BRUTAL CHOICES IN CURRICULAR DESIGN …

WHY I DON’T GIVE A RESEARCH EXAM

BY JUDITH ROSENBAUM

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Most of us who teach legal research, whether
as part of a stand-alone Legal Research course or
as part of an integrated Legal Research and
Writing course, would agree on the pedagogical
goals we are trying to accomplish in our research
training. We want students to learn that legal
research is part of a process leading to oral or
written analysis of legal rights and duties relevant
to a client’s problem. Thus, we want students to
learn about the types of primary authorities used
in legal analysis;2 the range of finding tools that
analyze the law or cite to primary authorities, or
both; and the mechanics of using the various
finding tools.3 Ultimately, but probably not until
they understand the webbed relationship between

1 I would like to thank Helene Shapo, who taught me just
about everything I know about teaching Legal Research and
Writing. Her insight and advice guide much of what I do in this
field. I would also like to thank Helene Shapo, Mary Lawrence,
and Mary Hotchkiss for their encouragement about my writing
this article and their patience waiting for it. Last, but not at all the
least, I would like to thank the creators of the research exams
cited in this article. I hope you will take my comments in this
article as an appropriate subject for professional debate. I am very
grateful to you for your willingness to share your exams by
publishing them in print and on the Internet.

2 The goal of research is to “find the relevant binding and
persuasive primary authorities of law.” Helene S. Shapo, Marilyn R.
Walter & Elizabeth Fajans, Writing and Analysis in the Law 209

3 See Maureen Fitzgerald, What’s Wrong with Legal Research
and Writing Problems and Solutions, 88 Law Libr. J. 247, 257
(1996) (“[T]he focus in legal research and writing should be on the
process of legal research and writing, which teaches students when
particular sources are needed, where to look for them, and how to
use them.”). authorities and finding tools, we want students to
understand how to develop a research strategy so
that regardless of the substantive area their issue
involves, they will be able to research that issue
with facility.4

Legal research teachers would also probably
agree that students do not remember nearly as
much after completing our courses as we would
like them to remember and that students and

4 Susan S. Katcher, Reflections on Teaching Legal Research in
Expert Views on Improving the Quality of Legal Research Instruction
in the United States 46, 47 (West 1992) (suggesting that sources
should be taught before introducing students to strategy).
even recent graduates often struggle putting what they do recall into practice in their jobs.¹ Most of us would agree as well that we need to use good assessment and feedback tools in our teaching to motivate our students and to stimulate learning.² We would disagree, however, on why they don’t retain what they learn in our classes as well as we would like³ and also on what constitutes a good assessment and feedback tool.⁴

Although legal research assessment tools have been called by a myriad of different names,⁵ all of them seem to fall into one of two categories. These assessment tools are either exercises designed to guide students in the various legal research resources or exams designed to test what they have learned at an earlier point in the year. Of course within the categories of exercises and exams, there are further subdivisions. For example, there are

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¹ In the late 1980s and early 1990s, many law librarians and legal research teachers engaged in vigorous written debate about the reasons for students’ poor research skills. Citing all these articles would take up too much space in this short essay. However, many longer journal articles written after this debate do provide citations to this rich debate in its entirety. See, e.g., James B. Levy, Better Research Instruction Through “Point of Need” Library Exercises, 7 J. Leg. Writing Inst. 87, 89 n. 7 to 90, nn. 8, 9 (2001).

² Id. at 92. See also Kristen B. Gerdy, Teacher, Coach, Cheerleader, and Judge: Promoting Learning through Learner-Centered Assessment, 94 Law Libr. J. 59 (2002).

³ Compare Ann Hemmens, Advanced Legal Research Courses: A Survey of ABA-Accredited Law Schools, 94 Law Libr. J. 209, 213 (2002) (suggesting that if students don’t have a chance to use the research skills that they learn, they will not “retain knowledge about them very long.”) with Helene Shapes & Christina L. Kuna, Teaching Research as Part of an Integrated LR & W Course, 4 Perspectives: Teaching Legal Res. & Writing 78, 80 (1996) (arguing that students remember more about their research instruction than they used in “some former—but unspecified—golden age of research instruction” as a result of better text books, improvements in the exercises used to teach research, and the integration of research and writing instruction in many law schools). See also Mary Whisner & Lea Vaughn, Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives, 4 Perspectives: Teaching Legal Res. & Writing 72, 72 (1996) (emphasizing that continual practice is needed to develop fully a newly taught skill).

