

Association of American Law Schools 2009 Annual Meeting

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10:30 AM -12:15 PM

Forbidden – Risky – Best Practices:
Assessing Acts of Collaboration and Plagiarism, and Exploring Techniques that
Move Students from Forbidden to Extolled

Panelists:

- Lurene Contento, The John Marshall Law School, Adjunct Professor and Writing Resource Center Director
- Anne Enquist, Seattle University School of Law, Writing Advisor and Associate Director of Legal Writing
- Elizabeth Fajans, Brooklyn Law School, Associate Professor of Legal Writing and Writing Specialist
- Deborah Moritz, University of Wisconsin Law School, Lecturer in Legal Writing; Wisconsin Court of Appeals, Staff Attorney
- Meredith L. Schalick, Rutgers School of Law-Camden, Visiting Clinical Assistant Professor of Law
- Cliff Zimmerman, Northwestern University School of Law, Associate Dean, Dean of Students, and Clinical Associate Professor of Law

Do Not Read Further Until Instructed!

Video Summary of “Appropriate vs. Inappropriate Collaboration: Where is the Line?”

Scene 1—Legal Writing professor’s office; 1L Jane and her Legal Writing Professor

After doing poorly on the draft of her first memo, Jane meets with her legal writing professor to discuss how to use cases. Her professor begins explaining how cases illustrate the way the courts have applied the law. *Fade out to indicate conference is continuing and then back in to conclusion of conference.* Professor concludes the discussion by saying Jane should try to apply what they have been discussing to the “conspicuous” element, and he suggests she look at a specific new case, *Clayburn*, for that element. When Jane then asks about the professor’s other comments on her draft, the professor recommends that Jane make an appointment with the Writing Specialist to discuss topic sentences and her grammar and punctuation problems.

Scene 2—two days later; Jane and her study group in a library study room

Study group gathers, and Tina asks Jane how her appointment with the legal writing professor went. After saying she now has a better idea of how to work cases into her memo, Jane adds that the Professor told her to look at the new *Clayburn* case for the “conspicuous” element. Jane says she read it last night and has no idea how to use it. As Jane listens, the other members of the study group begin discussing how the case might apply to the problem in their legal writing memo.

Scene 3—three days later; Jane in the Writing Specialist’s office

The Writing Specialist says she has read the draft Jane sent her and has Jane’s list of writing concerns: topic sentences, grammar, and punctuation. They agree to start with the topic sentences and save time to get to the grammar. The Writing Specialist recommends that Jane make a separate appointment to discuss her problem with commas. The Writing Specialist then proceeds to discuss how to write more sophisticated topic sentences. They then move to a discussion of a pervasive problem in Jane’s writing—subject-verb agreement, and the Writing Specialist shows Jane how to correct 1 or 2 of these errors. She tells Jane that there are 4-5 subject-verb agreement errors in the draft so she (Jane) will have to go through it carefully and correct these mistakes.

Scene 4—the evening before the final draft of the memo is due; Jane and her boyfriend Max (a paralegal in a local law firm) are in Jane’s apartment

Jane is frantically working on her memo and telling Max that she has met with the Writing Specialist who has told her there are more subject-verb agreement errors in the memo. Jane isn’t sure she is correctly spotting those errors in her draft. Max shows her how to correct a subject-verb agreement error and then starts pointing out comma mistakes. Jane says wasn’t able to get back in to see the Writing Specialist again to work on the commas and adds that back in her undergrad days, she always had a roommate or friend proofread for her. In reading the memo, Max notices that Jane has used a creative argument that Max got from an attorney at his firm. Eventually he sends Jane off to study for Crim Law while he takes over editing her memo.

Scene 5—law school hallway; Jane and another 1L, Kelly

Jane ecstatically tells Kelly that she has gotten an A- on her first memo. She comments that getting all the extra help from her professor, the Writing Specialist, the study group, and her boyfriend made all the difference. Kelly, who got a B-, asks whether this is cheating. Jane says all practicing lawyers have a “good back-up team.”

Scene 6—in the Dean of Students office; Jane and the Dean of Students

The Dean tells Jane that she has called her in because one of her classmates has accused her of cheating on her legal writing memo. Jane replies that she thought she was within the bounds of permissible collaboration.

Group Discussion Scenarios

Scenario 1: On-Line Brief

Professor Smith is talking to her class about the current writing assignment and asks them if anyone has found a recent case on point. The students have not. As they grumble about how difficult the research has been, Professor Smith mentions that in the workplace, some attorneys jumpstart their research by using a brief bank or by brainstorming with other lawyers in the firm. She then tells her students that for the current assignment, however, they must do their own work, and that they should not share their drafts or their ideas with the other students in the class.

Later that day, two of Professor Smith's students are talking. Bill tells Julie that he thinks he found the case that Professor Smith had mentioned earlier, a Seventh Circuit case decided less than 3 months ago. He tells Julie that the briefs in the case were published on line, and that he plans to use parts of one brief, especially its organization, in his assignment for Professor Smith. He also mentions that the briefs were filled with cases that he had not found previously. Julie jots down the information. Later that evening she looks up the case but can't decide whether the case is, indeed, the case Professor Smith had mentioned. To avoid becoming confused on the issues, she decides not to read the published briefs.

- Have Bill and Julie wrongfully collaborated?
- Did Bill wrongfully rely on the on-line brief?
- Did Bill plagiarize when he relied on the on-line brief?
- What could Professor Smith have done differently to prevent any misdeeds?

