University of Michigan Law School

University of Michigan Law School Scholarship Repository

2019

Transferability: Helping Students and Attorneys Apply What They Already Know to New Situations (Part 1)

Edward R. Becker

University of Michigan Law School, tbecker@umich.edu

Available at: https://repository.law.umich.edu/articles/2029

Follow this and additional works at: https://repository.law.umich.edu/articles

Part of the Legal Education Commons, Legal Profession Commons, and the Legal Writing and Research Commons

Recommended Citation

Transferability: Helping Students and Attorneys Apply What They Already Know to New Situations (Part 1)

By Ted Becker

Every fall, I work with my first-year law students to begin developing their legal writing skills. They work hard learning how to analyze cases objectively, predict how a court might resolve a dispute, and convey their assessments to an experienced attorney. Their improvement from September to December is noticeable. They have only one semester of law school behind them and still have much to learn, but they're on their way.

Then, every year, something happens. In the second semester, we begin focusing on advocacy. The first assignment asks students to draft a pretrial brief. When I review the drafts, I'm struck by how many problems that seemed to have been eradicated the previous semester reappear a little more than a month later. For many students, the hallmarks of effectively communicating legal analysis that were emphasized throughout the first semester—techniques in which students had started to become competent and, in some cases, proficient—are noticeably reduced or even absent from the draft brief. Organizing the analysis to focus on issues, not cases? Leading with conclusions? Keeping the unfamiliar reader oriented with strong topic sentences and other roadmap devices? Missing in action. To be sure, students make a signif-

icant shift from objective analytical memos to advocacy briefs, and it's to be expected that there might be bumps in the road that come with learning a new approach. Further, the students' substantive analysis tends to remain sturdy, and that's no small thing. But the ways in which students convey that analysis seem to backslide.

This can be explained in part by lack of practice. Legal writing is a skill, and like all other skills, a person's abilities can deteriorate without opportunities to put them into play. But the larger explanation is one that comes up over and over in all sorts of settings, whether academic, work-related, or personal. The reason my students seem to have forgotten much of what they learned can be summed up in one short phrase: the transferability problem. It's a problem they share with all adult learners. And as most lawyers who frequently work with young attorneys can attest, it's a problem that doesn't go away when law students graduate and begin practice.

A general introduction to transferability

Transfer can be defined quite simply as the ability to extend what has been learned in one context to new contexts.[1] One commentator calls it "[p]erhaps the single most important learning skill our students can

master."[2] It's a challenge that educators confront any time people acquire new knowledge or skills in one setting and then are expected to apply them in a new one. My experience from one semester to the next is often shared by clinicians at my school and other schools, who report that their upper-level students frequently seem to have forgotten what they learned in their first-year legal writing course or their summer internships when they're asked to perform tasks for clients in the clinical setting.[3]

I suspect that experienced attorneys who regularly work with new law school graduates are equally familiar with this phenomenon. A young attorney, with guidance from a mentor, learns to prepare a mediation summary in a premises liability case or draft a noncompete covenant for a business client. But ask that novice attorney to prepare what the supervisor might view as comparable work product in a different setting, and it can seem like the young lawyer has regressed to square one. This is undeniably frustrating to the supervisor on a personal level. It is even more troubling on a substantive level because transferring learning from one setting to another "goes to the core of what lawyers do in representing real clients—they transfer knowledge, skills, and legal concepts from previous cases to new legal and factual situations faced by their clients."[4]

> The reason my students seem to have forgotten much of what they learned can be summed up in one short phrase: the transferability problem.

What can be done to alleviate this common and often-frustrating byproduct of the ways the human brain is wired to take in and make sense of new information?[5] People tend to compartmentalize information in silos, illustrated by a law student learning a doctrinal rule in a class like Torts, putting that knowledge into a "torts" mental category, and being unable to easily retrieve it when engaged in tasks that the student doesn't recognize may relate to torts. The transferability problem can't be wished out of existence, but educators in general and legal educators in particular have developed various techniques to make transferring information and skills from one domain to another a more productive process.[6]

Techniques to ease the transfer problem are sometimes described as looking forward or backward. Whichever direction a particular technique might face, however, the goal is to assist adult learners in making connections between what they've learned or are learning and new situations where that knowledge will be useful. Practitioners who often work with young attorneys may want to consider whether these approaches could help new attorneys avoid common pitfalls and get up to speed more quickly.

Forward-looking transfer techniques

Forward-looking methods help prepare learners for transfer at the time knowledge is initially conveyed or obtained. Commentators have identified many useful techniques, including:

- Explicitly showing where and how a skill learned today may be useful tomorrow

- Teaching both the particular and the general

- Modeling desired approaches and outcomes

- Providing multiple opportunities to practice[7]

How can professors and practitioners help young lawyers both see the bigger picture *and* not forget it the next time they need it? A combination of the forward-facing methods described above can help. These techniques are not a panacea, to be sure, and I do not suggest that they will always be applicable or advisable. These methods also come at a cost: the supervising attorney's time and effort—little, if any, of which will be billable. The costs are often worth it, but there's no denying that a busy practitioner might not always have time to implement all or any of these methods each time a young attorney receives a new assignment. Still, in appropriate instances, supervisors putting these techniques into play with novice attorneys will likely find that these methods facilitate the new lawyer's on-the-job education.

Emphasize future applicability

Seasoned professors and practitioners can call upon their wealth of experience to help novice learners see how the skills they're learning today will be useful in different settings tomorrow. This can be as simple as explicitly telling students that the techniques used in an exercise simulating how to orally update a supervisor about where they tentatively stand on a research project will be applicable when they're asked to give a more detailed and conclusive oral analysis of a legal issue to a supervisor in their summer internships or upper-level clinics. In the same way, a senior attorney—drawing upon his broad knowledge of the assorted types of work that younger colleagues typically perform—has the necessary perspective to make connections between today's task and future anticipated projects.

