

Creating Expert Legislative Drafters: A Literature Review and Research Agenda

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This paper is a very brief, descriptive overview of some current general theories on the nature of expertise, the differences between novices and experts, and educational strategies that support expert learning. Because there is so little research - disciplined inquiry rather than storytelling or musing — on expert lawyers, we can theorize but not confirm whether the general theories apply to lawyers and specifically, to legislative drafters. We can, however, jointly begin to describe characteristics of novice and expert drafters and to develop methods of learning in the workplace that sustain expertise.

This paper reviews the literature on learning for lawyers, concepts of lawyering competence, concepts of expertise, the literature on novice-expert lawyers, and concludes by setting out a research agenda on expertise in legislative drafting.

The continuum of learning for lawyers

Legal education has changed substantially within the last twenty years, although the formal curriculum still relies substantially on doctrinal courses taught in a lecture setting. The growth and maturation of clinical legal educators and legal writing educators has brought alternative teaching methods to the foreground, providing students with both simulations and live experiences. While still “siloed” within the mainstream, clinicians and legal writing teachers are developing rich theoretical constructs supported by specialized journals and conferences.

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However, the literature on legal education is still weighted to what can best be described as classroom research, or philosophical essays rather than disciplined educational research. Indeed, one extensive review of the empirical research into legal education concluded that “relatively little is known, overall, about legal education.” (Ogloff, Lyon, Douglas, & Rose, 2000, at 242); Neumann and Krieger reached a similar conclusion in their review of research-based clinical legal education.(Neumann & Krieger, 2003)

Learning in the law firm

In contrast to the body of literature on post-graduate learning in the health care professions, the process of learning to become a lawyer after law school — as opposed to learning to think like a lawyer in law school — remains unexplored. The body of literature on learning after law school can be described as incomplete and fragmented.

Organizations such as National Association of Law Placement (NALP) and Association of Legal Administrators have produced some work on learning after law school. (NALP Foundation for Research and Education, 1998). While generally based on survey research, the reports are atheoretical and best described as prescriptive documents.

My academic literature review located very little research into learning after law school. This literature can be divided into three streams: research into the learning process, research into motivation for learning, and research into professional legal training programs.

Katzman (1996) replicated the classic Fox, Mazmanian and Putnam study to examine the extent to which learning played a role in lawyers lives. Katzman found that change was externally motivated, learning was primarily self-directed and not deliberative, and that the most frequently cited informal source was other people.

Foster (2000) examined how lawyers learned to manage — defined by supervising and training their junior lawyers. She found that learning was informal, using strategies of observation, analogous experiences, trial and error, and role modelling. Lawyers did not share and evaluate common learning experiences. Specifically, she found that “participants

were not the beneficiaries of mentoring or coaching relationships in learning lawyering skills. Learning anything about the managerial role through mentoring or coaching relationships was an even more rare occurrence.”

The Institute for the Study of the Legal Profession has produced a number of studies of vocational training in England (Johnston & Shapland, 1996; Shapland & Sorsby, 1995; Shapland, Wild, & Johnston, 1995). The Centre for Legal Education has produced two studies of vocational training in Australia (de Groot, 1995; Nelson, 1993) together with a review of the research and theories on continuing legal education (Roper, 1999). These studies focus largely on formal continuing legal education programs; in particular, the Shapland and the de Groot studies examined formal practical legal training programs in England and Wales, and in Australia.

Lawyering Competencies

The “trajectory of learning” can also be described as the transition period in which the student develops into a competent practitioner. A rich descriptive literature on lawyering competencies has developed over the past twenty-five years in both the United States and Commonwealth jurisdictions. While the literature is useful in that it provides some level of description of what lawyers do and on what lawyers need to learn as well as providing normative standards, it is limited. The literature describing elements of competent practice does not identify stages of development nor does it address how learning occurs. It tends to rely substantially on a behavioral view of learning and the nature of practice, although more recent formulations acknowledge the need for “reflective practice” (Schön, 1983, 1987, 1995) Finally, the descriptions of competent practice rarely acknowledge the affective components of lawyering. While Menkel-Meadow (1994, p. 595) specifically critiques the MacCrate Report, this quote applies generally to descriptions of lawyering competence:

Attempting the kind of taxonomic, scientific, classificatory, and schematic thinking about lawyering that comes closer to a Langdellian statement of “scientifically derived principles” about lawyering than any area of doctrinal law has accomplished. It is thus, too over-determined, too rigid and, at the same time, too incomplete for me.

