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Teaching, Thinking, and the Legal Creative Process

Barbara P. Blumenfeld

University of New Mexico - School of Law

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Teaching Thinking and the Legal Creative Process

By Barbara Blumenfeld, University of New Mexico School of Law

How does one teach thinking? Can one do that? These are questions that I kept asking myself as even students with excellent basic writing skills were not writing solid documents – they were not fully developing the reasoning that must be completed before one actually places words on paper or computer.

It is easy to blame the “thinking void” on the millennial generation, on social media, on Google, on undergraduate education, on first grade teachers, indeed, on anyone who came before. But that does not really help when students do not go beyond completing identifiable skill sets such as briefing a case or following a predefined rubric for writing a document. So, how do I get them to think? I can lecture about it – its importance, how to do it, syllogisms and Aristotle. But how do I get them to do it? And to understand how it is done? The quick response is: require it and don’t do it for them. But that begs the question of not only how to get the students to do the deep thinking necessary for law, but how to teach that thinking in the classroom.

This thinking is inextricably connected with the creative process as that process is manifested in products and results required of law students and lawyers. My focus is on the thinking and problem solving skills necessary for the real-world practice of law. Part One of this essay formulates the creative process necessary for developing good legal analysis, arguments, and documents, and suggests its encouragement by non-result oriented teaching. Part Two explains a class I designed in 2007 and taught most recently in 2011, which succeeds, at least in part, in bringing thinking to the surface for study and discussion.

Part One: The Legal Creative Process

Lawyers solve problems and

communicate solutions. Those solutions often take the form of an argument as the lawyer attempts to convince a particular audience that the solution put forward is legally sound, good, and should be adopted. To develop that argument, prior to its communication, the lawyer must engage in the thinking necessary to both understand and synthesize a wide range of material and to use that information and understanding to develop logical and sound proofs supportive of the proposed conclusions. This development of a legal proof and its subsequent articulation are a creative endeavor: a process that results in a final product such as a legal memorandum, a brief to the court, a presentation to a legislative body or to a client, or a scholarly article. The following theory of the legal creative process draws heavily from general studies of the creative process as presented by Rex Jung, Ph.D., Assistant Professor, University of New Mexico Health Sciences Center, on April 11, 2011.

That the process of developing a legal proof is a creative one finds support in a common definition of creative: “the ability to combine novelty and usefulness in a particular social context.” Consider that each document or argument created by a lawyer is unique (novel) because each case is unique and the document must be useful for its particular rhetorical situation (e.g. must convince a judge, persuade a colleague, etc.).

The creative journey to the final product includes both preparation and production and involves several mental processes. One must acquire and use knowledge; that knowledge can be cognitive or emotional. Cognitive knowledge will have its basis in empirical, factual information and will include both the facts of a particular case and the existing relevant law. Emotional knowledge considers social intelligence and how one copes with situational demands. It is generally interpretive.

These two types of knowledge will be processed either deliberately or spontaneously. Deliberate processing occurs at a highly aware, conscious state. The processing takes a direct course from point A to point B. Spontaneous processing, on the other hand, occurs at a less aware state and rather than a direct path to a goal, its course is more meandering.

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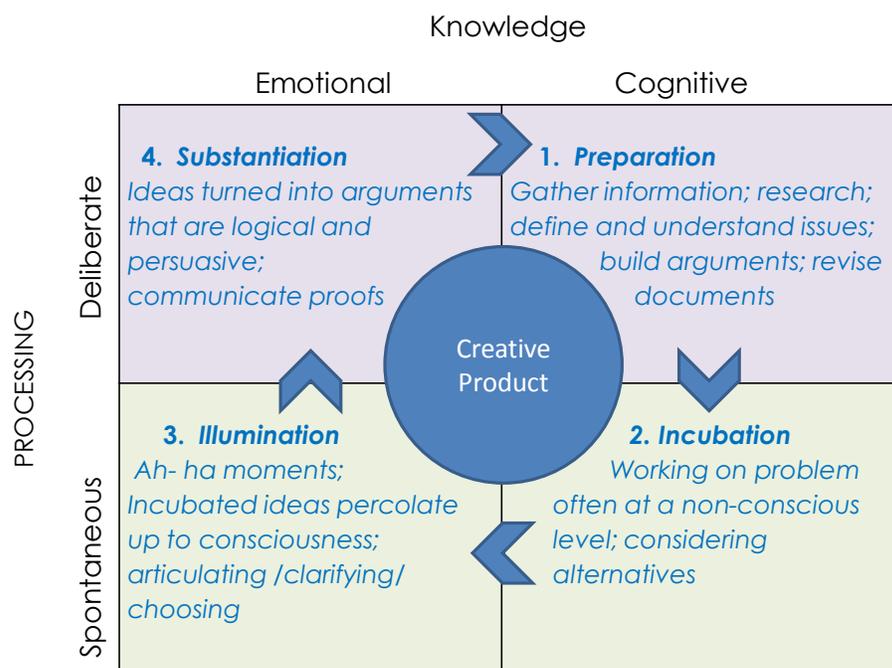
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This is depicted in the following chart:



The top row of this chart, the deliberate processing, is what we typically refer to when we use the term “intelligence.” It is measurable, and, being assessable, is often what we teach.

