

Maurice A. Deane School of Law at Hofstra University

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J. Scott Colesanti

Maurice A. Deane School of Law at Hofstra University

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Chapter X

The Law School Note: Having a Story to Tell (Instead of Having to Tell a Story)

Chapter Objectives:

- Identification of a Proper Note Topic
- Organization of a Note/Scholarly Piece
- Review of Fundamental and Universal Tools
- Employing Deepened Analysis

Substantive Takeaways:

- Online “Crowdfunding” as Capital Formation
 - Executive Orders and Labor Law Disputes
 - Elder Law and Related Penal Code Sections
-

I. Background

I am often approached by students wishing to be published by law school journals and thus requiring faculty supervision of the process. Further, many young attorneys enhance their careers by co-publishing scholarly articles with lawyers at their first employer, a noteworthy opportunity made possible only by prior experience in organizing ideas into a product comprised of lengthy legal commentary. Whenever I advise the student author on that first piece of legal scholarship, I urge adherence to a short checklist:

- Find your spark.
- Diligently learn the subject area.

- Follow a standard, industry outline
- Write until a solution comes to you.
- Follow your heart. And your outline.

Students normally object to such a form definite, parroting a list of questions such as:

Aren't I setting myself up as an expert?

Won't I be going out on a limb?

Will I get preempted along the way?

The answer to all of these questions is a resounding “Yes.” You are most definitely defining yourself as an expert; if not, the Note is not worth reading (much less publishing). And you are most definitely risking opposition to your theme. But that is true of every piece of Legal Writing you shall ever produce.

The third question raises a specter that is equally disposed of but likely more tangible. All students encounter “preemption checks” by their journal editors, and some will face that ugly possibility that another law student in a distant locale has been pursuing the same research. It is the position of this book that all Note topics overlap a bit with existing research but are ultimately salvageable through adjustment of the working premise, a practice common to all scholarship that will be reinforced later in the Chapter.

All topics being fair game, and all Note authors being a tad egocentric, the process remains one of creativity, hard work, and persistence. In other words, find your spark, diligently learn your subject area, and write until a solution comes to you.

II. Finding the Spark

If Hollywood can posit that everyone has a screenplay inside, surely each member of the vastly educated ranks of law school can summon a meritorious notion. Often, a valid contribution comes from the most instinctive and basic of everyday questions. Why was the city council's ban on sugary drinks struck down by the appellate court? Why did the President say Congress is to blame for the immigration stalemate? What exactly is the process by which the Supreme Court grants certiorari?

Follow your hunches rather than conclude that valid Note ideas fall only on the lucky. Commonplace questions lead to learned solutions. Surely, after a

year of varied and demanding law school courses, some thorny issues have clung to you. The challenge, therefore, lies not in finding worthy pursuits, but in linking them to areas of productive research.

Such a linking is done by lawyers and law firms every day. Clients inquiring about an IRS case are directed to the tax department. Relatives who have lost their driving licenses are put in touch with a criminal court litigator. A songwriter who seeks to know the effect of a Library of Congress copyright is forwarded to the firm's intellectual property guru.

Closely related is the law student's search for an area in which to ground a budding inquiry. The aforementioned city council ban on sugary drinks connotes administrative law (albeit on a localized level). The immigration debate—of this or any age—speaks to the legality of the President's executive order authority as defined by/hinted at in Article II of the Constitution. Even a question as amorphous as locating the legal authority for the Supreme Court's cert process is readily tied to a concrete source.¹ Indeed, with the “open courthouse” American common law system, it would be quite difficult to locate a topic that does *not* link with an area replete with both primary and secondary authority.

The quest for a successful Note next asks for a crystallized working premise. By the beginning of second year, students recognize that topics are like fireflies on an August night: Easy to surround but never quite sparkling when you want them to. That process of fine tuning your notion can only be effectuated by first becoming conversant with the accompanying body of law.

