

The Learning Curve

SUMMER 2015

Letter from the Editors

One recent phrase capturing the ears of legal educators is "practice-ready graduates." On the surface of the phrase, it seems like an obvious and desirable goal, but appealing buzz phrases often fail to acknowledge the barriers, both systemic and local, that stand between current practices and the obvious goal that we should be striving towards. Nevertheless, Academic Support Professionals across the country are engaging in activities to move from traditional forms of education towards something that will come closer to producing practice-ready graduates.

One such activity is determining whether graduates are "practice ready" before rolling out any reforms. Many institutions are narrowing in on whether and how the curriculum should change to support the creation of "practice ready" attorneys. What does "practice ready" mean? Given the myriad ways

that lawyers practice law, and the disparate competencies different categories of employers require, which career paths should be prioritized and which career paths should be deemphasized by law schools? Which forms of practice should be explicitly taught to law students at the expense of a broad general knowledge? We don't know whether our students are going to work in criminal practice, do transactional work, arbitrate, practice family law, fight for civil rights, or do something less mainstream that still qualifies as law practice. So, for the moment, current practice is to provide generally applicable knowledge that can be tailored and refined once a graduate is employed in a specific context. Some of this specialization can be accomplished through externships and clinics, but where else could it be integrated into the curriculum? What could it, or should it, supplant?

The articles in this issue of *The Learning Curve* offer some creative, practical, and interesting ways to think about how Academic Support can help develop practice-ready graduates even in the absence of a universal career path. From leveraging performance tests as a practice-like exercise, to using policy considerations when thinking about how to apply the law, these articles show how Academic Support can bridge the divide between law school and law practice. We enjoyed reading the submissions and hope that they pique your interest in helping to create practice-ready graduates from your schools.

Chelsea Baldwin,

On behalf of the Editors

Behind the Scenes of a Courthouse: Teaching Policy Creates Practice-Ready Attorneys

Christina Chong

Introduction

In *Schuetz v. BAMN*, 134 S. Ct. 1623, 1635 (2014), the U.S. Supreme Court stated, “[the holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow.” However, this holding was far from simple. In 38 pages, justices debated whether voters could enact laws to eliminate race-based preferences in the university admission process. Although the court acknowledged certain admission policies were necessary to transcend the stigma of past racism, it held courts have no power under the U.S. Constitution to overturn laws enacted by the public because the First Amendment gives citizens the right to debate about political issues and use the democratic process to shape their community.

Schuetz is an example of the court using policy to determine the out-

come of a case. Policy is defined as “how the law affects the welfare of the community as a whole.” Common policy considerations include efficiency, fairness, cultural norms, autonomy, retribution, administration, deterrence, and competency of the judges. In *Schuetz*, the court decided individual freedoms were more important than diversity. The paragraph above summarized *Schuetz*’s policy considerations, but practicing attorneys do not have summaries to help them find the hidden policy arguments in dense judicial opinions.

This article begins by discussing the shortage of opportunities to explore policy arguments in law school.

The article then explains why mastering policy increases an attorney’s success and how exposure to policy creates practice-ready attorneys. Finally, the article illustrates how Academic Skills Programs (ASP) can incorporate policy in their curriculum.

Policy is absent from the law school curriculum.

Although professors spend hours lecturing on policy, the final exam normally omits these extensive conversations and only tests rules and analysis. As a result, students disregard policy mentioned in class and written opinions. Law schools’ priority is to teach the skills neces-

sary to pass the bar exam, but ignoring policy creates a false belief that attorneys do not consider the greater impact on society when advocating for a client.

In reality, experienced attorneys include policy considerations to strengthen their claims. New attorneys without expo-

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sure to policy are at a disadvantage because politics always affect judicial decisions. Complaints about professors who lecture on topics beyond the black letter law confirm today's students are oblivious to how judges resolve cases and the benefits of using policy arguments. Unfortunately, many professors still avoid policy or skip clarifying policy's role in practice. If professors do not encourage participation in political discussions, then students graduate unaware of policy's significance and unprepared for real-world battles against experienced attorneys.

Successful attorneys use realistic policy arguments to win cases and change law.

Attorneys must look beyond the facts of their client's case and utilize the broader societal picture to sway the judges. This is especially true when opposing sides present equally meretricious arguments because courts with two reasonable outcomes use policy as the deciding factor. Great attorneys never allow judges to overlook policy considerations that support their client.

Policy is a weapon in court, but winning also requires a realistic argument. Idealistic attorneys frequently present creative arguments that are difficult to implement. Even if a court agrees with the attorney, it is unlikely to yield a decision in the client's favor if the idea negatively affects society. Smart attorneys recognize the court's limits and eliminate arguments that seriously conflict with the current political climate. The

filtering process prevents attorneys from presenting unfeasible proposals and encourages progressive arguments that courts can approve without repercussions.

Knowledge about policy helps attorneys pinpoint when an unrealistic idea transforms into a plausible outcome. Timing is essential when advocating for legal change because the definition of right and wrong shifts as society's culture evolves. Judges consider the impact of society in every decision, but the policy considerations emphasized vary depending on the time period. A strategic attorney fights outdated laws by advocating practical solutions when society is ready for and supports the change.

Exposure to policy in law school creates practice-ready attorneys.

First, classroom discussions about cases in different historical eras help students understand the American legal system's progression so they know when promoting changes is appropriate. Professors emphasize the current law, but cannot avoid the meaningful differences between legal decisions in the past and present.

Second, classroom debates about policy improve advocacy skills because students constantly assess the merit of the attorneys' policy arguments and learn different ways to approach legal problems. Endless nights of reading and intense class discussions are frustrating, but equip students with sample policy arguments they can modify or replicate when advocating for clients.

Third, policy discussions encourage students to challenge judicial

opinions and test the success of their policy arguments. The reasoning behind a court's decision is not always straightforward. Reading and briefing legal opinions reveal the list of policy arguments courts will entertain. Discussing opinions provides students with chances to practice policy analysis and the feedback necessary to improve their arguments before applying them in practice.

Law school is a safe space for students to experiment with policy because there are no malpractice consequences. However, the above benefits are tough to understand in the abstract. Let's use *Schuetz* as an example. In *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), the U.S. Supreme Court held a diverse student body was a compelling government interest and the First Amendment gave universities the "freedom...to make its own judgments [and select] its student body." About a decade later, *Schuetz* held individual voters could overturn a university's right to promote diversity.

