

Spring 3-1-2008

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Recommended Citation

Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 BYU Educ. & L.J. 53 (2008).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2008/iss1/3>

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THE PARADOX OF LEGAL EXPERTISE: A STUDY OF EXPERTS AND NOVICES READING THE LAW

*Leah M. Christensen**

ABSTRACT

What strategies do lawyers and judges use to read the law? The study described in this article examined the way in which ten legal experts (eight lawyers and two judges) and ten novices (law students in the top 50% of their class) read a judicial opinion. Whereas the experts read efficiently (taking less overall time), the beginning law students read less efficiently. Where the experts read the text flexibly, moving back and forth between different parts of the opinion, the novices read inflexibly. The experts connected to the purpose of their reading more consistently than the novices and drew upon their prior knowledge and experience with the law. The results of this study suggest that we can give our students the following advice in order to read like legal experts: (1) read with a purpose, (2) use background knowledge to situate the case, (3) establish the context of the case before beginning to read, (4) evaluate the case and have an opinion about its outcome, and (5) read flexibly; skim and skip when appropriate. By examining the actual transcripts of lawyers and judges reading a case, this article illustrates how we can teach our students to read like legal experts. The earlier they achieve these skills, the better for the individual students, the more likely their success in law school, and the better for the legal profession as a whole.

* Leah M. Christensen, Assistant Professor of Law, University of St. Thomas School of Law. I would like to thank Professor Ruth Ann McKinney, Clinical Professor of Law at the University of North Carolina Law School, for her wonderful work on legal reading generally, and for her comments on this article. I would also like to thank my research assistant, John Wittig, for his work compiling the data and creating the database for the coding of this data. And most importantly, I would like to extend my appreciation for the time given by the busy lawyers and judges who participated in this study.

I. INTRODUCTION

Consider the way in which a seasoned lawyer reads a judicial opinion: the lawyer skims through the first pages of the case, glancing at structural signposts, keynotes, and footnotes, and moves on to the holding. Her attention focuses efficiently on the language she needs to support her legal issue. Within minutes, she puts the case down and moves on to the next one. How did the lawyer read so well and so quickly? How does a legal expert acquire reading expertise? What strategies do legal experts use to read the law effectively? And how can we guide our students to become expert legal readers?

For those of us who teach law students, these are all relevant questions. Most of us are interested in how students learn and how we can make the learning process easier for both the student and the teacher. We know that experts in any field perform more skillfully than novices. The major finding in expert-novice research is that “expertise consists mainly of the acquisition of a large repertoire of knowledge in schematic form.”¹ As the novice becomes the expert, the novice gains both knowledge and experience, and develops patterns or frameworks (called schemas) “to integrate and structure that knowledge” more effectively.² For those of us who have practiced law, we know instinctively that lawyers read differently than law students. Yet what is it that lawyers do differently? There has been little empirical research on how legal experts read the law. Ruth Ann McKinney, Clinical Professor of Law and Director of the Writing and Learning Resources Center at the University of North Carolina School of Law, frames the issue as follows:

Exceptional law students, and exceptional lawyers, are expert readers. From the first semester of law school, fledgling lawyers commonly read hundreds of pages of dense, challenging law in a week, and thousands of pages in a semester. Later, in practice, lawyers read statutes, cases, and administrative regulations every day, decoding the words in

1. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 343 (1995); see also Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 164 (1999).

2. Berger, *supra* note 1, at 164; see also Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 142 (1994).

the texts and reaching behind the words to the many possible meanings that could be attributed to the law they're reading. . . .

Practicing lawyers who have developed sound reading practices in law school approach their analytical work with confidence, secure in the knowledge that they can read the law powerfully, passionately, and accurately. Put succinctly, these lawyers read with conviction, knowing they are reading like an expert.³

This article adds to the research on legal reading by describing an empirical study on how experts read the law. The study involved ten legal experts (eight lawyers and two judges) reading a judicial opinion. Specifically, the study examined the reading strategies of the experts compared to the strategies used by ten law students who fell within the top 50% of their law school class after the first semester of law school. Each participant read the same case, yet the legal experts read the case differently than the students. Whereas the experts read efficiently (taking less overall time), the beginning law students read less efficiently. Where the experts read the text flexibly, moving back and forth between different parts of the opinion, the novices read inflexibly. The experts connected to the purpose of their reading more consistently than the novices and drew upon their prior knowledge and experience with the law. Given the research that has been done on human expertise, these results are not surprising. Yet this article seeks to explore more specifically how lawyers and judges read the law as compared to law students.

This article first considers the nature of legal expertise as it relates to expert legal readers. Next, this article discusses the background information about the study, including the participants, the study methodology, and the task assigned to the readers. Part IV presents the results of the study, and Parts V and VI analyze various qualitative observations about expert readers. Finally, this article concludes by exploring how we, as legal educators, can guide our students more effectively

3. RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT*, at xiii (2005) (providing practical advice for beginning law students approaching legal text for the first time). Professor McKinney's book provides an accessible way to introduce new law students to the challenges of legal reading, and some very helpful solutions, strategies, and reading tactics.

to become expert legal readers.