For me, the MacCrate Report pays insufficient attention to the human aspects of lawyering — variously called empathic, affective, feeling, altruistic, and service aspects of lawyering, whether the representation is of an individual, an entity, or a “cause” or issue.

Lawyering competence has been defined for the purpose of professional governance. For example, the Law Society of Upper Canada offers a broad description of lawyering competence that is now included in the Rules of Professional Conduct. Similarly, the American Law Institute-American Bar Association in 1980 proposed a definition, cited in Roper (1999, p.100-101) :

Legal competence is measured by the extent to which an attorney

1. is specifically knowledgeable about the fields of law in which he/she practices,
2. performs the techniques of such practice with skill,
3. manages such practice efficiently,
4. identifies issues beyond his/her competence relevant to the matter undertaken, bringing these to the client’s attention,
5. properly prepares and carries through the matter undertaken, and
6. is intellectually, emotionally and physically capable.

More extensive descriptive lists are available. Beginning with the relatively modest list of six competencies (oral competency, written competency, legal analysis competency, problem-solving competency, professional responsibility competency and practice management competency) (Cort & Sammons, 1980) up to the more recent Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (the MacCrate Report) (American Bar Association Section of Legal Education and Admissions to the Bar, 1992) expansion to ten competency skills and four values, academics and professional governing bodies have attempted to describe in varying levels of detail what lawyers do. Fitzgerald (1994) provides a thorough description of the work on lawyer competences, including the significant work in the U.K., Australia and New Zealand.

Roper (1999, p.115-117) analyzed a series of questions about the nature of competence-based training (questions applicable to other professions as well):

Can competence be seen only as context specific or can it be described in general terms?

Do competence standards set minimum standards or standards of excellence?

Can standards be written which are realistic or are they inevitably aspirational?

How can competence-based standards reflect the flexibility of legal practice, with its need to deal with contingencies and variance?

Are the standards to be of performance or attributes?

How do we write competence-based standards for a profession that is not homogeneous?

Cognitive apprenticeship, craft apprenticeship, experiential learning and situated learning

Learning within law firms includes elements of cognitive apprenticeship, craft apprenticeship, experiential learning and situated learning, in a complex mix. The mix includes behaviours that are highly visible and reproducible — for example, behaviour with clients, colleagues and others — together with activities that are invisible unless unearthed — for example, deciding on strategy or analysing documents.

These theoretical frameworks are helpful because they explain the social nature of learning as well as the developmental trajectory during the lengthy and complex apprenticeship process. However, these frameworks do not address the specific role of relationships in learning, either within a dyadic or a constellation of relationships.

Collins, Brown and Newman (1989) have identified some of the crucial features of traditional apprenticeship: 1) apprenticeship focuses closely on the specific methods for carrying out a task in a domain, learned through modelling, coaching (with scaffolding) and fading, 2)

observation plays a key role, providing a conceptual model of the task or process, and 3) learning takes place within a social context, where all members participate in the target skills, with access to more than one master and to other learners.

Cognitive apprenticeship, in contrast, addresses the method to teach the processes that experts use to handle complex tasks, and conceptual and factual knowledge situated in the multiple contexts of their use. Learning is focused on cognitive and meta-cognitive, rather than physical skills and processes. Traditional apprentices can rely on observation since process and methods are visible; learning cognitive skills relies on the “externalisation of processes that are usually carried out internally” (Brown et al., 1989 p. 457).

Like the traditional apprenticeship model, lawyering is a highly social activity. Working in a firm of any size, students are exposed both to experts and to learners at different stages of development. Some lawyering tasks can be learned through observation and gradually more active participation — much like the tailors of Goa (Lave & Wenger, 1991). Law students can observe client meetings, transactional closings, and meetings with other lawyers, negotiations, courtrooms, discoveries, etc. However, they may not be able to move from the outside to the inner circle with the same stately precision as the tailors (from cutting to pressing to simple garments) — in part because events do not always unfold in predictable ways, and in part because of the exigencies of the workplace.

However, much of what lawyers do is cognitive. While the final product — a document or a winning argument — is observable — the complex processes that lead to the result are not. For example, the expert transactional lawyer may begin with a useful precedent, and knows how to tailor the precedent in accordance with the facts of that particular transaction. The novice may not “see” the salient differences between the particular transaction and the document. So, for young lawyers, access to the “masters” cognitive thinking is a critical feature of their development (Blasi, 1995; Neumann, 1989).

