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Crafting Comment Letters: Teach Policy, Develop Skills, and Shape Pending Regulation

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IDENTIFYING AND TEACHING NON-TRADITIONAL TRANSACTIONAL SKILLS

Nicole G. Iannarone &
Benjamin P. Edwards

*Crafting Comment Letters:
Teach Policy, Develop Skills,
and Shape Pending Regulation*

Kevin Conboy*

*Adding Marketing and Sales
Skills to the Law School
Curriculum*

CRAFTING COMMENT LETTERS: TEACH POLICY, DEVELOP SKILLS, AND SHAPE PENDING REGULATION

Nicole G. Iannarone¹
Benjamin P. Edwards²

INTRODUCTION

Increased student engagement with the regulatory process offers real benefits. Much of the law governing business activities emerges from regulatory agencies after a notice and comment process.³ Despite this, the public and many law school graduates may not appreciate the role administrative agencies play.⁴ Law schools increasingly focus on how to address this gap and emphasize regulatory process in the law school

* Editor's Note: Prof. Kevin Conboy's presentation *Adding Marketing and Sales Skills to the Law School Curriculum* is incorporated by reference to Kevin Conboy, *Inventory Less Sales Equals Scrap: Legal Education's Largest Lacuna*, 18 TENN. J. BUS. L. 81 (2016).

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³ See Richard J. Pierce, Jr., *The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 185–87 (1996) (describing growth of agency rulemaking resulting from increased size of federal government).

⁴ See Cynthia R. Farina et. al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 417 (2011) (“[E]ven very intelligent college graduates are remarkably clueless about administrative agencies—and they find the rulemaking process a mystery that many only dimly apprehend even after taking the course.”).

curriculum.⁵ At the same time, the academy is embracing experiential education with requirements that law schools offer courses that expose students to real-world practice through simulations or live-client representation.⁶ Law schools are developing learning outcomes for legal education and developing plans to assess their teaching.⁷ The practicing bar welcomes this “practice-ready” focus on the regulatory state and experiential education.⁸

In our experience, student participation in the regulatory process offers accelerated skill development and fosters a more nuanced understanding of administrative law. We each began our full time teaching in the clinical arena, creating grant-funded securities arbitration clinics.⁹ After considering both

⁵ See Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 617–19 (2007) (explaining that while at the time “Langdell developed his curriculum in the 1870s and early 1880s, his assumption that American law consisted essentially of common law was tenable,” law schools must adapt to the emergence of the regulatory state); Kevin M. Stack, *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, 65 J. LEGAL EDUC. 28, 44 (2015) (advocating for first year administrative law courses to “help reduce the gap between law teaching and law in action” and provide “direct exposure to the primary sources of law in the administrative state, sources beyond the judicial opinion”); Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation & Administrative Law in the Law School Curriculum*, 65 J. LEGAL EDUC. 121, 126 (2015) (twenty-three of the law schools surveyed require regulatory state or legislation and regulation courses).

⁶ ABA Standard 303(a)(3) states that law schools shall require “each student to complete at least . . . one or more experiential course(s) totaling at least six credit hours.” American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools 2015–2016*, Standard 303(a), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_3.authcheckdam.pdf.

⁷ American Bar Association, *Chapter 3: Program of Legal Education at Standard 302*, Standards 302 & 315, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_3.authcheckdam.pdf.

⁸ See American Bar Association, *Report and Recommendations, American Bar Association Task Force on the Future of Legal Education* 1, 3 (2014) (“The balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further toward developing the competencies and professionalism required of people who will deliver services to clients.”), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf; see also Paul Radvany, *Preparing Law Students to Become Litigators in the New Legal Landscape*, 33 REV. LITIG. 881, 881 (2014) (“Employers increasingly want to hire students who are ready to practice.”); Peter A. Joy, *Symposium: Navigating the Practice of Law in the Wake of Ethics 20/20 – Globalization, New Technologies, and What it Means to be a Lawyer in These Uncertain Times: Law Schools and the Legal Profession: A Way Forward*, 47 AKRON L. REV. 177, 186–93 (2014) (detailing law school experiential education requirements bar regulators are considering requiring prior to admission to practice).

⁹ The FINRA Investor Education Foundation created an Investor Advocacy Clinic Program in 2009 “to provide start-up funding and assistance to law schools to establish investor advocacy clinics in high-need areas.” FINRA, *Investor Advocacy Clinic Program*, <http://www.finrafoundation.org/grants/advocacy/> (last visited Oct. 1, 2016). The last two of eight three-year start up grants provided under this program were awarded in 2012 to the authors’ then institutions, Georgia State University College of Law and Michigan State University College of Law. FINRA, *Investor Advocacy Clinic Program*, <http://www.finrafoundation.org/grants/awarded/advocacy/index.html> (last visited Oct. 1, 2016). Professor Edwards started the

pedagogical and practical considerations, we independently concluded that including rulemaking processes in our courses would enrich students' experience. Though only one of us currently teaches in a securities arbitration clinic, our initial thoughts and subsequent experiences in teaching comment letters led us to the same conclusion: the commenting process has so many benefits and strong outcomes that it will continue to be part of our respective teaching pedagogies in both clinical and doctrinal courses.