II. BUILDING A THEORY OF LAWYERING EXPERTISE

In order to explore lawyering expertise, we need to understand the basic principles found within expert-novice research. A central finding in expert-novice research is that what makes a person an expert is very specific “to the field in which” she practices.⁴ Yet the differences between experts and novices in a general sense are quite similar across all fields.⁵ Experts use more “stored schemas and self-reflective techniques, and they draw on a broader range of strategies appropriate to their domain.”⁶ In contrast, although novices can learn and recall definitions, structures, and rules, they may not know how to “organize and apply the knowledge.”⁷ “Novice thinking is elemental and structured around concrete pieces of knowledge in a domain, while expert thinking is global and relates to abstract, higher order principles and procedures.”⁸ In addition, experts “carefully monitor and evaluate how they are doing as they move through a problem and make changes that improve their problem-solving performance.”⁹

What then is lawyering expertise? Professor Gary Blasi comments that “[g]iven the amount of money spent on lawyers and on legal education, it is remarkable how little empirical information there is about what lawyers do.”¹⁰ Blasi defines “lawyering expertise pragmatically: faced with a personal legal matter of grave importance, to what sort of lawyer does a sophisticated client (including a law student or a law professor) turn for representation?”¹¹

Blasi states that practically speaking, when faced with a personal legal problem, even a law professor will choose to go to an experienced lawyer over “the most brilliant recent law

4. Berger, *supra* note 1, at 164.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* (quoting Saunders & Levine, *supra* note 2, at 141).

9. *Id.*

10. Blasi, *supra* note 1, at 323.

11. *Id.* at 315.

school graduate.”¹² Most lawyers will turn to more experienced lawyers for advice—lawyers “having sound judgment” and the ability “to offer wise counsel in solving complex [legal] problems.”¹³ Yet “we know virtually nothing about how lawyers acquire the” abilities and skills most valued by clients and most important to the “nuts and bolts” of practicing law.¹⁴ Professor Linda Berger suggests that expert-novice research is particularly useful when thinking about how we teach the law because, in her opinion, “law students may more quickly become more expert as legal readers if their teachers base some of their instruction on expert behavior.”¹⁵

But what is expert “behavior”? What do legal experts do differently than law students? This study seeks to examine lawyering expertise as it relates to how lawyers and judges read the law.¹⁶ Further, this study seeks to explore the hypothesis that legal education can affect the success of law students by teaching legal reading early on in the law school curriculum. Specifically, law schools could teach students the strategies and techniques that expert legal readers use to read the law. Teaching these skills early on may be important. If our goal as legal educators is to prepare students for practice, they need to read like legal experts or practicing attorneys.

III. PRIOR RESEARCH ON EXPERT-NOVICE LEGAL READING

There have been only two empirical studies describing expert-novice reading in the legal domain: the first by Mary Lundberg and the second by Laurel Currie Oates.¹⁷ In 1987,

12. *Id.*

13. *Id.*

14. *Id.* Blasi notes that “[l]egal academics have largely ignored these other aspects of lawyering practice, seeing them as either uninteresting or unfathomable.” *Id.*

15. Berger, *supra* note 1, at 166.

16. For the purposes of this study, I defined an “expert” as a practicing lawyer or judge with more than three years of experience. All but one of the experts in this study had more than seven years of experience.

17. See Mary A. Lundberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407, 407 (1987); Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139, 139–140 (1997). There have been more empirical studies/articles on how law students read the law. See BONNIE B. ARMBRUSTER ET AL., THE ROLE OF METACOGNITION IN READING TO LEARN: A DEVELOPMENTAL PERSPECTIVE 18 (1983); Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE L. REV. 603 (2007); Dorothy H.

Mary Lundeborg completed a study that examined the way in which experts and novices read judicial opinions.¹⁸ Lundeborg used ten expert and ten novice volunteers.¹⁹ The experts were eight law professors and two attorneys who had practiced law or taught law for at least two years.²⁰ The novices were five women and five men with at least a master's degree in their various fields but they had not studied law.²¹

Lundeborg used two judicial opinions for her study.²² Using a think aloud methodology, Lundeborg told all study participants "that after they were finished reading, [she] would ask them the kind of questions first-year law students typically have to answer in class."²³ The participants read through two judicial opinions and engaged in a think aloud as they read the cases.²⁴ After reviewing the think aloud protocols, Lundeborg found that the participants' reading strategies could be placed into six general categories: use of context; overview (previewing the opinion), rereading analytically, underlining, synthesis, and evaluation.²⁵ Within each of these categories, Lundeborg identified specific strategies that fell within these larger categories.²⁶ Lundeborg compared how experts and novices used these strategies while reading a judicial opinion.²⁷

Lundeborg found significant differences between the two groups.²⁸ In particular, the expert and novice readers differed substantially in two categories: context and evaluation.²⁹ With regard to context, very few of the novices noted the names of

Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 *READING RES. Q.* 154 (1995); Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 *U. TOL. L. REV.* 657 (1996); James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 *REV. EDUC. RES.* 153, 159-61 (1990); James F. Stratman, *When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection*, 34 *DISCOURSE PROCESSES* 57 (2002); Suzanne E. Wade et al., *An Analysis of Spontaneous Study Strategies*, 25 *READING RES. Q.* 147 (1990).