III. Diligently Learn the Subject Matter

Once comforted that you have a notion worth pursuing, a formal organizational outline serves as a prod for your own education on the topic. Someone once said that all popular films follow one of 36 plots. Further, experts on screenplays advise that every successful movie adheres to a pattern of acts, set off by three “plot points.” Whether you agree with these blanket statements or not, the fact remains that there is a great deal of structure behind any lengthy work.

1. The quick Internet search of “Supreme Court cert procedures” yields the URL <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (“The Supreme Court has its own set of rules ...”).

And a Note represents your lengthiest Legal Writing to date. An outline is no longer a strong suggestion—it is the required starting point. The typical Note outline proceeds along the following five parts:

A. Introduction Section

The Introduction requires a working title that makes the Note stand apart. Selective editors truly enjoy a departure from classic rhetoric. I have titled my own pieces with inspiration from a song from a Broadway show, a quote from Mark Twain, and a country western movie. Such unconventional titles provide an allure to your Note that is difficult to quantify (and best left to your journal editor to fully explain). Separately, the Introduction normally houses the terse listing of each subsequent section within a Note, a useful roadmap readily evidenced within any sample Note you choose to read.

More importantly, the Introduction needs to point out the harm occasioned by the status quo—whether that status quo be attributable to a statute, a case decision, a regulation, or simple inaction. My years as a litigator taught me that every case requires a victim, for few triers of fact care to point the finger of blame for purely technical violations. Likewise, scholarship requires the identification of somebody in peril. Thus, before traveling too far down the road of writing a Note, ask yourself, “Will people care about this problem?” Life is full of logical inconsistencies and human foibles; effective scholarship clamors that a specifically harmful inconsistency needs to be immediately addressed.

In this regard, the example provided by journalism is of great assistance. Note how the newspapers wrap stories around people, and introduce such stories with a call for reform. Few people would read an article titled “Price Gouging Statutes Repose Too Much Discretion with the Attorney General.” However, many would find their attention provoked by “Attorney General to Investigate \$5 Gas Sales as Price Gouging.” Likewise, a Note needs to (concretely) reveal someone harmed by the status quo.² Evaluate the two examples below:

WEAK:

THE AMERICAN ANTI-TRUST LAWS:
WHY CONGRESS MAY NEED TO REFORM

2. Many students seek to alter the status quo via their scholarship. However, there is nothing wrong with using the structure and tools described within this Chapter as a means of *preserving* the status quo to prevent harm.

BETTER:

THE SHERMAN ANTI-TRUST ACT OF 1890 AND THE
\$5 GALLON OF GAS: THE CALL FOR CHANGE

The second example clearly entices and informs in superior fashion. How a law from 1890 can be blamed for skyrocketing fuel costs in 2015 is a legitimate question, to be answered by the subsequent *Background* section within your Note.

B. Background Section

The Background section is often the easiest to both plan and write: It serves primarily as a recap of the current law. Indeed, the biggest obstacle to completion of this section will be knowing when to *stop* providing background.

Another pitfall to be avoided when writing the Background section is the employment of subjectivity. Recall that when learning to draft an ideal Rule (Chapters I and II), you were cautioned against adding subjective commentary. Likewise, remain neutral when providing the status quo. Your Note will afford you plenty of time later on to editorialize. Note the differences between these two examples, both dealing with the problems caused by billions of dollars presently being donated to online entrepreneurs via “Crowdfunding”:

WEAK:

State Crowdfunding statutes, passed by nearly 25 states in a matter of months, ironically cite section 3(a)(11) of the Securities Act of 1933, an aged provision known more for its disuse.

BETTER:

Many of the states that have passed Crowdfunding statutes have cited section 3(a)(11) of the Securities Act of 1933. That statutory provision was first interpreted in 1961; in recent years, the Securities and Exchange Commission has refused requests for a formal re-interpretation of its 1961 ruling.

The second passage still succeeds in conveying the author’s ultimate opinion (that existing law is outdated). But the second passage maintains an air of deference and formality more aligned with what the “academic academy” labels scholarship; stated otherwise, the second author is more likely to generate credibility.

