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## When Should We Teach Our Students to Pay Attention to the Costs of Legal Research?

By Beth Hirschfelder Wilensky<sup>1</sup>

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It is axiomatic in legal research pedagogy that law schools should teach students how to conduct cost-effective legal research.<sup>2</sup> To do that, we need to teach students to consider the amount of time and money their research requires, how paid legal research platforms like Westlaw and Lexis charge for their services, and how to research in an efficient and cost-sensitive way.<sup>3</sup> But we shouldn't do those things. Or at least, we shouldn't do them at first. Instead, we should tell students *not* to worry about the costs of legal research during their first year of law school—with the possible exception of preparing them for summer employment at the end of the year. And even then, our instruction should be limited.<sup>4</sup>

<sup>1</sup> The author thanks Ted Becker and Don Herzog for helpful comments.

<sup>2</sup> Kathleen Darvil & Sara Gras, *The Missing Piece: Teaching Cost Recovery as Part of Cost-Effective Research*, 22 Perspectives: Teaching Legal Res. & Writing 107, 107 (2014) (“A way to connect classroom legal research instruction to the ‘real world’ of lawyering is to incorporate training for cost-effective research and cost recovery.”); Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 Legal Communication & Rhetoric: JALWD 153, 156, 184-86 (2011) (Legal research instruction “should take into account the cost of conducting research . . .”). *But see* Sarah Gotschall, *Teaching Cost-Effective Research Skills: Have We Overemphasized Its Importance?*, Legal References Services Quarterly 29:2, 149 (2010).

<sup>3</sup> By “cost-effective legal research,” I mean all of the costs, from the actual money paid to a CALR platform like Westlaw or Lexis to the attorney’s billable time spent in conducting the research. In fact, the latter might be more important, but in my experience students are often more concerned with the costs of Westlaw and Lexis in the “real world.”

<sup>4</sup> While my focus here is on the pedagogical reasons not to teach

Why wouldn't we want to teach students to be aware of the high costs of Lexis and Westlaw? Why wouldn't we want students to think about how much time they ought to spend tracking down and fully exploring every possible legal wrinkle their client's facts might implicate? We do—eventually. There is little question that, as future attorneys, students need to know how to conduct cost-effective research.<sup>5</sup> But we undermine their ability to learn how to conduct research *at all* if we ask them to think about costs—in money and in time—too early.

Students undoubtedly need to learn to conduct cost effective legal research at some point. The challenge is to determine that point and then instruct them accordingly. And that is a significant challenge since students may not be ready to focus on the costs of legal research for most or all of their first year.

### A. Two Major Reasons To Wait

Why shouldn't we focus on cost-effective research strategies in the first year course? For two major reasons: First, students need to start with a lot

cost-effective research early in students' law school experience, there may be non-pedagogical reasons as well. *See generally* Sarah Gotschall, *supra* note 2 (arguing that teaching cost-effectiveness of CALR research might be less important where most students are going to work for employers that purchase flat-rate plans that give users no ability to go outside the plan and drive up costs); *see also* Shawn G. Nevers, *Candy, Points, and Highlighters: Why Law Librarians, Not Vendors, Should Teach CALR to First-Year Students*, 99 Law Lib. J. 757, 763 (2007) (observing that the popularity of flat-fee CALR contracts makes teaching cost-effectiveness less important in the first-year legal research and writing course).

<sup>5</sup> Patrick Meyer, 2012 Law Firm Legal Research Requirements for New Attorneys, (Sept. 26, 2011) 3, available at <http://ssrn.com/abstract=1953437> or <http://dx.doi.org/10.2139/ssrn.1953437> (in survey of law firm librarians, 86.9% described “cost-effective research” as one of the most important research tasks for new attorneys to know); Darvil & Gras, *supra* note 2, at 107 (“In today’s market, knowing how to research an issue cost effectively is a pivotal skill.”).

“[W]e undermine their ability to learn how to conduct research *at all* if we ask them to think about costs—in money and in time—too early.”

“It might seem obvious that students are unlikely to absorb much if we try to teach them everything they need to know about a skill all at once. But that point often gets lost ...”

of practice on the foundational aspects of legal research. Second, encouraging students to consider costs feeds into the inclination many already have to look for quick, easy answers in their research.

#### Reason One—Managing the Cognitive Load:

Learning occurs most effectively where foundational skills are introduced first and then reinforced as more nuanced skills are introduced. It might seem obvious that students are unlikely to absorb much if we try to teach them everything they need to know about a skill all at once. But that point often gets lost in the first-year legal research and writing course that, due to syllabus constraints, frequently requires introducing multiple skills in quick succession.