The bottom row of the chart, the spontaneous processing, includes what we typically think of as “creativity.” It is less measurable and often occurs when one is not consciously working on a problem or seeking to articulate a specific goal. It is what goes on in the mind. It is not easy to teach.

In the typical class, we teach the skills on the top row. Even when using Socratic Method we do little with the bottom row. Yet, proficiency in the creative process requires effectiveness in all four of the depicted squares. Indeed, proficiency requires both practice and play. That is, it requires practice that will build proficiency in required and measurable habits and skills, but it also requires play in the sense of unstructured cognitive activity that allows for the spontaneous processing of many ideas, some that fail along with those that ultimately succeed. This mental activity, while perhaps

leading to identifiable results, does not of itself have clearly assessable markers.

One can write a legal document using only the skills of the top row, but a truly effective document also requires the bottom row. That is, one can research, find arguments and organize them for presentation to a specific audience, but deeper and less formulaic thinking as represented by the bottom row can result in deeper understanding and richer arguments and documents. The cycle depicted in this chart applies to both an entire argument, as well as specific details, each of which must be developed. That is, the cycle repeats many times during the creation of one document.

Looking at each square of the chart in more detail provides additional insight into the creative process. Square one, Preparation, is both cognitive and deliberate. This is where the individual is deliberately learning. For example this is where, after receiving an assignment, one determines facts, audience, purpose, what is needed. Here the individual researches the problem, defines issues,

finds arguments. When a document is drafted, this is also where one deliberately revises, formats, edits.

Square two, Incubation, is cognitive and spontaneous. This involves learning that is not deliberate and often occurs at a non-conscious level. This is the learning that goes on when one is doing something else, for example, when one goes for a walk the mind may still be working on the problem.

The third square, Illumination, is emotional and spontaneous. Here we find the “ah-ha” moments of enlightenment. This is where the incubated material percolates to the surface. This is not unlike unstructured brainstorming where a multitude of ideas, some outlandish, are produced. Here, the spontaneous mind produces many ideas for analysis and argument. Following a meandering and often unconscious process, the ideas coalesce and one may begin choosing arguments and approaches, or, with document in hand, choosing words, phrasing, etc.

The final square, Substantiation, is emotional and deliberate. Here, the ideas are deliberately turned into proofs that are persuasive. The individual is now conscious of the audience and deliberately engages the necessary emotions to be effective in the particular context in which the argument will be presented. Here one consciously considers the rhetorical triangle and other rhetorical devices.

When our teaching focuses primarily or exclusively on the top row of assessable skills, we may be unwittingly sending the message that those skills are all that are important. Perhaps more significantly, in teaching those skills the message may be that rather than several equally good results, there is a standard, right, or a best way to do something: this argument, this interpretation is best; this organization must be used; write the sentence this way, etc. These

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articulations of judgments, whether express or implied, can inhibit the free-flowing mental activity that is essential to the bottom row of the chart. There is a subtle but important distinction between finding an answer (top row) and developing an answer (requires use of top and bottom row). If a student believes that the teacher holds one “correct” answer, then there is less incentive to develop an answer on one’s own; rather, it encourages the student to have as a primary goal discerning the teacher’s answer rather than developing her own thinking leading to an acceptable and justifiable answer. This is not to say that we should not evaluate, but it is important in the process of evaluation not to substitute the teacher’s judgment for that of the student. To do so fosters dependence on the teacher when what we must do is foster independence of thinking.

Unfortunately, assessment of student performance is easier if it assesses a measurable answer rather than assessing a student’s thinking. Standardized testing trains students early to seek an answer, not to think. Outcome assessment can have the same result if it is not carefully applied. At its worst, for students it becomes something akin to learning how to fill in a form. While some professions may indeed have a correct answer in every situation, law is not such a profession. Each situation faced by a lawyer is unique and students must be encouraged to learn to develop an answer, not just to find one.

Part Two: The “Group Mind” Studies Thinking

Now, let us return to the question that began this essay: How do I teach and encourage thinking? Enter the “Group Mind” approach. The following describes my upper-level, three-credit class that has been successful in bringing the sub-conscious or spontaneous aspects of the legal creative process, discussed in Part One above, to the

surface for student discussion.