Neither professors nor practitioners can predict the future with certainty, of course; I don't know for sure that any particular student will be called on to give exactly this type of oral report in a summer job or will ever take a clinic. Similarly, client work is not always predictable, and the downstream payoff of a discrete task for other types of work will sometimes be murky. This reflects a truism of teaching: no educational method works in every setting. In the right situation, though, any method can help increase the odds of a student or young attorney successfully transferring knowledge to new contexts.

Make the particular, general

One of the most effective methods of priming a novice learner for transfer is to step back from the specific details of the knowledge being conveyed today, important as those details are to accomplishing the task immediately at hand. The pedagogical goal should be placing those details in a larger explanatory context or deriving general principles of which the specific task is but an example. This can be accomplished with direct instruction from a professor or practitioner, but is even more effective when novice learners are able (perhaps with guidance) to identify those broader points on their own. This helps learners place today's new knowledge within their preexisting mental frameworks, sometimes referred to as "scaffolding," allowing them to more easily retrieve that information when needed later.

Here's an example, taken from the earlier oral report scenario: I encourage students to put themselves in the shoes of their audience, who will listen to the report in real time without the luxury of being able to hit a rewind button or flip back several paragraphs or pages in a written text. What do those audience characteristics mean for how the students should plan to orally convey information? My goal is for students to see that how they answer the question isn't limited to this particular type of oral report, but is representative of broader audience-focused principles that apply to all sorts of oral presentations (including, of course, oral arguments) that they might be called on to perform in their careers. Indeed, some of the points that students might identify in this seemingly (but superficially) narrow context of a research report are, in fact, applicable to any form of communication that has an audience—which is to say, everything.

Model approaches and outcomes

Modeling how to perform a task (or providing samples of quality work) is another simple method for alleviating transfer problems for novice learners. Asking students or young attorneys to reinvent the wheel not only wastes everyone's time and money, but is counterproductive in terms of learning.

The cognitive load on anyone asked to perform a new task or draft a new type of document is significant even when the person has examples to try to learn from. When the novice learner has to expend effort trying to identify basic characteristics of the task from scratch, the cognitive load increases. And worse, many of the neophyte's efforts to reduce that load aren't specifically directed at completing the task satisfactorily as much as learning what the task fundamentally entails. It's simply neither efficient nor effective in terms of productivity or learning.

Fortunately, in many instances, supervising attorneys can easily provide samples of work to help new attorneys learn what they need to prepare. If time permits, a supervisor can model how to perform a skill, which can be as simple as taking a young attorney to observe the supervisor's court hearing, deposition, or negotiation session. Of course, providing models or samples becomes even more effective when coupled with an explanation of *why* the sample is worth emulating. Admittedly, providing a sample might not always be practical (there might not be any upcoming opportunities for a supervisor to model a skill or technique, for example), and useful high-quality samples might not come readily. Further, a student or young lawyer can become wedded to a model and erroneously conclude that the model's approach is the only way to resolve a particular task. Still, in many cases, demonstrating a new skill for new attorneys via models or samples can be an effective way for them to both start to develop that skill in the present and see how it can be applied in different contexts in the future.

Practice, practice, practice

For legal skills, practice makes perfect—sometimes. From a transfer perspective, providing multiple opportunities to apply knowledge and develop a particular skill helps students build stronger mental scaffolding to aid recall months and years into the future.[8] An important caveat, however: without guidance, practice may not be as effective as it could be. Novice learners need to understand exactly what it is they're practicing. For example, novice learners may not recognize the deeper structure underlying two separate research exercises in a legal-writing class. Instead, they might focus on surface similarities or differences. In doing so, students may miss how the same broad research approach—say, beginning with secondary sources to get a handle on the basic legal principles applicable to the issue—likely applies equally well to a different research project that, at first glance, seems to raise completely different topics from those in exercises they have already completed.

Part 2—Reaching backward

Part 2 of this article will discuss backward-facing techniques for assisting knowledge transfer. Watch for it in the March 2019 issue. ∎

Ted Becker is a clinical professor of law and the director of the Legal Practice Program at the University of Michigan Law School. He teaches Legal Practice, Transactional Drafting, and Research and Analysis in American Law. He is a member of the Executive Committee of the Institute for Continuing Legal Education in Ann Arbor.

ENDNOTES

1. Bransford et al, *How People Learn: Brain, Mind, Experience, and School* (Washington, DC: National Academy Press, 2000), p 51 <https://www.nap.edu/read/9853/chapter/6>. All websites cited in this article were accessed December 12, 2018.

2. Capulong et al, *The New 1L: First-Year Lawyering with Clients* (Durham: Carolina Academic Press, 2015), p 41.

3. E.g., Bowman & Brodoff, *Cracking Student Silos: Linking Legal Writing and Clinical Learning through Transference*, Clin L Rev (forthcoming Spring 2019), p 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3234384>.

4. *The New 1L* at 41.

5. Any discussion of the science underlying human learning, memory, and brain processes will likely be outdated almost as soon as it's written. With that caveat, an accessible description can be found in Archer et al, *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J Leg Ed 258, 260–268 (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495575> [https://perma.cc/2ZCH-6FDM].

6. For a thorough discussion of transfer in legal education, see Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 Seattle U L Rev 51 (2010) <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1961&context=sulr> [https://perma.cc/SH9U-DXTB].

7. See *Cracking Student Silos* at 24 and *Reaching Backward and Stretching Forward* at 281–282.

8. *Reaching Backward and Stretching Forward* at 281.