First, *Schuetz* and *Grutter* is an example of the law's progression. In 2003, diversity was priority. However, in 2014, diversity became secondary to individual autonomy. What changes in society influenced the court's subsequent decision? Supporters of affirmative action claim America's first black president created a deceptive belief that equality is accomplished. But, is this true? There is no correct answer. A debate about the politics helps students understand the policy considerations and historical context that influenced the court's decisions.

Second, the cases exemplify a situation where two important policy

Behind the Scenes of a Courthouse: (cont'd)

considerations conflict. One is equal opportunity to education (fairness) and the other is the democratic process (autonomy). Studying these cases taught students two plausible policy arguments they can implement in practice and showed them the current court favors autonomy.

Third, a close read of the cases reveals the court used the First Amendment to justify both diversity as a compelling government interest and overturning admission policies promoting diversity. The First Amendment policy reasoning is similar in the cases, but the outcomes are different. Was it because *Grutter* involved an entity and *Schuetz* involved individuals? What policy arguments did the attorneys overlook? A session brainstorming possible policy arguments allows students to practice creating realistic solutions that permit autonomy and diversity to exist simultaneously.

Policy should be included in the law school curriculum.

ASP commonly explains policy because substantive law professors have limited class time. However, discussing the intricacies of political debates in cases is difficult when ASP's focus is skills and not substance. Possible solutions to this dilemma include clarifying policy in individual student meetings, partnering with a professor to do a policy exercise, or hosting a workshop on policy considerations.

The first two solutions are student and professor specific, but

the last solution lends itself to the sample lesson plan below that addresses three types of policy. The first type is "Resolution by Policy (Facts)," which is when facts support a favorable decision for both parties. The second type is "Resolution by Policy (Rules)," which is when a court must select the appropriate rule or develop a new rule. "Pure Policy" is the third type and involves political debates about rules and holdings from the past, present, and future. Pure policy questions are usually open-ended prompts without facts.

Time	Exercise
5 min.	Define policy. Explain its role in practice and on exams.
10 min.	Define the three types of policy.
20 min.	<u>Resolution by Policy Exercise</u> Provide a template showing where to address policy on essay exams. Resolve ambiguous facts and multiple rules using policy in a large group.
20 min.	<u>Pure Policy Exercise</u> Define the four types of pure policy prompts (quote, evolution of law, proposal, and discuss). Provide a template illustrating how to address a pure policy question. Break into small groups to complete a pure policy exercise.
10 min.	Review the pure policy exercise. Invite students to submit a rewrite for individual feedback.
10 min.	Address the common mistakes and myths about policy. Answer questions.

For sample materials, contact Christina Chong at csjchong@gmail.com.

Conclusion

Policy plays a larger role in advocacy than most academics, practicing attorneys, and students realize. ASP departments often tell students to filter information irrelevant to the exam. But, this reinforces that policy is trivial because it is rarely included on the final. Encouraging students to disregard policy might improve their grades, but it cripples their professional career because courts never decide cases without considering the impact on society. Instead, ASP should emphasize the importance of policy and equip students with the policy knowledge necessary to influence judges and advocate for appropriate legal change.

Using Checklists to Help Struggling Students

By Alex Ruskell

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Students who struggle in law school have two major weaknesses. First, their writing structure is poor. Second, their ability to manage their time is poor. To help these students with these weaknesses, and make sure they don't carry these weaknesses into practice, our Academic Success Program runs several programs based upon the concept of checklists.

Why checklists? Checklists are really satisfying. Whether you are shopping for groceries, working out, or running errands, having a list you can scratch off as you go gives you a sense of completion and a clear visualization of how far you have come. This is as true for law students as it is for everyone else.

In the whirl of law school, students are faced with the Socratic Method, few opportunities to be evaluated, and an infinite variety of suggested study strategies and study tools

(outlines, flashcards, online games, board games, study groups, etc.). Some students are overwhelmed by all of this. Some react by flailing around and trying to read every study aid available. Some react by fleeing school altogether.

In many ways, studying for law school is like writing a novel: you could do it 24 hours a day, no one tells you if it is any good as you go, the potential content is infinite, and there are thousands of people giving conflicting advice in how to write it. In law school, the problem of infinite possibility is exacerbated by online tools. Students can personalize study plans and work whenever and however they like. For weaker students, this kind of freedom seems to hurt them.

Consequently, for new or struggling law students, I give them a fairly strict format to follow. Once they are comfortable with a strict format, we build upon it to make sure their writing and thinking doesn't become too formulaic or robotic. Even so, in my experience, the checklist method hasn't resulted in constrained or limited work. In

fact, giving them such a strong base seems to have resulted in the opposite, similar to the way a solid springboard allows a diver to do more intricate flips and dives.

Once the school year begins, I provide First Year students with handouts consisting of checklists of what the student should be doing that week. They are keyed to the weekly Academic Success Workshops. For example, a list for a given week might look like this:

- 1. Evaluate Schedule
- 2. Continue to Brief
- 3. Begin Outlines
- 4. Review Your Notes
- 5. Back-up Your Computer

If the checklist for that week introduces a new concept, the checklist comes with an explanatory handout and there is a Workshop that week explaining the concept. In the list above, assuming outlining is a new concept in this list, I would include information on outlining in the handout and base that week's Workshop on outlining.

For some students, I

expand on this checklist idea. For students having trouble with outlining and exam writing, I also help them create "fill-in-the-blank" answers to questions likely to appear on the exam. The students can then use these when doing practice questions before the exam or perhaps even use these as attack outlines on the exam itself. For example:

The issue is whether

_____ gained titled to the property through adverse possession. A person gains title to land through adverse possession if he or she engages in use that is hostile, exclusive, open and notorious, continuous, and actual for the statutory period. Here, _____ use was hostile because _____; it was exclusive because _____; it was open and notorious because _____; it was continuous because of _____; and it was actual because of _____. However, continuous use for the statutory period may be an issue because _____.

