7-2008

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New book on legal education demonstrates the lack of attention paid to legal research training

by Richard A. Leiter

Educating Lawyers, a new book from the Carnegie Foundation, analyzes our modern system of legal education, and, in some measure, finds it wanting. The authors set out to evaluate legal education's response to decades old criticisms that it fails to teach lawyering skills and legal ethics.

Many people both inside and outside the profession have long criticized law schools for failing to teach law students how to practice. The charge gained momentum in the 1970s when Chief Justice Warren Burger declared that law schools had generally failed to train lawyers how to practice. The criticism received added power in the early 1990s when the American Bar Association issued the McCrate report, which severely criticized law schools and challenged them to focus more attention on training lawyers in practical skills.

On the whole, few observers of modern legal education will find much to disagree with, nor will many find fault with, the authors' suggested remedies to fix it. The criticisms are that modern legal education places too much emphasis on teaching students legal analysis and not enough on teaching skills, defined in the study generally as "writing, negotiating, and counseling."

The authors also take legal academia to task for its testing methods, which frequently involve a single test at the end of a semester or year-long course, with no feedback along the way. The authors argue that the present system reinforces scholasticism devoid of practical skills. In a profession that deals with people's legal issues on a daily basis, it is absurd that a law student can graduate from law school without once practicing to solve a real or simulated legal problem or without once practicing interaction with a real or simulated client. The study uses modern medical education as a model of what professional education should be.

Thus, the book proposes a new model of legal education that integrates the teaching of lawyering skills, moral ethical training, and analysis. The proposal is hard to argue with, and the book presents it in highly readable, even enjoyable, prose.

But as a law librarian, I was curious what the authors had to say about the state of legal research instruction in modern legal academe. Surprisingly (but perhaps not), legal research instruction gets almost no mention anywhere in the book. There is not a single reference to legal research in the index. Legal research is rarely mentioned as a lawyering skill. This got me thinking about why this might be.

The Evolution of Legal Research

A careful reading of the book reveals an important insight into why legal research is not an important part of the dialog. On page six, the authors describe the history of legal education and state that, "Students taught from Langdell's case books were being introduced by their professors to legal research, much as a laboratory or seminar professor in the arts and sciences of those days would have led students to grasp the principles organizing the particular domain." The impression here is that the simple act of reading cases and analyzing them imparts legal research skills.

My first reaction to this assessment of legal research training was defensive. But after reflecting, I think that there is some truth to the observation above and an important lesson that law librarians involved in the training of lawyers should take very seriously.

First, when Langdell developed his casebook method of teaching, there was really very little in the way of legal bibliography. In the mid-1870s, among other things that today's legal researchers take for granted, there were very few reporters of record; the National Reporter System wasn't developed yet; there were no official sources at all to federal case law; few law reviews were extant; the US Code was only a desperate dream; and the Code of Federal Regulations wasn't even a dream yet. Perhaps, reading cases and treatises really did effectively teach law students nearly everything they needed to know about research.

The late 19th and early 20th centuries saw the industrialization of legal publishing: the development of the National Reporter System, Shepard's Citations, the explosion of New Deal policies and regulation, the eventual rise of administrative law, and ultimately the passage of the *Administrative Procedures Act* all contributed to a climate of prolific publication of legal materials of all types—primary, secondary, and scholarly. In the face of these developments the process of legal research moved from being simply finding and reading cases and treatises to knowing *where* to read about what and when.

While the Sources are Constant, the Formats Constantly Change

From the midst of this evolution of legal bibliography, legal issues developed multiple bibliographic dimensions. Nearly every issue a lawyer is now called upon to advise a client about may involve matters of state law, common law, and federal regulations, whether it's family law, a small business matter, or criminal law. As this complexity grows, so also do the sources of materials that are available to help lawyers. But as the sources themselves proliferate, we now have the added burden of learning the multitude of formats, too. From film to fiche, buckram to loose-leafs, and online services to Web-based resources, the field for legal bibliography is getting more interesting and more challenging than ever before.

The sources of the law—the modern bibliography of the law—stays the same, but the formats are changing, combining, and re-combining at an alarming rate. But most of these developments are new. The best and most exciting of these developments are very new, but are by no means yet settled.

It is understandable, therefore, that legal research was not a significant focus of legal education in its early development. In fact, it may be argued that it is still a skill that can be taken for granted very easily. For decades it has been such an integral part of what lawyers do that it is difficult to see on its own.

Where once upon a time a lawyer who wanted to read about the law of contract formation simply needed to read some of Corbin's great treatise and then read through the cases cited there, use the Key Number System and Shepard's to find more cases, and verify their value, now a lawyer must first decide where to begin in a world where all the treatises, cases, law review articles, and statutes and regulations may be available in a few minutes without ever leaving the office. But most lawyers' imagination and perception of conducting the research hasn't kept up with reality. Pundits and promoters tell us that since we can access so much material on our computers the process has become simpler, easier, and cheaper. The opposite is true, but our capacity for taking the process for granted hasn't changed at all.

How Much Research Do Lawyers Actually Do?

