

Show Me, Don't Tell Me! Teaching Case Analysis by "Thinking Aloud"

“Using a think aloud gives me the opportunity to show my students the cognitive processes I use as I read and analyze a judicial opinion.”

Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own “teachable moments for teachers” to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071, fax: (610) 519-6282, e-mail: sirico@law.vill.edu.

By Leah M. Christensen

Leah M. Christensen is an Assistant Professor of Lawyering Skills at the University of St. Thomas School of Law in Minneapolis, Minn.

Introduction

I was the nerd's “nerd” in law school. I briefed every case before class. I used six different highlighter colors to represent the various structural components of a case. I have recurring nightmares about being called upon in class even now, 15 years later. The nightmare usually involves my property professor emerging out of a cloud of mist, his somewhat beady eyes scanning the dreaded seating chart only to land on my name: “Ms. Christensen, let's talk about adverse possession.” I wake up in a cold sweat.

Looking back, I realize I was a good student. I studied hard. I took good notes. I went to class. But during that first year of law school, I simply did not understand what my professors were asking me to “get” out of a case. I could regurgitate the facts, holding, and issues of any case, but I always seemed to be missing something in the classroom discussions. I had been very successful in academics before, so why was I having such a difficult time? Fortunately, between my first and second year of law school, something clicked and I became

proficient at exams; my writing improved and I ended up doing very well in law school despite my slower start. I will never forget that first year. I understood what it felt like to struggle.

Since beginning my teaching career as a legal writing professor, I have noticed there are always a handful of students who struggle during their first-year writing course. They are often just a second or two behind the rest of the class. They never quite seem to grasp the importance of a case or how to apply its reasoning to the facts of a memo. How do we help these students? What could make a difference to them? I recently had a teaching “epiphany.” Sometimes, instead of telling students how to master a particular skill or concept, we need to “show” them. This is particularly true of case analysis. I have come to the conclusion that one of the most effective ways to teach case analysis in the legal writing classroom is to model how I read a case. I have begun using the “think-aloud” methodology in class. My students enjoy this experience as much as I do. Using a think aloud gives me the opportunity to show my students the cognitive processes I use as I read and analyze a judicial opinion. The lesson is invaluable.

The “Think Aloud”

A think aloud is most often used as a research tool in the field of cognitive psychology. In a think aloud or verbal report, participants state their thoughts as they read and think out loud. Verbal reports “allow access to the reasoning and purpose underlying cognitive behaviors.”¹ This is particularly true when we study experts in any field. Researchers often ask the question: how do we discover the knowledge and strategies that experts use? You generally cannot ask

¹ Suzanne E. Wade et al., *An Analysis of Spontaneous Study Strategies*, 25 Reading Res. Q. 147, 150 (1990) (citations omitted).

experts how they do something because experts who engage in a process usually cannot express “how they know what they know.”² This is particularly true for those of us who teach legal writing. Think of your typical writing professors. Haven’t they likely practiced law for many years, written hundreds of briefs, and graduated in the top of their law school classes? Even when the most talented legal writing professors try to be explicit about a particular topic or case, they “often cannot break down the reasoning process to the degree necessary to communicate it effectively to some students.”³ What if instead of “hiding the ball” in class, we explained the process for accomplishing a particular task? When it comes to reading and case analysis, we need to be willing to show our students how to read a case by providing an example. The think aloud is a simple technique that provides our students with a glimpse into our own cognitive processes and shows them what we cannot express in words.

Consider the sentiments of a first-year law student who had just completed his second memorandum assignment. He was still struggling with reading and analyzing case law despite the fact that he worked hard, attended classes, and sought outside help from his writing professor. After first semester, he fell in the bottom 10 percent of his class. During an interview, he talked about his difficulties with case reading and analysis.⁴

Interviewer: If you think back to the beginning of first semester when you first started reading cases, what was most difficult?

Student: Everything. Because I remember getting that outline of what you should look for and I had no idea. It took me the longest time. I felt like when I was in class, when the professor would say well, what’s the holding? I’d be like I don’t know—I hadn’t figured it out. And then the professor would say what the holding was, so I’d underline it. And then I just learned, OK, that’s what a holding is. I started to learn from that. I literally just—I really didn’t get it. It was very difficult for me to get the parts of the case.

Interviewer: Do you think it would have helped to have the professor actually read aloud a couple of the cases during those first weeks of law school?

Student: Oh yeah. Definitely. Definitely.

This student wanted to figure out what was going on in the cases he read so that he could apply the law properly in his writing assignments. He wanted to understand what his professors expected him to “get” out of the cases. Having his legal writing professor show him by using a think aloud in class might have helped a great deal.

Using the Think Aloud in Class

Although any professor could use a think aloud in class, legal writing professors have particular advantages when it comes to this type of exercise. First, our class sizes are smaller. Therefore, we get to know our students earlier in the semester and usually have established a good rapport. Second, most of us feel comfortable using different teaching methodologies and can adapt to this exercise easily. Third, if we use the problem method of teaching, i.e., teaching within the context of our actual memo problem, students are particularly attentive to and interested in how we might analyze a relevant case. And, we can use the think aloud to discuss not only case analysis, but almost any other topic we might touch upon during the semester, e.g., legal argumentation, synthesis, or rule application.

The following lays out an example of a think aloud I have used before in my first-semester legal writing

“When it comes to reading and case analysis, we need to be willing to show our students how to read a case by providing an example.”

² Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407, 409 (1987).

³ Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 Willamette L. Rev. 315, 321 (1997).

⁴ This interview was part of a larger empirical reading study on how law students and lawyers read legal text. I used a think-aloud protocol to collect data on reading strategies. Following each think aloud, I interviewed each student to learn more about the challenges they experienced reading legal text.