The first passage identifies three potential culprits: A rush to legislation, rampant State defiance of federal regulation, and a dated federal standard. Such a shotgun blast slows the development of the Note. Thus, a lapse into

subjectivity—while feeling good—not only erodes credibility, but also blurs the focus on the proper Issue. And the Issue section drives the scholarship.

C. Issue Section

The Issue poses the specific problem to be addressed by the Note. It must always be foremost in the Writer's mind, although its precise wording may be worth postponing until other sections have crystallized.

The most ready way to identify the key Issue is to focus your Note on one of three ills: a) inadequate statutes, b) improper enforcement of existing statutes, or c) inconsistent judicial decisions involving those statutes. By focusing on the biggest of possible problems, you arrive at the clearest statement of the Issue.

For example, the Federal Sentencing Guidelines can be said to have set penalties for white collar crimes too high. Conversely, the Department of Justice can be said to have too often utilized the high end of the guidelines in its sentencing requests. Moreover, judges may be the cause of the alarming sentences, as the data may indicate that white collar crimes tend to draw stiffer penalties in more populated regions of the country. Any one of these possible themes is acceptable; the use of three themes allocates blame to all (and thus, ultimately, to none).

D. Resolution Section

Closely related to a specific identification of the problem is the identification of the cure. The Resolution section is where the author earns his/her praise, for lawyers are expected to pose a remedy. Ask the Legal Reader to join you in amending the statute or urging a case's reversal. But do not stop there: Provide the actual statutory language that needs to be included in an amendment, or expressly state what the outcome of the test case needed to be.

This task is universally resisted by young Writers, who feel that they lack the experience to cure an ill (and have grown accustomed to learning Issues from collegiate courses that do not always require an exact solution to a discovered dilemma). But you are already an expert on the topic, if for no other reason that few lawyers have the time to personally research fine points at great length. Recognize also that, while preparing your Note during the customary four–six month process, there is nothing wrong with saving the proposed solution for the last section to be written.

E. Conclusion Section

Finally, the Conclusion offers the opportunity to sum up, reiterate the theme, and leave the Reader with some food for thought. It is also a great place to come back to that Broadway show lyric or novelist quote that started the piece.

At this point, I normally suggest to the student that he/she discuss his Note topic with others. While I would not always endorse a budding author's advertising an idea on the Internet (and thus universally sharing a unique idea), each student surely has a partner or law school colleague who can act as a sounding board. Often, merely the act of voicing the issue aloud—like a screenwriter's "pitch"—can serve to streamline a message and eliminate noise (i.e., those metaphors and anecdotes that, while enjoyable to write, do little to advance the theme).

To test your familiarity with the 5-point Note outline, try the Exercise appearing below.

Exercise One: Creating an Outline for a Note

Please read the three introductory paragraphs below in preparation for stating a theme via an outline. The topic is executive power under the Constitution.

In 2015, President Barack Obama issued several Immigration Accountability Executive Actions. In the main, these Actions would shift resources to the southern U.S. border, limit deportations to felons (and not families), and encourage greater background checks on aliens present within the geographical boundaries of the United States.

In 1981, President Ronald Reagan reacted to a widespread strike by over 11,000 air-traffic controllers by terminating their employment. President Reagan relied upon a prior Executive Order greatly limiting the controllers' right to strike.

In 1952, the Supreme Court struck down President Truman's seizure of the steel mills via Executive Order 10340. In a decision conveyed via five differing opinions, the Court effectively ruled that the President had no inherent wartime power to seize property absent express Constitutional or Congressional authorization. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Using these examples, write five topic sentences that would guide you through a Note similarly evaluating the legality of the most recent White House pronouncements. Be sure to weigh factors such as presence of foreign conflict, Congressional inaction, or urgent circumstances (i.e., the same factors that steered prior analyses of swift executive action). Note also that, in the wake of

mass shootings in 2015, some commentators have urged use of the Executive Order to legislate gun control of automatic weapons.