Learning to conduct legal research actually requires students to learn many different things. Here is a partial list:

- The difference between primary sources and secondary sources and what each source is useful for
- How to navigate through computer-assisted legal research platforms such as Westlaw and Lexis
- What free online resources exist and what research tasks they are helpful for
- How to strategize about a legal research project: Where should I begin? What background information do I need? What is the goal of the research? What are the different ways to achieve that goal?
- How to determine what weight a particular legal authority carries for your research task
- What to do when you hit a roadblock in your research
- How to conduct cost-effective research: how much the research process costs, how much time it takes, how to do it more efficiently, how to fit the research process into a preset time limit, how to prioritize when time is limited

Plenty of recent learning pedagogy makes the point that breaking down a large learning task into smaller chunks is essential to lighten the learner’s cognitive load. The authors of one book on successful learning

strategies devote a section to the importance of breaking new material into “component skills.”<sup>6</sup> They suggest that a teacher ought to “temporarily constrain the scope of the task” when introducing new material until students “develop greater fluency with component skills.”<sup>7</sup> Similarly, in the recent book “Make it Stick: The Science of Successful Learning,” the authors conclude that foundational knowledge must precede deeper engagement with the skill, which must precede mastery of the skill.<sup>8</sup>

Foundational knowledge includes memorizing key facts necessary to learn the skill and then developing a conceptual understanding of how to use those key facts to engage with the skill.<sup>9</sup> An elementary school student needs to memorize addition, subtraction, multiplication, and division facts ( $7 \times 6 = 42$ ,  $15 - 9 = 6$ ), because just about every math concept requires him to be able to draw on those facts quickly. If a student is learning long division but is unable to quickly divide 42 by 7, and then has to stop again to count out 65 minus 9, he will quickly become frustrated. More significantly, he is unlikely to develop competence in long division. Those math facts need to be immediately accessible in his mind.

Legal research has analogous “key facts” that need to be cemented in memory to grease the wheels of the research process. Those facts include information about how legal research systems and sources are organized, what sources are available and what information each contains, and how to navigate to specific tools on Westlaw and Lexis.<sup>10</sup>

<sup>6</sup> Suan A. Ambrose et al., *How Learning Works: 7 Research-Based Principles for Smart Teaching* 99-103 (2010).

<sup>7</sup> *Id.* at 116. Those of us who teach legal writing are already familiar with the importance of managing the audience’s cognitive load, since it is something we frequently teach our students to consider when writing reader-friendly documents. I often find myself telling a student that a paragraph or sentence she wrote is trying to do too many things at once, and that she is forcing her reader to work too hard to absorb each point; that makes it less likely that her reader will absorb any of them.

<sup>8</sup> Peter C. Brown et al., *Make It Stick: The Science of Successful Learning* 5, 17-19 (2014).

<sup>9</sup> *Id.* at 18.

<sup>10</sup> This last item – learning how to navigate through Lexis and Westlaw—is undoubtedly an important skill for students to learn,

They need to be available instantly to a student so that she avoids getting bogged down each time she wants, for example, to use the West digest system. When she clicks into something that says “ALR” she needs to immediately recognize whether it is a primary or secondary source, how she can use it, and how she can’t. Stopping to remember or seek answers for those things undermines her ability to engage deeply with the research process. And engaging deeply with the research process requires the cognitive attention to pay attention to the details of cases, think creatively about the legal problem, cultivate a sense of which paths are likely to prove fruitful and which are likely to be dead-ends, and recognize what research tools are most promising for each aspect of the research.<sup>11</sup> Students also need to learn how to adjust their approach to each of those tasks depending on their goal.

If, on top of learning all of these “key facts” and then using them to engage with deeper skills, first-year students must think about the costs of the research, we are adding too much to their cognitive load. They are unlikely to learn to research effectively if they are simultaneously thinking about how much time their research is taking or how many cases they are clicking into in Westlaw or Lexis.

