

PROCESS OVER PRODUCT: A PEDAGOGICAL FOCUS ON EMAIL AS A MEANS OF REFINING LEGAL ANALYSIS

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I. INTRODUCTION

As a 1997 law school graduate, I was among the first generation of lawyers to regularly use email in law practice. During the late 1990s and early 2000s, lawyers and other professionals developed a reputation for being wedded to their BlackBerry email devices.¹ Not trained in communicating via email in law school,² the lawyers of that era became self-taught experts on the topic.

Over the past several years, email communications have increasingly become part of legal writing curricula.³ Professor Kristen Tiscione, in her 2008 landmark article on email communications and the first-year (1L) legal writing curriculum,⁴ presented survey data revealing email as the primary mode of communicating legal analysis in law practice.⁵ She concluded that legal educators “who seek to prepare students for the practice of law” should recognize the shift from traditional memoranda to email communications

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¹ These devices were called “CrackBerries” in popular media. See Doug Gross, *From CrackBerry to “Depressing”: The BlackBerry’s 5-Year Fall*, CNN (July 2, 2012, 6:30 AM), <http://www.cnn.com/2012/06/29/tech/mobile/blackberry-fall>.

² See Kristin J. Hazelwood, *Technology and Client Communications*, 83 MISS. L.J. 245, 280 (2014) (noting email communications were not a “common component” of legal writing curriculum in the early part of the 21st Century).

³ A 2014 Association of Legal Writing Directors (ALWD) and Legal Writing Institute (LWI) survey revealed an upward trend in the assignment of emails in legal writing courses. ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 13 (2014), <http://lwionline.org/uploads/FileUpload/2014SurveyReportFinal.pdf> [hereinafter ALWD & LWI SURVEY]. In response to the 2014 survey question about whether email memos are assigned, 109 out of 174 law schools responded affirmatively, in comparison to 102 law schools in 2013 and 81 law schools in 2012. *Id.*

⁴ Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32 (2008).

⁵ See *id.* at 48–49.

and informal memoranda in law practice.⁶ I agree that email communications should be taught because they are a primary mode of communicating legal analysis in law practice. To prepare law students for law practice, legal writing professors need to teach students how to write the types of documents that they will be writing.

Building from Professor Tiscione's and others' work on assigning emails in legal writing courses, I offer in this Article another reason why the legal writing curriculum should include emails: writing emails setting forth legal analysis can help students refine their legal analysis skills in a way that writing the traditional, long-form memorandum does not. This Article focuses on email communications not as a writing product, but as a vehicle for enhancing the legal writing process.⁷ Legal writing professors should embrace email as a means to enrich their teaching of legal analysis and to help students develop their legal analysis skills. Email writing should be assigned because it can help students through the challenge of performing legal analysis, and it provides a student with a powerful tool for working through the legal writing process.

This Article suggests that email writing should join free writing and oral presentation as valuable tools for helping students develop analytical skills.⁸ This Article builds on at least two areas of scholarship on legal writing pedagogy. First, it describes the literature documenting and advocating for a focus on process, rather than product, in teaching legal writing.⁹ With a focus on the legal writing process, professors have discussed how free

⁶ *Id.* (discussing a survey of practicing attorneys, which revealed the traditional format and substance of the legal memorandum had become nearly obsolete in favor of substantive e-mail as the preferred method for communicating with clients). See also Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC 1 (2015). Taking the prevalence of email communications as a given, Professor Margolis examines the effect of technology on legal analysis. See generally *id.*

⁷ In this Article, the author does not engage in the debate about whether the traditional office memorandum is "dead," as framed by Professor Davis. See Kirsten K. Davis, *"The Reports of My Death Are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471, 474 (2013).

⁸ See Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589, 594 (2009); Pam Jenoff, *The Self-Assessed Writer*, 10 LEGAL COMM. & RHETORIC 187, 187-88 (2013).