Scenario 2: Clinic and Judicial

Situation #1: Team of students in an in-house clinic (3L students)

Nina and Matt are the two members of a team working in their law school's clinic. At a court appearance on a motion (Tuesday morning), the students are instructed by the hearing judge to file a supplemental supporting brief for their motion. They must file the brief by Friday.

Back inside the clinic later that afternoon, Nina and Matt talk with another team of students in the same clinic, explaining what happened in court. The second team of students indicate that they have a similar enough issue that they believe their brief can be a good starting point for Nina and Matt's case. They immediately pull out their brief and hand it to Nina and Matt. In fact, Nina and Matt believe that the brief is so on point and also so well written that they incorporate whole portions of the legal analysis in their own draft. They submit it to their clinical professor on Wednesday.

- Have Nina and Matt done anything wrong?
- Does the timing pressure of the brief influence your answer?
- Would it matter if the brief that the second team gave Nina and Matt did not come from a clinic case but came from an upper level writing course being taken that semester?

Situation #2: The use of a brief written by the student's parent

Imagine the same scenario except that Nina's mother is an attorney and that Nina and Matt went to lunch with her Tuesday morning. As part of asking about the case, Nina's mother indicated that she had a brief that could be useful to them.

****Note:** the students carefully maintained client confidentiality when they spoke to Nina's mother.

Again, as in the first scenario, the students decided that the brief was so helpful that they used whole sections for their own brief.

- Have Nina and Matt done anything wrong?
- Does the timing pressure of the brief influence your answer?

Situation #3: Judicial law clerk and the brief

After the brief is filed in court a judicial law clerk uses it for the bench memo. The law clerk incorporates whole paragraphs in the bench memo and bases her recommendations on the student brief. The judge agrees with the bench memo and asks the law clerk to write the first draft of the opinion. The law clerk's draft also includes paragraphs from the student brief.

- Is it problematic for the law clerk to use sections of the brief in a bench memo?
- Does the picture change for a judicial opinion?

Scenario 3: International Student

A professor e-mails June, an international student, asking her to come in for a conference on her first research memo. June had gone to college in the United States but lived in her home country prior to that.

When June arrives, the professor turns to a page in a treatise and to pages in two different judicial decisions and then compares them to a page in her office memo. The professor points out that June copied paragraphs, one from each source, without attribution. He says she violated the school's academic honor code. June looks stricken and responds that the materials made the points so perfectly, so much better than she could, that she copied the passages. In her country, she says, it is common, even expected, to use an authority verbatim without attribution. After all, she adds, everyone in her culture would assume she didn't write these paragraphs since she was not an authority on the matter. The teacher tells June she must not only use quotation marks for exact language, but she must provide a citation. Nonetheless, the professor adds, in this situation, it would have been more concise and given a better picture of the law to synthesize and paraphrase the courts' reasoning in the cases, rather than quote, as long as citations were provided.

The teacher then turns to the statement of the case and points out that June used, again without attribution, large portions of a newspaper account of the event. June protests, saying in college she was told that known facts were considered common knowledge and didn't need to be footnoted.

The professor ends by turning to another page and criticizing June for paraphrasing rather than quoting a statute. June interrupts, noting that the teacher just said it would be more concise and make better sense to paraphrase the law. The student looks totally confused now.

- How would you explain the practice of quotation, paraphrase, and citation to an international law student? If June were a student in a law school clinic, would any of your answers change?
- Should the penalty for a first-year student be different from that of a third-year student? What about a first-semester and second-semester student first-year student?
- Should the plagiarism described in paragraph one be treated differently from the plagiarism described in paragraph two? Should June's academic misconduct be treated differently than that of a student born in the United States?

Scenario 4: ESL Student

A legal writing student, David, has submitted a draft of an appellate brief that has numerous English-as-a-second-language writing errors. The errors don't actually affect his analysis, but they are so pervasive that they would be distracting to most readers. David's legal writing professor does not have any background in teaching ESL students, so she recommends that the student work with the law school's Writing Specialist, who isn't an ESL expert either.

The Writing Specialist looks for specific patterns in the ESL errors and notices that the majority of David's errors fall into two categories:

1. incorrect verbs
2. missing articles

As she and David go through the first few pages of the draft and discuss the verb choices and identify spots where articles are missing, the Writing Specialist becomes increasingly concerned that David is not really learning how to make the corrections himself; instead he seems to be simply making the corrections that she suggests. When she asks him to read the next page and determine whether the verbs are correct or whether any articles are missing, David makes an effort to do so but is generally unsuccessful. He then says that as an undergraduate he had the same writing issues, but he "just took his papers to the Writing Center and the TA's there corrected them." He then hints that he was expecting the Writing Specialist at law school to do the same thing. After all, he explains, he probably will be returning to his home country after law school, and even if things change and he stays in the US, he doubts he would be writing appellate briefs. In any case, he could also have a native speaker colleague in the firm or even a legal secretary proof his writing and catch any verb or article problems.

- How should the Writing Specialist work with this student?
- How much should the legal writing professor factor the ESL writing errors into David's grade?
- Should it matter if David plans to take the bar and practice in the US or return to his home country after law school?

Wrap-Up, Final Thoughts, Conclusions . . .

Narrow the gap between acceptable conduct and a violation

- Be clear in your instructions and on expectations.
- If you allow collaboration, clearly identify:
 - With whom they can collaborate
 - On what they can collaborate
 - At what times collaboration is acceptable
- Do not recycle assignments (yours or others).
- Know your law school academic integrity rules and process.