informative; however, the simulation did not teach all it could teach. First, Professor Kelly had only a limited amount of class time to devote to this exercise. Second, because student contributions were voluntary and ungraded,³ they were often hastily conceived and prepared. Third, as class enrollment grew—up to 80—the simulation became unwieldy; there were too many proposed bills, too many proposed agency rules, too many comments on the rules, and too little time to review them.⁴

We thought a practicum would remedy this situation by providing students with better grounding in the fundamentals of drafting and more time for brainstorming and preparing the stat-

² As Pamela Lysaght and Christina Lockwood note, “[r]equiring students to place the doctrinal concept in context while working on a concrete legal problem . . . helps students who may not have understood the concept in isolation. Further, students who thought they understood the concept may not have realized the intricacies involved until they attempted to apply the concept to a legal problem. Having completed the document, the students have a better understanding of the doctrine—learning is enhanced.” Pamela Lysaght & Cristina D. Lockwood, *Writing-across-the-Law-School-Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ALWD 73, 101 (2004).

³ Contributions did count, however, as class participation.

⁴ Simulations, especially those resulting in a written product, are labor intensive for both teacher and students. See Elliot M. Burg, *Clinic in the Classroom: A Step toward Cooperation*, 37 J. Leg. Educ. 232, 246 (1987); Jay M. Feinman, *Simulations: An Introduction*, 45 J. Leg. Educ. 469, 479 (1995).

ute and its implementing regulations. Moreover, a rule drafting simulation seemed to us like a good way of promoting creative thinking because it requires students to explore a problem and to invent a solution. Because this is a change from much of the critical thinking in law school, where the focus is often on applying or critiquing existing law, it is a valuable experience.⁵ And, although only the students in the practicum would draft the documents, the entire administrative law class would still participate in the process, providing both ideas and comments on the statute and regulation, and experiencing—at least secondhand—some of the lessons that can be derived when theory is put into practice. These lessons derive from a program of active learning, a realistic context for learning professional responsibility, and the integration of skills and theory—including problem solving, negotiating, and drafting.⁶

II. THE CONTOURS OF THE PRACTICUM

The practicum will begin with four classes on the fundamentals of drafting. Although these skills classes will be my primary responsibility, Professor Kelly and I intend to audit each other's classes and lend our perspective where appropriate.⁷ The first class will be an introduction to drafting—both the problems and the solutions. We will delve into normative prose and sensitize students to semantic and syntactic ambiguity, to terms of authority, and to the differences between, and appropriate use of, specific, general, and vague language. The second class will center on ways to avoid some types of ambiguity through the use of definitions, tabulated sentence structure, proper punctuation, and document design. In the next class, students will learn how to conceptualize a rulemaking document. Topics include gathering information, brainstorming and troubleshooting, and adapting boilerplate and models. Students will also learn how to test content by assessing completeness, consistency, and level of generality,

⁵ See Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 Clin. L. Rev. 835, 838–839 (2003).

⁶ See Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values with Theory and Practice*, 47 J. Leg. Educ. 401 (1997).

⁷ Collaboration between legal writing and doctrinal faculty cannot help but be mutually fruitful. Legal writing faculty can acquire helpful background and methodology for “approaching problems in a particular subject area. . . . Doctrinal faculty will find in legal writing faculty a rich resource in how . . . to include . . . a skills agenda in a subject course.” Lysaght & Lockwood, *supra* n. 2, at 105. Equally profitable might be a three-way collaboration: clinical, legal writing, and doctrinal faculty.

and how to test structure for logical sequence and overlap. We will end this unit with a class on the ethics and politics of legislative drafting, the process of drafting a rulemaking document, the components and conventions of the genre, and the impact of statutory construction on the drafter.⁸

While this background is being covered in the practicum, the entire administrative law class will be discussing the legislative component of administrative law, including the nondelegation doctrine, the separation of powers doctrine, problems of vagueness, executive supervision of agency action, and congressional control of agency functioning. These classes will provide the context within which legislation is written. Professor Kelly will also reserve time for the administrative law class to discuss the substance of the statute that the practicum students will write. Students in the doctrinal class will be divided into interest groups for that discussion, but the class must eventually come to a resolution that results in a directive to the practicum students. In other words, the class will function as the bill's sponsor and the practicum as its legislative drafter.