This essay unpacks the regulatory comment letter process and how to incorporate it into the law school curriculum. Participating in live rulemaking offers unique opportunities for students including mastering the substantive area of law, developing critical thinking skills, and developing their professional identities. We will describe our own experiences in incorporating students into the regulatory rulemaking process. Because of our focus on securities law, our students review and comment on proposed actions by securities regulators—the Financial Industry Regulatory Authority (FINRA) and Securities and Exchange Commission (SEC).¹⁰ After providing an overview of the pedagogical and practical rationale for incorporating the securities rulemaking process into our courses, we describe how we teach the process to students. We conclude with a discussion of the outcomes and benefits that we and our students experienced after adding the live rulemaking process to our pedagogical toolkits.

Although this essay describes our experiences in the live rulemaking arena through a securities law lens, the pedagogical and practical outcomes are not limited to that substantive area of the law. Instead, many, if not all, of the benefits our students and programs have recognized can be translated to other courses with an administrative law component. Whether involving live rulemaking or a simulated problem,¹¹ it is our aim to provide a framework for

Michigan State Investor Advocacy Clinic and Professor Iannarone started the Georgia State Investor Advocacy Clinic. Neither clinic is currently receiving any grant funding from the FINRA Foundation. Although no further grants will be provided to fund similar clinics or sustain existing clinics, investor advocates routinely argue for continued funding to ensure that regular retail investors have access to legal counsel and that the existing clinics continue to thrive. See generally Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. CONFLICT RESOL. 597 (2014).

¹⁰ FINRA is a self-regulatory organization of broker-dealer firms. See Andrew F. Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV. 101, 103-05 (2014) (describing FINRA's history).

¹¹ While live rulemaking offers students the opportunity to step into a role as a lawyer while still in law school and witness, in real time, how the agency responds, simulated rulemaking has a place within the law school curriculum and may have its own benefits particularly in large enrollment courses or within the first-year curriculum. Practical benefits of simulated rulemaking include the ability to specifically tailor the assignment to the material being covered, ensuring that the timing matches the pace of the class, ease of assessment, and effective use of a professor's

including rulemaking in any course addressing the administrative state.

I. INITIAL PEDAGOGICAL AND PRACTICAL RATIONALE FOR INCORPORATING COMMENT PROCESSES INTO SECURITIES COURSES

Pedagogical and practical considerations prompted us to incorporate the comment process into our courses. On the pedagogical side, we each entered academia after significant practice involving securities or complex litigation. This background informs our teaching philosophies and gives us a perspective from which to infuse experiential opportunities into our courses. We noticed that while there is an increasing supply of simulated experiential opportunities in corporate and securities law, the area lacks live experiential opportunities.¹² Participation in the securities rulemaking process helps fill this void while affording students benefits that cannot be duplicated in a simulation.¹³ Comment letters also provide a concrete opportunity to show how practicing lawyers engage with policy development and do not simply take the law as a given. The comment letter process would allow us to infuse drafting skills into our courses and teach students about persuasion in a non-adversarial forum.

Finally, we recognized that including comment letters in our teaching would permit students additional opportunities to develop their professional identities as lawyers.¹⁴ Crafting a comment letter causes them to think about

limited time by creating and preparing to teach a simulation for use more than once.

¹² See J. Samuel Tenenbaum & Thomas H. Morsch, *Guidelines for Establishing a Law School Investor Advocacy Clinic*, Foreword (Dec. 2013), <http://www.finrafoundation.org/web/groups/foundation/@foundation/documents/foundation/p118734.pdf> (stating that securities arbitration clinic “fills a gap for schools with no separate course in securities law, and provides an experiential component for schools already offering courses in that area of law”).

Moreover, securities arbitration clinics and the regulatory comment process fill another void in providing experiential opportunities “to business-oriented students who have shied away from more traditional law school clinics because the subject matter (e.g., criminal law, poverty law, street law) is not the kind of law they plan to practice.” Gross, *supra* note 7, at 611.

¹³ See Radvany, *supra* note 6, at 889–90 (listing benefits provided by live client representation over simulations).

¹⁴ Professional identity formation is the process through which a law student moves from novice learner to a professional lawyer able to prioritize her client’s interests above her own. See Neil Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?*, THE BAR EXAMINER (Sept. 2014), at 13 (“professional formation encompasses an *internalized moral core* characterized by a *deep responsibility or devotion to others*, particularly the client, and some *restraint on self-interest in carrying out this responsibility*”) (citing Neil Hamilton & Verna Monson, *Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 326 (2011)); Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 201-02 (2012) (“Professional identity refers to the way that a lawyer integrates . . . personal and professional values. A lawyer with an ethical professional identity is able to exercise practical wisdom and to live a life of satisfaction and well-being.”); Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 663 (2009) (describing professional identity formation

the voices they project and how they will approach their work as professionals.

In addition to these pedagogical considerations, practical considerations weighed in favor of including comment letters in our curriculum. First and foremost, as any newly established law firm must do, we needed to build awareness and reputation to attract clients. Potential clients and referral sources will rarely engage a lawyer or firm simply because they offer free services. Instead, they rely upon the reputation of the firm and look for concrete evidence of expertise and quality in the practice area. Engaging in the rulemaking process would allow us to demonstrate competence and interact with the attorneys most active in the practice area. Engagement with the relevant bar is an especially important part of developing the law firm because most practicing attorneys receive their cases and clients from other lawyers.¹⁵

Participation in the rulemaking process may also help to maintain professional reputation. Engagement on a sustained level allows a lawyer or law firm to have a seat at the table and be sought out as an expert in the field; this exposes them to not only lawyers whose practices are aligned with their own, but also with potential adversaries and even the regulators themselves.¹⁶

In addition, we recognized that the securities rulemaking and comment letter practice may be especially beneficial in the clinical context.¹⁷ Through the generous guidance of our securities arbitration clinic colleagues, we learned that the commenting process had been part of many of their clinics.¹⁸ We knew that our caseload would fluctuate in a countercyclical fashion from the market because securities clinics receive fewer inquiries in bull markets.¹⁹ The ever-

course as “seek[ing] to equip students with the information they need to choose what kind of lawyer they will become and inspire them to make choices that will enable them [to best] serve their clients, fulfill their public responsibilities, and find deep meaning in their work.”)

