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Running the Race Together: Co-Authoring Legal Scholarship with Students

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Introduction

The two co-authors of this essay collectively have co-authored more than seventy law review articles or other scholarly publications with students.¹ The vast majority of these are published in law reviews other than those at our home institutions. We're not legal writing professors, but we are professors who work a lot with students to improve their writing. One of the ways we do that is by encouraging them to publish the papers they write for our courses and by working with them one-on-one to polish their drafts. We've learned some key lessons from that experience about improving student writing that we think might be helpful to any law school professors who work with students to improve their writing including LRW professors, law school writing specialists, and doctrinal professors.

This essay describes how we co-author with students; the myriad benefits such co-authoring offers to us, our students, the academy, and the bar generally; and a few speed bumps we have run into along the way.

How We Do It

Both of us teach a wide variety of labor, employment, and alternative dispute resolution courses. Some of these courses are seminars with writing components. Even in larger, non-seminar courses, we sometimes give students the option of writing a research paper for all or part of their final grade.

In any given academic year, we each supervise anywhere from 10–30 student research papers. Our expectations for student papers are high—we expect that an “A” paper will look a lot like a law review article. We provide extensive feedback to all students writing research papers, on everything from analysis and research to organization and grammar. As we review the students' draft papers, we notice which papers seem to have a unique legal thesis and are particularly well-researched and well-written.

At the end of each semester, when we are returning students' final papers with their grades and our comments, we flag those papers with special potential. If necessary, we might do some independent research to verify the uniqueness of the thesis or the accuracy of the analysis. We reach out to the student(s), tell them that we believe that their paper may have publication potential, and invite them to meet with us individually in our respective offices.

At that meeting, we discuss with the students the strengths and weaknesses of their papers. Usually, there is a significant amount of work to be done before the paper is publication-ready. This often involves looking at the legal issue from a different perspective—for example, considering how an analogous body of law has treated a similar issue. Students generally are receptive to these suggestions, because they already have received their (very good) grade and because they are thrilled at the possibility of publishing.

At this meeting, we also describe for the students the process of getting their paper published. First, we discuss any student writing competitions for which the paper might qualify. We discuss the advantages and disadvantages of submitting the paper to a student competition versus submitting it to law reviews for publication. The obvious advantage to student competitions is the possibility of earning a cash prize. On the down side, however, the odds of winning can be slim,

¹ Our scholarship, respectively, is listed at http://law.onu.edu/faculty_staff/profiles/richard_bales and <http://www.law.umn.edu/facultyprofiles/beforts.html>.

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competitions often impose length restrictions, and not all winning papers are published.

Next, we discuss the process of getting a paper published in a law review. We discuss, for example, the best times to submit an article, the process of mass-submissions, the expedite process, and the goal of “trading up” to high-prestige journals.²

We also discuss the publication process from the perspective of a law review articles editor. We discuss, for example, why those editors want articles making a novel legal argument—an argument that does not merely restate what another article has already said.³ We discuss how student articles editors often prefer to publish articles from prestigious authors,⁴ and how law reviews often have express policies against considering articles submitted by law students from other law schools.⁵ We tell the students that the vast majority of student-edited journals do not blind-review articles, and that author prestige can play a role⁶ in determining which articles are reviewed immediately and which are put aside to await an expedite request.

This discussion transitions easily into a discussion about the pros and cons of faculty-student co-authorship. The major advantages to a student in co-authoring with a law professor is that co-authorship makes it more likely that the article will be published, and, if so, more likely that the article will be published in a high-prestige journal. The potential disadvantage is that the student will share authorship credit for an idea that might originally have been her own (frequently, however, the original idea came from a list of potential paper topics that we gave students at the beginning of a course), or the student will share authorship credit for an article on which the professor functioned more as an extremely active editor than as a primary writer.

We make it clear that we are willing to help the student get her article published regardless of whether we are listed as a co-author. One of us, for

example, has helped more than 20 students get articles published in external publications. If the student is in his or her final year of law school, we discuss the pros and cons of the student waiting until graduation and then shopping the article solo. Ultimately, we leave the decision of whether to co-author or not to the student.