Unlike law school, young lawyers in the workplace are part of the ordinary culture of their practice and therefore their learning can be characterized as “situated”. At the entry level, many of their tasks are at the “outer margins” of activity: research, organising paper, conducting searches. These activities are often critical to success, yet only a small

piece of a much larger picture. The young lawyer may or may not understand how their small piece fits the big picture — or even what the big picture is. Often files unfold over time, so that observation of activity within a single file requires a certain level of perseverance.

These descriptions of cognitive apprenticeship and situated learning are consistent with Resnick's (1987) four differences between learning in school and learning out of school: 1) individual cognition in school versus shared cognition outside, 2) pure mentation in school versus tool manipulation outside, 3) symbol manipulation in school versus contextualized reasoning outside school, and 4) generalized learning in school versus situation-specific competencies outside. A unified theory of learning at work could classify activity within one or more of these differences and identify the learning process or processes for each.

Eraut (2000) describes four main approaches to the facilitation of learning in the workplace: induction and integration, exposure and osmosis, self-directed learning, and structured personal support for learning. This structured personal support is further described as a "virtuous circle of positive development": offering support increases confidence, which allows for more challenging work which in turn increases confidence.

Expertise

Over the past twenty or so years, cognitive psychologists and educational researchers have grappled with the problem of identifying characteristics of experts, describing expert analytical and creative processes, and applying the results in the formal learning settings as varied as elementary schools and professional schools. A recent theme issue of *Educational Researcher*, a publication of the American Educational Research Association, included a series of articles on various questions on expertise. Predictably, most questions about experts remain unanswered; in particular, we have very little information or research on what constitutes expert lawyering practice and teaching and learning for expertise.

Characteristics of Experts

Theorists differ even on the appropriate description of an expert. The introduction to the theme issue describes the consistent and reliable features of experts as those who:

- ❑ possess extensive and highly integrated bodies of domain knowledge.
- ❑ are effective at recognizing the underlying structure of domain problems.
- ❑ select and apply appropriate problem-solving procedures for the problem at hand.
- ❑ can retrieve relevant domain knowledge and strategies with minimal cognitive effort. (Alexander, 2003)

Lajoie describes expert characteristics as:

- ❑ superior memory for information in their domain.
- ❑ better awareness of what they do and do not know.
- ❑ greater pattern recognition.
- ❑ faster and more accurate solutions (although they tend to spend more time initially analyzing problems prior to solving them).
- ❑ deeper, more highly structured knowledge. (Lajoie, 2003)

Sternberg theorizes that becoming an expert calls for a blend of creative, analytical and practical thinking that goes beyond deliberative practice; while a large, well-organized knowledge base seems necessary, it is not enough. (Sternberg, 2003)

Scardamalia and Bereiter (cognitive psychologists based at OISE/UT themselves experts in computer-based knowledge building communities) describe experts not in terms of the bundle of attributes or in contrast to novices, but as persons engaged in a process. They contrast “experts” with “experienced non-experts”:

Experts address problems whereas the experienced non-expert carries out practiced routines. The career of an expert is one of progressively advancing the problems of a field of work, whereas the career of a non-expert is one of gradually constricting the field of work so that it more closely conforms to the routines the non-expert is prepared to execute.

Experts tackle problems that increase their expertise – non-experts tackle problems for which they do not have to extend themselves. (Bereiter & Scardamalia, 1993, p. 11)

Thus experts continually reinvest mental resources in progressive problem solving.

Research into Lawyers and the Novice-Expert Continuum

Predictably, there is very little research into the differences between novice lawyers and expert lawyers. Lundeberg (1987) compared law students and experts (law professors and practitioners) reading case law, asking each participant to “think aloud” while reading a series of cases. She found that, on the ability to synthesize:

“...the experts classified problems at a higher level than did the novices, who were more likely to classify problems to be solved by the surface characteristics given in the problems. Here, in discussing the cases, experts could pull together the underlying threads, tying together the facts, issue, rule and rationale into a cohesive whole. The novices tended to focus more narrowly on one element of the case, demonstrating less connectedness in their discussion of the case.” (1987, p. 414)

Experts and novices used time in different ways: experts would spend more time overviewing the case and reading the first page, providing context for later reading. “Novices failed to attach the same importance to the first page and did not spend any more time on this page than on the others.” (1987, p. 416)

The experts used six reading strategies. Five strategies were not used by the novices:

1. Use of Context: noting the name of the parties, the date of the opinion, and the court or judge.
2. Overview: previewing the opinion, marking the action and summarizing the facts
3. Rereading analytically
4. Synthesizing the facts, rules and rationale of the case, and generating hypotheticals
5. Evaluating the opinion, expressing approval/disapproval, and demonstrating a sophisticated view of jurisprudence.