⁴ See Amy Sloan, Creating Effective Legal Research Exercises, 7 Perspectives: Teaching Legal Res. & Writing 8, 8 (1998).

⁵ See Dennis S. Sears, The Teaching of First-Year Legal Research Revisited: A Review and Synthesis of Methodologies, 19 Legal Reference Serv. Q. 5, 10–14 (2001) (referring to dozens of these names, both favorable and derogatory).
In the following excerpt, the questions are asked in a true-false format:

6. True or False: You can find a case using a digest if you know only the docket number. [3 points]

7. True or False: United States Supreme Court cases are always binding on each state supreme court. [3 points]

The following questions are asked in the short-answer format:

• What are three things contained in an annotated code that are not contained in an unannotated code? Please be specific. [6 points]

Some objective test questions use the "matching" format, which is somewhat of a cross between multiple choice and short answer. Following is an example of this format:

<table>
<thead>
<tr>
<th>Match These ...</th>
<th>To These</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Law Reports (ALR)</td>
<td>A. An individual pamphlet issued upon enactment of a statute into law.</td>
</tr>
<tr>
<td>Digest</td>
<td>B. The same case in a different reporter.</td>
</tr>
<tr>
<td>Law Reviews or Law Journals</td>
<td>C. A system of arranging, by subject, the headnotes of cases.</td>
</tr>
<tr>
<td>Official Reports</td>
<td>D. Statutes enacted by a legislature, arranged chronologically.</td>
</tr>
<tr>
<td>Parallel Citation</td>
<td>E. The first appearance of a decision issued by a court.</td>
</tr>
<tr>
<td>Restatements</td>
<td>F. Alphabetical compilation of terms defined by the courts.</td>
</tr>
<tr>
<td>Session Laws</td>
<td>G. The public, general, and permanent statutes of a jurisdiction in a fixed subject or topical arrangement.</td>
</tr>
<tr>
<td>Shepard's Citators</td>
<td>H. The opinions of a given court published by the court-designated publisher.</td>
</tr>
</tbody>
</table>

(continued on next page)

14 Huddleston, supra n. 13.
15 Jensen, supra n. 14.
16 Lynch, supra n. 16, at 438, n. 42.
21 Darby Dickerson, Stetson College of Law, Faculty and Courses, Research and Writing I Exercises, Fall 1999 Exam <www.law.stetson.edu/darby/r&w1.htm> (last updated Aug. 19, 2002).
22 Staheli, supra n. 13, at 75
The problem with all of these test questions, regardless of whether they are asked in multiple-choice, true-false, short-answer, or matching format, is that they teach memorization. While it certainly is true that knowledge acquisition is a necessary foundation for learning, because raw facts have to be absorbed, and often memorized, before higher forms of cognitive activity can take place, the essence of legal research is a search for understanding in which finding and thinking continually cross-fertilize each other and these mental processes cannot be emulated by an objective test.

Some research professors have recognized that knowing the answer to a question such as how many series of ALR are published does not really demonstrate a student’s mastery of legal research ability, because these questions do not involve any analysis. These professors have attempted to devise analytical questions by building a series of multiple-choice questions based on a short hypothetical fact pattern. The following is an example of this type of exam question:

Questions 17–20 are based on the following paragraph.

Your firm has been retained to represent Britney Moore. Ms. Moore recently had the name “Justin” tattooed around her navel by a tattoo artist in Nevada. Apparently, the tattoo dye has caused inflammation and infection of her navel. You attended a meeting with a senior partner at your firm and Ms. Moore to learn more about the facts of the case and her injuries.

17. At the conclusion of the meeting, the senior partner asked you to determine potential causes of action to be pursued in Nevada and to begin researching the law immediately. What are your next steps?

A. Go to the library and begin to research Nevada law on body tattoos.

B. Go online and pull up all law review articles from Nevada journals addressing body tattoos and tattoo dye.

C. Analyze the facts and formulate a preliminary research question.

D. Go to the library and find a secondary source discussing body tattoos.

E. Make a list of all sources of law.

18. The senior partner believes that there is a statute in Nevada that regulates tattoo artists. He has asked you to research this potential statutory claim. Which of the following would be the most effective way to begin your research?

A. Find the Nevada Revised Statutes because it will provide the governing statutory language.

B. Find the Nevada Revised Statutes Annotated, either in the statute books or on Lexis or Westlaw, because the annotated statutes will provide both the governing statutory

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25 Lynch, supra n. 16, at 416.
26 Id. at 416–19.
language as well as annotations to cases interpreting the statutory provisions.