IV. Writing Until an Answer Comes

Armed now with the requisite structure, there is no excuse for not writing. Employ full sentences, paragraphs, and sections in an early attempt at a piece in full. Realize that your initial goal is not to write a 40-page Note, but to author three sections (i.e., Background, Issue, Resolution), each approximately ten–twelve pages long. Sections 1 and 5 (the “Introduction” and “Conclusion,” respectively) will ultimately write themselves.

Remember throughout the process that a Note is expected to engage in deep analysis; as one maxim states it, Notes “go an inch wide but a mile deep.” The two chief ways to thus elevate your writing are to effectively describe precedent cases and to accurately summarize statutes. Meaningful statutory and case analysis is discussed in Chapter IV. Two points within that Chapter require reiteration.

First, recognize that even after diligently dissecting the verbiage of a codified law, accurate description may prove evasive unless you are familiar with the broader context. For example, imagine that you are writing on the disparate penalties among the States for financial frauds against senior citizens. The following statutory provision, defining “economic crime” within Ohio’s elder protection law, thus serves a key function in your Note’s “Background” section:

Economic crime is hereby defined as those illegal acts which are characterized by deceit, concealment or violation of trust and which are not dependent upon the application or threat of physical force or violence.

At first read, the definition appears to be of great utility. It evidences both a concise definition and also the legislature’s concerted attention to the issue.

But upon a closer read, the definition—by itself—tells the reader very little. How do we define “deceit”? Which relationships may serve as a basis for a “violation of trust”? And can a crafty villain simply incorporate violence into the equation to remove himself from the definition? Finally, since the predicate acts must be illegal to begin with, the provision is actually reliant upon another statute (e.g., the Penal Code of Ohio). Thus, a thorough understanding of this provision by a Note author warrants a full read of the subject statute as well as a review of the implied/referenced companion statutes. Only after such diligence can the Legal Writer ensure an accurate analysis.

Stated otherwise, even when you feel comfortable with a statute, do not stop your reading. Explore commentary; read the statute it replaced. Review the examples below for illustration of the more comprehensive approach:

WEAK:

In Ohio, a concise passage within the Elder Protection Law defines “economic crimes” against seniors as illegal acts “characterized by deceit, concealment or violation of trust” in the absence of physical violence.

BETTER:

In Ohio, a definition within the Elder Protection Law of 2011 informs that covered “economic crime” is “characterized by deceit, concealment or violation of trust.” Pre-existing case law defines the key terms within that definition. Contemporaneously, the Ohio Revised Code covers financial crimes resulting in physical manifestations of harm, while the traditional Penal Code covers threats or application of violence.

The second Chapter IV point worthy of reiteration concerns case summaries. Such tools, even if consistently progressing from to “accident/crime to check-book/jail time,” may bury the Reader with details. To ease the reading, only offer a case for one of two clearly stated reasons: in explaining the status quo, or in support of an alternative to the status quo. Such clarification may require the addition of a second topic sentence in each relevant paragraph.

Witness the relative ease of use of the following two passages:

WEAK:

The case law on piercing the veil of sole proprietorships is quite varied. A 2001 Georgia case concerned obligations under an insurance policy where the covered party was a sole proprietor. *Miller v. Harco Nat. Insur. Co.*, 274 Ga. 387 (S. Ct. Ga. 2001). The Georgia high court trivialized a trade name as nothing but an “alter ego” for the policy holder, thus finding coverage. However, a 1994 Montana case shielded the sole proprietor debtor because the statute did not expressly indicate that owners of unregistered businesses could be potentially liable on a personal level. *Jerry Martin & Assoc., Inc. v. Don’s Westland Bulk*, 884 P.2d 795 (S. Ct. Mt. 1994). Thus, change is needed.

BETTER:

The case law on piercing the veil of sole proprietorships is quite varied. State benches have exhibited a variety of means at reach-

ing a just end. These means often center on a stated or unstated reliance upon a finding of an “alter ego.”

An example of the stated approach comes from a 2001 Georgia case which concerned obligations under an insurance policy where the covered party was a sole proprietor. *Miller v. Harco Nat. Insur. Co.*, 274 Ga. 387 (S. Ct. Ga. 2001). The Georgia high court trivialized a trade name as nothing but an “alter ego” for the policy holder, thus finding coverage.