And let’s not forget that to conduct effective research, students also need a basic grounding in the legal system (e.g., sources of law; how to read, analyze, and synthesize cases; binding versus persuasive precedent). And they need some understanding of substantive legal doctrine

to conduct legal research. Experienced attorneys are likely to start a research task already having a sense of whether the topic they are researching is one of state law, federal law, or both, whether the answer is likely to be found in common law or statutes, and whether the question is primarily procedural or substantive. And they already know some substantive law that might get them started in the right direction.<sup>12</sup> Knowledge of all of those things contributes significantly to the cost-effectiveness of an attorney’s research, and law students in their first semester of law school don’t know any of it. The amount of time or money they spend on their research is utterly meaningless without a basic grounding in those things.

#### Reason Two—Incentivizing Thoughtful Research:

Promoting consideration of time and costs early also encourages students to take ill-advised shortcuts, to fall back on what they know (i.e., “Google-like” searches), and to look for quick fixes. The authors of “Make it Stick” emphasize the danger of seemingly “easy answers” to the learning process. They write that “When the going is harder and slower and it doesn’t feel productive”—an apt description of much legal research, especially for novices—“we are drawn to strategies that feel more fruitful, unaware that the gains from these strategies are often temporary.”<sup>13</sup> And the current generation of law students is particularly susceptible to being seduced by the quick answers on-line platforms spit out, since students come to law school quite comfortable using technology to provide all kinds of information by typing in a few words and hitting a button.<sup>14</sup> As one book about learning pedagogy puts it, “Students’

“Promoting consideration of time and costs early also encourages students to take ill-advised shortcuts, to fall back on what they know ... and to look for quick fixes.”

but it also might be the least important thing for faculty to teach. See Toree Randall, *Meet Me in the Cloud: A Legal Analysis Research Strategy that Transcends Media*, 19 *The Journal of the Legal Writing Institute* 127, 134 (2014), quoting Carrie W. Teitcher, *Rebooting the Approach to Teaching Research: Embracing the Computer Age*, 99 *L. Lib. J.* 555, 565 (2007) (“[M]ost electronic sources are designed to be self-taught. And because modern law students are ‘technological chameleons,’ there’s little doubt that they’ll figure it out if they believe that it’s important.”) But regardless of how students learn to use on-line platforms, they do need to learn that as a foundational part of learning legal research.

<sup>11</sup> See Randall, supra note 10, at 130 (“In short, the more students know about legal analysis, the more confidently they will approach the research process, regardless of the tools they use or the order in which they use them.”).

<sup>12</sup> See *id.* at 136 (“Of course, an age-old problem may persist. The less law one knows, the harder it is to know what law to find. Developing a significant substantive law foundation takes time, and this will remain a challenge without easy answers.”).

<sup>13</sup> Brown et al., supra note 8, at 3.

<sup>14</sup> See Randall, supra note 10, at 141 (“Because other online research seems so easy, [law students] generally underestimate the effort involved in conducting thorough legal research. Consequently, many of them come to law school saddled with a proclivity to demand quick answers and instant gratification.”); Kaplan & Darvil, supra note 2, at 175 (observing that the current generation of law students grew up with technology and the multitasking it brings with it, which “can result in a tendency to be impatient to have expectations of instant gratification”).

prior knowledge can help or hinder learning.”<sup>15</sup> Our students’ prior knowledge of research and technology is likely to be the kind that hinders it.

Legal research often requires tracking down multiple leads to the ends of many branches of a decision tree, using multiple approaches and tools to tackle a problem, and engaging in deep reading and thoughtful analysis of legal authorities instead of just producing a list of cases. Most students have had little if any exposure to that kind of research. Telling students not to worry about how much time their research takes and how much money it would cost in the real world frees them to experiment.

That experimentation is essential to effective learning.<sup>16</sup> We want to embolden our students to try things that are harder than the Google-like search they are used to, things that ultimately will be more effective once they learn to do them well. They need to learn—often on their own, through trial and error— what approaches are worth pursuing and what ends up being a waste of time. Students need to make mistakes in the research process. They need to learn through experimentation that consulting a good treatise avoids wasted time, that reviewing case squibs in the West Key Number system would produce many more cases than they located, that spending time thinking through their topic and reviewing the facts of their client’s situation would have kept them on track and suggested lines of analysis they missed. Of course we should provide feedback to students on their research process and depth of analysis, and we should reward effective approaches and results. But that is an insufficient replacement for creating an environment that encourages students to learn by making—and correcting—their own mistakes.

<sup>15</sup> Ambrose et al., *supra* note 6, at 13.

<sup>16</sup> In fact, students might benefit from experimenting with legal research even before we formally introduce that topic. See Brown et al., *supra* note 8, at 4 (“Trying to solve a problem *before being taught the solution* leads to better learning, even when errors are made in the attempt.”) (emphasis in original).