18. Lundeborg, *supra* note 17, at 410.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 411.

25. *Id.* at 412.

26. *Id.*

27. *Id.*

28. *Id.* at 412-15.

29. *Id.*

the parties, the judge authoring the opinion, or the date of the opinion; in contrast, most of the experts did.³⁰ With regard to evaluation, the experts evaluated the opinion by making statements agreeing or disagreeing with the court's holding or rationale or demonstrating a "sophisticated view of jurisprudence" whereas the novices did not.³¹

Lundeberg also noted other interesting differences. The experts were more likely than the novices to preview the opinion and to reread it analytically.³² Similarly, the experts were more likely to engage in synthesis within the case, i.e., to merge the facts, rules, and the rationale.³³ Lundeberg's study concluded that experts and novices read the law differently.³⁴

In 1997, Oates published a study in which she analyzed the reading strategies of first-year law students who were part of an alternative admissions program at a regional law school.³⁵ The participants in Oates' study included four law students and a law professor as "the 'expert' legal reader."³⁶

Oates' results suggested that "[t]hose students who did better on their first-semester exams read differently than those who did not do as well."³⁷ The data showed that those students who were more successful used more of the strategies adopted by expert legal readers than did the students with weaker performances.³⁸ "The expert, the law professor, used Lundeberg's six strategies more frequently than the novices, the students."³⁹ "The data also suggest[ed] another hypothesis. Students who [did] better than their LSAT scores predict[ed] may [have] exceed[ed] expectations because they . . . may be adept at using strategies like those used by expert legal readers. . . ."⁴⁰

30. *Id.* at 412-13.

31. *Id.* at 414-15 (describing how experts evaluated opinions more than novices did).

32. *Id.* at 413-14.

33. Oates, *supra* note 17, at 141 (citing Lundeberg, *supra* note 17, at 414).

34. Lundeberg, *supra* note 17, at 417. Lundeberg's study actually encompassed several experiments examining novices with no law school experience, two weeks of law school experience, and two months of law school experience. *Id.* at 417-24.

35. Oates, *supra* note 17, at 145.

36. *Id.*

37. *Id.* at 148.

38. *Id.*

39. *Id.*

40. *Id.* at 158.

The present study seeks to build upon Lundeberg's and Oates' research to explore in greater detail how lawyers and judges read the law.⁴¹

IV. THE PRESENT STUDY

The following section will explore the methodology of the present study, including the participants, the think aloud protocol, and the coding scheme used to analyze the data.

A. Methodology

The study of experts in any field is difficult.⁴² Experts "engage in a process automatically" and likely "do not know how they know what they know."⁴³ Lundeberg described this "loss of awareness phenomenon" as the "paradox of expertise," which refers to the experts' inability to describe a process in which they engage without conscious thought.⁴⁴ Further, because experts are often unaware of their own cognitive

41. Whereas Oates' study focused on one expert, a law professor, the present study will examine the reading strategies of ten legal experts as compared to ten students. The present study also analyzes the reading strategies of lawyers (and judges) versus law professors. Lundeberg's study used a combination of eight law professors and two practicing attorneys. It is my belief (having practiced law prior to beginning my teaching career) that experts engaged in the day-to-day practice of law read differently (and for different purposes) than law professors. Therefore, I believe the present study is unique with regard to the type of study participants. Although the present study focuses on how experts and novices read the law, there has been research on legal reading more generally, and more specifically, on how law students read legal text. In 2007, I published a companion piece to this study which addressed in detail the literature concerning legal reading and the studies examining the reading strategies used by law students. See Christensen, *supra* note 17, at 603. In the study, I analyzed how students in the upper and lower 50% of their class read a judicial opinion and whether their reading strategies correlated to their success in law school. In collecting the data on the students, I also collected the data on the experts in this study. In *Legal Reading*, I present the results of the study as it relates to students. *Id.* at 625. In the present article, I explore the results as they relate to lawyers and judges reading the law (as compared to ten law students). The study methodology was the same for both groups of participants, i.e., students and experts. For additional studies on legal reading, see *supra* note 17.