⁹ See Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from Product to Process*, 24 REGENT U. L. REV. 83, 93 (2011).

writing and oral presentation are tools for developing legal analysis skills.¹⁰ Second, this Article adds to the growing body of scholarship regarding assigning emails in the legal writing classroom by discussing emails through the lens of process-focused teaching rather than product-focused teaching.¹¹

This Article advocates for assigning email writing in the 1L legal writing curriculum because drafting emails can help students develop legal analyses for a major writing project, such as a formal office memo or an appellate brief. The relative informality and familiarity of the email medium help liberate the modern student writer and can create an opening for deeper analysis where previously the student writer felt stuck or blocked.¹² The email assignment can provide students a constructive break from traditional legal memorandum or brief writing; with an email assignment in legal writing courses, students are freed from the formal restrictions of the memorandum.¹³ This activity can help students refine their legal analysis and revisit their memorandum with a more informed perspective.

Part A discusses how legal writing teaching developed to emphasize process over product. Part B explores the connection between oral argument and legal writing teaching. Part C reviews the connection made by scholars between free writing and legal writing teaching. Part III, against the backdrop of the reasons for assigning oral argument and free writing, explains the benefits to the legal writing process of assigning email writing. Part IV proposes ways to integrate email writing into the 1L legal writing course to maximize its benefits to the legal writing process.

¹⁰ See Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 522 (2002); Jenoff, *supra* note 8, at 187–88 (arguing for free writing in legal education to eliminate writer’s block); McElroy, *supra* note 8, at 589 (arguing for oral argument as part of legal education).

¹¹ See Hazelwood, *supra* note 2, at 284.

¹² See Margolis, *supra* note 6, at 8–9.

¹³ Professor Tiscione once noted that she feels “liberated” when she writes emails, as contrasted to how she feels when she is writing a memorandum with all of its formal requirements. Kristen Tiscione, Professor of Legal Research and Writing, Georgetown University Law Center, *The Rhetoric of Email and Its Effect on Legal Analysis, Presentation at the Fourth Annual Capital Legal Writing Conference* (March 1, 2014). Email is “distinguished from traditional memoranda by its lack of format and the subsequent liberation of the writer.” Kristen K. Tiscione, *The Rhetoric of Email in Law Practice*, 92 OR. L. REV. 525, 538 (2014).

II. FOCUS ON PROCESS OVER PRODUCT IN LEGAL WRITING TEACHING

A. *The Movement Toward Process*

Legal writing teaching has evolved to focus students on the process of legal writing rather than the final product.¹⁴ Professor Pollmann documented the progress of legal writing teaching beyond formalism towards emphasizing legal writing process over product: “Students learn that the process is recursive rather than linear; in other words, the process requires looping back to form a spiral of learning and thinking.”¹⁵

Legal writing professors employ many strategies to guide the student through the process of legal writing. These include freewriting, writing plans, peer edits, and other elaborate staged edits that “allow[] the writing teacher to intervene in the students’ work while the students are in the process of composing.”¹⁶ Professors Felsenburg and Graham suggest providing more opportunities for students to pre-write and to “write to learn.”¹⁷ For example, they describe a simple first writing assignment: students write down the steps they go through in analyzing a legal issue presented.¹⁸ In that assignment, the professors did not specify any particular format, allowing students to focus solely on the analytical process “without having to worry about the writing style or format that an outside reader would expect.”¹⁹

¹⁴ See Felsenburg & Graham, *supra* note 9, at 96; J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 56–57 (1994) (explaining how social perspective, which incorporates process perspective, can enrich understanding of legal writing and inform legal writing pedagogy); Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 721 (1997) (describing innovations in Villanova’s legal writing program reflecting a shift from a focus on the writing product to a focus on the writing process); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 98 (2005) (reviewing the Temple University School of Law Legal Research and Writing program and how it incorporates process-based teaching).

¹⁵ Terrill Pollmann, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 905–07 (2002).

¹⁶ Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How To “Think Like Lawyers”*: Integrating Socratic Method with the Writing Process, 64 TEMP. L. REV. 885, 888 (1991).

¹⁷ Felsenburg & Graham, *supra* note 9, at 86.

¹⁸ *Id.* at 99.

¹⁹ *Id.* at 106.

Most notably, legal writing professors have written about two strategies in particular, oral presentation and free writing, which help give students a sense of freedom in the writing process and provide an opening for enhanced legal analysis.