Using Checklists to Help Struggling Students

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However, seasonal use can be good enough for adverse possession because courts look at the nature and condition of the land and how a true owner would use it. Here, the land is _____

The problem with creating a fill-in-the-blank answer outline like this is that it could lead a student to be too robotic in his or her answer. However, if the student has issues with completing exams in time or with general writing structure, having a model like this to follow can be incredibly helpful. In addition, it reinforces the idea that a good outline allows the student to basically pre-write half of the exam before he or she actually sits down. Finally, for a struggling student, it allows him or her to “feel” what writing a good answer is like. While this is not a classic checklist, it maintains the key ingredients of what makes checklists successful, namely clear structure and a sense of satisfaction when tasks are completed. The fill-in-the-blank answer outline basically turns checklist boxes into blanks and checks into words and phrases.

Outside of Bar Preparation, most of the work I do with Second and Third Year students is with students in academic trouble. With them, I provide similar checklists (adapted for second or third year work) and also give them packets of practice questions and fill-in-the-blank answers to complete each week. This seems to have helped many students in academic trouble, even to the point where they were consistently earning CALI awards.

Ultimately, the solid structure provided by checklists appears to

help struggling students succeed in school. Once the idea of checklists are internalized, the students can then bring that skill with them to practice, when they are once again faced with an infinite number of possibilities, an infinite number of people giving advice on how to succeed, and possibly little guidance.

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Beyond the Socratic Class: Helping Prepare Practice-Ready Students by Incorporating Client Interviews in the 1L LRW Class

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I teach within UNC School of Law's Writing and Learning Resources Center ("WLRC"). The WLRC houses our Academic Excellence Program and our two-semester first-year legal research and writing program—*Research, Reasoning, Writing, and Advocacy* ("RRWA"). During both semesters of RRWA, students analyze hypothetical case files, and then research and write various assignments based on the particular legal issues that the case files present. Students may also be required to perform oral presentations and client interviews to help them further develop professional practice skills. These experiential skills help bridge the gap between the legal doctrine that students critically think about in their doctrinal classes and the responsibilities that many of the students will carry as licensed attorneys.

Critical Thinking in the Socratic Class

Traditional law school classes aim to promote critical thinking skills by creating a dialogue between a professor and her students. The wise professor's continued questions—the "whys," "what ifs," and "what abouts"—help create an environment where students are able to apply the substantive law that they have read about in their casebooks to a variety of factual hypotheticals.

American law schools have used some form of the so-called "Socratic Method" for many years. It has been the terror and the joy for

many students. It even helped John Houseman win the Academy Award for Best Supporting Actor in *The Paper Chase*. But, in their effort to help train their students, law schools do more than the Socratic Method—or, at least, they should.

The Carnegie Report: More Direct Training in Professional Practice

The authors of The Carnegie Foundation for the Advancement of Teaching criticized the law school curriculum as "typically pay[ing] relatively little attention to direct training in professional practice." Carnegie's emphasis that law students "need a dynamic curriculum that moves them back and forth between understanding and enactment, experience and analysis" has encouraged law schools throughout the country to provide for more experiential learning opportunities—particularly in the second and third year of law school.

The ABA Standards: More Experiential Coursework

The American Bar Association's new Standards and Rules of Procedure for Approval of Law Schools adds a six-credit requirement for "experiential coursework" to the J.D. degree. This coursework includes what many have traditionally viewed as practice-ready courses—clinics and field placement work. However, the ABA also allows for this coursework to be satisfied through "simulation" courses that are "reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member." Faculty

should directly supervise the students' work in a simulation course. There must be several opportunities for the students to perform in the course, as well as opportunities to receive feedback on their performance. Finally, students should formally meet in a classroom for instruction in the course.

These requirements sound like a first-year Legal Research and Writing class to me.

Experiential Learning in the Legal Research and Writing Class

First year legal research and writing professors provide experiential learning opportunities throughout their entire course. We provide multiple opportunities for students to receive feedback on assignments that assess a variety of lawyering tasks. These assignments, which may include legal research, drafting a client letter, or writing an objective memorandum, relate to hypothetical case files that mimic a student's representation of a client. These case files require students to work with everyday lawyerly documents—like complaints, answers, discovery, and depositions—to help analyze how substantive and/or procedural laws directly impact their "clients."

In addition to their legal research and writing assignments, many first-year legal research and writing professors are now incorporating other lawyering skills in their class, such as client interviews. As an academic support professional who also teaches legal research and writing, I particularly enjoy incorporating client interviews in my classroom. Client inter-

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views help students work on their oral and written communication skills. Client interviews also provide the students with additional opportunities to do something more with the legal doctrine that they are learning in the Socratic class.

Interviewing and Counseling in the 1L Legal Research and Writing Class

I ask my RRWA students to participate in several ungraded interviewing and counseling sessions. On a selfish note, I get to utilize and teach many of the counseling skills that I developed while receiving my Master's in Counseling. On a pedagogical note, the students get to learn and practice basic lawyering skills related to a client interview, such as questioning, active listening, reflecting, and empathy. The students also get to test whether the legal research that they have performed prior to the interview helps answer the legal question at issue in their case file. Finally, the

students get an additional opportunity to better understand that the tone of a lawyer's communication often depends on her audience.

A. The Client Interview: The Task

I normally provide an assigning memo to the students when we start a new hypothetical case file. The memo includes some short background information on our new client's problem. This information usually includes a clue to the general substantive law that the students will be working with for the case file, as well as some instructions that ask the students to prepare for a client interview.

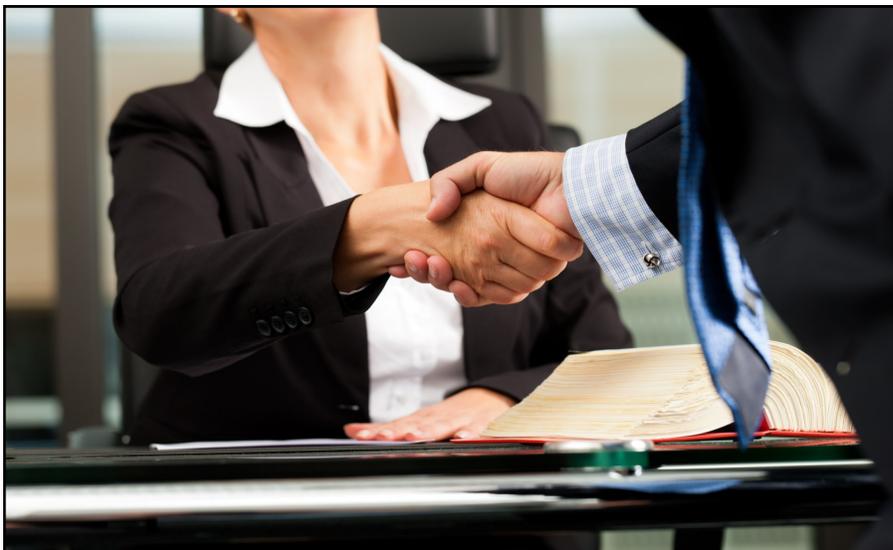
The students prepare for the interview by performing some initial legal research on the substantive law that was referenced in the assigning memo. Then, based on the initial legal research, the students interview me (as the client) to elicit the factual information necessary for them to appropriately complete the assigned writing task (for example, an objective memo or a trial court

motion). Following the interview, the students may be required to write up a summary of the client interview. I also provide some additional discovery documents for the hypothetical case file (like, affidavits, discovery responses, and depositions) after the interview.