42. See Lundeberg, *supra* note 17, at 409. Lundeberg notes appropriately that it is also difficult to determine what constitutes an expert. *Id.* Lundeberg distinguishes an expert from someone who is simply experienced. *Id.* She states, "Because there are no established criteria to define an expert in legal case reading, for this study I chose law professors and lawyers who had practiced law or taught at least two years." *Id.*

43. *Id.*

44. *Id.* (citing P.E. Johnson, *The Expert Mind: A New Challenge for the Information Scientist*, in BEYOND PRODUCTIVITY: INFORMATION SYSTEMS DEVELOPMENT FOR ORGANIZATION EFFECTIVENESS, 368 (T.M.A. Bemelmans, ed. 1984)).

processes (as an expert, they use these processes automatically), they cannot describe what they are doing because they feel it is overly obvious to mention.⁴⁵ Therefore, Lundeborg came to the conclusion that “interviewing experts may not tell us as much as asking experts to engage in a task, observing them, and asking specific questions about what they are doing while they are doing it.”⁴⁶

Like Lundeborg’s study, the present study utilized a think aloud procedure as the primary method of data collection.⁴⁷ The think aloud or verbal report is an important research tool for obtaining accurate information about cognitive processes that cannot be investigated directly.⁴⁸ “Because participants state their thoughts as they are thinking them, their reports are considered more accurate than reports obtained through introspection or post hoc questioning.”⁴⁹ In the present study, each participant read the case out loud and stated their thoughts about the text spontaneously.

B. The Participants

The participants in this study included ten experts and ten novices. The experts were eight practicing attorneys and two judges who had previously practiced law. Between them, they averaged sixteen years in public sector or private practice experience, with the overall range being between three and thirty-six years. The lawyers represented the following practice areas: (1) intellectual property, (2) appellate practice, (3) public defense, (4) general civil litigation, and (5) complex litigation. One of the judges had been a bankruptcy judge for more than twelve years; the other was a tax court judge with over eight years of experience on the bench. The students were ten law students in a private urban law school in the top 50% of their law school class (after the first semester of law school). All of the students took the same classes during their first semester of law school. All of the study participants (expert and novice)

45. *Id.* (internal citations omitted).

46. *Id.*

47. *Id.* at 409 (citing P. Afflerbach & P. Johnston, *Research Methodology on the Use of Verbal Reports in Reading Research*, 16 J. READING BEHAV. 307, 307 (1984)).

48. Wade et. al., *supra* note 17, at 150.

49. Oates, *supra* note 17, at 144 (citing K. ANDERS ERICSSON & HERBERT A. SIMON, *PROTOCOL ANALYSIS: VERBAL REPORTS AS DATA* 60–61 (1984)).

volunteered for the study.⁵⁰

C. Materials and Task

Because lawyers spend a significant amount of their time reading cases, I chose a single judicial opinion as the reading text for this study.⁵¹ The case, *In re Thonert*,⁵² was a three page, per curiam decision by the Indiana Supreme Court. In the decision, the court reviewed a disciplinary proceeding against an attorney.⁵³

The participants were asked to read the assigned text using the strategies they typically used when reading a case, but reading aloud, and stopping every sentence or two to say what they were thinking. They were also asked to read the case with a specific purpose in mind.⁵⁴ I gave each of the participants the following purpose for which to read:

Read the following legal text assuming that you are a practicing attorney and that you are reading the opinion to prepare for a meeting with a client who has a case that is similar to the facts of the case you are reading.

I then left the room to allow each expert (and student) to perform the think aloud protocol.⁵⁵ After the participants

50. The participants in this study were a portion of the law students that I used for the data in the companion study. See Christensen, *supra* note 17, at 615. The students had just completed their first semester of study at a private, urban U.S. law school. Out of approximately 150 first-year law students, twenty-four students volunteered to participate in the larger reading project. This group was then divided into two sub-groups— a “higher-performance” group (HP) and a “lower performance” group (LP). Within the group of twenty-four, twelve “higher-performance” (HP) students ranked in the top 50% of the first-year law school class. *Id.* For the purposes of the expert-novice study, I compared the experts with the top ten students within the HP group. I selected ten students within this group because I had ten experts in the study. I purposefully chose to use the top ten students (in the HP group) because I wanted to see how legal experts read differently even against the best law students. For a breakdown of student LSAT and GPAs within the HP group, see Christensen, *supra* note 17, at 615–16.

51. This does not in any way diminish the reality that lawyers spend just as much time reading statutes, regulations, codes, etc. Lundeberg also chose legal cases as the reading text for her study. See Lundeberg, *supra* note 17, at 410.

52. 733 N.E.2d 932 (Ind. 2000).

53. *Id.* at 932–33.

54. The purpose was typed on a plain, white piece of paper attached to the front of the study text. All documents used in this study are on file with the author.

55. Although many think alouds are done with the researcher in the room, I specifically left the room because I felt that both the experts and law students (who were sensitive to being judged or evaluated) would read more naturally if they performed the think aloud alone. As such, I believe me being absent for their think

finished the think aloud, I came back into the room and conducted a short interview.⁵⁶ The entire task took approximately forty-five minutes. The protocols and interviews were transcribed and each statement coded.⁵⁷

For each statement a reader made, I used a code to describe the particular “move” made by the reader at that point in the text, i.e., underlining, paraphrasing, evaluating, hypothesizing, questioning, etc.⁵⁸ I placed each of the reader’s moves into one of three larger categories: (1) problematizing reading strategies, (2) default reading strategies, or (3) rhetorical reading strategies.⁵⁹ Moves that fell within the problematizing category were purposeful or “strategic.”⁶⁰ The participants actively engaged in the text and responded to the text by “drawing a tentative conclusion,” “hypothesizing,” “planning,” “synthesizing,” or “predicting.”⁶¹ I categorized these types of actions as problematizing.⁶²

In contrast to problematizing strategies, the second category was default strategies. Readers used default reading strategies when they moved through the text in a linear progression,⁶³ which included “paraphrasing” or “underlining” text. Default strategies also included “margin” notes, “noting aspects of structure,” and highlighting text. Default strategies were different from problematizing strategies because of the “unproblematic nature of the process.”⁶⁴ In other words, verbal

aloud increased the reliability of the data.