## B. What Should We Do in the First Year?

My experience is that students really want to know how much CALR costs and how much time a particular research assignment “should” take. *We should discourage them from worrying about those things for most of the first year.* And it is important that we be explicit about that:

If students are expending their cognitive resources on extraneous features of the task, it diverts those resources from the germane aspects of the task. Thus, one way to help students manage cognitive load is to clearly communicate your goals and priorities for particular assignments by telling students where to put their energies—and also where not to.<sup>17</sup>

We can tell our students honestly that even seemingly straightforward legal research projects are likely to take them a lot of time right now. We can suggest a minimum number of hours they should set aside for each assignment. We might even be more specific. For example, when I assign my students their first research memo, I tell them to get started right away, to set aside at least three blocks of two or more hours over the next two weeks, and that they could easily need more time. But beyond that, we should encourage our first-year students to focus on practicing their research skills, since practice is the only way to achieve mastery. I also reassure them that, as with everything they are learning in law school that is new (such as reading a case or writing a legal memo), they will get more efficient at legal research as they gain experience. And getting better at working with cases and other legal authorities will help speed up their legal research process too, since a major part of the time that legal research takes involves reading and analyzing authorities they find.

Here is what we *should* do in the first year: encourage students to spend substantial time conducting research. We can require in-class and out-of-class exercises across a variety of substantive topics. When we do that, we should

<sup>17</sup> Ambrose et al., *supra* note 6, at 114.

“Telling students not to worry about how much time their research takes and how much money it would cost in the real world frees them to experiment.”

make sure students practice different kinds of research tasks, from quick questions (“confirm that X doctrine is still good law in this jurisdiction”) to in-depth analysis of how a court will handle a client’s problem. We can give our students ideas for research topics they can work on. And we can urge them to play around on the paid and free research sites using topics that are interesting to them or news stories they read that suggest a legal question. (I occasionally email my students news articles I find and suggest some related research topics they might pursue when they need a break from reading their Property casebook.) We should especially encourage our students to engage in self-discovery of what approaches work best for different kinds of inquiries and different parts of the research process, and remind them mastering legal research requires practice on all of these things.

If we do ask students to account for their time or costs, we should give them some assignments in areas with which they are already familiar. Give them a scenario that requires them to take a doctrine they have studied in one of their other first-year classes and determine how it applies to a client’s problem in a specific jurisdiction.<sup>18</sup> This helps address a major problem with teaching legal research in the first year. As discussed above, students don’t yet have the substantive background they would often have in tackling a legal research problem in the “real world.” When we ask our students to focus on cost-effective research, we should start by placing them in a situation that approximates that of a practicing attorney with some minimal familiarity in the relevant substantive law.<sup>19</sup>

<sup>18</sup> For example, I gave my students a news article about a Little League coach who sued one of his players. The player had thrown his helmet down in celebration while scoring the winning run, and the helmet hit the coach and tore his Achilles tendon. Mike Axisa, *Little League coach suing 14 year old player for more than \$500,000*, CBSsports.com (Jan. 16, 2014, 4:59pm), <http://www.cbssports.com/mlb/eye-on-baseball/24411112/little-league-coach-suing-14-year-old-player-for-more-than-500000>. My students had already taken Torts and were familiar with the general rules surrounding negligence and sports. I asked them to research the player’s potential defenses under California law and assess their likelihood of success.

<sup>19</sup> All of the approaches described in this section have an added benefit: they provide other ways to break up the cognitive load

### C. When Should We Teach Students to Consider Costs?

Do we need to teach students to take costs into account at all during the first year? Students need a *lot* of practice in legal research before they are ready to start thinking about the amount of time and money they are spending on it. So we shouldn’t, for example, just add in instruction and evaluation on cost-effectiveness for their second major research assignment after introducing the basics with the first assignment. Rather, we should wait at least until the end of the year to provide any direct instruction about cost-effective research. At that point, our students will have had nearly a full year of (1) substantive instruction in the law and (2) practice in conducting legal research. But even then, we shouldn’t devote too much instructional or student work time—both of which are already in short supply—to it.<sup>20</sup> While conventional wisdom suggests that, at a minimum, students need this information for their summer jobs, I question how much additional instruction in cost-effective research they really need.