B. The Client Interview: The Process

The students enjoy the client interview. They appreciate the opportunity to practice some basic lawyering skills in a learning and supportive environment.

I try not to put too much pressure on my students during the sessions. I tell them that I am just introducing them to some basic interviewing and counseling skills, and that I do not expect them to be perfect. I do not require every student to ask questions, because I know that there may be students who are too anxious to speak or who may need a little extra time to process the information that the client is relaying to the class. However, I also do not limit the number of students who can ask ques-



Beyond the Socratic Class (cont'd)

tions. I simply have the students raise their hand when they wish to ask a question. I look at the student who has raised his hand and acknowledge with a nod or a point that he can ask his question. This gives me some power to control which students get to ask questions.

I have found that even the students who tend to be quieter in class get involved in the interview sessions. These students see that I am respecting and responding to everyone's questions—not only the students who may be more talkative. I make sure to give the quieter students an opportunity to ask their questions. I also give all the students an opportunity to talk to one another in class for about fifteen minutes before the interview session. This preparation time, which mimics a collaborative team meeting that may often take place in a practice setting, helps calm down some of the more anxious students. The preparation time also gives the students an opportunity to discuss with each other the type of information that they believe they need to receive from the client to help them better analyze the legal issue that is presented in their case file.

C. The Client Interview: Editing and Real-Time Legal Analysis

I am no actor. But, I try to come across as a real client would in an actual client interview so that the students can have a better learning experience during the interview. I try to be evasive with my answers, so that the students can work on active listening and on their ability to rephrase unan-

swered questions. I have found that evasive client answers may also help my students better appreciate the need to be clear and concise in their legal writing.

I try to go off on tangents with some of my answers, so that the students can work on redirecting the client and controlling the interview. I have found that tangential client answers may also help my students better identify when their legal writing loses focus.

Finally, I try to spread the facts that are most legally relevant to the issue presented in the case file throughout the interview, so that the students can work on real-time legal analysis. The students are hearing the facts of the case for the first time during the interview. As such, during the actual interview, the students are applying the substantive law that they researched before the interview session to the facts that the client is communicating to them. This real-time analysis not only helps the students think about what follow-up questions are needed, but it provides a foundation for how the students might begin to outline their written assignment for the case file. As they listen to the client's answers, the students begin to fill gaps in their outline. They begin to ask themselves what additional research is needed to help answer the legal issue. They begin to think about whether they need case illustrations to help them further explain the substantive law relevant to their legal issue. They begin to think about how they might compare the facts from these case illustrations to the facts that the client is communicating to them. They begin to formulate and edit

their legal argument.

Conclusion

Law school classrooms continue to move beyond the Socratic class that was so dramatically displayed in *The Paper Chase*. Law schools have followed Carnegie's recommendation, and they are trying to foster more practice-ready students. Part of the practice-ready curriculum includes the type of experiential learning that takes place in a first-year legal research and writing class. Client interview sessions are some of the experiential learning tasks that I have included in my legal research and writing classes.

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TODAY IS THE FIRST DAY OF THE REST OF YOUR LIFE IN THE LAW: SETTING UP FIRST IMPRESSIONS

Jeremiah Ho

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In designing a course, for me, much thought about teaching is often given toward the performative aspects that one engages in when delivering a particular subject matter to students. Whether it's doctrine or skills, a lot of my own course planning and design is devoted to the set-up and posturing over the narrative of a course. In teaching 1L's, the setup could be about the course alone—*e.g.*, legal analysis or contract law—but the first class of the semester in the One-L year is also a significant moment, symbolic of a myriad of things. It doesn't just have to be about their first day of One-L year. Of course, it's also the first day of their entire law school careers, and by extension their life in the law—their very first step toward developing themselves into full-fledged legal thinkers. Accordingly, it's a class day that one can harness very carefully in order to comment and underscore its resonating impact and do so with the subject matter.

With that said, this piece builds off a previous posting I wrote back in 2012 for the Institute of Law Teaching and Learning website (*See In Medias Res: Starting in the Middle of Things, Idea of the Month, February 2012*, INST. FOR L. TEACHING & LEARNING (Feb. 2012), <http://lawteaching.org/articles/index.php>), where I described how I often begin courses with a "Surprise!" pop-exam. I've done it in both doctrinal and skills courses—yes, I'm ex-



tremely guilty of sneaky behavior, all over the place. To summarize, I've used this exercise both as a diagnostic introduction to whatever course I'm teaching but also as a way to set the tone of the course. With doctrinal courses, I usually use a first-day exam that walks through the major topics of the doctrine to simulate how to issue spot, organize, and think globally about this substantive topic—whether it's contract law or products liability, remedies or any other substantive course. With academic support courses I've taught, this exercise is great for isolating legal reasoning skills but also other relevant support topics such as law school essay exam strategies that then get me to talk about how study methods such as course outlining, case briefing, and time management all play into understanding a law subject successfully and doing well on semester exams.

In recent years, I've toyed around with this exercise with my first-year

courses. With the last two Contracts courses I've taught, I have abandoned the pop-exam. So I haven't shown up to my classroom the night before and tuck a box of bluebooks under the lectern in order to whip everything out and pretend to give out a surprise exam on the first day. Instead, I've disseminated the exam fact pattern as an assignment during Orientation week that must be completed and turned in on the first day of class. Again, this exercise serves as a diagnostic and helps me set the tone of the course. However, the two different times I've varied from the original exercise, both occasions have allowed me to use the time on the first class day as a period of profound discussion more appropriate for a student's first day in the law.