1. Summary of the course

The idea behind this course is to get the thinking process out of individual heads and onto the table for examination. The basic plan involves an in-class brief that the class works on together, piece by piece, including thinking. We do one portion of the thinking or writing process each week in class as a group, discuss it, and then the students do the same on their own with a different “out-of-class” problem. The goal is to force students to articulate the thinking that is often done alone and unconsciously, discuss it with other students, and at the same time see other students’ thinking processes. Working and discussing together to create one in-class product, the students become more consciously aware of the thinking process.

One “case file” is used throughout the semester along with two separate “MPTs” that require students to perform the thinking and writing about a completely new problem in one class period. The case file involves a complex fact scenario in which three pre-trial motions have been filed. The students receive the briefs of both sides for the first motion. These serve as examples for class discussion and evaluation. Writing the brief in support of the second motion is the in-class writing project carried out throughout the semester. The out-of-class writing assignment requires students to individually write the brief in support of the third motion. The two “MPTs” are in-class writing modeled after, but more complex than, the MPT portion of the bar exam. Students have three hours to complete an argument, questions presented and statement of facts for the brief requested by the problem.

To some the pacing of the class might seem slow, and indeed, a full semester to write one brief is certainly far longer than one would have in the real world. But the pacing allows for detailed examination of the thinking process.

Assignments related to the briefs being written include: 1) determine presumptive positions, syllogisms, conclusions and premises; 2) build, ground and nest premises; 3) outline arguments and draft presentation of relevant law (proof of rules); 4) write application of law to facts; 5) put law and application together and revise argument; 6) write other sections of the brief; 7) write complete brief.

There are a total of 10 graded assignments, seven of which involve the out-of-class brief, one of which involves a written evaluation and comparison of briefs and two of which are the in-class “MPT” writing assignments. Each assignment counts for 10% of the final grade; I also assign 10% to class participation. Of these 11 grades, I drop the lowest, giving students a final score out of 100%. Making all assignments equally valuable places emphasis equally on the thinking process as well as the more assessable final brief.

Generally students have one week to complete assignments (this obviously excludes the two in-class writings; students have two weeks to complete the full argument draft and the final, complete brief). Because each week builds on the previous week’s work, I must return their work to them with comments before the next assignment is due.

2. A typical class

The class, capped at 12 students, meets in a three-hour block once weekly. Class typically begins with the reading assigned for the day (we use two texts, one practical, the other more theoretical). This reading addresses and allows us to discuss the general concepts relevant to the in-class work we will be doing that day. I point out what I see as key concepts in the reading; we discuss those as well as other insights and questions of the students. This generally lasts between a half hour and an hour.

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The second portion of the class is devoted to using the previously discussed concepts in the context of the in-class problem. I now serve as typist as we project the group work onto a screen. Students suggest something to type; as I start, others question or make suggestions for improvement. We might have a 20-minute discussion over which word to use, or we might write several sentences with little discussion. I sometimes participate in the discussion, but never make a judgment as to which of the choices being considered I think is best.

Rather, I might ask questions pushing students to ponder factors not yet considered, until they reach a decision themselves. It is a crucial aspect of this class that I not propose the resolutions; if I did, then students might be less likely to perform the deep thinking necessary to make those judgments on their own. Instead, they would rely upon me to ultimately make the judgment for them.

In the early classes we develop our thinking in the context of writing, nesting, and grounding syllogisms. In subsequent classes we project these onto the screen as we begin writing the actual proofs. Later in the semester we revise by projecting earlier work on the screen and working through it as one would one's individual documents. In all situations the students actively participate, debate, and push one another to make the best choices for the document. They expect one another to justify their reasons for viewing or expressing something a particular way. Students nearly always come to

a consensus, sometimes fairly quickly, sometimes after a good half hour of discussion, and sometimes students will seem to arrive at a consensus, then after a moment of thought someone will point something out that leads to more discussion and a resulting consensus that is different from the initial one.

After class I post our in-class work on TWEN as an example for the students to use as they complete the same aspect of the writing process for the out-of-class problem. The only alterations I

more aware of the less deliberative aspects of the creative process. Students uniformly comment that they find it a luxury to be able to conduct this examination and that being more aware of their own creative process allows them to both improve it and use it to construct higher quality work products.

I believe that my most important contribution to this class, besides making it happen, is to withhold my judgments about the in-class work. There are times when I cringe at the phrasing or

approach students agree upon for the in-class writing. But my overt response is only to ask them why that approach or whether everyone agrees. This generally sparks a discussion among the students, with me as facilitator, wherein they further examine their thinking.