If the student indicates an interest in working as a team in co-authoring the article, we then turn to a discussion of logistics. One issue, depending on the circumstances, may concern the possibility of the student being eligible for academic credit or research assistant pay for the extra work. A second topic of discussion is to establish a timetable for the exchange of future drafts. In this discussion, we make it clear that the faculty co-author will be an active participant in the writing process and not just an aloof editor. Finally, we also discuss an approximate target date by which we hope the article will be ready to send out to law reviews. From this point forward, most of our interaction takes the form of exchanging drafts via email, interspersed with a few strategizing sessions.

As the law review submission time approaches, and assuming the article is by then of publishable quality, we meet again with the student to discuss submission strategy. We find out from the student whether there are any journals that she particularly wants to target (e.g., an undergraduate alma mater, or a journal from her home state), and we make certain we have up-to-date contact information for her so we can communicate immediately any offer that might be forthcoming. We send the article out, and shop it, just as we would an article we were sending out in only our own name. The only difference is that we consult the student on any decisions that need to be made, just as we would if our co-author were a faculty colleague.

Benefits to the Professors

We have not used student co-authored legal scholarship as promotion or tenure articles for ourselves. Similarly, our student co-authored legal scholarship supplements, rather than supplants, the scholarship we do individually and as co-authors with faculty colleagues throughout the legal academy. Nonetheless, we benefit significantly, in at least six ways, from co-authoring legal scholarship with students.

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² EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* 139–43 (2003).

³ *Id.* at 13.

⁴ See Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269, 274–75 (2009).

⁵ Nancy Levit et al., *Submission of Law Student Articles for Publication*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656395.

⁶ Gingerich, *supra* note 4, at 274–75.

“... the student receives an unparalleled opportunity to hone her writing skills.”

First, co-authoring legal scholarship with students adds significant breadth to our expertise. Although we teach generally in the area of labor/employment/ADR law, our scholarship tends to be much more narrowly focused than the overall scope of the material we teach. Co-authoring with students takes us a bit out of our scholarly comfort zones. However, because co-authoring supplements rather than supplants our regular scholarship, we retain our scholarly depth.

Second, this greater scholarly breadth also enhances our teaching. By expanding our areas of substantive expertise, we gain greater insight into the issues and policy concerns at work in these areas. This greater understanding, in turn, informs our teaching and is passed along to students in our courses.

Third, we have found that we tend to get better—and harder-working—students in our courses than otherwise would be the case. Great students (i.e., talented and enthusiastic) opt in because they value the opportunity to publish. Less dedicated students opt out because they know we have higher-than-average expectations for student performance in our paper courses.

Fourth, we get better student work-product than otherwise would be the case because students have something to strive for other than just a grade. This is good for us because high-quality student papers are much more enjoyable to read, critique, and grade than mediocre or poor ones.

Fifth, co-authoring legal scholarship with students allows us to take advantage of opportunities that lack of time otherwise would make us turn down. For example, we might identify a “hot” scholarly topic that we would like to write about but cannot because of existing scholarly commitments. If we know a student in one of our courses is particularly good at research and writing (perhaps because we have had the student in a previous course), we can suggest the topic to that student. Similarly, we often receive solicitations from law journals and law practice journals to write articles for them. Existing scholarly commitments normally would require us to decline most such solicitations. We can, however, accept many more of them if we co-author with students (we disclose the co-authoring arrangement before accepting any such solicitation).

Sixth, co-authoring with students gives us plenty of practice shopping articles to law reviews. As a result, our faculty colleagues often come to us for advice when they are shopping their own articles.

Benefits to the Students

Just as co-authoring with students benefits us as professors, it also benefits our student co-authors in a number of ways.

First, the student receives an unparalleled opportunity to hone her writing skills. We typically exchange two to four drafts with students when they write the paper in a law school course, and another three or more drafts as we prepare it for publication. This intensive, long-term instruction is invaluable to a student’s development of extraordinary writing skills.

Second, the student receives a huge boost in the job-search process. The student gets a great line on her resume, a conversation starter in an interview, and something that distinguishes her from nearly all of the other thousands of new lawyers minted annually. The student—and the student’s prospective employer—also receives an external validation of the student’s ability to research, analyze, and write about a legal issue. Handing a prospective employer a professionally printed reprint is much more impressive than handing out a student paper prepared for class.