“The think aloud is simple and casual. Nonetheless, as I was reading through the case, I illustrated several important reading strategies even before getting to the fact section. ...”

class discussing the case of *Olson v. Walker*, 781 P.2d 1015 (Ariz. App. 1989).⁵

OK, today you were assigned to read the case of *Olson v. Walker*. I'd like to spend the first part of today's class showing you how I might read the case if I picked it up for the first time. As you listen to the way I go about it, consider not only what I notice about the substance of the case, but also pay attention to how I go about reading the case—my process. Each of you will develop your own process for legal reading. However, make sure that your process, whatever it is, allows you to extract all the necessary information out of that case.

The first thing I do before I begin to read a case is to think about why I'm reading the case. I guess you'd call this my “purpose” for reading. If you ask any practicing lawyer how he or she reads a case, the lawyer will usually tell you that he or she always has a purpose for reading. So, when I read a case, I assume I'm a practicing lawyer because that role is most familiar to me. I pretend to read the case in preparation for a client interview. Don't be afraid to put yourself in a “role” or give yourself a purpose for reading the case other than simply reading it to prepare for class.

So, I pick up *Olson*. I usually preview the opinion to see how long the case is. This case is pretty long, 12 pages. Yikes. OK, this is the Arizona Court of Appeals decision, so it's not the highest court. There may be other precedent out there that could be more authoritative than this opinion, so I'll need to make note of that. This decision was published in 1989, so it's not that recent. I'll probably want to find out if there are more recent cases addressing this issue. Looks like the Supreme Court denied review that same year. Hmm ... guess they didn't want to hear the case. I wonder why? Oh wait, there's a footnote there

⁵ I use this case in orientation to introduce case briefing and I return to it throughout the semester to discuss other aspects of the case related to various class topics.

that states that three of the justices wanted to take review of at least three of the issues. Interesting. I'll make a note of that.

OK, now I usually skim the headnotes of the case. Looks like this case is about punitive damages or “exemplary” damages. That's a new term. I need to look that up before I go on to make sure I understand what that is. (Looks up the word in the dictionary before proceeding.) Boy, there are a lot of headnotes here. There are a number of headnotes about the “constitutionality” of the statute—so this must be another important issue. I'll keep those in mind.

OK, now I'm ready to tackle the opinion. The chief judge wrote the opinion; Judge Grant. Nope, don't know the judge. Sometimes if I know the judge, it makes a difference in how I view the decision.

(Reading from text) “This appeal primarily concerns the award of punitive damages in a personal injury action. A secondary issue concerns the trial court's refusal to strike certain expert testimony. For the reasons explained below, we affirm.”

Based upon this first sentence, this is an appeal. So, someone lost in the lower court. Yes, the defendant lost. OK, looks like he got sacked with punitive damages in a personal injury action. So, he's appealing that. And, the second issue is that the trial court allowed some expert testimony to come in. The court of appeals is “affirming,” which means they are upholding the lower court's decision. OK, they agree with the lower court. Moving to the facts. ...

The think aloud is simple and casual. Nonetheless, as I was reading through the case, I illustrated several important reading strategies even before getting to the fact section of the opinion. If students paid attention to “how” I read in this example, they learned that I established a purpose before I read, put the case in context, noted the court and date of the decision, identified the key issues in the case, and understood the procedural posture of the case.

Although we might assume our students naturally pay attention to all these details, they do not.

If I were to continue thinking aloud using the case above, I might also comment or discuss the following:

1. Diagram or create a mental image of the fact section.
2. Illustrate how each individual issue relates to the case as a whole.
3. Comment upon how you try to resolve confusion or questions. For example, if you come to an unusual term, look up the word and have your class watch you do it. If you have questions as you read, illustrate how you go back and reread to answer your questions before moving on.
4. Ask out loud why the court came to its conclusion. What rule comes out of the case? How might this rule apply to a different factual situation?
5. Illustrate what notes you would make. Write on the board as you read. What parts of the opinion did you find noteworthy? What portions did you skim? Summarize key aspects of the case in your own words. Why is the case important? Is the decision correct? How will the opinion serve as precedent for future cases?

When my first-year writing students witness me using this formula, they begin to understand the many facets of case analysis. They learn to read actively. Further, when I verbalize my thoughts to my students out loud, I make my thinking “visible.”

There are some who might disagree with this approach, arguing that students gain more when they struggle individually with how to think like a lawyer.⁶ For some students, this may be true. But for others, there is simply too much to learn. First-year law students in any typical legal writing curriculum are overwhelmed with new concepts, e.g., the facts of a problem, the structure of a memo, basic legal

terminology, etc. In addition, the tools and strategies they may have used to think and write “well” before law school no longer work in quite the same way. Research by cognitive psychologists shows that novices in a field show greater growth in learning when knowledge and strategies are directly taught rather than when students are encouraged to discover them on their own.⁷ At least during the first semester of our legal writing curriculum, we need to provide our students some direction. In any learning context, it is “the job of the expert to make explicit the secrets of her craft.”⁸ If we work to make our cognitive processes more visible to our students, we can enhance their learning in the first year and help them through some of the many cognitive challenges of approaching legal writing for the first time.

© 2007 Leah M. Christensen

“Research by cognitive psychologists shows that novices in a field show greater growth in learning when knowledge and strategies are directly taught. ...”

Another Perspective

Please note that beginning with volume 1, all issues of *Perspectives* are available in the Perspectives database (PERSPEC) on Westlaw and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. *Perspectives* is also available in PDF at west.thomson.com/newsletters/perspectives.

⁶ Peter Dewitz, *Conflict of Laws Symposium: Reading Law: Three Suggestions for Legal Education*, 27 U. Tol. L. Rev. 657, 672 (1996).

⁷ *Id.*

⁸ *Id.*