¹⁵ PAMELA BUSY PIERSON, *THE BUSINESS OF BEING A LAWYER* 270 (2014) (“Many, if not most, referrals of clients will come from other attorneys.”).

¹⁶ See e.g., *Partner Profile for Allison L. Land*, SKADDEN, ARPS, SLATE MEAGHER & FLOM, <https://www.skadden.com/professionals/allison-l-land> (last visited Oct. 1, 2016) (“Ms. Land serves on the Council of the Delaware Corporation Law Section of the Delaware State Bar Association and . . . the Alternative Entity subcommittee of the Corporation Law Council, which is responsible for reviewing and recommending revisions to the Delaware General Corporation Law . . .”).

¹⁷ The robust and ever evolving nature of the securities regulatory framework may even make it possible for instructors to build an entire policy and drafting course around the rulemaking process. Such a focus on drafting and rulemaking might be an important contribution to the law school curriculum, but we instead teach the process as an addition to the substantive focus of our respective courses.

¹⁸ See e.g., CORNELL LAW SCHOOL, *Securities Law Clinic*, <http://www.lawschool.cornell.edu/Clinical-Programs/securities-law-clinic/> (last visited Oct. 1, 2016) (“Students have the opportunity to research and write on legal topics of importance to investors, including regulatory comment letters, amicus briefs and research articles.”).

¹⁹ See Gross, *supra* note 7, at 616 (describing inverse relationship between stock market

evolving rulemaking process continues in all markets, allowing students substantive legal work even when there is a lighter caseload. Comment letter assignments may also balance uneven caseloads when matters close unpredictably and ensure that all students across the clinic have substantive experiences.²⁰ In addition, adding comment letters to students' caseloads allows them to experience the challenges of real-life lawyering where caseloads and responsibilities are neither static nor predictable. This addition drives students to develop techniques for balancing their obligations to all clients while under pressure. Finally, a comment letter practice allows students to showcase their actual legal work to potential employers as writing samples without the concerns about violating client confidentiality.²¹

II. IDENTIFYING IDEAL COMMENTING OPPORTUNITIES

The adaptive regulatory state continually adjusts existing regulations to respond to constantly-changing circumstances. While administrative rules frequently change, new rule proposals march through a regimented process, providing clear windows for identifying comment-worthy proposals and crafting responses. Because our students have engaged with rulemaking in the securities sphere, we are most familiar with the ways that securities regulators release information.

A. FINRA and SEC Rulemaking Process

The Administrative Procedure Act's (APA) rulemaking process proceeds in a relatively straightforward manner.²² The APA requires agencies to notify the public about a proposed rule by publishing a notice in the Federal Register. The notice must include the time and place of any proceeding about any proposed rules to give interested persons an opportunity to review the notice and submit their views.²³ The agency may then issue its rule "[a]fter consideration of the relevant matter presented" along with "a concise general statement of [the rule's] basis and purpose."²⁴

Comment letters respond to these rulemaking notices and can have significant impacts. For example, when the Department of Labor recently

performance and number of potential clients contacting a securities arbitration clinic and addition of policy work in periods of less cases).

²⁰ While wonderful for clients, a sudden, generous settlement may deprive students of opportunities to gain substantive securities law experience.

²¹ See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2016) (all information relating to the representation of a client is confidential unless the client gives informed consent for disclosure with other exceptions that are not applicable here).

²² See Administrative Procedure Act, 5 U.S.C. § 553 (2016).

²³ *Id.* at (b).

²⁴ *Id.* at (c).

proposed a rule to impose fiduciary obligations on persons giving personalized financial advice in connection with retirement accounts, over three thousand comments were submitted.²⁵ In response to considerations raised by these comments, the Department of Labor significantly altered the final rule.²⁶

While the APA governs much of the notice-and-comment processes for administrative agencies, not every agency welcomes and engages with public comments in the same way. We suspect that many agencies would respond well to comments generated by law schools and law students,²⁷ and we can confirm that the securities regulatory bodies welcome student-authored comments.²⁸ In addition, many agencies offer opportunities for comment and engagement beyond proposed rules, offering additional opportunities for student engagement.²⁹

FINRA, a self-regulatory organization overseen by the SEC, operates

²⁵ See Employee Benefits Security Administration, *Conflict of Interest Proposed Rule*, UNITED STATES DEPT. OF LABOR, <https://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html> (last visited Oct. 1, 2016).

²⁶ See *Chart Illustrating Changes from Department of Labor's 2015 Conflict of Interest Proposal to Final*, UNITED STATES DEPT. OF LABOR, <https://www.dol.gov/ebsa/pdf/conflict-of-interest-chart.pdf> (last visited Oct. 1, 2016).

