A Step Toward Aligning Legal Education with Practice

Encouraging Independent Issue Spotting

By Stephanie LaRose

Legal education has come under fire for being disconnected from the practice of law. Sometimes, though, these criticisms reveal more about the persons making them than they do about the supposed deficiencies of legal education. As one example, the authors of several law review articles question the value of traditional issue-spotting essay examinations in which a "good" answer is organized by identifying the issue, presenting the governing rule, applying that rule to the issue while examining both sides' arguments, and, finally, concluding.[1] Many lawyers will recognize this as the familiar IRAC method of organizing a legal analysis. And many lawyers likely remember receiving advice that in essay questions raising multiple issues, each issue must be treated using IRAC form.

Criticizing this traditional approach, one law review author claimed that organizing an exam answer using IRAC is not necessarily a good proxy for intelligence.[2] But this criticism is itself evidence that (at least some members of) academia are out of touch with practice.[3] Contrary to this author's assumptions, a typical law school exam attempts to assess basic lawyering skills, not intelligence. Whether attorneys litigate, do appellate work, draft wills, write contracts, negotiate real estate transactions, or practice law in other ways, clients approach those lawyers with a goal that they want to achieve. Lawyers have to then spot the issues, find the governing rules of law, conduct analysis and counter-analysis, and come to a conclusion to competently represent their clients.

Despite these authors' criticisms, variants of the IRAC method continue to be the gold standard in legal memorandum and brief writing—the skills I teach. The late United States Supreme Court Justice Antonin Scalia and Bryan Garner, who co-wrote the popular *Making Your Case: The Art of Persuading Judges*, know perfectly well that lawyers cannot persuade judges by neglecting the most basic and expected method of legal analysis.[4] And, as Garner was quoted in *The New Yorker*: "Word for word, lawyers are the most highly paid professional writers in the world."[5] Since lawyers are indeed professional writers, legal writing must be taught using the approaches that practitioners actually use and judges prefer.

But even in writing-focused skills courses, I wonder if faculty can do more to inculcate the skills needed for practice, in particular the critical skill of issue spotting. For example, I have observed reluctance on the part of legal-writing faculty to allow simulated client problems to be open-ended. There is an impulse to restrict the issues that students can identify and the arguments they can make. This is an understandable impulse; there are some legitimate pedagogical reasons, especially in the first semesters of law school, for trying to limit issues and arguments. New law students might have difficulty learning to effectively communicate their analyses and arguments even if their professors tell them exactly what those arguments should be. But exercising a level of control that discourages creativity and independent thought is not a good way to simulate actual practice, given that clients don't approach lawyers having identified their own legal issues or all the problems that could arise if, for example, estate planning documents or contracts are not drafted skillfully.

Faculty don't need to wait until after graduation to start seeing the effects of a failure to adequately teach issue spotting; instead, negative consequences can become apparent while the students are still in law school. I recently participated in a new bar-prep-type course offered by my law school in which students completed old bar examination essay questions. Those questions normally raised multiple issues, and the third-year law students were losing massive numbers of points for not identifying all of the issues, let alone analyzing them. Legal

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educators do students no favor even in the short run when controlling which issues students will research and analyze in legal writing, advocacy, and other skills courses.

Moreover, limiting opportunities for students to branch out and explore potentially novel lines of analysis and arguments—and learn the potential pitfalls that can occur when they go too far down an analytical rabbit hole—doesn't help the students when they graduate and enter practice. Legal employers are looking for new lawyers who can identify and anticipate issues for themselves. For example, in a criminal defense practice, no one is going to tell a new lawyer to file a motion to suppress. Instead, a new lawyer has to read the fact pattern (such as a police report) and recognize that the client may be able to raise a search-and-seizure issue. A bankruptcy client will tell his lawyer his life story; the lawyer then must cull the legally relevant information and identify the legal avenues that can be pursued. Because identifying issues is so crucial to how practitioners represent clients, students need more, not less, practice at issue identification, and they need to be allowed to chase down some dead ends only to find out, after hours of research, that an issue that initially looked promising is not viable.

Where can students obtain this experience while still in law school? From what I've observed, intra-school moot court and similar competitions are the best ways to develop and reward the skill of thinking independently to identify the issues. Unfortunately, at my law school, fewer than 10 percent of students compete externally in moot court; the numbers may differ slightly at other schools, but it's safe to say that the overall conclusion is similar. Since most students are not getting this experience, it's essential for professors to loosen the reins in those classes that come closest to replicating actual practice—for example, at my school, advocacy courses in which all students write an appellate brief and present oral argument.

In moot court competitions, although some of the issues posed by a competition's prompt can be obvious, thinking outside the box and identifying non-obvious issues in a brief is highly rewarded. I attribute this to the fact that practicing attorneys are usually ranking the briefs and arguments. Legal education should take a page from their book. The practitioner is the employer, and employers highly value independent critical thinking. Faculty need to work harder to help students develop issue-spotting skills and reward those who make unusual, but viable, arguments. Some law students will take to this more readily than others, of course, which is fine because some students get As and some get Cs. If law schools provide opportunities for and reward independent issue spotting, our grades and other assessments will better reflect whether new lawyers have acquired the skills legal employers want.

Finally, my suggestions in this article aren't aimed solely at professors. Practitioners can play their part, too. Specifically, since moot court and similar competitions are among the most effective pedagogical tools that law schools offer—in part because practitioners participate in them and thus expose students to what's valued in practice—practitioners should take every opportunity to get involved in these competitions. By judging, advising, and ranking briefs and other student submissions, practitioners can help reinforce the importance of creative issue spotting. Doing so will help strengthen the skills of future employees and the profession as a whole. ■

Stephanie LaRose is a clinical professor of law at Michigan State University College of Law. She has taught moot court, advocacy, and legal writing for more than 15 years. Before teaching, she litigated at a mid-sized firm and as an assistant prosecutor, and then presided over child custody and support, child abuse and neglect, and juvenile delinquency cases as a family court referee. She is the current chair of the SBM Professional Ethics Committee.

ENDNOTES

1. See, e.g., Friedland, *A Critical Inquiry into the Traditional Uses of Law School Evaluation*, 23 Pace L Rev 147 (2002) and Zimmerman, *What Do Law Students Want?: The Missing Piece of the Assessment Puzzle*, 42 Rutgers L J 1 (2010).
2. *A Critical Inquiry* at 156.
3. As even more evidence that traditional legal academia had to be forced to acknowledge the value of skills training, the American Bar Association recently added a requirement that students at an accredited law school must complete "one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement, as defined in Standard 304." ABA, *2018–2019 Standards and Rules of Procedure for Approval of Law Schools*, Standards 303(a)(3) and 304(a) <https://www.americanbar.org/groups/legal_education/resources/standards.html> (accessed October 13, 2018).
4. Garner & Scalia, *Making Your Case: The Art of Persuading Judges* (St. Paul: Thomson/West, 2008).
5. Carp, *Writing With Antonin Scalia, Grammar Nerd*, The New Yorker (July 16, 2012) <https://www.newyorker.com/news/news-desk/writing-with-antonin-scalia-grammar-nerd> (accessed October 13, 2018).