56. The interview was used for two purposes. First, I asked the students and lawyers to describe the process they typically used to read cases. Second, I asked participants about how they read the case, what they thought about the result, whether they agreed with the judge’s decision, and whether they thought it was a difficult text to read. I also asked the legal experts how their reading had changed over time.

57. For a detailed explanation of how the statements were coded, see the companion article describing the other half of this study, Christensen, *supra* note 17, at 619–24. In addition, please note that the numbering of the participants’ interviews is not in numerical order, i.e., 100, 101, 102, etc. The participants described in this study were part of a larger reading study and I numbered the participants’ interviews based upon when I completed the interviews during the course of the study.

58. The complete list of codes used to describe various moves made by the participants can be found at the end of this article in Appendix A.

59. See Deegan, *supra* note 17, at 160–61. I also added a fourth category that I called “other.”

60. *Id.* at 160.

61. *Id.*

62. *Id.*

63. *Id.* at 160–61.

64. *Id.* at 161.

responses in the default category were not “tied to explicit questions or hypotheses.”⁶⁵ Instead, the reader usually noted something about the structure of the case, paraphrased, and/or recited the text.

The third category was rhetorical reading strategies. Moves were rhetorical when readers examined the text in an evaluative way or when readers moved outside the text “into the realm of . . . personal knowledge.”⁶⁶ In the present study, I categorized the following moves as rhetorical: “evaluating,” “connecting with prior knowledge,” “contextualizing,” and connecting with purpose.⁶⁷ The last category was the “other” category.⁶⁸ Many of the readers spent some time commenting on their “typical processes.” These moves were placed in the “other” category.

A database was created to help analyze the frequency and type of reading strategy used by each participant.⁶⁹ These individual strategies or moves were placed into one of the four categories described above, i.e., default, problematizing, rhetorical, or other. The percentage of time each group (expert and novice) spent using each reading strategy was then compared.⁷⁰ The results of the study are discussed below.

V. STUDY RESULTS

Significant differences existed between the expert and novice readers with regard to the percentage of time each group spent engaging in the various reading strategies. The experts as a group spent significantly more time engaging in rhetorical strategies and significantly less time engaging in default reading strategies as compared to the novices. The experts and novices spent a similar amount of time engaging in

65. *Id.*

66. *Id.*

67. *See id.* I categorized “connecting with purpose” as a rhetorical strategy because when readers connected to the given purpose of the reading, they “[took] a step beyond the text itself.” C. Haas & L. Flower, *Rhetorical Reading Strategies and the Construction of Meaning*, 39 C. COMPOSITION & COMM. 167, 176 (1988).

68. *See Deegan, supra* note 17, at 161.

69. All of the raw data supporting the results of the study is on file with the author.

70. In order to establish reliability estimates for the strategic moves selected for further investigation, I asked an independent coder to validate my coding strategy by analyzing several random transcripts to differentiate between the problematizing, default, rhetorical, and other responses.

problematizing strategies.

Specifically, the experts spent a mean time of 10.09% of their time engaged in default reading strategies, 32.73% of their time in problematizing strategies, and 53.13% in rhetorical strategies. In contrast, the novices spent 18.91% of their time engaged in default reading strategies, 34.58% of their time in problematizing strategies, and 28.5% of their time in rhetorical strategies.⁷¹ Table 1 below summarizes these results.

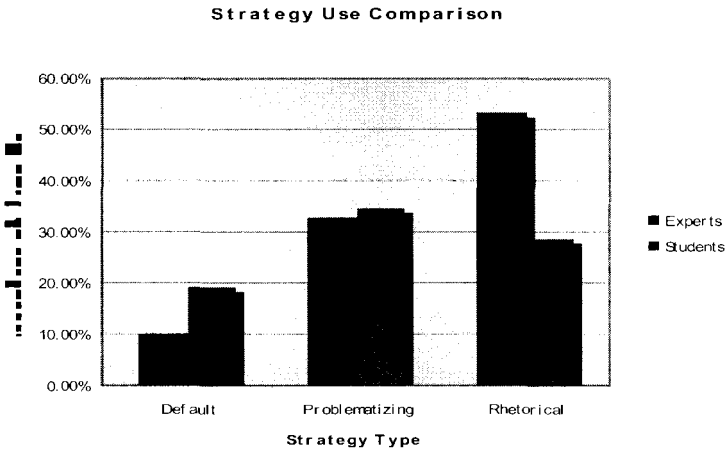


Table 1: Strategy Use Comparison

A. Rhetorical Reading Strategies

The most significant difference between the expert and novice readers was in the amount of time each group spent using rhetorical reading strategies. Deegan described rhetorical strategies as “points where the reader . . . [took] a