Another issue that must also be raised in this context is to define what legal research is in the first place. In the "old days" it was easy to define research as whatever work was done in a library or by librarians. But as definitions of what is a *library* evolve (I posit that it has *never* been properly defined), the meaning of "legal research" must also be adapted.

Working with the sources of the law certainly is legal research, and today this takes place practically anywhere for many types of material. But there are some kinds of research that simply can't be performed on an iPhone, even if the sources can be accessed on one. There are also some kinds of research that don't lend themselves exclusively to work in the library or on a computer, but may require a bit of both.

And then there is the curious phrase quoted above, in which the authors of *Educating Lawyers* state that as students were reading Langdell's casebooks, they were learning legal research. The fact is, lawyers who do what is commonly described as legal research are the new lawyers or experienced lawyers who are faced with a novel set of facts. Experienced lawyers with a specialty, like tax or environmental law, don't need to research tax or environmental law each time they work on a case. A tax lawyer is an expert in the law of taxation and only needs to conduct research to learn about new rulings or to fill in old knowledge to apply to a new set of facts.

One must ask, "How much research do lawyers actually *do*?" Most research that I've observed in law firms is conducted by law clerks and younger lawyers. Experienced lawyers with specialties use library materials routinely but use them primarily as current awareness tools to add to their knowledge. Perhaps the authors' observations are more correct than we are willing to acknowledge: legal research is primarily the tool of students. (In this context, empirical research or appellate research is a different topic altogether.)

This is, perhaps, why legal research instruction has received so little attention in legal education. If there were such a thing as a school for carpenters, it is likely that there would not be any classes on how to swing a hammer or where to buy the best ones; the focus of such a school would be on the best methods for measuring the raw materials, reading plans, and the numbers of nails needed to hold up a stud. Is it possible that legal research is like swinging a hammer or buying a good one?

In this case, what can be said about teaching students how to research? My own approach is that it is less important to teach students how to use certain books or databases than to teach them what it is they're trying to find. Like learning to track an animal, it is most important to know the subjects' habits.

The law is invisible, of course, so it is of primary importance for students to know where, for instance, cases come from, how they are made, and (the millions of places) where they end up: databases, Web pages, case reporters, specialized reporters, micro-formats, loose-leafs, annotations, etc. Once students understand a case's (or statute's, regulation's, position paper's, etc.) life cycle and habits, then they can decide how they want to track one down. There is never a perfect fit for all circumstances or for all people.

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Fighting for Legal Research Training

The book also raises an interesting issue for us as a profession. We have not generally been as vocal as we could be, or should be, in advocating for the importance of training in legal research skills. Legal writing instructors (whose skills actually result in something tangible, i.e., written documents) have been very successful at raising awareness of the importance of legal writing as a skill. Law librarians have been slow to raise similar awareness in law school curricula, but progress is being made as many schools now offer advanced courses in legal research. Can it possibly be that we have been poor advocates for our profession's role in teaching legal research skills because we don't even understand

fully what it is that we're teaching? Or how to teach it?

Research is not a secondary skill. It is a critical skill that is as important to learning as it is to practice. Is it possible for a lawyer to know any law without conducting some sort of legal research at some point in his or her career? And how should classes be structured to address the concerns of lawyers at the various stages in their careers? Is the mere reading of a particular case research? Or is it the process by which the lawyer has found the case? Is it considered research when the case is only being read to update the lawyer's knowledge? Or is it research only when the lawyer is learning something new?

As important as these definitions may be, it is much more important for our students to be firmly grounded in the life cycle and habits of the elements of legal bibliography. But we must be able to develop the vocabulary necessary to allow us to speak accurately about legal research and, therefore, advocate for its inclusion in the curricula of modern legal academia. The absence of focused treatment of legal research in the modern debate about reform of legal education happens because we don't have an accurate vocabulary and virtually no research of our own to give form to the discussion.

Overall, *Educating Lawyers*' emphasis on reform of legal education is admirable and noble. It speaks with enough authority that it is likely to be widely read, and it is well-written enough to actually be well read. In that case, it may have a significant influence in the legal academy by re-opening discussion of ways to reform law schools' curricula to include greater emphasis on clinical and practical lawyering experience. This may be a ripe opportunity for academic law librarians to seize the opportunity to join the discussion and advocate for more involvement in legal education. Law firm librarians may also have a voice in this discussion by advocating for the particular skills they wish to see new lawyers possess when they arrive at firms as new associates or law clerks.

As such, the book is a must-read by all who are interested in legal education. Certainly, every director should read the book and become a part of their school's curriculum committee and any ad hoc committees that may form to discuss curriculum reform. The book's importance extends beyond the particulars of curriculum reform, however. Hopefully, law librarians will be concerned enough with our lack of attention in the book to inspire us to actually begin to seriously consider and write about what it is we do and what we, who are teaching young lawyers research skills, teach.

As an aside, the book may also prove to be helpful to anyone who is considering going to law school. The book presents very interesting insights into legal education and may actually help when deciding on a school to attend. ■

Richard A. Leiter *(rleiter@unl.edu) is director of the University of Nebraska-Lincoln Schmid Law Library.*