First, the standard legal research pedagogy already primes students to engage in cost-effective legal research. We teach students to consult secondary sources early in the research process, to rely on digests or indexes for an overview of a legal topic and speedy review of a large volume of cases, to Shepardize or KeyCite helpful cases to find additional ones, and to tailor their process to their research objectives. All of these things happen to be aids to efficient—and therefore cost-effective—legal research.<sup>21</sup> In other words, there is little difference between “cost-effective research” and “effective research.” We may need to do little more than

of learning legal research. When students research many different assignments over the year, and when they practice research in smaller chunks, they are learning discrete strategies that come together to form a complete research pedagogy. As a result, they are likely to end up better researchers overall.

<sup>20</sup> See Nevers, *supra* note 4, at 763 (“The bulk of cost-effective legal research teaching can be done in conjunction with preparation for summer clerkships or in an advanced legal research course.”).

<sup>21</sup> See Kaplan and Darvil, *supra* note 2, at 185 (describing cost-effective legal research as including things like using secondary sources, tables of contents, citators, headnotes, and annotations).

“Students need a lot of practice in legal research before they are ready to start thinking about the amount of time and money they are spending on it.”

“[T]here is one additional reason we can feel comfortable limiting instruction in the first year even though students might have to seek out additional information on their own later: they are highly motivated to do so.”

point that out explicitly at year-end to send our students on their way to a successful summer.

Second, in-depth treatment of cost-effective research strategies may be less important for law students' summer jobs than conventional wisdom suggests. Both Lexis and Bloomberg now allow students to use their law school login IDs to conduct free legal research for their summer jobs, bypassing the employer entirely. And even where an employer's pricing structure for CALR comes into play, most employers now use some version of “all you can eat” plans, which provide unlimited searching for certain information and clear warnings before the user can access other information outside the plan.<sup>22</sup> As a result, summer law clerks just need to use common sense to avoid spending outrageous amounts of time conducting research or researching outside the employer's plan.<sup>23</sup>

So we need only do a few simple things at the end of the first year to help prepare students to conduct cost-effective research at their summer jobs:

- Demonstrate some strategies for integrating free and paid online platforms. For example, if you know that you will incur a separate charge for every case you click into in Westlaw, you might use Westlaw to find a list of cases you want to read and then use Google Scholar or another free site to pull up the full text to read.
- Discuss with students the inefficiency of using inferior “free” search methods where a Westlaw or Lexis search is likely to provide quicker or better information.<sup>24</sup>

<sup>22</sup> Some employers do have more complicated pricing plans, but they can be very specific to the individual employer. Trying to teach the different permutations to law students is probably not a good use of class or student time. See Kaplan and Darvil, *supra* note 2, at 184 (“[T]eaching new associates how to research efficiently within a firm's pricing plan is a task best suited for law firms . . .”).

<sup>23</sup> See Gotschall, *supra* note 2, at 155-56 (observing that the rise of “flat-rate” pricing for Westlaw and Lexis makes the need to teach attorneys the intricacies of different pricing plans less necessary).

<sup>24</sup> See Darvil and Gras, *supra* note 2, at 110 (“Associates' fear of unpredictable and exorbitant costs is precisely what vendor contracts are designed to avoid. . . . When used properly, online research platforms can save significant time and improve reliability of legal research.”).

- Remind students to consult with their employer's law librarian, if it has one.
- Require or suggest that students take the Lexis and Westlaw classes on cost-effective legal research offered at most law schools towards the end of the year.
- Encourage students to ask questions about their employer's CALR pricing plans and cost-recovery policies when they arrive at their summer jobs.
- Remind students to take advantage of the Westlaw and Lexis research help lines, both at the initial planning stages of a research project and when they get stuck.

It is true that the first-year legal research and writing course might be our only opportunity to require students to learn cost-effective legal research.<sup>25</sup> But there is one additional reason we can feel comfortable limiting instruction in the first year even though students might have to seek out additional information on their own later: they are highly motivated to do so. The cost of legal research is a major concern for students. They particularly want to know how much searching online costs. They have heard horror stories of junior attorneys racking up astronomical research costs and want to avoid being that attorney. In fact, they often seem obsessively focused on how much a search would have cost their employer or client in the “real world”—and as I discuss above, that focus can undermine their ability to learn how to conduct research effectively at all. But when it is time for them to learn cost-effectiveness, they are likely to have the internal motivation to do so even absent formal instruction as part of a legal research and writing class.

<sup>25</sup> Kaplan & Darvil, *supra* note 2, at 155 (“Research instruction is generally mandated only in the first year of law school . . .”).