Sometimes the result is still something I personally am not happy with or would not use were I the author of the document. Nonetheless, I let it stand. Interestingly, these portions of the document are often again brought up for discussion by the students during a class in which we are revising the document. Had I imposed my judgment earlier, the later discussion would not have arisen and the students would not learn the self-evaluative thinking and judgment skills that result. Moreover, once I expressed my judgment, students would be subsequently less inclined to exercise fully their own thinking and judgment skills, presuming instead that in the end I would tell them what was best. Thus, while I do question approaches, make judgments, and suggest alternatives in

If a student believes that the teacher holds one “correct” answer, then there is less incentive to develop an answer on one’s own; rather, it encourages the student to have as a primary goal discerning the teacher’s answer rather than developing her own thinking leading to an acceptable and justifiable answer.

make are spelling corrections or filling out abbreviations I used while typing in class.

3. What the class accomplishes, student comments, and broader perspectives

This class forces students to articulate for discussion the aspects of the creative process that normally occur within one's mind and about which one is often not conscious. Essentially what they are doing is the thinking that any author should do when writing a document. The difference is that by doing it as a group they not only encourage one another to fully think through each aspect of the process, they also actually see a concrete example of the process in action. Their scrutiny makes students

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my comments on the out-of-class work, my lack of evaluative judgment in class allows the students to reach the level of examination of thinking that occurs in class and I believe carries over to the out-of-class work.

The lesson that I take from this class is how important it is to not set ourselves up as owners and providers of what is best, of what an author/thinker must do. While, as law faculty, we likely have more knowledge or information about the law than do our students, that does not necessarily mean that we have superior thinking skills or that our way

is the only valid approach to a problem. Without overtly acknowledging this, we risk, in one way or another, sending the message that there is a correct or better answer that the students simply must find. That message circumvents the creative process. Instead of completely using their own minds to fully explore a problem and arrive at a logical and defensible solution, students will deliberately go in search of the answer. Yet, as lawyers faced with new and unique situations, they will have to find their own answers. While the routine matter may not require much creativity,

students must be given the opportunity to develop all the skills of a truly great lawyer, including the deep and less deliberate thinking that marks creativity. That these skills are difficult to assess should not preclude their being a key focus of our teaching.

Barbara Blumenfeld is a Lecturer and director of the legal writing program at University of New Mexico School of Law. She can be reached at blumenfeld@law.unm.edu.

Teaching Students How to Evaluate a Written Work's Quality

By Alex Ruskell, Roger Williams University School of Law

I have seen and heard a lot of completely useless feedback on written work in my life. A student suggests, "You should scrap this completely and start over." A single comment written by a partner on one of my co-worker's motions -- "NO! NO! NO!" A professor's note: "This should be better." I have seen students and practicing lawyers cry, ball up papers in frustration, and ask aloud whether business school might be a good option. I've been guilty too. At the Iowa Writers' Workshop, I told one of my fellow students that "The only thing that could make this story better was a monkey." The story eventually ended up in *The New Yorker*, sans monkeys.

We all need to learn the skill of constructive criticism. Giving meaningful feedback is a skill, one we often assume our students (who are bright, energetic, and motivated) will "just kind of have." But we can and should do more to provide opportunities for students to look at the work of their fellow students and practice providing comments that can actually help improve the work. In their careers, a colleague may ask them to "take a look" at a brief or contract, or to help improve office forms, and students should be able

to provide more than "Looks great!" or "I caught a typo."

For the past few years, I have taught several law classes using a "writers' workshop" format (Contractual Drafting, Water Law, Law and Literature, and Art Law). As part of the class, I require students to turn in a draft of their final papers or a particular contract, and I ask the other students to read the work and provide at least one type-written page of comments (aside from anything they might write directly on the text). They also come to the next class prepared to discuss the work. As motivation, at the end of the term, I have all the students vote for the top three students who provided the most helpful comments (both on paper and in class). The top vote-getter wins a grade "bump" of one grade level on their final grade.

On their student evaluations of these classes, students have commented that they enjoyed the chance to evaluate others and thought they learned some valuable lessons on how to express their thoughts, understand the raw thoughts of others, and how to provide meaningful guidance to colleagues. They've also commented that this exercise has helped teach them to edit

themselves as they work on their own papers.

While no student has ever criticized the concept, I have had a handful of students complain about the "bump." Interestingly, their fears of people voting for their friends or voting against people who they don't like haven't panned out. When they turn in their work, I evaluate it myself, and I also ask for a copy of the evaluations people have written. I also take notes when we discuss work in class. In the five classes I have tried this technique in so far, the class reached the same result I would have reached had I done the picking myself.

Ultimately, I believe it has been a successful experiment, and one that has led to work that has been better than the work students turned in for the prior versions of these courses when I didn't incorporate this technique.

Alex Ruskell is Associate Director for Academic Support and an Adjunct Professor of Law at Roger Williams University School of Law. He can be reached at aruskell@rwu.edu.