B. Oral Presentation and the Process of Writing

With a focus on “intervening” in the process of legal writing, legal writing professors have developed a variety of exercises that require oral presentation.²⁰ Regardless of the type of exercise, the goal is to help students achieve better, stronger analysis.²¹ The operative theory is that talking through analysis can help refine the communication of analysis through writing.²² Professor McElroy articulates that simulated oral argument exercises in the legal writing classroom are key “[b]ecause lawyers work through and analyze their cases through the oral advocacy process [L]aw professors can better train their students to engage in the basics of legal analysis by having them argue that analysis on their feet in simulated oral argument exercises.”²³

Accordingly, many legal writing professors assign simulated partner-associate meetings or “research reports” in the course of a legal writing class.²⁴ In my legal writing class, students engage in at least one interactive oral exercise concerning issues the students have researched and written about in a draft.²⁵ Students draw from their work-in-progress research and analysis for these role plays. For example, students might engage in a role-play exercise in which they present about the law to a group of potential clients at a simulated industry conference. Or, they might engage in a role play in which one plays the general counsel of the client and the other plays the outside advising attorney. Students in my classroom might also assume

²⁰ See *id.* at 886.

²¹ See *id.* at 887.

²² See DeJarnatt, *supra* note 10, at 522.

²³ McElroy, *supra* note 8, at 592.

²⁴ See, e.g., Sarah J. Morath, *From Awkward Law Student to Articulate Attorney*, SECOND DRAFT, Fall 2013/Winter 2014, at 6, 6–7. Also, Professor Katherine Kelly has discussed the Partner Status Update simulation exercise in which her students engage. Katherine Kelly, Assistant Clinical Professor of Law & Dir., Acad. Support Program, Moritz Coll. of Law, Two Skills, One Assignment: Research Meetings that are Productive, Professional, and (Relatively) Painless, Address at the 16th Biennial Legal Writing Conference of the Legal Writing Institute (July 1, 2014).

²⁵ See Katrina June Lee, *Mentoring and Legal Writing: How 1L Legal Writing Courses Prepare Students for Mentoring Relationships in the Legal Profession*, SECOND DRAFT, Spring 2015, at 23, 24.

the role of law firm partner, while others assume the role of associate answering questions about a case from the partner.

Simply talking about ongoing work, outside of a research report or partner-associate role playing, also fits into “progressive” legal research and writing pedagogy.²⁶ By talking, students “focus[] on the process of writing and not exclusively on the end product.”²⁷ Professor DeJarnatt notes, “Students will have the richest experience in conversing about their writing when they are still in the process of working out their written analysis.”²⁸ Talking about ongoing work engages students in a very different way than postmortem examinations of final drafts.²⁹ Professor McClendon explores how “talking-out” improves writing: “Talking is a catalyst of writing. Talking is a bridge between thinking and writing.”³⁰ Professor DeJarnatt explains how talking about writing enables and requires students “to explain their writing choices verbally” and “help[s] students experience being the audience for their [own] legal writing.”³¹ She discusses how such conversations about writing help students “develop their ability to have the effective internalized conversations that are essential to good legal writing and analysis.”³² In that vein, Professors Chew and Pryal recommend “changing your medium of composition.” For example, they suggest to students who usually write on a laptop, “you can take your cell phone with you on a walk and dictate into your cell phone’s voice recorder while you walk.”³³ They suggest that the “change of scenery and the change of medium can help you gain a new perspective on your writing task.”³⁴

Thus, legal writing professors have endeavored to benefit their students’ learning by linking talking to the process of legal writing. Similarly, they have done so by linking free writing to the process of legal writing.

²⁶ DeJarnatt, *supra* note 10, at 518.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Kellen McClendon, *The Convergence of Thinking, Talking, and Writing*, 38 DUQ. L. REV. 21, 47 (1999).

³¹ DeJarnatt, *supra* note 10, at 522.

³² *Id.*

³³ ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 300 (2016).