Once the doctrinal class has issued its directive to the practicum students, the practicum students will begin to draft the enabling legislation. In order to capture the collaborative nature of many drafting projects, we envision dividing our practicum students into pairs and assigning particular sections of the statute to each pair. The practicum classes will, at this point, be working sessions, and Professor Kelly and I will act primarily as facilitators. The students will need to discuss each pair's contributions to the enterprise, and the statute's overall substance, effectiveness, completeness, consistency, accuracy, and organization.

Once the drafters are satisfied with their work, the statute will be submitted to the entire administrative law class for discussion, vote, and, if necessary, amendment. In addition, the bill will provide the rest of the class with some hands-on examples that will expose them to some of the drafting issues on which the practicum students have been working. (Of course, if the class finds many "hands-on" errors and refuses to pass it, we may need to exercise some discretion and decree it law.) At this point, the practicum students will change from legislative drafters of the statute to administrative rule drafters. We hope this change of roles will further sensitize students to the complexities of drafting. We antici-

⁸ The syllabus for this course with some tentative readings follows as Appendix A.

pate that our students' efforts to implement the statute they wrote will reveal previously unrealized problems and complexities.⁹ The change of role will also teach students about the differences between legislative drafting and regulatory drafting. As one administrative rule drafter notes:

Drafting a rule differs from drafting legislation in that a legislature can address almost any issue it desires, while a rule maker is limited to the authority delegated to it by its enabling legislation. When drafting a rule, consequently, the drafter must always be aware of the scope of the authority delegated to the agency adopting the rule. If the legislature has granted broad discretion to an administrative agency, the agency has substantial leeway to exercise discretion and affect policy in the rule development process. If, however, the legislature has placed specific limitations on the agency's discretion, the freedom of the agency and thus of the rule drafter to make policy decisions through a rule is limited. The drafter must continually ask whether the rule is within the statutory authority of the agency and whether it is consistent with any prescriptive language in the statute.¹⁰

These lessons will be reinforced in the doctrinal class, which will, at this point, move on to a discussion of the sources of administrative process, that is, agency processes as imposed by the Constitution, the Administrative Procedure Act (APA), the enabling statute, and the agency itself. Thus, for example, students will learn that both the Constitution and the APA require there be some kind of agency adjudication of any administrative regulation.

Students will also learn about the process of notice and comment in rulemaking. After an agency proposes a rule, various interest groups draft comments to which the agency must respond and in light of which the agency must justify its rule. The large administrative class will again be divided into interest groups to comment on the agency's proposal. Once the class submits these

⁹ Indeed, Professor Kelly and I have been discussing how much feedback to give on the first assignment, the legislative bill. We are thinking of giving minimal comments on the theory that students will learn from their mistakes and from their opportunity to correct some of those mistakes in the agency rules. Moreover, as Lysaght and Lockwood note, students should be exposed to "ill-structured problems, meaning those that . . . mimic the multi-dimensional problems students will face in practice where there is often not an easy answer. Such problems challenge students to use higher-level thinking and create new cognitive structures and understanding to creatively solve the problem." Lysaght & Lockwood, *supra* n. 2, at 102.

¹⁰ Robert J. Martineau, Jr., *Administrative Rules*, in Robert J. Martineau & Michael B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English* 132 (West 2005).

comments to the practicum students, practicum classes will be used to brainstorm appropriate responses and to draft the rule.

The last practicum assignment will be an agency or judicial decision—an assignment that is responsive to the third component of the administrative law class, namely, judicial review of agency rulemaking and agency adjudication. Students will be presented with a hypothetical involving, for example, an appeal based on the validity of, or ambiguity in, their rules. Just as the attempt to implement a statute would hopefully force students to reflect on the efficacy of their statute, so might an opinion force them to reflect on the efficacy of their regulations.¹¹

III. CONCLUSION

Practica are an excellent and workable model for writing-across-the-curriculum proposals.¹² The biggest obstacle for such proposals tends to be resources. Teachers understandably find a writing component or drafting course labor intensive. But this model, which involves a limited number of practicum students working on collaborative projects, is less laborious than other writing courses and has the additional virtue of involving a large lecture class, albeit more peripherally, in the drafting process. Because of this, both of us hope the workload will be manageable and are adding this practicum to our normal teaching loads, at least on an experimental basis.

Admittedly, collaborative student work has both benefits and drawbacks. Clinicians—who have, perhaps, the most extensive experience with student collaborations—say that some of the more important benefits include better brainstorming because of diverse perspectives, a better work product as a result, and increased collegiality leading to greater involvement and satisfaction.¹³ On the other hand, one of the important drawbacks they describe is the difficulty of pairing students effectively. Societal factors (race,

¹¹ For a description of a client-based simulation in an administrative law class, see Michael Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. Leg. Educ. 234 (1974).