An example of the unstated reliance on a finding of an alter ego is the *Martin* case. *Jerry Martin & Assoc., Inc. v. Don's Westland Bulk*, 884 P.2d 795 (S. Ct. Mt. 1994). In that 1994 Montana case, the sole proprietor debtor was shielded from the creditor because the statute did not expressly indicate that owners of unregistered businesses could be potentially liable on a personal level. Both approaches belie the certainty that businesses and business law consistently seek. Thus, change is needed.

The first example relies heavily on transitional words (e.g., “however”) to keep the Reader engaged. Such words, while very helpful when initially learning coherence, may not be up to the task when Writing gets more complicated (as in a Note).

The second example requires more time—both in analysis and its presentation. But its benefits are many. First, the diligent Reader feels educated in learning two judicial approaches. Second, supporters of both approaches remain engaged, as the purpose of the passages is repeatedly made clear. Finally, the longer case summaries allow for the interruptive cite—a frequent occurrence in Notes—to be harmlessly placed at the end of the first sentence.

Recognize that even if a series of case summaries succeeds as consistently engaging the Legal Reader, an effective Note would nonetheless add a transitional paragraph after the summaries (e.g., “Thus, clearly existing law is not providing for consistency of approach ...”). Indeed, such transitions smooth out many of the disparate missions and sections of a Note, the individualized preparation of which is detailed below.

V. A Step-by-Step Example of the Note Process

This example recites the steps in this Chapter thus far while providing more concrete details.

Imagine that you are curious about the previously described 1981 decision by President Ronald Regan to fire over 11,000 air traffic con-

trollers. You have read varying opinions on the event, ranging from accolades for strong, central action to doubts over the legality of the move. A quick check on the Internet yields many examples of relevant secondary authority; your piercing scan of one such item directs you to Executive Order 11491. That White House pronouncement, decades before the firings, ostensibly outlawed the strike that the controllers threatened in 1981, thus paving the way for Reagan's drastic action. Alternatively, Order 11491 was outdated and/or taken out of context, rendering the 40th President's bold move beyond Constitutional authority.

Such a tangible determination is still weeks away. At this point, you now (happily) have some primary authority—albeit a bit generic and a good deal less dramatic than the actual 1981 firing (the footage of which appears on the Internet³). The first step is to attempt a title—perhaps something playing with an aviation theme, such as “THE DOOMED AIR TRAFFIC CONTROLLER STRIKE OF 1981 AND THE LIFT IT PROVIDED EXECUTIVE ORDERS.” Do not be shy here. The campier titles tend to please editors and Readers alike.

After you have a working title, create a rough outline. This structure would inform you of the research that awaits you, namely, the pinpointing of Constitutional provisions, the most famous examples of Executive Orders, and the commentary on both (e.g., your answer to Exercise One of this Chapter).

After familiarizing yourself with the empirical data, only then may you begin to investigate the limitations on executive orders, a political reality loosely grounded in our Constitution at Article II, section 1. With little effort you will learn of other bold moves by Presidents under the auspice of Executive Order authority—to wit, President Lincoln's suspension of habeas corpus in 1861 provides an interesting tale with which to evaluate the frequency and scope of this curious power of the Chief Executive. Now conversant with the relevant events, you are well on your way to outlining the “Background” section of your Note.

The next section, “Issue,” carves out a category from the “Background.” To wit, you will focus on when Presidents *not* faced with a war or a national labor problem perhaps exceed the Constitutional

3. See, e.g., *Reagan fires 11,359 air-traffic controllers*, available at <http://www.history.com/this-day-in-history/reagan-fires-11359-air-traffic-controllers>.

power bestowed upon them. Generally, your inspiration here harkens back to your reason for selecting the Note topic. More specifically, your research will seek a list of factors the Supreme Court has used in evaluating the necessity for the Executive Order action. The *Youngstown* case exhibited a direct judicial analysis of the President's bold actions—did other benches subsequently adhere to that approach? It is doubtful that all courts evaluating inherent Executive authority follow the exact same approach; such distinctions create your Issue.