³⁴ *Id.*

C. “Freewriting” and the Process of Legal Writing

1. Freewriting—Writing Without Control—Helps with the Legal Writing Process

Some legal writing professors have advocated for freewriting as a way to begin the process of legal writing or to generate new ideas in the analysis process.³⁵ Freewriting is “stream-of-consciousness writing.”³⁶ The process of freewriting has been described as follows: “When you freewrite, you dump every idea you have about your topic on paper without regard for logical sequence, grammar, or spelling. You simply put your pen on the pad, or fingers on the keyboard, and record all your passing thoughts.”³⁷ Others describe free writing as a “spontaneous, unedited writing that generates new ideas.”³⁸

Professor Jenoff, a fiction author and legal writing professor, has described how the free writing process used in fiction writing can help the legal writer.³⁹ She discusses with her students the importance of “silencing our inner editors,” and she reads to her students a passage that emphasizes the utility of loss of control in the writing process.⁴⁰

Legal writing professors have recommended a number of freewriting strategies. Professor Jenoff describes a timed writing exercise she gave her students:

They may be instructed to write with a particular focus or to answer a certain question, or they may just write generally. I tend to make the exercise relevant to the memorandum or brief on which the writers are working, but its less technical aspects, such as writing the fact section. I instruct them to write for ten minutes without lifting up the pencil or ceasing typing or stopping themselves to edit or doubt.⁴¹

³⁵ See, e.g., DeJarnatt, *supra* note 10, at 505; HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, *WRITING AND ANALYSIS IN THE LAW* 197–98 (6th ed. Foundation Press 2013); CHEW & PRYAL, *supra* note 33, at 299.

³⁶ SHAPO, WALTER & FAJANS, *supra* note 35, at 197–98.

³⁷ *Id.*

³⁸ CHEW & PRYAL, *supra* note 33, at 299.

³⁹ See Jenoff, *supra* note 8, at 188.

⁴⁰ *Id.* at 199.

⁴¹ *Id.*

Professor Jenoff further explains, “Many writers find themselves uncomfortable with the concept of writing freely and nonstop.”⁴² Thus, Professor Jenoff assigns the free writing exercise repeatedly in different sessions.⁴³ Professors Chew and Pryal advocate for some “parameters” for student freewriting.⁴⁴ For example, they describe the “question-and-answer” freewriting strategy: “[Y]ou interview yourself, first freewriting questions and then freewriting the answers.”⁴⁵ They explain that “asking questions frees you to consider ideas that you haven’t thought about before.”⁴⁶ The idea of helping new legal writers write by strategically assigning exercises in which they write without control or with less restraint is therefore not a novel one.

2. *Freewriting Opens Up Brain Space for Creative Associations and Critical Thinking*

Scholars have advocated for the free writing process, not only for legal writing students but also for lawyers generally as they work through analysis of a matter.⁴⁷ Professor Rappaport argues that lawyers too often ignore free writing.⁴⁸ He notes that the “free writing process—opening the mind to all associations, possibilities, [and] hunches that may occur—provides a powerful basis for exploring the factual and legal possibilities of a case.”⁴⁹

The idea that freewriting helps with legal analysis links directly to the need to address formal rules and schema in the brainstorming phase.⁵⁰ Professor Rappaport posits that lawyers, through freewriting, can benefit from opening their minds to less bounded, more powerful creative associations.⁵¹ Similarly, Professor Rowe, in a bar association publication for lawyers, discusses the virtues of a writing “brain dump”: “The goal of a brain dump is to move as much information as possible out of your head and

⁴² *Id.*

⁴³ *See id.*

⁴⁴ CHEW & PRYAL, *supra* note 33, at 300–01.

⁴⁵ *Id.*

⁴⁶ *Id.* at 300.

⁴⁷ *See* Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 LEGAL WRITING BEYOND MEMOS & BRIEFS 32, 52 (2008).

⁴⁸ *See* Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 J. LEGAL WRITING INST. 65, 108–09 (2010).

⁴⁹ *Id.* at 109 (quoting Charles J. Moxley, Jr., *Effective Litigative Writing*, 10 J. BUS. & TECHNICAL COMM. 143, 158 (1996)).