²⁷ Information for commenting on rulemaking by numerous federal agencies, from the American Battle Monuments Commission to the Wage and Hour Division, are available at www.regulations.gov.

²⁸ See FINRA, *The "What to Expect" Webcast Series: Rulemaking Process*, http://www.finra.org/sites/default/files/Education/p038464_0.pdf at 3 (last visited Oct. 1, 2016) ("Some believe that once FINRA publishes a rule proposal for comment in a *Regulatory Notice*, the rule is essentially final. This is not the case . . . FINRA asks for comments that help identify or improve any problems that might exist in the proposal. This is the firm's opportunity to get involved in the rulemaking process and make their voice heard. And, there is a long history that shows rule proposals do, in fact, change as a result of such comments."); see also Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 435–59, 497–99 (2005) (finding substantial participation by lay people and public interest groups in three rulemakings and finding that the sophistication of the comments, rather than the identity of the commentator, determines whether a comment influences the agency's decision); *Public Comments Make a Difference*, REGULATIONS.GOV, https://www.regulations.gov/docs/FactSheet_Public_Comments_Make_a_Difference.pdf (last visited Oct. 1, 2016) ("Public participation matters. Democratic, legal, and management principles justify why public comments make a difference in regulatory policy. Public participation is an essential function of good governance. Participation enhances the quality of law and its realization through regulations (e.g. rules).")

Before adding a comment letter exercise to a course, instructors should investigate the target agency's actual practices. While the FINRA and SEC regulatory process is extremely transparent and regulators often comment on how helpful comment letters are within the process, inviting them from our programs and students, not every agency follows the same practice. In some agencies, it may be more fruitful to engage in a dialogue with the agency in the pre-drafting stage rather than after a proposal has been formally drafted and comments solicited.

²⁹ For example, the Food and Drug Administration solicits comments on guidance documents and has even requested public comment on a proposed term of art before crafting a rule. See 80 Fed. Reg. 69905 (Nov. 12, 2015) (requesting public comment on use of term "natural" in food labeling).

its rulemaking process much like traditional administrative agency rulemaking.³⁰ This process provides a relatively straightforward vehicle for introducing administrative rulemaking to the law school curriculum. FINRA's website contains multiple resources detailing the entirety of the rulemaking process from idea generation through final rule implementation.³¹ FINRA also maintains an up-to-date list of all pending rule proposals, linking to each pending and past proposal.³²

Rulemaking at FINRA begins with an idea. FINRA accepts input from all sources: firms, investors, FINRA staff, and the SEC.³³ Ideas are then researched, drafted, and vetted within FINRA before being submitted to the FINRA Board.³⁴ If the Board decides to move forward with a proposal, it may choose two routes: (1) publishing a Regulatory Notice or (2) filing the proposal directly with the SEC.³⁵ In either instance, comments are solicited from interested parties.³⁶

The difference between these routes is the amount of time and commentary solicited and how close the proposal is to final adoption. The typical process for proposed rules involves both processes to allow up to two opportunities for comments on the proposal. Rule proposals are most often first published in a Regulatory Notice with a comment period of one to two months.³⁷ Staff then determines whether, based upon the comments received, amendment is necessary. If changes are made to the proposal, it goes back to the FINRA Board in its revised form.³⁸ If no changes are made, it moves one step closer to adoption and is filed with the SEC where the proposal is published in the Federal Register. Unless the proposal is filed for immediate effectiveness, comments are typically accepted for 21 days.³⁹

Both processes provide students with meaningful opportunities to

³⁰ Whether FINRA qualifies as a government agency has been subject to some dispute. See Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 196 (2008) ("Although FINRA may not be a government entity, in all or virtually all of its activities, it can be viewed as exercising powers delegated to it by the SEC.").

³¹ See, e.g., FINRA, *FINRA Rulemaking Process*, www.finra.org/industry/finra-rulemaking-process (last visited Oct. 1, 2016); FINRA, *The "What to Expect" Webcast Series: Rulemaking Process*, http://www.finra.org/sites/default/files/Education/p038464_0.pdf (last visited Oct. 1, 2016).

³² See FINRA, *Rule Filings*, www.finra.org/industry/rule-filings (last visited Oct. 1, 2016).

³³ See FINRA, *FINRA Rulemaking Process*, www.finra.org/industry/finra-rulemaking-process (last visited Oct. 1, 2016).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* In some situations, rule proposals skip the Regulatory Notice process and proceed directly to filing with the SEC, though this is not the norm.

engage in the regulatory process. Whether filed at the Regulatory Notice or SEC levels, FINRA evaluates and considers every comment. It even publishes its response, leading to a particularly meaningful experience for students who can later see if and how FINRA responded to their comments. In addition to FINRA's response, every comment letter received on a particular proposal becomes part of the public record, with comments on proposed rules filed with the SEC published in the Federal Register alongside the proposals. Such publication helps students as they develop professional portfolios. Moreover, the iterative commenting process shows students how rules evolve and change and allows them to refine their commentary as a rule proposal progresses towards final adoption. Finally, the deadlines for comments in either process, whether two months or 21 days, challenge students without unduly stressing them or limiting their ability to present quality work. While such deadlines may feel like an eternity for practitioners, the commenting periods provide a manageable challenge for students juggling multiple responsibilities and developing their lawyering skills.