In a related vein, and a third benefit for the student, co-authoring a law review article gives students a different way to distinguish themselves both in law school and on the job market. Many of the students with whom we have co-authored with were on our home law reviews, but many were not. First-year exam grades are a major determinant of entrance to law review, yet the skill set required to excel on a timed exam does not necessarily correlate with the skill set required to excel on a long-term research and writing project. Both types of skills are valuable in practice. In short, co-authoring a law review article provides students who may not have excelled at exams a different opportunity to shine.

Fourth, the student receives a terrific reference. When we write a recommendation letter for a student and say that the student is terrific at legal research, writing, and analysis, we have something to back up

our claim. Moreover, in working with the student on the co-authored article over nearly a calendar year, we get to know the student much better than we would if our only contact was in a classroom setting. When we say that the student is hard working, self-directed, and responds appropriately to feedback, we again have a factual basis for our claim.

Fifth, once the student has the new job, the co-authored article gives that student a calling card to give to new clients. Fresh-out-of-law-school graduates look very young to clients who may be in their 50s or 60s. A published article in the graduate's name, particularly on a subject related to the matter on which the graduate will be working, gives the new associate a level of credibility with the client that the graduate otherwise may not have had.

Sixth, the co-authorship experience introduces students to the long-term benefits of writing for publication. These benefits include enhanced credibility and client development. Several of our students, after writing co-authored articles with us, have gone on to write solo articles for law reviews and bar journals.⁷ Co-authoring gives the students not only experience in shopping an article, but also credibility with the journals to which they submit subsequent articles.

And finally, both faculty and students gain the experience of collaboration. The academic life can be a solitary existence and much of law school for students focuses on individual performance. But, success in both academia and in practice requires the skills of good communication and being able to work cooperatively with others. Our joint scholarship projects directly foster those skills.

Benefits to Academy and Bar

Practicing attorneys and judges often criticize law review articles as being disconnected from regular practice.⁸ The argument is that articles written by law professors are too abstract and theoretical to be of any use to real attorneys trying to solve real legal problems. Legal scholarship, so the argument goes, exists largely for its own sake, rather than for the advancement of the law.

Co-authoring law review articles with students bridges academic legal scholarship and practical legal scholarship. Both because law student time horizons are constrained to a year or so, and because most students have an eye on their future law practice, most co-authored student scholarship tends to be more practical than legal scholarship written solo by academics. For example, many of the articles we have co-authored with students have involved issues on which lower courts are divided—often, federal circuit court splits of authority—which by definition involve issues that practitioners and judges are likely to face on a regular basis.⁹ Thus, co-authoring articles with students thus helps make legal scholarship more relevant for the practicing bar.

Co-authoring articles with students also helps ensure that law reviews receive quality article submissions.¹⁰ Law reviews provide law students an opportunity to hone their legal writing, editing, and citation skills. However, the recent proliferation in the number of journals, combined with far more modest growth in the size of the legal academy, has left many journals scrambling for quality submissions. Co-authoring articles with students increases the number of articles available, while at

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⁷ See, e.g., Joseph S. Burns, *Predispute Arbitration Agreements in Ohio: An Employer's Guide to Creating an Enforceable Agreement*, 28 U. DAYTON L. REV. 351 (2003); Joseph S. Burns & Carrie E. Fischesser, *A Survey of Kentucky Employment Law*, 31 N. KY. L. REV. 85 (2004); Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535 (2001); Tyler Lane, *Are You Ready for the Check? Employers Face Title VII Disparate Impact Liability for Discriminatory Tipping Practices*, 44 DAYTON L. REV. 53 (2018); Emily N. Litzinger, *Willfulness, Good Faith, and the Fair Labor Standards Act*, 12 NEVADA L.J. 112 (2011); Brian A. Riddell, *The Ability of Successor Employers to Enforce Covenant Not to Compete*, *Capital Law Review*, 33 CAP. U. L. REV. 499 (2004); Kelly A. Schoening & Kelli A. Kleisinger, *Off-Duty Privacy: How Far Can Employers Go?*, 37 N. KY. L. REV. (2010); Frank C. Woodside III & Margaret M. Maggio, *The Learned Intermediary Doctrine: Is it Eroding?*, 52-DEC FED. LAW. 28 (2005); James A. Comodeca et al., *Killing the Golden Goose by Evaluating Medical Care Through the Retroscope: Tort Reform from the Defense Perspective*, 31 U. DAYTON L. REV. 207 (2006);