⁵⁰ *See id.*

⁵¹ *See id.*

onto a page. That will free up space for critical thinking.”⁵² Professor Rowe suggests giving students a short amount of time to write as much as possible, without worrying about technical skills or coherence.⁵³

Thus, similar to what has been written about the virtues of oral presentation exercises, or simply talking about writing, in the process of legal writing, scholars recognize the utility of “freewriting” in the legal writing process. I propose that email writing can provide process benefits similar to freewriting and oral presentation.

III. EMAIL COMMUNICATIONS AND THE PROCESS OF LEGAL WRITING

Oral presentations and freewriting help strengthen legal analysis by removing some of the strictures of formal legal writing that can limit students’ abilities to focus on legal analysis. Writing emails similarly removes some of those strictures. Thus, like oral presentations and freewriting, writing emails can help students focus on legal analysis.

The presence of email communications in law school curricula is a recent growing trend.⁵⁴ Many legal writing textbooks now feature a chapter or subchapter on email communications in law practice.⁵⁵ A survey of legal writing textbooks revealed that 35% covered the “genre” of email memos.⁵⁶ The book sections on email memos generally cover issues of confidentiality and professionalism.⁵⁷

This section will first describe reasons set out by others for assigning emails in the legal writing course, and then explore an additional, complementary reason for assigning emails: enhancing the process of legal analysis.

⁵² Suzanne E. Rowe, *Unblocking Writer’s Block: Moving Ideas from Head to Page*, OR. ST. B. BULL. (Oct. 2006), <http://www.osbar.org/publications/bulletin/06oct/writer.html>.

⁵³ See *id.*; David A. Rasch & Meehan Rasch, *Overcoming Writer’s Block and Procrastination for Attorneys, Law Students, and Law Professors*, 43 N.M. L. REV. 193, 202–203 (2013).

⁵⁴ ALWD & LWI SURVEY, *supra* note 3, at 13.

⁵⁵ See, e.g., MARY BETH BEAZLEY & MONTE SMITH, *LEGAL WRITING FOR LEGAL READERS* 256–257 (2014); CHEW & PRYAL, *supra* note 33, at ch. 10; SHAPO, WALTER & FAJANS, *supra* note 35, at 339–346; CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES* ch. 18 (2d ed. 2013).

⁵⁶ Katie Rose Guest Pryal, *The Genre Discovery Approach: Preparing Law Students to Write Any Legal Document*, 59 WAYNE L. REV. 351, 368–69 (2013).

⁵⁷ See, e.g., COUGHLIN, ROCKLIN & PATRICK, *supra* note 55, at 295–304; SHAPO, WALTER & FAJANS, *supra* note 35, at 339–46.

A. *Oft-Cited Reasons for Assigning Emails in the Legal Writing Classroom*

1. *Email is the Dominant Mode of Lawyer Communication*

Email is a prevalent form of communication in law practice, which is one often-cited reason why it should be assigned in a legal writing class.⁵⁸ Given the prevalence of email, students must learn how to write effective emails to a legal audience to be law practice-ready.⁵⁹ Formal memos have been on the decline for years.⁶⁰ Professor Tiscione documents the decline in her 2008 article, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*.⁶¹ Professor Tiscione conducted a study on the use of emails in law practice and found lawyers had retreated from writing formal memos.⁶² Lawyers were instead distilling the salient arguments of their legal analysis into an e-mail that recipients could read and share quickly and efficiently.⁶³

A survey of attorneys conducted by the American Bar Association (ABA) in 2007 reinforces the notion that email communications have been extremely prevalent in law practice for many years.⁶⁴ That year, the ABA reported that 97% of responding attorneys used email at work for routine correspondence.⁶⁵ More than 70% used email for case status and memoranda/briefs.⁶⁶ Therefore, legal writing professors wishing to teach students about a prevalent mode of communication in law practice should teach email writing.

⁵⁸ See Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-Mail Professionally*, 71 MD. L. REV. ENDNOTES 1, 1 (2011).

⁵⁹ See *id.* at 18.

⁶⁰ See *id.* at 1.

⁶¹ Robbins-Tiscione, *supra* note 4, at 35–37 (discussing a survey of practicing attorneys showing the traditional format and substance of the legal memorandum has become nearly obsolete in favor of substantive e-mail as the preferred method for communicating with clients).