*B. Identifying Opportunities for Student Comment Letters
within the Securities Rulemaking Process*

In adding the rulemaking process to our courses, we experimented with different approaches to identify appropriate rule proposals for student comments. In some instances, we simply select and assign out commenting targets on our own. In the alternative, we may ask students to identify their own commenting opportunities after monitoring the subject area. Both approaches highlight important pedagogical aims: ensuring that our students are aware of the law's continual development and concretely introducing the ethical duty to maintain competence by understanding those changes in the law and how those changes impact differing constituents within the legal system.⁴⁰ Asking students to monitor the process supplements this ethical obligation by teaching students specifically how to monitor for changes in the law in one field, which is a skill they can translate to whatever area of law they ultimately practice.⁴¹

⁴⁰ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 at cmt. 8 (2016) ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice . . ."). As professors who also teach Professional Responsibility, injecting legal ethics into the doctrinal and experiential curriculum outside of the required professional responsibility course and in context is especially important to our pedagogical goals. See generally Deborah Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

⁴¹ FINRA's transparent rulemaking process makes students' experience investigating avenues for keeping abreast of proposed changes to the regulatory landscape straightforward so long as a student is willing to spend a few minutes of time investigating sources of information. FINRA

Automated updates make the monitoring process substantially easier. While one could regularly check each of these sites for updates, subscribing to email alerts from FINRA about FINRA Board of Governors meetings and rule proposals simplifies the process. FINRA's email subscription service allows interested persons to request email updates on all areas of FINRA's operations, from regulation to arbitration to investing.⁴² We subscribe to these updates to keep ourselves knowledgeable about FINRA's rulemaking priorities and to serve as a backstop in the event that students monitoring the area fail to identify a commenting opportunity.⁴³

Membership in industry groups or bar associations may also aid the monitoring process. For example, we joined the Public Investors Arbitration Bar Association (PIABA) and its Self-Regulatory Organization (SRO) Committee. The SRO Committee monitors for rule proposals that might impact the consumer investor. On regular conference calls, members discuss any relevant proposals. Our students joined PIABA as student members and have served on the SRO committee.⁴⁴ In addition to providing a source of information concerning potential commenting opportunities, we find that students benefit from early exposure to leadership opportunities, collaboration within the substantive community, and additional opportunities to develop their lawyering identities within the professional arena.⁴⁵

reports the rulemaking initiatives discussed at its Board of Governors meetings as the conclusion of those meetings, and the results are published on FINRA's website. *See* FINRA, *Board of Governors Meetings*, <http://www.finra.org/industry/governors-meetings> (last visited Oct. 1, 2016). Attentive students and professors can begin thinking about rule proposals far before a Regulatory Notice is published or the rule is filed with the SEC. FINRA also maintains a page on its website dedicated to Rule Filings, listing each proposal by number and linking to the full information for each listed proposal. *See* FINRA, *Rule Filings*, www.finra.org/industry/rule-filings (last visited Oct. 1, 2016).

⁴² FINRA, *FINRA Email Subscription Service*, http://apps.finra.org/contact_us/1/subscribe.aspx?lists=prof (last visited Oct. 1, 2016).

⁴³ Student failure to monitor also generates a teachable moment and allows for an opportunity to discuss the importance of keeping abreast of new developments.

⁴⁴ Law students who are enrolled in a securities arbitration clinic or who are employed by a member of PIABA are eligible for student membership in PIABA. *See* PIABA, *Student Membership Information*, <https://piaba.org/join-piaba/student-membership-information> (last visited Oct. 1, 2016).

⁴⁵ *See* Neil W. Hamilton, *Ethical Leadership in Professional Life*, 6 U. ST. THOMAS L.J. 358, 395 (2009) (stating that legal education should move "toward educational engagements to equip students for the leadership roles lawyers serve in society"); Alicia E. Plerhoples & Amanda M. Spratley, *Engaging Outside Counsel in Transactional Law Clinics*, 20 CLINICAL L. REV. 379, 388 (2014) (in clinical context, student collaboration with attorneys outside the program allows them to "view multiple styles and methods of lawyering" and reflect upon their own lawyering identity); *id.* at 399 (finding that law students collaborating with teams including outside lawyers allows them "to develop their collaborative skills by working with other professionals, increase their substantive knowledge of a particular area of law by engaging in legal research, and develop leadership and professionalism skills by working on a project vesting them with authority to act.").

C. Developing a Point of View: Teaching Whether to Comment

While locating and monitoring rule proposals is a valuable practice skill, it sets the stage for an analytic process. As students evaluate rule proposals, we ask them to consider whether the proposal merits comment. We ask if it impacts a constituent or policy that falls within the substantive focus of the course or scholarly interest of the student or professor. FINRA rulemaking covers a diverse landscape, from technical requirements for clearing systems to resolving disputes between the industry and customers.

With our areas of focus in mind, not every proposal warrants student commentary. The sorting and filtering process supports our pedagogical aims—students benefit tremendously when we unpack the substantive focus of our work. For example, we explain that in our work within securities arbitration clinics, we represent regular investors with claims against their brokers that are subject to arbitration before the FINRA Dispute Resolution forum.⁴⁶ Similarly, Professor Edwards' research addresses securities class actions and retail investor interactions with the securities industry.⁴⁷ In either case, students determine whether the proposal they have identified as a target fits within our respective areas of expertise or focus.