71. The experts spent 4.04% of their time utilizing “other” strategies, while the students spent 18.01% of their time using “other” strategies. Independent t-tests confirmed that the differences in mean values obtained between groups for the default strategy, the problematizing strategy, and the rhetorical strategy were significant. The t-test is probably the most commonly used statistical data analysis procedure for hypothesis testing. The most common is the “independent samples t-test,” which was used in this study. The “independent samples t-test” examines whether or not two independent populations share different mean values on some measure. All the raw data to support the calculations used in this study is on file with the author. Like Deegan’s study, these results were based upon calculating the frequency or number of moves in each individual category translated into proportions. See Deegan, *supra* note 17, at 162. The proportions represented the total number of moves by each participant in the different reading categories. See *id.*

step beyond the text itself. They [were] concerned with constructing a rhetorical situation for the text, trying to account for author's purpose, context, and effect on the audience."⁷² Rhetorical strategies comprised actions such as "evaluating the text," "contextualizing," connecting with prior experience, and connecting to the purpose of the reading.⁷³

The experts spent 53.13% of their time engaged in rhetorical strategies while the novices spent 28.5% of their total reading time using rhetorical reading strategies. Specifically, the experts spent more time than the novices doing three things: (1) connecting with their prior knowledge and experience, (2) connecting to the purpose of the reading, and (3) contextualizing within the case.

First, the experts drew upon their "prior experience" with the law more frequently than the novices. The experts as a group "connected to prior experience" sixty-five times during their respective protocols (an average of 6.5 times per expert). In contrast, the novices as a group "connected to prior experience" only five times total (an average of .5 times per novice).

Second, the experts "connected to the purpose" of the reading, i.e., preparing for a client interview, far more often than the novices.⁷⁴ The experts spent 11.39% of their total reading time using the single strategy of "connecting to purpose" whereas the novices spent 4.49% of their time connecting to the purpose. The experts as a group "connected to purpose" a total of eighty-eight times during their protocols (an average of 8.8 times per expert) whereas the novices "connected to purpose" thirty-five times (an average of 3.5 times per novice). Table 2 illustrates the percentage of total reading time each group spent connecting to the purpose of the reading.

72. Deegan, *supra* note 17, at 161 (quoting C. Haas & L. Flower, *supra* note 67, at 176).

73. See *supra* note 67 and accompanying text.

74. This is not altogether surprising given that novices have little experience upon which to draw. Nonetheless, it is important to understand how this experience improves reading or minimally makes the experts' reading more efficient.

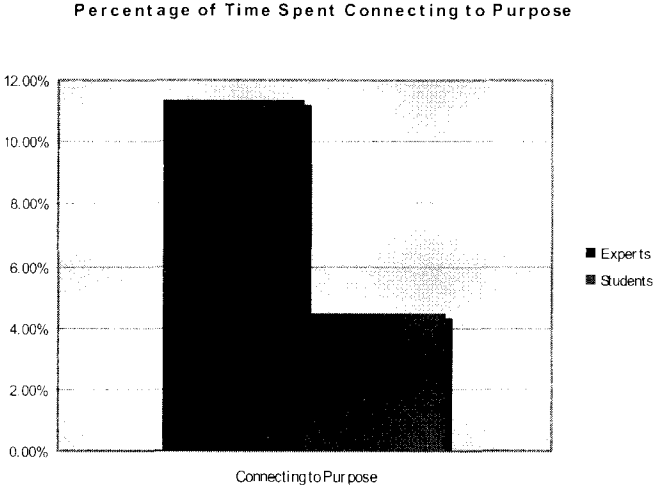


Table 2: Connecting to Purpose

Third, the experts established the “context” of the opinion more consistently before beginning to read the case than the novices. Like Lundeberg’s experts, the experts in this study noted the caption of the case, the judge, the type of court, and the date the case was decided.⁷⁵ The experts spent 11.52% of their total reading time “contextualizing” within the case whereas the novices spent 4.94% of their time referring to the context of the opinion. Numerically, the experts as a group “contextualized” 107 times during their protocols (an average of 10.7 times per expert) whereas the novices as a group contextualized 48 times (an average of 4.8 times per novice). Table 3 below represents the percentage of total reading time each group spent “contextualizing” while reading the opinion.

⁷⁵. See Lundeberg, *supra* note 17, at 412–13.