⁶² See *id.* at 32–33.

⁶³ See *id.*

⁶⁴ See *FYI: E-Mail for Lawyers*, A.B.A., http://www.americanbar.org/groups/dep_arts_offices/legal_technology_resources/resources/charts_fyis/email.html (last visited Apr. 8, 2016).

⁶⁵ *Id.*

⁶⁶ *Id.*

2. *Importance of Teaching Professionalism and Ethics of Email*

Legal scholars have also argued that email communications should be taught because today's law students must understand the ethical dimensions of electronic communication.⁶⁷ Professor Fershee explains that legal writing professors must teach email writing to ensure students receive appropriate guidance on using the email medium professionally and ethically.⁶⁸ Recognizing the "decided informality" of email, Professor Fershee sheds light on the need to provide today's law students with guidance to make the transition from informal use of email to use of email in a professional setting.⁶⁹ Similarly, citing Professor Tiscione's work and reiterating the need to include email communications in legal writing curricula, Professor Hazelwood discusses the need to teach students the ethical dimensions of electronic communication.⁷⁰

However, although scholars have emphasized the prevalence of email communications in the legal profession and the unique ethical concerns associated with email communications as reasons for teaching email communications in legal writing courses, largely left understated and unrecognized as a reason for teaching email communications is the promising role of email writing in enhancing student writers' legal analysis and legal writing process.

B. Similar to Oral Presentation and Free Writing, Emails Can Provide a "Liberating" Aid in the Process of Developing Written Legal Analysis

Email can serve a very important function in a legal writing student's process of achieving strong legal analysis. Legal writers can feel freer, more liberated, and less burdened in email writing.⁷¹ This significant observation suggests that email writing in the legal writing classroom may offer benefits to students' learning process similar to that of free writing and oral presentation, both discussed above. Such benefits to the learning and writing

⁶⁷ See Fershee, *supra* note 58, at 1.

⁶⁸ See *id.* at 3.

⁶⁹ See *id.* at 12. Similarly, approaching email as its own genre, educators have argued for teaching its specific conventions, even to young children. See Julie E. Wollman-Bonilla, *Email as Genre: A Beginning Writer Learns the Conventions*, 81 LANGUAGE ARTS 126, 126 (2003).

⁷⁰ Hazelwood, *supra* note 2, at 247.

⁷¹ See Ellie Margolis, *Incorporating Electronic Communication in the LRW Classroom*, 19 PERSP. TEACHING LEGAL RES. & WRITING 121, 124 (2011); Tiscione, *The Rhetoric of Email in Law Practice*, *supra* note 13, at 531.

process can be distinguished from the benefits of focusing on email solely as a writing product prevalent in law practice.

The unique aspects of a medium can equate to or suggest different or new approaches to legal analysis.⁷² Professor Tiscione asserts, “Just as the typewriter transformed writing, e-mail has transformed legal analysis.”⁷³ For example, legal analysis communicated through email entails a shift in audience and persona from the traditional memorandum. Professor Tiscione notes, “When a lawyer writes an e-mail—as opposed to a traditional memorandum—her analytical process changes.”⁷⁴ She suggests that a writer is “more *aware* of creating meaning in the process of composing e-mail” because the very nature of email communications in law practice places writer and reader in an ongoing conversation.⁷⁵ Professor Tiscione’s insight imbues email writing with a unique place in the writing or prewriting process akin to oral presentation and free writing. A lawyer or student writing an email writes to a particular known person with the expectation of an eventual reply. That intimacy between author and audience may allow the student to see the audience’s needs more clearly and prompt the student to attempt writing legal analysis in a clearer and easier-to-read fashion.⁷⁶

The intimacy between email author and audience can help a law student feel “freer” to focus on the audience’s needs when writing an email as opposed to a traditional memo.⁷⁷ Professor Margolis shares her experience assigning practice emails to her legal writing students.⁷⁸ She describes how one student suggests to her that “it was easier to relate to the reader in this [email] assignment” because of the “lack of pre-existing structure.”⁷⁹ Because the assignment had few rules about what the document should include or what form it should take, one student “felt freer” to focus on what information she thought the reader would need.⁸⁰ Professor Margolis notes that some students turned in their best writing of the semester in their email assignments.⁸¹ She surmises that this success was due to several factors:

⁷² See, e.g., Margolis, *supra* note 6, at 28 (describing how the “iPad brief” has “the potential to be a multidimensional document employing analytical devices that go far beyond our current understanding of written legal argument”).