For instance, the fact pattern I've given for this first assignment in my Contracts course walks students through every major topic that we will cover for the two semesters together—formation, breach, remedies, and finally quasi-contracts. Even though the students don't have any doctrinal knowledge of contracts just yet, they are asked to evaluate the issues in the fact pattern based on a set of question calls that organizes and walks them through my global roadmap of contract law:

1. Was there a valid and enforceable contract?
2. If a valid and enforceable contract does exist, then was there breach?
3. If there was breach, then what are the damages that should be award-

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ed?

4. If no valid and enforceable contract exists, then is there an alternate legal recourse?

Having tried their hands at answering the questions prior to the first day class, we are now able to discuss (or debrief) their answers and figure out whether they got the assignment right or wrong.

At least, that's what they think. Instead, I use both the diagnostic fact pattern and the lecture time saved from not having to proctor a first-day in-class surprise exam to focus on what they think they know about contracts and what they do not know. I conduct a very hard Socratic question-and-answering session, pretending to wrestle out whether there was a contract formed between the parties in the fact pattern by pointing to the facts ("What's a contract? "What looks like a contract here?" "Yes? And why do you say that? What do you mean?"). I lead them down rabbit holes that go nowhere and respond to their definitive, confident answers with unnerving deadpan responses ("So?" "Really?" "Oh, yeah?"). I will even look individual students dead in the eyes just to conjure the most intimidating Socratic law professor within me. I haven't yet made them each stand up when I cold-call them (although, at the time of

Aside from learning about contracts and aside from their own career ambitions for their lives in the law, I want my students to encounter this basic act of lawyering and to know that from now on whenever they see facts, they must think of rules of law and be able to apply those rules to the facts.

this writing, the Fall 2015 semester has yet to start and I have a few days before we go to press to ponder on that option). Some unsuspecting, would-be Contracts students of mine in the future better watch out.

One of the biggest trial practice tips I ever received when I was in private practice was regarding an effective way to cross-examine a witness: Keep asking questions that dance around what you want the witness to uncover, starting first

with broad questions and then narrowing them down until the witness is practically giving the answer you want without having to expressly answer it. And just as this happens, and everyone knows it, stop all questioning and end the cross-exam.

During this first-day discussion, I try to channel this technique when getting my students, who are new to contract law, to realize that they might think there was a contract formed in my contracts fact pattern or there was an ensuing breach and that damages are due. *But really, do they know for sure?* Usually, students are good sports. They try to argue the events and articulate fairness concerns that border on policy arguments. They pick out facts and interpret the sub-text microscopically. They

analogize my fact pattern to contracts they've entered into. They make up pseudo-contractual issues that don't really exist. But every time they think they've resolved one of my questions, I come back at them with something that disarms their lawyerly fervor. Inside, I applaud their zealous advocacy on their very first day and I hope it continues. (I promise to them quietly in my head that I won't be this socially difficult in class for the rest of the semester.) But today, I want them not just to hear about the intense complexities that arise in lawyering;

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I want them to *feel* just how hard this process can be—especially, for those who do not know the law yet.

And this is the realization that I eventually get them to arrive upon: *that they don't know contract law and so this is the difficulty they are having in answering my fact pattern effectively like a lawyer.* Sure, they might have the lawyerly bravado and the drive to reason and make arguments about contract law here. But without knowing the exact rules, they are not able to do the basic reasoning that good lawyers do every day. This is the point in which I make their first day with me significant. Here is where I introduce rule to fact analysis and set the course up doctrinally so they are off on good and equal footing.

Detailed comprehension of rules combined with sharp organization pertaining to a specific body of law, enables lawyers to spot legal issues and assign conclusions regarding a set of random but legally-salient facts. *Was there insider trading here? Was this a breach of the covenant of quiet enjoyment? Was there a contract formed here?* Aside from learning about contracts and aside from their own career ambitions for their lives in the law, I want my students to encounter this basic act of lawyering and to know that from now on whenever they see facts, they must think of rules of law and be able to apply those rules to the facts. And so at some point on the first day, I shut down the Socratic portion of the class and introduce to them what they do not know—which is a global

I want them not just to hear about the intense complexities that arise in lawyering; I want them to *feel* just how hard this process can be—especially, for those who do not know the law yet.

view of the law behind contracts that the facts in the assignment touched upon. I show them that those four calls of the question are questions they should always ask themselves when they enter into a contracts issue, whether on my exam, on the bar, or in practice. Most importantly, I want to introduce to them the lawyerly reflex whenever they are called upon to analyze a set of facts: *What's the rule here? And how do we use it to analyze these facts?* I lecture about the rules of contract law, but really I've introduce them to how rules function and what lawyers need to do with rules—not just knowing them, but knowing how to apply them—in order to do well on exams, pass the bar, satisfy clients, and pursue justice. In the next class, I will reminisce on this exercise when I teach them IRAC and that the basic first step of legal reasoning in American lawyering is that rule-to-fact analysis that occurs within the R and the A of IRAC. But on the first day of their rest of the lives in the law, I want them to know the basics of legal reasoning begin with what they don't know yet and what they came to law school for: *to become great legal thinkers.*

Have a great start to the year everyone!

Getting Extra Practical Training out of Performance Tests with

Professor Sara J. Berman

Assistant Dean of Academic Support and Bar Support at Whittier Law School

For anyone not familiar with performance tests (PTs), they are closed-universe lawyering problems, administered as part of many bar exams, where students are provided a File and Library and required to draft a task such as a brief, memo, or letter, demonstrating minimal competency of a beginning lawyer. Multistate performance tests are 90-minute exams. The California PT, originally a three-hour exam, will become a 90-minute PT in 2017. Students should plan to spend at least 30 minutes studying model answers after completing each PT, comparing and contrasting their own answer to a model answer to learn how to improve their thinking and writing.

What is a “spin-off exercise”? I employ the term to mean a new task or tasks that students can draft, or brainstorm about how to draft, using essentially the same facts and law as in a previously completed PT. PT spin-off exercises require students to envision how their “answer” would differ, if the students:

- a) Represented a different party (for example they were writing the same document but acting as counsel for the other side); or
- b) Were asked to perform a different task, or to draft a similar document but for a different audience (if for example the task were changed from drafting a

brief to the court to drafting a fact-gathering plan to a private investigator, or from drafting a settlement offer to opposing counsel to preparing a counseling letter urging one’s own client to propose or accept a settlement).