Students do well at identifying proposals that mesh with the substance of our courses or research agendas and become adept at explaining why the proposal matters. They typically identify commenting targets that fit within one of three categories: (1) a proposal that impacts the regular retail investor;⁴⁸ (2) a

⁴⁶ See Jill Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1179 (2010) (describing securities industry arbitration forum and near universal arbitration of customer disputes against brokerage firms and brokers before FINRA Dispute Resolution); Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47, 101 (2014).

⁴⁷ See Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305 (2015); Cathy Hwang & Benjamin P. Edwards, *The Value of Uncertainty*, 110 NW. U.L. REV. 283 (2015); Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47 (2014).

⁴⁸ See, e.g., GEORGIA STATE UNIVERSITY COLLEGE OF LAW INVESTOR ADVOCACY CLINIC (GSU Clinic), *Comments on SR-FINRA-2015-057*, <https://www.sec.gov/comments/sr-finra-2015-057/finra2015057-1.pdf> (Jan. 14, 2016) (proposal concerning information supplied to investors when their broker changes firms and solicits them to move their account to new firm); GSU Clinic, *Comments on Regulatory Notice 15-37*, http://www.finra.org/sites/default/files/15-37_georgia-state-law_comment.pdf (Nov. 25, 2015) (comment concerning proposed rule to protect seniors and vulnerable adults from financial exploitation); GSU Clinic, *Comment Concerning SR-FINRA-2015-009*, <https://www.sec.gov/comments/sr-finra-2015-009/finra2015009-1.pdf> (May 30, 2015) (comment concerning rule proposal to protect members of US Armed Forces from dishonest and predatory practices regarding securities sales on the premises of military installations).

proposal impacting the securities dispute resolution forum;⁴⁹ or (3) a proposal that would meaningfully impact the overall regulatory environment.⁵⁰

III. BREAKING DOWN THE PROCESS FOR STUDENTS

After identifying a proposal, we find that breaking down the drafting process improves student performance and learning. To ensure the greatest student gains, we recommend beginning the process by asking students to envision how they, as developing lawyers, fit into the legal system as a whole. We then move to active and collaborative exercises to examine the process in pieces. We start with a legal research and idea-formation stage before moving into the pedantic mechanics of how a professional comment letter should look. We then turn to the iterative process of soliciting feedback from peers and the instructor and improving the product all while working on a real world deadline. Students approach the processes diligently because they understand that the resultant work product will be permanently part of the public record and the student's lawyering portfolio.

A. Coaching Students in the Transition from Student to Lawyer

After initial hesitation, students are usually comfortable identifying opportunities for drafting and filing comment letters. There is perhaps more hesitation when they are asked to step into the role as lawyer and evaluate the proposal with an eye toward adding to the dialogue. An instructor's encouragement at this stage is crucial to assisting students in making the leap from student to expert and building their professional identities. At this point we ask our students to envision the lawyer's role within the legal system. In particular, the securities rulemaking process allows us to focus on a portion of the ABA Model Rules of Professional Conduct that is often overlooked in law school: the lawyer's responsibilities as "a public citizen having special responsibility for the quality of justice."⁵¹

⁴⁹ See, e.g., GSU Clinic, *Comment on SR-FINRA-2015-003*, <https://www.sec.gov/comments/sr-finra-2015-003/finra2015003-6.pdf> (Mar. 13, 2015) (proposal to increase hearing postponement and late cancellation fees); GSU Clinic, *Comment on SR-FINRA-2014-028*, <https://www.sec.gov/comments/sr-finra-2014-028/finra2014028-35.pdf> (Nov. 6, 2014) (proposal to redefine "public" and "non-public" arbitrators); GSU Clinic, *Comment on SR-FINRA-2014-020*, <https://www.sec.gov/comments/sr-finra-2014-020/finra2014020-2.pdf> (May 1, 2014) (comment on proposal to prevent brokers from conditioning settlements with investors on customers' agreement to support or not oppose expungement).

⁵⁰ See, e.g. MICHIGAN STATE UNIVERSITY COLLEGE OF LAW INVESTOR ADVOCACY CLINIC (MSU Clinic), *Comments on FINRA Regulatory Notice 14-37*, http://www.finra.org/sites/default/files/notice_comment_file_ref/Michigan%20State%20University%20College%20of%20Law%20-%20Comments%20on%20Regulatory%20Notice%2014-37_0.pdf (Dec. 1, 2014) (proposal to implement a data collection and analysis program for investor protection).

⁵¹ MODEL RULES OF PROF'L CONDUCT Preamble at 1 (2016).

We ask students to consider the obligations and benefits of self-regulation. Drawing particular attention to the aspirational precept that “[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession,”⁵² students think about the various constituents impacted by the FINRA rulemaking process. Lawyers and securities firms often top the list, and it sometimes takes a bit of back and forth to ensure that consumers of financial services, whether sophisticated or novice investors, are part of our discussion. Given space to reflect, students recognize the power differential between well- and under-represented voices in the regulatory process.⁵³ Once we fully catalogue the constituencies and points of view to be considered, students research the proposal and its potential impact on each constituent in order to develop their own point of view in light of the interests they seek to represent. We ask students to reevaluate their initial reaction to the proposal. Do they support it? Do they oppose it? Do they believe the regulators’ goals are laudable but changes should be made to better effectuate the regulatory aim of the proposal? Though the answers to these questions will often shift and change throughout the research and drafting process, they provide a good baseline from which a student can start to envision what a comment letter does and how she will attack the process.