Here is a good point to engage in a preemption check. If another student has published a Note examining this specific genre of executive power, examine the conclusion. Can you state the counter-analysis? Perhaps you can salvage the originality of your idea by focusing on one of the tangential approaches to evaluating Executive Orders (e.g., by centering on one of the numerous concurring decisions within the Supreme Court's *Youngstown* decision).

Next, you will offer a tentative answer to the Issue in your "Resolution" section. Students falter at this point when they stick too closely to their initial themes; remember, you ultimately will either approve of Executive Order 11491 (and call for further use of this form of action) or disapprove of it (and call for limitations, likely set by Congress, the courts, or the citizens themselves). Either way, the Reader will need to be able to picture your solution. Draft actual text; be a legislator here.

Overall, while working on sections 2–4 (i.e., Background-Issue-Resolution), you will revise your title, adjust your premise, and perhaps even delay drafting the exact language of the Issue (or Resolution). Such delay is fine, as is a change of heart. Perhaps you will start to opine that President Reagan was well within his authority in firing the air traffic controllers. Perhaps you will not. The ultimate opinion matters less than the depth of analysis and coherence of your Note.

Finally, you will sum up your Note in your "Conclusion" section. The Conclusion section amply provides room for closing thoughts and periodic updates (e.g., whether President Obama's immigration Executive Orders will ultimately be undercut by the federal courts). As a last step, you will adjust the roadmap within your "Introduction" section to accurately reflect what you have written.

As you can see, no section works in isolation, and your exact theme is subject to constant change (so save all drafts). The Note process should feel new and a bit uncomfortable, but the process gets exponentially easier each time it

is subsequently attempted. Most importantly, the methodology described herein will ensure that such work at perfecting your brand of scholarship is consistently productive.

To begin the process of subsequent attempts, below is an Exercise asking simply for the “Introduction” section of a Note:

Exercise Two: Writing an Introduction Section

To tie the Chapter’s lessons together, write out a full first section of a Note based upon the Executive Order debate described above. At this point, your position and depth of familiarity are secondary. Strive to create two meaningful paragraphs (of six–ten sentences) both clarifying your topic and the Note’s structure. Include a title, each section’s purpose, and a roadmap of the Note.

VI. Conclusion: Follow Your Heart

To be sure, completion of a law school Note is a long, arduous, frustrating process. Deadlines will seem impossible; insights will appear and then vanish unpredictably. But possibly no law school thrill compares with receiving word that your Note has been selected for publication by your Journal. Likewise, few job interview props shine more than a bound copy of your Note or Comment in response to a request for a Writing sample.

I have been fortunate enough to both advise a great many law student Notes during my years in teaching and witness a large number of these authors “get published.” One particular story stands out.

A few years ago, a student who had been in my year-long Legal Writing class shared with me her good fortune in being selected for publication. Her Note examined the effects of and solutions to an online company’s gathering of an incalculable number of books for digital reproduction. When I asked her how she had arrived at this topic, she said simply that, upon her learning of this unique commercial event, she had uncovered a law story that had to be told.

The student’s success continued to grow. Months later, a federal judge cited her work repeatedly in his decision in a case involving the very same dispute on which she had opined. Thus, before she had even graduated law school, the student’s research had helped shape the debate on a dynamic, crucial area of intellectual property. In short, the student was inspired by having a story to tell, instead of feeling overwhelmed at her Journal’s instruction to tell a story.

Students who recognize this distinction ultimately find the writing of a law school Note a most rewarding adventure. Half the battle is committing to telling of a Legal confrontation without ready remedy, and never questioning your revelation's worth. For if you believe that you are making a valid contribution to the storied world of "scholarship," the hard work shall always seem justified.

Find your spark. Diligently learn the subject area. Write—and rewrite—until a solution comes to you. And consistently follow your outline (and your heart).