Students are then encouraged to reflect on differences they would employ in tone, presentation, analysis or argument, and strategy.

I first thought to use spin-off exercises when I studied for my own bar exam. I lived in Los Angeles where much time was spent driving to and from bar review. Not wanting to waste precious hours, I found work to do in the car. After main lectures, I would try to recite aloud as many rules as I could remember. I would also listen to tapes I had recorded of my own voice reading rule statements. Driving home after PT workshops, I would imagine dozens of scenarios stemming from the law and facts in PTs we had completed, and pretend to “dictate” different tasks. I realized how little exposure I’d had to the many different types of tasks the bar examiners might ask us to draft and figured this was an easy and efficient way to think through how new tasks would be written. (A law student’s dream: maximum exposure with minimal time and effort! True confession, I did spin-off exercises *on top of* writing out many extra PTs in full, so this was “bonus work” and not a shortcut.)

My commitment to incorporating performance tests into my teaching also arose out of necessity. I

had to miss a session of the Criminal Procedure course I was teaching and needed to fill three hours of class time with work students could complete productively on their own, sans professor. This was one of my first years teaching in law school, but my prior background in bar review and my love of performance tests from my own law school and bar study experiences gave me an idea: assign an in-class PT, grade it (with extensive comments and feedback) during the week, and then discuss it next class.

I found an exam that centered on *Miranda* issues and fit right into our lessons. The largely 2L students were thoroughly engaged, though they had never before seen a PT. They said, “*It felt real.*” They loved role-playing as actual lawyers, arguing facts, and, most important, using the very law we had been studying for weeks in our casebook. What had previously existed only on paper now came alive.

When I returned the following week, all eyes were wide open. Students were sitting at the edge of their desks. Everyone had an opinion. Some enjoyed the exam and were now convinced that they wanted to pursue careers in either public defender or prosecutor offices. Others were frustrated because they had not been able to finish the assignment within the allotted time—a very common problem for most students first learning to tackle performance tests. Perspectives on the exam differed, but everyone was engaged. And, many wanted to know more, prompting a long discus-

Getting Extra Practical Training (cont'd)

sion thread of “what ifs” that eventually led me to focus on spin-off exercises as teaching tools.

“What if the court wants to hear oral argument on the motion to suppress we just wrote, how would that go? What questions would the judge ask? How would we respond? What would the other side say?”

What if the case goes to trial, what sorts of jury instructions would jurors receive about the underlying criminal offenses? What will our closing argument sound like? What would theirs sound like? How would we draft an opening statement and how would that differ from our closing argument?”

What if the defendant were offered a plea deal, should he take it?”

Many questions surfaced in that first classroom experience teaching PTs in law school. I was so inspired by the level of student participation that, ever since, I have tried to incorporate PTs into doctrinal courses.

In my current role in ASP and Bar Support, I encourage students to complete as many PTs as possible, as early in the process as they can, preferably during school. On some bar exams, a PT is worth as much as twice an essay exam; those points are invaluable, especially on an open book exam where one cannot “forget” the rule. Because PTs are skills-based, they are like learning to ride a bike. If you learn how to handle them in 1L and 2L, you will know how to complete them on the bar exam.

I often explain that mastering the PT is akin to taking out an insurance policy for that one moment on the bar exam when you know, but forget, an important rule. Most of us have been there. We teach students what to do in such cases. But, we can also help students “free up” additional time as they get closer to the bar exam for tasks that demand memorization (essay and MBE work) by helping them master PT skills during law school.

ASP faculty may use PTs in dedicated performance test courses (which more schools are now offering), in other ASP and/or Legal Writing courses, or in ASP workshops. PTs can also be administered as part of a lesson in a doctrinal course, either by the doctrinal professor or in collaboration with ASP.

Student engagement is often high when working with PTs because the exams are realistic and because students, who tend to have been exposed to essay and multiple choice testing, may be unfamiliar with (and apprehensive about) the PT. The incentive to learn to handle PTs comes both from the fact that PTs appear on most bar exams and because PTs tend to mimic real-life lawyering tasks. Training students to write well on PTs helps students to become practice ready at the same time it helps students with essay writing; though PT and essay exams differ, the skills are symbiotic.

To make the most of PT teaching, I always try to add try spin-off exercises when debriefing PTs. Spin-offs take little extra time while providing enormous extra learning potential. To illustrate how I “teach” spin-off exercises, let’s springboard from my earlier example using crimi-

nal procedure. The students might initially have been asked, in the PT exam as it was written, to assume the role of prosecutor and draft a response to the defense motion to suppress evidence (statements allegedly made in violation of the defendant’s *Miranda* rights). After completing that assignment, I might ask students to picture themselves as counsel for the defendant instead of as prosecutors. Depending on time, I might then either have them write part of their new response or discuss how what they wrote would change as their client changed. From just a moment’s seeing themselves as representing the other side, they often evaluate issues quite differently. Students often jump in with observations and new thoughts about a point they had originally felt was particularly strong, or weak.

I might then hold a mini “court” hearing, calling on students to argue the motion they just drafted, addressing the judge on key arguments for the defense and prosecution respectively. (I either ask a student to play the role of judge or do so myself.) Next, I tell the students that the prosecution has offered a deal, briefly describe the terms of that deal, and ask the students to all assume they are defense counsel and take a few minutes to write their client a letter counseling the defendant on the pros and cons of accepting the prosecution’s plea bargain offer. Time permitting, I might also group them in pairs with one student playing the role of prosecutor and the other the role of defense counsel and let them negotiate with one another. (You can also bring pairs up to conduct their negotiations in front of the class while other students watch, discuss, and comment.

In often no more than 30

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minutes, (though you can take as long as you have class time for), preferably right or soon after they completed a particular PT, students have assumed various roles as lawyers and seen the “same facts” from entirely different perspectives. By completing these various tasks, students put themselves in both an adversary and a counseling mode, helping them to see what is feasible and what is in the client’s best interests, and why. They also observe differences in tone and organization of a written brief, an oral argument on a motion, a letter to a client, and negotiations with opposing counsel.

In addition to teaching with PT spin-off exercises wherever possible, I also counsel students that to maximize their own time, especially while studying for the bar exam, they should get into the critically important habit of creating of their own “spin-off” exercises after every PT they complete independently. Students love the “bang for the buck” that spin-offs provide. I love the learning.