B. Researching the Rule Proposal

Research into a rule proposal is always guided by a point of view, whether it is the author’s own or that of a client represented by the lawyer. We have taken different approaches as to whether a comment is written in a representative capacity on behalf of a client or with the student as the sole author in making his or her own recommendations. Our students have written comment letters on behalf of our securities arbitration clinics, which helps students more fully approach and understand that every law firm has its own identity and client base. This approach also provides some protection to

⁵² MODEL RULES OF PROF’L CONDUCT Preamble at 6 (2016).

⁵³ Securities clinics play an important role in advocating for ordinary, retail investors. These investors may experience personally significant and even devastating losses that may not be significant enough to attract the representation of a private securities lawyer. Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 622 (2015) (“There are also very few trade associations or comparable groups that serve the collective interests of investors.”). The commenting process provides students with a real opportunity to develop reflective practice skills and understanding how their work fits into a broader social fabric. See Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 344 (2014) (proposing six stages of reflective practice including “[s]ocietal [c]ontext” in which students unpack “systemic power dynamics, political and social realities, and economic forces that affect their decisions.”).

students who write a contentious comment letter but later wish to be employed by a proponent of the particular rule or policy. They can correctly state that their position was taken on behalf of a client.⁵⁴ Students who instead write a comment letter on their own behalf as a party interested in the regulatory framework also benefit. It is within this role that they are especially able to develop their own philosophy of lawyering and voice. We afford students broad latitude in identifying point of view for a comment letter whether they are commenting on behalf of a clinical program or on their own accord.

After the point of view is identified, students delve into the research. FINRA's accessible rulemaking process allows us to more easily teach the process of researching the impact of or alternatives to a rule proposal to students. First, we direct students to prior proposals. It gives them a sense of the types of comments that others draft. Students learn how others have approached the commenting process and how effective those approaches are. Since all comments are publicly available, students are able to quickly discern the difference between high and low quality submissions. This initial research into the process also illustrates how point of view impacts the ultimate position taken and illustrates a number of the research sources students may wish to consult. Next, students begin substantive research. We ask them to be creative and to think broadly about the proposal. Are there other similar rules within different areas of the law? If so, what has the impact of those rules been? On a more granular level, within the securities industry, have others, like state regulators operating under the Blue Sky framework, enacted similar rules? Why or why not? These questions help students develop their research plan and determine how to develop, support, or revise their initial position.

C. Unpacking the Comment Letter Drafting Process

Students may begin to struggle when moving from initial research to drafting. Though they have conducted significant research and have well-formed substantive comments to contribute to the regulatory conversation, we find that many have never actually drafted a business letter and are intimidated by an unfamiliar process. We therefore take a layered approach to the drafting process with students, incorporating a discussion about substance with an introduction to the form. Our instruction, which takes place within and outside of the classroom, includes a basic overview of the component pieces of a business letter with an explanation of why each segment exists and what role it serves. While working within this framework, we engage all students in

⁵⁴ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2016) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

experiential exercises designed to support the student-drafter in presenting the best possible comment letter.

Student groups benefit most when at least one student has researched a proposed rule and is considering how to draft the submission. On rare occasions, all teams of students have been working on different comment letters at the same time. This presents an opportunity for each team to present their initial work and solicit feedback from peers, and each student in the course serves the roles of drafter and evaluator. Even without such fortuity, asking non-drafter students to participate in the process produces strong results. Each student, whether expert on the particular proposal or just introduced to it, engages through substantive discussions and experiential exercises. Through collaboration and the support of their colleagues, our student-drafters have produced much stronger comment letters.

Prior to class, we ask students to review a business letter template in the clinic handbook to which Professor Iannarone has added footnotes explaining each of the segments and its function. Professor Edwards provides samples and a law firm's style manual to accomplish the same goals. Students can also be asked to review sample comment letters prior to class to gain an understanding of how others have approached the drafting process. We find it especially helpful to provide both weak and strong samples so that students are better prepared to describe what makes a comment letter effective. The rule proposal or proposals currently being researched by students should also be circulated as pre-seminar reading.

The class begins with student-drafters presenting an overview of the rule proposal upon which they are commenting and sharing their initial thoughts about the proposal. We then bring the component pieces of the comment letter to life through experiential exercises.⁵⁵ For instance, we may begin by presenting a slide that captures the first paragraph of a comment letter, the section that should convey the expertise of the author, acknowledge the policymakers' well-intended proposal, and describe if and how the

⁵⁵ We are grateful to Professor Faith Mullen for sharing her materials outlining each portion of an effective comment letter generally, after a request via the clinical listserv. Professor Mullen breaks the comment letter into the following components: business letter format, proclamation of expertise, acknowledgement of regulators' intentions, articulation of shared goals, roadmap, emphasis on persuasion, using graphics to support meaning, using topic sentences, paying close attention to tone, and drafting a strong conclusion.

Additional sources also provide information for effective comment letters and professors may elect to ask students to read them prior to the class meeting. See, e.g., *Tips for Submitting Effective Comments*, REGULATIONS.GOV, https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf (last visited Oct. 1, 2016); Richard G. Stoll, *Effective Written Comments in Informal Rulemaking*, ADMIN. & REGULATORY LAW NEWS 15 (Summer 2007).

policymakers' aims and goals dovetail with those of the author. Our slide will include an excerpt of an opening paragraph from another comment letter. We then ask students to identify the purpose of each sentence within the excerpt and whether the author has achieved his or her aims in a persuasive manner.