⁷³ Tiscione, *The Rhetoric of Email in Law Practice*, *supra* note 13, at 528.

⁷⁴ *Id.* at 531.

⁷⁵ *Id.* at 532.

⁷⁶ The author is indebted to Professor Alexa Chew for her insight on this point.

⁷⁷ See Margolis, *supra* note 71, at 124.

⁷⁸ See *id.* at 121.

⁷⁹ *Id.* at 124.

⁸⁰ *Id.*

⁸¹ See *id.*

First, digital natives (the generation of students who has grown up using computers from a very young age) are simply more comfortable and familiar with electronic communication. While the downside of this is the oft-noted problem with overly casual tone in professional communications, this experience reminded me that there is an upside as well.⁸²

Professor Margolis notes that because of the less formal structure compared to the assigned office memorandum, the students were able to better focus on the information they believed the reader wanted.⁸³ She recalls a specific conversation with a student about the relative lack of rules in email communications: “The class discussion about the first assignment had show[n] the students that, as a new type of communication, there weren’t a lot of ‘rules’ about what the document should include, or what form it should take.”⁸⁴ Professor Tiscione, likewise, discusses how she personally felt more “liberated” when writing emails, as opposed to formal memoranda.⁸⁵

Thus, email, so familiar to the current generation of students, can provide a comfortable medium for students to work through analysis, just as student writers have used oral argument and free writing.⁸⁶ Email provides

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *See supra* note 13 and accompanying text; Tiscione, *The Rhetoric of Email in Law Practice*, *supra* note 13, at 538.

⁸⁶ Also, in drafting an email communications, students must provide the “bottom line” for a legal analysis. *See* Charles Calleros, *Traditional Office Memoranda and E-mail Memos*, in *Practice and in the First Semester*, 21 PERSP. TEACHING LEGAL RES. & WRITING 105, 107 (2013). This mirrors the key points that a student might have to make in an oral argument. The author also notes that the exercise of having to provide a “bottom line” can help students with metacognitive development. Professor Niedwiecki defined metacognition in the context of legal education as follows:

[M]etacognition involves the awareness and control over one’s own thinking. Metacognition is characterized by two components: 1) the awareness of what a person brings to the learning experience, and 2) the on-going process of actively planning, monitoring, evaluating, and creating pertinent learning strategies in order to complete some particular task.

Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33, 41–42 (2006).

an intriguing option for legal writing professors seeking to help students develop meaningful legal analysis.⁸⁷

IV. INTEGRATING EMAIL INTO LEGAL WRITING CURRICULA AND LEGAL WRITING

Thinking of email writing as part of the legal writing process can help shape a legal writing professors' goals and approach toward teaching email writing.⁸⁸ A legal writing teacher might consider how an email assignment fits into the larger writing assignments of the semester and how email communications might come up in the course of that assignment in "real life" law practice. If email writing is presented to students as a way for working through their analysis, email writing should be assigned partway through a student's major legal writing assignment. Below are an example of an email assignment and ideas for others.

A. *Example of Email Assignment with Focus on Email as Process*

Approaching email writing as an exercise that can help "free" or "liberate" students from the formal requirements of an office memorandum, I often assign email writing in the midst of my students' work on the longest legal writing project of the semester. I provide an example of such an email assignment below.