I hope you too will find spin-off exercises useful teaching tools in your law schools, and that these thoughts become part of a larger discussion about more extensively incorporating PTs and other practical skills exercises into legal education. PTs provide a perfect vehicle for experiential learning, helping prepare our students for success on the bar exam *and* in the real world. (Please contact me at SBerman@law.whittier.edu to share your experiences about using PTs as teaching tools. I will compile what different ASP faculty are doing and write a follow up to share with everyone.)



PROFESSIONAL READINESS: ROLES FOR ACADEMIC SUCCESS PROFESSORS

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Academic Success involves so many different aspects of student success in law school, from orientation, to bar prep and everything in between. Most of these activities are direct services to students, focused exclusively on skills in the context of academic performance. With the recent call from employers for practice-ready attorneys, law schools are looking at every aspect of the curriculum for adding in practice-ready exercises. As exciting as teaching practice readiness might be, many of us have already developed such robust programs that our jobs have become much more than a full time job. However, all of our direct service activities overlook perhaps the biggest impact we could have on student success: as a faculty development and curricular consultant.

With the call for law schools and faculty to train practice-ready lawyers, many law schools and faculty are hungry for assistance about how to achieve this new(ish) outcome. Academic success professors often have a wealth of knowledge about andragogy, teaching design and methods, and creating achievable outcome measurements. By serving as consultants for these areas in the context of practice-ready exercises, we can help our law

schools reach their institutional goals of creating practice-ready educational opportunities.

Opportunities for Faculty Development

Many law schools are adopting policies where faculty must or are encouraged to include a practice-ready exercise in some courses. At the same time, many faculty are working harder than they ever have before, serving on more committees and teaching more courses and bigger sections. Academic success professors can assist our doctrinal faculty colleagues in a number of ways, including: being a resource expert or practice-area consultant, assisting faculty in developing practice-ready lessons in a box, and giving workshops that support faculty in developing practice-ready lessons.

Being (or Becoming) Resource Expert:

By spending an afternoon perusing practice-ready supplements, you can familiarize yourself with the current offerings and summarize that knowledge in conversation. For example, you could let an inquiring faculty know, “Many of the Property practice-ready exercises focus on negotiations and oral advocacy in the ‘Bridge to Practice Series.’ If you’re looking more for drafting trial motions, the ‘Developing Professional Skills Series’ is your better bet. If you’re looking for a casebook that uses the Carnegie approach, the Context and Practice series has exercises focused on student learning, bar prep, and practice-ready exercises.”

You could also provide a resource guide for faculty that indexes the available resources by subject, topic, general skill (like drafting, interviewing, etc.), and specific skill or practice experience (like filing a 12(b)(6) motion or drafting a custody agreement).

If you are just beginning as an academic support professor or don’t have a lot of time, this idea is a manageable way to start to develop your expertise as a practice-ready resource. The National Conference of Bar Examiners has published “A Study of the Newly Licensed Lawyer” on its website. This document contains a list of these practice-ready skills within the context of subject areas. You can then track the available supplements against this list.

Practice-Area Consultant

If you practiced law in a specific area, you might offer to discuss practice-ready exercises ideas with a faculty member who teaches in your area of expertise. You could identify some of the most common practice-ready skills and documents you needed in your first five years as an attorney in that specialty.

Developing Lessons in a Box

Academic Success professors have to be highly knowledgeable in the bar tested subjects and mandatory course offerings. Thus, we are often in a position to be able to create a practice-ready lesson in these subjects, regardless of our practice

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Developing Lessons in a Box

Academic Success professors have to be highly knowledgeable in the bar tested subjects and mandatory course offerings. Thus, we are often in a position to be able to create a practice-ready lesson in these subjects, regardless of our practice areas. If you have a couple of years of academic success under your belt, developing a lesson can be a great fit for your experience and it can reinforce your andragogical expertise in a different context than standard ASP and bar prep situations. You could create a practice-ready lesson in a box for other faculty teaching in that subject area could use. To do so, it would have to be a lesson in a box, complete with the handouts for students that included learning objectives, an assignment description, instructions, and a client file. It should also include grading rubrics, an exemplar, and pre-written feedback for common errors.

If you can find a faculty who would want you to develop one lesson for him or her, it might lead to other professors also asking for lessons in a box. By developing quality lessons for faculty, you could raise your reputation as a quality educator among the faculty, at the same time you are assisting your colleagues and helping the institution reach its practice-ready goals. The NCBE's "A Study of the Newly Licensed Lawyer" can help focus your efforts for lesson development, and as will be discussed later, provide a starting point for coordinating faculty-wide efforts in implementing more exercises to increase practice readiness across the curriculum.

Please note, when faculty develop materials for other professors to use, the faculty is often paid a stipend. Thus, while it might be a good idea to develop one lesson to demonstrate your capability, it could be appropriate to ask for a stipend for additional requests or a school-wide project.

Assist Faculty in Developing their Own Lessons

As an experienced academic success professor, you can provide quality assistance about what a faculty should consider in developing his or her own lesson. For example, you can help tease out the learning objectives and help draft meaningful and well-communicated learning objectives. You could help a faculty identify the prerequisite knowledge, skills, and values a student must have to work as a meaningful learning tool. You could help professor think through grading possibilities, especially alternatives that allow them to grade more efficiently. Additionally, you can help faculty develop ways of providing constructive feedback efficiently.

To engage in this form of assistance, you need to have both the experience and the confidence to answer the most common andragogical questions on the spot. You should also be able to refer to research that supports your statements, not by name, but by, "there's at least one study that.... I can get you a copy of it if you want."

Giving Workshops on Practice-Ready Lesson Development

Some of the more experienced academic success professors could also offer to deliver a faculty development workshop focused on creating practice-ready lessons. These lessons would draw on standard andragogically-sound lesson

planning. Thus, the workshop could be about developing andragogically sound lessons in the context of developing practice-ready lessons.

When giving a faculty development workshop, it is often easier to have a neighbor school invite you to give a workshop than it is to have your own faculty recognize your value. An expert is often defined as a knowledgeable person *from at least 50 miles away*. Once you have delivered this workshop at other schools, your own school might be more interested in your workshop.