After a traditional exposition of the information, we move toward experiential exercises. For example, a "quick write"⁵⁶ exercise asks students to apply what they have learned and create a draft opening paragraph for a comment letter. After the quick write concludes, students swap their work with a peer, with each silently reading and responding to their peer's work. After the silent review period, students share the feedback they have collected with their peers.

This intentional loop of presenting new information, asking students to identify what they have learned by reviewing another's work, applying their learning through practice, and then peer reviewing a colleague's work, has proven beneficial. It develops familiarity, increases confidence, and improves drafting abilities. Students see that the format and introductory pieces can be completed swiftly and that while it may be possible to fret about a particular component of the letter, they can articulate a strong basis for commenting. The boost of confidence helps as we move into the more substantive components of the comment letter in the seminar class. Given adequate time, we engage in a similar process for developing a plan to put the students' actual commentary on the proposal into an outline for his or her letter.⁵⁷

The final step usually takes place outside of class after a student has completed a first draft. We have had differing experiences with students at this phase. Some, recognizing that the comment letter will be forever a part of the public record with their name prominently displayed, will ensure that a draft is completed well before the comment period closes, affording a rich experience with deep feedback and opportunities to point out substantial growth from the first to the final draft. Students who instead wait to prepare a draft until very close to the comment period's conclusion may be presented with a different learning experience: choosing whether to file work that could be improved with additional attention.

Whether within the semester during which a student files a comment letter or not, we endeavor to provide our students with FINRA's responses to

⁵⁶ "Quick writes are short, three-minute reflection pieces based on recently encountered ideas or past experiences." Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 513 n.23 (2012).

⁵⁷ Of course, an instructor could modify our pedagogy in multiple ways to achieve his or her own goals. As one example, students could be asked to bring partially completed drafts of their own comment letters to class and engaging directly in peer review, omitting the quick write step.

their comments when available. This gives them the opportunity to see how a regulatory agency reacted to their proposals and whether their ideas prompted a change or other action.

IV. CONCLUSION

The securities comment letter process has generated positive outcomes for our students and programs. The process provides a concrete example of lawyering in a non-adversarial, non-litigation format. Students learn more about the legal system and can identify the well and underrepresented interests in the development of the law.⁵⁸ They become more confident and use their confidence to identify and begin creating their own professional identities in a live setting.

Participation in the rulemaking process has also led to recognition for our students and programs. Perhaps the greatest outcome in this arena relates to students' ability to leverage commenting experience into post-graduation employment. Our former students have obtained permanent employment in securities firms, financial institutions, FINRA, and the SEC. One student who interviewed for a position with FINRA and supplied a comment letter she drafted as a writing sample later reported that the interview was far more substantive than any other she had previously experienced, with the entire interview focusing on the substance of the comment and how the rule would operate. Even when a student is not interested in employment within the securities industry, the comment process still provides students with a concrete example of their work in a real world situation. These samples are often easier for practitioners to evaluate than a writing sample from a simulation course that cannot, no matter how hard we try, duplicate real-world law practice.

Adding a regulatory comment letter practice to an existing course or clinic also provides real world lawyering opportunities to students without the

⁵⁸ From a public policy perspective, student comments fill an important void because the persons most affected by rulemaking are often the least likely to effectively raise their voices in this regulatory process. See Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2019 (2012) ("individuals most impacted by agency adjudications in public rights cases often have the least access to the rulemaking process"). Technological innovations meant to increase citizen participation have not resulted in more voices in the regulatory process. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 964 (2006) ("Even after introducing various forms of e-rulemaking, regulatory agencies continue to garner only the most modest, if not trivial, level of involvement by ordinary citizens."). E-rulemaking simplifies the means for submitting comments but "traditional barriers to citizen participation," including "professional expertise in the subject matter, motivation, and resources to translate knowledge into substantive comments" remain even if the means of submission is simple. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 96 (2012).

institutional costs associated with other types of live client experiences. Commenting can be incorporated into courses when time permits. The relatively short commenting process fits neatly within the semester while not becoming a continuing obligation after a comment is filed, unlike the sometimes unpredictable nature of live-client representations that do not fit neatly within an academic term.

An additional outcome of including a comment letter practice within our clinics has been the ability to teach students how to approach their own business and professional development early,⁵⁹ allowing them to get a head start on many of their peers in creating a portfolio of work that can be showcased to potential clients as exemplars of quality. Moreover, even if students do not intend to work within the securities industry, they can transfer the skills they learned by identifying changes within an industry and become part of the relevant community in any area in which they intend to practice. The experience may help students more quickly assimilate into bar associations and committee work after graduation.

Finally, a slightly unexpected outcome from incorporating comment letters into our course has been what we describe as a “halo effect.” Teaching within clinical programs, we sometimes faced challenges in conveying how well our students performed in representing their clients, especially considering that most civil matters often resolve by confidential settlement agreements. Adding a regulatory comment letter process allows us to publicize and promote the work of our students and our programs. Our respective institutions have showcased students’ comment letters in their outreach and communications functions, enabling the institution to gain recognition from an experience that also substantially benefits students.

⁵⁹ Nicole G. Iannarone, *Practice Ready Lawyers Don't Just Represent Clients: Experiential Education for the Business of Law*, 16 TENN. J. BUS. L. 373, 374 (2015) (“Teaching business development in law school helps our students be better ready to enter the profession, take charge of their own destinies, and capitalize on opportunities related to their own identity.”).