Every fall semester, like many other professors, I assign my 1L students an office legal memorandum that accounts for the bulk of their final grade. The memorandum includes all of the classic components: Question Presented, Brief Answer, Facts, Discussion, and Conclusion. I give my students a page limit, usually fifteen double-spaced pages. For most of my students, the memorandum is an unfamiliar, challenging undertaking. By virtue of its form, the memorandum, with all of its requirements and its unfamiliarity to students, can be intimidating and daunting. Meanwhile, students are still learning how to implement the legal analysis framework.⁸⁹

About halfway through the semester, my students turn in a draft of their long memorandum. They have several weeks to refine the long

⁸⁷ Professor Tiscione expresses a concern "that the skill required to synthesize information in a fluid, readable, efficient e-mail is that of an *expert*, not a novice." Tiscione, *The Rhetoric of Email in Law Practice*, *supra* note 13, at 540 (emphasis added). However, Professor Tiscione also argues that perhaps students' familiarity with the medium of electronic communications will lead students to focus further on content rather than the medium. *Id.* at 541-43.

⁸⁸ See Margolis, *supra* note 71, at 121.

⁸⁹ The legal analysis framework may take several forms, represented by various acronyms such as "IRAC," "CREAC," and "CRAC."

memorandum draft, based on my feedback, their own self-assessment, and additional exercises and readings.

During the process of my students' writing and editing the long memorandum, I may assign emails as well as role-play exercises requiring oral presentation. After the draft assignment is due and before the final is due, I have assigned my students to write an email to the client. One semester, for example, after the draft memo assignment deadline, I provided my students with this transcription of a simulated voicemail message from the partner⁹⁰ in the fictitious law firm's Washington, D.C. office:

Hi, Maggie, it's Mitch. I just wanted to see how your team's work on Compilling Company's matter is coming along. What is the research telling us? Can you have one of your associates shoot me a short email about where this project seems to be headed? Any particular cases that I should know about? That I should read? I know that you are working up a complete memo on the issue. I don't need the memo now, but I'd appreciate a quick email briefing since I am going out to lunch with the CEO when she is in town next week. Thanks a million. You're the best!

With this voicemail message in hand, I instructed my students to write an email to the partner that was single-spaced and did not exceed one page. I gave them instructions in class to provide the bottom line—the answer—at the beginning of the email and proceed from there with legal analysis appropriately responsive to the partner's request. Alternatively, a legal writing professor might provide absolutely no email parameters to students.

B. Other Ideas for Email Integration in Legal Writing Courses

With a focus on the writing process rather than on emails as final written product, a legal writing professor could implement any number of variations of the above-described assignment. For example, a legal writing professor might assign an email in the midst of work on a brief, defending or explaining a part of the brief to a skeptical colleague or client. Or, the professor might inform students that they must write an email to a new associate who is taking over a portion of the assignment. The email assignment could be as "simple" as an email summarizing the contents of a

⁹⁰ I arrange for a real law firm partner to call into my class and use her or his real name, but the name of a fictitious law firm. Thus, when the students receive the voicemail transcription, it often contains the name of a real person. However, all names have been changed for this Article.

draft brief's discussion in one or two paragraphs. Regardless of its simulated context, the email assignment meant to help a student refine legal analysis should be given in the midst of a longer writing assignment, and it should compel the student to report on the analysis in the ongoing legal writing project.

V. CONCLUSION

Today's law students are eminently comfortable with email communications.⁹¹ They are usually not as familiar or comfortable with the office memorandum or the appellate brief.⁹² I propose that legal writing teachers recognize the importance of email writing in the process of legal writing. The reasons for assigning email writing in the midst of a long legal writing assignment with many formal requirements, such as a memorandum or appellate brief, mirror the reasons why a legal writing teacher might similarly assign oral presentation exercises or free writing exercises. Having students write in a medium they are comfortable with will help them feel more liberated and more at ease. They may make creative associations they otherwise would not make. They might also develop a keen awareness of the shortcomings and strengths of their analysis.⁹³

Similar to oral presentation and free writing during a longer legal writing project, email writing can help students engage more closely with their legal analysis and write more effectively. In this way, email writing assignments serve as part of the writing process and not purely as a final written product for the sake of giving students experience with a prevalent mode of lawyer communication. Ultimately, legal writing professors' strategic assignment of emails in the midst of legal writing assignments will enrich students' writing and learning experiences, and provide them with a lifelong writing tool.

⁹¹ See Margolis, *supra* note 71, at 124.

⁹² See *id.*

⁹³ See *id.*