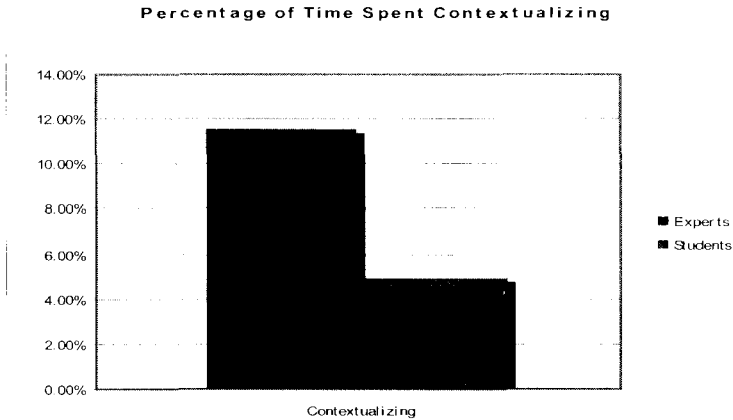


Table 3: Contextualizing

B. Default Reading Strategies

Another notable difference between the expert and novice readers was the amount of time each group spent using default reading strategies. Default strategies were “unproblematic;” they were not “tied to explicit questions or hypotheses.”⁷⁶ Instead, the reader usually noted something about the structure of the case, and/or paraphrased the content, or recited the text. Readers used default strategies when they “paraphrased” or “underlined” text.⁷⁷ Default strategies also included “making marginal notes,” noting aspects of structure, and highlighting text.⁷⁸ In this study, the expert readers spent very little time using default strategies, only 10.09% of their total reading time. The novices spent 18.91% of their time using default reading strategies, almost twice as much time as the experts.

C. Problematizing Reading Strategies

The two groups showed similarity in one aspect. The novice readers spent 34.58% of their reading time utilizing problematizing strategies and the experts spent 32.23% of their time using problematizing reading strategies. “Readers use problem formation strategies to set expectations for a text.

76. Deegan, *supra* note 17, at 161.

77. *See id.*

78. *Id.* I added “highlighting” as my own “default” strategy.

They ask themselves questions, make predictions, and hypothesize about the developing meaning.”⁷⁹ Various studies have associated the use of “problematizing” strategies with higher performing student readers and expert/lawyer readers.⁸⁰ These readers asked questions; they talked back to the text, made predictions, hypothesized about meaning, and connected with the overall purpose of their reading.⁸¹

In this study, both experts and novices used problematizing reading strategies to a similar extent. Why did the novices read like experts in this regard? Part of the answer may be that these novices had learned to read (in some respects) like legal experts. After the first semester of law school, the novice group fell within the top 50% of their law school class while some members of the class were within the top 5% of their first year class. Perhaps these students were successful because they used problematizing strategies like legal experts.⁸² Like expert readers, the novices posed questions and made predictions about the text and re-read when necessary. It is possible that reading like a lawyer contributed both to these students’ success and to the results of this study with regard to the use of problematizing strategies.

D. Summary of Findings

In summary, the results of this study support the

79. Peter Dewitz, *Legal Education: A Problem of Learning from Text*, 23 N.Y.U. REV. L. & SOC. CHANGE 225, 228–29 (1997) (describing his interpretation of Deegan’s problematizing strategies).

80. See Deegan, *supra* note 17, at 164; Lundeberg, *supra* note 17, at 417; Oates, *supra* note 17, at 159.

81. See Oates, *supra* note 17, at 158–59.

82. The results from my companion reading study that compared the reading strategies of higher and lower performing law students support the proposition that successful law students read more like legal experts. The study concluded that reading strategies correlate to student success, i.e., the more successful students used more rhetorical and problematizing strategies and the less successful students used primarily default reading strategies. See Christensen, *supra* note 17, at 625–27. The results were that the higher performing students (top 50% of the first year class) spent an average of 21.43% of their time engaged in default strategies, 45.70% in problematizing strategies, and 32.87% in rhetorical strategies. *Id.* In contrast, the lower performing students (bottom 50%) spent an average of 77.48% of their time engaged in default strategies, 12.54% in problematizing strategies, and 9.55% in rhetorical strategies. *Id.* The lower performing students spent significantly less time utilizing problematizing and rhetorical reading strategies in comparison to both the higher performing students and the experts in the present study. *Id.* One of my conclusions was that these lower performing students would benefit most from additional instruction on how to read like a legal expert. *Id.* at 633, 635, 646.

conclusion that expert readers do read differently than novice readers. Experts in the domain of law spend more time using rhetorical reading strategies, i.e., reading with a purpose, contextualizing, and connecting with their prior experience with the law. Experts spend less time than novices using default strategies, i.e., marking the text, paraphrasing, and highlighting the text. Both legal experts and successful law students use problematizing reading strategies to a similar extent, including questioning the text, posing hypotheticals, and working to resolve questions or problems. The following section of this article will explore more qualitatively how lawyers and judges read the law.

VI. QUALITATIVE OBSERVATIONS: WHAT DID THE EXPERTS DO DIFFERENTLY?

In addition to the results described above, there were also qualitative patterns within the expert protocols that provide some insight into how legal experts read differently than novices. These qualitative observations overlapped to some extent with the results discussed above. However, this section will explore these differences in greater detail and offer specific examples from the transcripts themselves.

After reviewing the protocols, I noted the following patterns about how legal experts read the judicial opinion: (1) the experts used the purpose of the reading to read more effectively and efficiently; (2) the experts used their prior experience to enhance their understanding of the case; (3) the experts situated themselves within the context of the case; (4) the experts evaluated the opinion; and (5) the experts read flexibly. The following subsections will examine each of these observations in more detail.