When creating a faculty development workshop, keep in mind that it often takes a lot more time for planning and preparation than developing lessons for students. So, ensure you have the time to put forth a quality program by the delivery date.

Also keep in mind that the audience has changed. You are no longer the expert teaching the novice. Rather, you are an expert sharing ideas with fellow equals.

If you begin by giving information, you will often cover ideas which they already have. As a result, you risk losing their attention before you get to the value-added information. Thus, it is often a good idea to let professors share their own expertise first with each topic that you introduce. For example, you can ask professors what best practices they utilize to write learning objectives. By placing this exercise before your talking points, you can limit your talking points to ideas the group didn't cover or expanding upon ideas a faculty member provided. Additionally, this exercise allows

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faculty to share their own expertise with their colleagues. Often times, these types of workshops are where faculty learn what their colleagues are doing, so your workshop can facilitate current and future exchanges of ideas. To cut down on the “I do the same thing that she does” comments, after each professor’s idea, ask how many professors also utilize that idea.

It is often a good idea to follow the “acknowledgement of experts in the room” with questions professors have about your topic. That way, professors identify their learning goals explicitly and you can tailor your talking points to address their goals in a personal way. This exercise often allows faculty to better perceive the workshop as beneficial to them.

Finally, it is often a good idea to workshop your workshop with a few trusted colleagues. Faculty workshops are a different animal, and often much harder, than teaching students, so it’s good to get feedback before you take your show on the road.

Opportunities for Curricular Redesign

As many schools adopt policies requiring or encouraging faculty to engage in practice-ready exercises, two problems arise: excessive repetition of introductory skills and inclusion of advanced exercises placed in the curriculum without the necessary pre-requisites.

Coordination

When many faculty adopt practice-ready exercises simultaneously,

the result can be that many of the practice-ready exercises emphasize the same few skills. Multiple exercises in multiple contexts can be a good thing. However, if the exercises tend to be geared toward “introduction to x skill,” students might perceive the later exercises as less beneficial. Additionally, the school misses an opportunity for exposing students to a breadth of practice-ready skills.

Even a relatively new academic success professor could volunteer to keep a list of practice-ready exercises that faculty offer at his or her institution. The list could collect data on the subject, topic, general skill, and specific skill. That way, when another faculty member wants to create a lesson, they could check to make sure they are not duplicating skills. If their idea does duplicate efforts, you might be able to begin a conversation about other ideas for their lessons by identifying critical skills that are missing from the totality of offerings.

Exercise Placement

Because of the independent nature of the teaching, faculty often make assumptions about what students have been exposed to in prior courses. Because of the “do it now” nature of many policy adoptions, faculty often don’t have time to fully consider all of the prerequisite skills students need to complete the assignment. Additionally, while faculty have years of expertise thinking about prerequisite doctrine, many faculty don’t think about skills in the same terms, especially because lawyers have to learn the skills in whatever order they are needed for their current client. Thus, you have an opportunity to en-

gage in the curriculum development aspect of coordinating learning objectives across courses. In that role, you can help faculty think through the prerequisite skills necessary for a practice-ready exercise. You can keep track of the upper level practice-ready exercises, and possibly even suggest ideas for first, second, or third semester courses that would support the upper level practice-ready skills.

Opportunities for Creating Outcome Measurements

Finally, you can help your institution develop meaningful and attainable practice-ready outcomes. Measuring outcomes is a new and growing requirement for accreditation. Many law professors have not been exposed to the outcome measurement literature. Most law professors have not had to provide measurable outcomes for their courses. Thus, this concept is foreign to many law faculty.

In contrast, many academic success faculty have had to provide outcome measurements to justify our programs. In addition, academic success conferences provide exposure to outcome measurements. Finally, we have experts in our community who specialize in creating outcome measurements. Thus, the outcome measurement phenomenon provides us with an opportunity to serve our institutions by creating meaningful and achievable outcome measurements.

Conclusion

Academic Success Professors are often in a unique position to assist

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Conclusion

Academic Success Professors are often in a unique position to assist institutional

goals through faculty development. We often focus exclusively on direct services to students so that we neglect our possible role in faculty development. However, the push for practice-ready education draws on so many of our academic success strengths that we are in a position to best serve our institution by serving our faculty through assistance with lesson development, faculty development workshops, curricular design, and creating meaningful outcome measurements. This article provided many ways to reach these goals or begin developing the repertoire of skills and knowledge to work towards those goals. I would encourage any experienced academic success professor to pick one or two (no more) of these or similar activities and serve your institution by assisting faculty when they want to engage in andragogically-sound practice-ready exercises.

Call for Submissions

THE LEARNING CURVE is published twice yearly, once in the summer and once in the winter. We currently are considering articles for the Winter 2016 issue, and we want to hear from you! We encourage both new and seasoned ASP professionals to submit their work.

We are particularly interested in submissions surrounding the issue's theme of using ASP to increase student engagement. How do you motivate students? Are you integrating ASP throughout the curriculum to offer engaging opportunities for students? Are you involved with assessment at your institution and have tools to share with your colleagues that will enhance engagement? Do you creatively use social media platforms to reach students? Please ensure that your articles are applicable to our wide readership. Principles that apply broadly — i.e., to all teaching or support program environments —

are especially welcome. While we always want to be supportive of your work, we discourage articles that focus solely on advertising for an individual school's program.

Please send your submission to LearningCurveASP@gmail.com by no later than October 30, 2015. Attach it to your message as a Word file. Please do not send a hard-copy manuscript or paste a manuscript into the body of an email message.

Articles should be 500 to 2,000 words in length, with light references, if appropriate. Our publishing software does not support footnotes that run with text, so please include any references in a "References and Further Reading" list at the end of your manuscript. (Please see the articles in this issue for examples.) For more information, you may contact Lisa Young at youngl@seattleu.edu. Please do not send inquiries to the Gmail

account, as it is not regularly monitored.

We look forward to reading your work and learning from you!

-THE LEARNING CURVE Editors

**Don't learn to do, but learn
in doing.**

-Samuel Butler

The Learning Curve is...

The Learning Curve is a newsletter reporting on issues and ideas for the Association of American Law Schools Section on Academic Support and the general law school academic support community. It shares teaching ideas and early research projects with a focus on models and learning environments that create positive learning experiences for law students.

For more information about THE LEARNING CURVE, its content, or its editorial and selection processes, write to Lisa Young at youngl@seattleu.edu.

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