C. Search the Internet for sites about tattoos because the Internet is free for all attorneys, and searching the Internet is the most efficient method to find all information.

D. a and c.

E. all of the above.27

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The problem with all of these is that they do not measure a student’s understanding of or ability to do good research. Research is a process involving an interaction between thinking and doing. It takes place in context—in the context of a client’s problem for which controlling law must be located and analyzed.28 Thus, a good researcher must

- understand the relevant facts;29
- think about legal concepts that can serve as search terms;
- go to research sources, whether in print form or online, to test out the utility of the search terms;
- evaluate the utility of the sources and information discovered and adjust the search terms if necessary;
- read explanations in secondary authority of unfamiliar areas of the law governing the issue once the relevant search terms are identified;
- read and analyze the primary authority to determine how it relates to the client’s problem;
- evaluate the usefulness of the material discovered and determine whether there are gaps that need to be filled, either by more research or by deeper analysis of the sources;
- conduct additional “spot” research when necessary or appropriate to fill in the holes;
- know when to follow a research trail to the end, when to start a new trail30, and when to stop.31

These tasks, which are essential to a good research strategy, are part of a recursive process, in which the researcher understands the relationship among tools, authorities, and analysis and constantly fine-tunes and adjusts the steps of the research process based on reading what he or she discovers and analyzing that material in light of the oral or written report he or she will make to the client or to a senior attorney.

The problem with the objective research exam is that it is one-dimensional. The answer is there if the questions are multiple-choice, true-false, or matching format, or the answer can be recalled from memory if the questions are short answer. This type of exam does not mirror in any way the trial-and-error aspects of actual research.32 It fails to capture the internal feedback loop that comes from reading and analyzing the various sources consulted. It doesn’t bring up the decision points where the researcher reaches a fork in the road, such as what to do when he or she cannot find a controlling case or statute, and must decide which way to turn. The objective exam omits the critical role that timing often plays in research, where an answer must be found by a certain date in order to be ready for a client meeting or to satisfy a court deadline. It is missing the imagination and creativity, and even a little bit of the serendipity33.

30 For example, sometimes the first step in research, perhaps reading a treatise, will lead to a citation to a relevant case in the controlling jurisdiction. A good researcher might go to that case, read it, decide it is helpful, and go to either a citator or a digest to find similar cases from the jurisdiction. This is what I call following a research trail to its end. Once the end of the trail is reached, the researcher must decide whether to start a new trail, such as looking at another treatise, or perhaps American Law Reports or a legal periodical or whether he or she has enough material from the first trail to begin preliminary analysis of the problem.

31 Christina L. Kunz, Terminating Research, 2 Perspectives: Teaching Legal Res. & Writing 2 (1993).


33 We all must have had at least one time or another, at least in print research, the experience of looking for what we need in one section of a book and accidentally happening upon another section that turns out to be even more useful than what we were originally trying to find.
that research actually involves. In short, the objective exam is missing the tangible, physical interaction between thinking and doing that constitutes the essence of good legal research.

Having said all this, and having taken the time to review at least some of the research exams that our profession is using—and, of course, having been a lawyer for 26 years—I can see the other side. A lot of time and thought has gone into the creation of these exams. Many of the questions are excellent. Moreover, these types of questions have a purpose since learning theory tells us that knowledge acquisition is the first step to moving from novice to expert and these objective questions force students to know the basics and give them the motivation (or prod, as the case may be) to commit the basics to memory so that they can go on to higher forms of learning such as “comprehension, application, analysis, synthesis, and evaluation.”

The objective research exam seems to me to put the cart before the horse, or perhaps more accurately, focuses on the cart and leaves the horse in the barn. It makes the answers to questions an end in themselves and not a means to an end. These questions would seem to make an excellent in-class assignment, maybe even a game that could be played in class where students work on the questions in teams and a prize is given to the team that garners the most points. But as an end-of-the-semester evaluative mechanism, these exams miss the point. The real proof of whether we have accomplished our pedagogical goals in teaching legal research is not whether our students can answer these objective questions, but, rather, whether they can harness together “finding and thinking,” or in other words whether they can get the horse out of the barn and in front of the cart.

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34 Fitzgerald, supra n. 24, at 262.
35 Lynch, supra n. 16, at 426.