¹² For a description of both an employment discrimination practicum and a federal taxation practicum, see Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Course*, 33 John Marshall L. Rev. 303 (2000).

¹³ These benefits are discussed at greater length in David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 Clin. L. Rev. 199 (1994).

gender, sexual orientation, socioeconomic status) occasionally impede student interactions, as do varying abilities. These difficulties can be minimized if teachers explicitly identify the development of collaborative skills as a goal of the course and of the profession, and make collaboration one of the evaluation criteria.¹⁴ This seems especially appropriate when the written product is, in practice, a collaborative effort.

Another difficulty with collaborative work is evaluation. Teachers must decide whether to grade on the basis of work product alone or whether to grade individual performance, and how to do it. Teachers who grade individual performance in a collaborative enterprise frequently require their students to report on their tasks and obligations.¹⁵

These difficulties aside, the practicum model strikes us as sound pedagogy. It is responsive to three dominant theoretical approaches in composition theory. First, it incorporates the instrumental, product-based approach, teaching students about the conventions of format and style.¹⁶ Second, it takes the class through the writing process, forcing them to gather information, to generate and organize content, and to assess the adequacy of the meanings they memorialize in language in light of class response and administrative interpretation.¹⁷ Finally, it employs a social context, social discourse approach, teaching students about “the social context in which writing takes place and, thus . . . the ways in which writing generates meanings that are shaped and constrained by those contexts.”¹⁸ Here, students learn about both legislative and administrative process, about both the constraints and compromises the process imposes on drafters, and about the vistas that commentators and interest groups open up for them. In short, it requires students to create and articulate the purpose of their document, to capture that purpose in appropriate language, and to have that language assessed by peers and interpreted in administrative regulations and by courts. It is a course where writing is

¹⁴ *Id.* at 235–237.

¹⁵ *Id.* at 236.

¹⁶ In the instrumental approach, the product is a transparent document that reflects the writer’s thoughts and that conforms to the conventions of the discipline. Such documents establish an author’s credibility. See Carol McCrehan Parker, *Writing throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 565–566 (1997).

¹⁷ See *id.* at 566.

¹⁸ *Id.*

222 *The Journal of the Legal Writing Institute* [Vol. 12

truly a tool for learning—unless, when we actually teach it, we learn otherwise.

APPENDIX

ADMINISTRATIVE LAW & PRACTICUM

REQUIRED BOOKS

Administrative Law Text

- Jerry L. Mashaw, Richard A. Merrill & Peter Shane, *Administrative Law—The American Public Law System—Cases and Materials* (5th ed., West 2003).

Practicum Text

- Elizabeth Fajans, Mary Falk & Helene Shapo, *Writing for Law Practice* (Found. Press 2004).
- Handouts

ASSIGNMENTS

Administrative Law: Class 1

- *Introduction: The Legislative Connection: Vagueness* (pages 1–29, 59–77 (up to but excluding note 3 on page 77) and 78–94).
- Appendix A: Constitution, Articles I, II, and III.

Administrative Law: Class 2

- *The Legislative Connection: Vagueness* (pages 94–106; notes 4, 5, and 6, pages 108–110; note 8, pages 112–114; pages 114–127).

PRACTICUM 1

- Poor Drafting: The Problem and the Cure Syntax and Semantic Ambiguity, Words of Authority, Vagueness & Generality, Conditions, Penalties
- *Writing for Law Practice* [WLP] (pages 377–394).
- Robert Martineau & Michael Salerno, *Legal, Legislative, and Rule Drafting in Plain English* 71–73 (West 2005) [Martineau].

224 *The Journal of the Legal Writing Institute* [Vol. 12

- Bryan Garner, *Words of Authority in A Dictionary of Modern Legal Usage* (2d ed., Oxford U. Press 1995).
- Joseph Kimble, *The Many Misuses of Shall*, 3 *Scribes J. Leg. Writing* 61 (1992).

Class 3

- *Executive Supervision of Agency Action: Appointment and Removal* (pages 190–220).
- *Executive Supervision: Congressional Power* (pages 220–229 (up to but not including note 6)).

PRACTICUM 2

- *Definitions, Tabulation, Document Design* [WLP] (pages 395–408).
- Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 *J. ALWD* 108 (2004).