⁸ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

⁹ See, e.g., Richard A. Bales & Troy Daniels, *Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII Retaliation Cases*, 44 GONZ. L. REV. (2009); Stephen F. Befort & Alison Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Anti-Discrimination Statutes*, 60 S. C. L. REV. 383 (2009).

¹⁰ See Tracey E. George & Chris Guthrie, *Joining Forces: The Role of Collaboration in the Development of Legal Thought*, 52 J. LEGAL EDUC. 559, 579 (2002) (asserting that collaborative legal scholarship, including faculty-student collaborations, “hold the promise of producing better scholarship”).

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the same time giving law reviews assurance that the articles have been thoroughly vetted for quality.

Finally, and importantly, co-authored articles give credit where credit is due. Faculty members sometimes appropriate student written work or fail to acknowledge student contributions to faculty publications.¹¹ By candidly identifying student co-authors in appropriate circumstances, collaborating faculty serve the interests of both law schools and the legal profession in rewarding hard work and promoting professionalism.

Potential Speed Bumps

Before agreeing to co-author a law review article with a student, a law professor should consider strategies for avoiding a handful of potential minefields. First, the professor should realize that co-authored articles reflect upon the professor's reputation just as articles that are authored individually. A professor should not offer to co-author an article unless the professor is willing and able to ensure that the article is a high-quality product.

Second, and related, there is the problem that we will term “premature collaboration.” For example, one of the authors of this article once authorized a co-author arrangement with one of his students based upon excellent in-class performance, but without a draft of a paper in hand. We have also had the experience of realizing too late that a student paper needed substantial revisions before it was ready for prime time. In both situations, it ultimately fell to the professor to spend considerable time assuming the lead author role. A more thorough vetting of an actual draft may either have steered the professor away from offering to co-author either of these particular articles, or at least would have identified the problems early enough for the students to have been able to address them without involving so much of the professor's time.

Third, the professor must be prepared for students to approach him or her with requests to co-author articles. This is not necessarily a bad thing—most students interested in co-authoring know that writing a publishable article is much more work than writing a run-of-the-mill student paper, and these students are a pleasure to have in class and their papers are a joy to read. However, when the situation warrants, the professor must be willing to tell a student that her paper is not yet ready for prime time. Similarly, the professor should think ahead about how he will react when asked by a student to co-author a paper that is solid analytically but in which the professor disagrees with the thesis.

Fourth, the professor should be willing to communicate clearly with the student regarding their respective roles in the project, while at the same time giving an appropriate degree of deference to the student as a partner rather than a subordinate. Will the professor function primarily as an editor? Will the professor be responsible for writing one or more sections of the paper from scratch? How will the student and professor coordinate (a) editing the article prior to submitting it for publication, (b) submitting the article for publication, and (c) editing the article after it has been accepted for publication? Whose name will go first when the article is published? One of the authors of this essay always puts the student's name first, while the other varies the order depending upon the respective contributions of each to the finished product. There's no one-size-fits-all answer to these issues—but it is best to discuss them with the student ahead of time, ideally when the parties first discuss the possibility of joint authorship.

Conclusion

Co-authoring law review articles with students offers individual benefits for both the student and the faculty member, and institutional benefits for the academy and the practicing bar. Based on our experience, we strongly endorse this faculty-student collaboration. But, faculty participants must be proactive in structuring the collaboration to ensure the best outcome for all concerned.

¹¹ See, e.g., Bill L. Williamson, *(Ab)using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 ARIZ. ST. L.J. 1029, 1048 (1994) (maintaining that “the misappropriation of student research is one of the dirty little secrets of American academic life”).