And one strategy was used by both the novices and the experts:

1. Underlining.

Oates (1997) replicated this study with similar results, although she focused specifically on the needs of law students admitted through an alternative admissions program.

Sherr (2000) studied the differences in initial interviewing skills of entry level and of experienced lawyers, finding that there were essentially no differences in skills as between new lawyers and lawyers with as much as twenty-five years experience. He concluded in part that “(E)xperience over time does not appear by itself to turn out vastly better client interviewers, and is a very poor second compared with the results of training.” and “it would seem to be essential that the apprenticeship system ...should provide careful supervision and monitoring of young lawyers program is the full value of experience is to be gained.” (2000, p. 113).

The sparse research base means that we have limited information on how novices think about constituent problems of legal practice, how they formulate solutions, and where they go wrong. The handful of studies on entry to practice does provide some information, in particular on how the novices handle what Scardamalia and Bereiter describe as “self-regulatory knowledge”, or self-management. “Self-regulatory knowledge may be thought of as knowledge that controls the application of other knowledge.” (Bereiter & Scardamalia, 1993, p. 60)

A very recent UK study (Fancourt, 2004) is helpful. Fancourt interviewed both solicitor trainees and trainers at a number of different institutions, as background research to improve the Law Practice Course. Comments by both trainees and trainers illustrate novice problems, particularly in self-management:

“I think...that students are still in an academic mode of writing, rather than getting to the point...Comes through when writing up recommendations from a piece of research they might have done. Or drafting a letter of advice. Really good ones master it quite well. Sets a good trainee from the average one, ability to get straight to the issue...the only criticism of the research is the ability [or lack of it] to see the wood for the trees...They give everything and it is for someone else to decide what is wood and what is tree” (2004, p. 32)

“I am afraid trainees straight out of LPC with no prior experience generally don’t know what they don’t know. It puts more pressure on us as they need nurturing much more and are much less help.” (2004, p. 17)

“analytical skills, getting down to what the problem is...and here’s the legal context and here’s the answer. Clarity of thought...understanding the context of what it is, and that there are different answers and different options on each question.” (2004, p. 25)

“One of the things we are looking for, is that you don’t need to know answers to everything, but should know when you are getting out of depth...Capable of realizing very quickly if something is not following the norm or they are getting to a point when they are uneasy with it.”(2004, p.27)

“[Trainees need to be] more aware of how to use precedents: the way to use them constructively and not just copy them out...[They] always find drafting difficult, seem to get really entrenched with precedents and it puts free thinking out of window, and more importantly they don’t look at the document as a whole, and if they stick different precedents together they don’t check the basics such as defined phrases.” (2004, p. 32)

“Sometimes it seems that trainees arrive looking forward to head-down, black-letter law and legal research. Whereas in fact so

much of what we do here involves transaction management...it's very practical.... graduates who have outstanding intellectual credentials but how are less comfortable working in teams.. are going to take longer to find their niche.” (2004, p. 39)

Working from these interview quotes, we can conclude that the experts note that the best of the novices:

- ❑ get to the point
- ❑ can weigh competing options and make decisions
- ❑ know their limits
- ❑ understand the importance of context
- ❑ recognize the extraordinary
- ❑ work well with others

Becoming an Expert Drafter

If we were to construct a research agenda on the novice-expert trajectory or continuum, it might include these questions:

1. What are the characteristics of an expert drafter? At what point could one be considered an expert? Does it take a certain time period to develop?
2. Do experts approach problems differently than novices? What are the “surface features” in legislative drafting, and what are the underlying “deep structures”? Is there a defined point at which novices begin to identify the deep structures, thus redefining the problem at hand?
3. What are the problems for which legislative drafters must exercise self-management; for example, how do expert drafters work in teams, or work with clients, or manage changes in government and administration?
4. What kinds of drafting problems require progressive problem-solving, i.e. the ability to recognize and manage complexity over time. How do expert drafters progressively advance their field of work?

5. Finally, what combination of formal and informal learning supports the transition from novice to expert drafter?

Understanding the differences between novices and experts is useful in three ways: First, new drafters may think differently than expert drafters, and therefore need certain kinds of learning supports. Second, becoming an expert is a process that requires time and cannot be pushed. Finally, any official approach to teaching and learning should address mechanisms to enhance thinking in deep structures and progressive problem solving.

These questions will be explored further in the conference session.

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