Class 4

- *Executive Supervision: Congressional Power and Executive's Policy Initiation* (pages 231–255, 255–267).
- Begin Class Discussion on Practicum Problem

Class 5

- *Executive Supervision: Executive's Policy Initiation* (pages 268–279; 288–292; 298–301).
- *Administrative Adjudication: Due Process* (Appendix C: APA, sections 554, 556, and 557, pages 312–315; 322–335 (up to but not including 335)).

PRACTICUM 3

- *Conceptualizing and Organizing* [WLP] (pages 3–24).
- *Impact of Legislative Process and Statutory Construction on Drafting* [Martineau] (pages 92–95, 104–114).
- Drafting within the Law and Determining Substance
- Thomas R. Haggard, *Legal Drafting* 209–217 (West 2003).

2006]

Learning from Experience

225

Class 6

- *Administrative Adjudication: Due Process* (pages 337–347, note 2 on pages 348–351, 351–374).

PRACTICUM 4

- *Legislation* [WLP] (pages 415–451).
- David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 Tul. L. Rev. 2437 (1996).
- Victoria Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case*, 77 N.Y.U. L. Rev. 575 (2002).
- Samples of Enabling Legislation
- First Practicum Assignment (Enabling Legislation)

Class 7

- *Administrative Adjudication: Due Process and Federal Statutory Hearings Rights* (pages 380–386, 386–402).

Class 8

- *Administrative Adjudication: Federal Statutory Hearings Rights* (continued) (pages 407–420, 451–455; note 2, pages 456–459; 460–467 (up to and including note 3), pages 470–473).

PRACTICUM 5

- Class Discussion of Legislation, Collaborative Drafting

Class 9

- *Administrative Rulemaking: Informal Rulemaking* (pages 474–481, 481–499, 501–509).
- Review Appendix C: APA, section 553.

PRACTICUM 6

- *Grammar 1—Syntax and Concision* [WLP] (pages 135–160).
- First Practicum Assignment Due (Enabling Legislation)

226 *The Journal of the Legal Writing Institute* [Vol. 12]

Class 10

- *Administrative Rulemaking: Procedural Requirements and Substantive Review* (pages 509–532 (up to but not including note 4); 535–542 (up to and including the note on page 542)).
- Class Discusses Proposed Legislation

Class 11

- *Administrative Rulemaking: Hearings and Ex Parte Contacts* (pages 548–576).
- Class Votes on Proposed Legislation

PRACTICUM 7

- Drafting Agency Rules
- Martineau (pages 132–143).
- Sample NPRMs
- Other Handouts

Class 12

- *Administrative Rulemaking: Bias and Prejudgment and Exemptions from Section 553 Requirements* (pages 576–593 (up to and including note 1)).

PRACTICUM 8

- Second Practicum Assignment, Notice of Proposed Rulemaking (NPRM), Class Discussion of Regulations, Collaborative Drafting

Class 13

- *Administrative Rulemaking: Making Policy without Rules; Institutional Impediments, Discretion to Adjudicate, Required Rulemaking* (pages 598–612; 612–623).

Class 14

- *Suits to Review Administrative Action: Scope of Review; the Chevron Doctrine* (pages 784–813).

2006]

Learning from Experience

227

PRACTICUM 9

- NPRM Due and Class Finalizes

Class 15

- *Suits to Review Administrative Action: Chevron* (continued); *Findings of Fact* (pages 813–823; 823–840).
- Class Discussion on Comments to NPRM

PRACTICUM 10

- Comments to NPRM Due: Group Works on Response to Comments

Class 16

- *Suits to Review Administrative Action: Fact, Policy and Interpretation* (pages 845–860).

Class 17

- *Suits to Review Administrative Action: Availability of Judicial Review* (pages 893–904; notes 2–3 on 904–906).
- Review of Agency Inaction (pages 914–930).
- Review Appendix C: APA, sections 701, 706.
- Review Appendix C: APA, sections 702, 704.
- Class Discussion on Comments to NPRM

PRACTICUM 11

- Group Works on Regulations Comments

Class 18

- *Suits to Review Administrative Action: Review of Agency Inaction* (pages 930–940, 948–961).

PRACTICUM 12

- Regulations Due and Class Finalizes

Class 19

- *Suits to Review Administrative Action: Timing* (pages 961–973, 978–982, 988–993).

228 *The Journal of the Legal Writing Institute* [Vol. 12]

Class 20

- *Suits to Review Administrative Action: Standing* (pages 1001–1019; 1025–1032).

PRACTICUM 13

- Judicial Opinions WLP (pages 337–364).
- Fourth Practicum Assignment (Judicial Review of Agency Action).

Class 21

- Catch Up and Review

PRACTICUM 14

- Opinion Due