A. The Experts Connected to the Purpose of the Reading

Each participant was told to read the text assuming she was a practicing attorney preparing for a client interview. Nine out of the ten experts used this purpose to facilitate their reading (as compared to four of the novice readers). The experts also connected with the purpose more specifically, i.e., placing themselves into the role of an attorney. Professor Berger explains that experts pay more attention to why they read because experts simply cannot read without a purpose; if none

is given, they will construct one on their own.⁸³

One expert in this study, a patent attorney at a major metropolitan law firm, explained that she never reads a case without understanding “why” she is reading.

I read cases for three reasons For clients, usually, I’m researching a specific issue. . . . If I’m looking at the validity of somebody’s patent and I’m going to concentrate on the issues where I believe there is the issue for this product or the product of my concern and the patent The second reason [for reading a] case is for staying current in my field of law. And in patent law there are key issues . . . so I’ll read every case in the hot IP issues so I can keep current and try to help clients [with] what’s happening in the law. . . . And I write a lot on those topics so I need to stay current. . . . And the third reason has to do with something very similar to [the issue in this study]. When we’re preparing to meet with a new client that has a particular issue, I like to read cases that may set the boundaries of what the client wants to see. That reading is a little bit more extensive. I don’t have a set issue; I have more of a “let’s move everything and kind of assimilate what has happened to other clients.” And then I’ll read it more [extensively].⁸⁴

When asked how her reading has changed over the years, she replied: “[Now] I try to skim through [the case] to find what I want or why I am reading the case . . . I skim much more.”⁸⁵ Consider this portion of her reading protocol in which she connects directly to the purpose of the reading:

So if the client is coming in to see us and has a similar legal issue, we really need to know what the relationship is with the case that they [might have] failed to cite and . . . what other kind of arguments they may have made in their briefs⁸⁶

Other experts in this study read the text similarly. A federal tax court judge used the purpose of the reading to frame what questions she would ask her “client.” The judge, who had practiced law before serving on the bench, read the case to learn what facts she needed to elicit from her “client.”

What [the purpose] . . . is telling me [is] that I need to . . .

83. Berger, *supra* note 1, at 170.

84. Transcript of interview with participant 105e at 5–6 (on file with the author).

85. *Id.* at 5.

86. *Id.* at 4.

make sure to find out the facts in my client's case. To find out: One, whether or not [my client] had information with regard to an earlier precedent that he did not share with his client or with the court. . . . And what I will need to find out from the client based on . . . whether or not he represented someone in an earlier case [and] failed to let opposing counsel know the precedent, . . . and also [I need] to let my client know that not only was there a public reprimand [in this case], but that my client may be charged with costs and that all of the courts within the area are notified of this disciplinary action.⁸⁷

In addition, one of the experts, a worker's compensation attorney, used the purpose of the case to read more efficiently. Knowing that he was reading to prepare for a client interview helped this attorney focus on the relevant portions of the opinion and skim or skip irrelevant sections. In this example, the attorney appropriately noted that the court's discussion of the *Snowe* case was largely irrelevant to the court's holding.

Already in [reading] this paragraph, I can tell that this is not going to be important to the underlying holding of this case. And my purpose for reading the case—which would be to assess the appropriateness for attorney discipline in my client's case—may [affect how I read this]. So how the underlying *Snowe* decision in a criminal law matter impacted this case is less important to me . . . than understanding how the attorney in [my] case may have misadvised his client. So I would skip the remainder of that paragraph and move down.⁸⁸

This attorney read effectively, moving back and forth through the material to focus on the relevant issues of the case as they related to his client's problem.

The novice readers did not use the purpose of the reading in the same way as did the legal experts. Consider the following statements from one novice, a first year law student, who struggled through the details of this same section of the opinion. Although she expended a great deal of time and effort grappling with *Snowe*, she failed to grasp that *Snowe* was not important to the outcome of the case.

So it sounds like the respondent is relying solely on *Snowe v. State* and not any other precedential matter or statutes which

87. Transcript of interview with participant 117e at 4 (on file with the author).

88. Transcript of interview with participant 110e at 3 (on file with the author).

the client was not aware of. . . . We don't know in *Snowe* if the defendant viewed the tape advising him of his rights, but we do know in this other prior case that the client had. I'm just going to make a note of that. *Snowe* is unsure of viewing and what was the name of his prior case? We don't know. In this case, client viewed the videotape. There is a distinction between those two prior cases. . . . Um – we do not know whether the client in the prior case knew and understood his rights. Highlight that holding. The *Snowe* holding. I'll just make a note of the question. "Did client know of and understand rights?"⁸⁹

The law student discussed *Snowe* for several more paragraphs and spent a great deal of time attempting to reconcile how *Snowe* fit into the overall reasoning of the opinion. Because she did not appear to consider "why" she was reading the case, she read each part of the opinion with the same degree of focus and attention to detail. She did not skip or skim within the text. The student ended her case reading with more confusion than clarity about the court's holding. Ultimately, she had to begin her reading all over again. "I am not entirely sure why the notice is being provided to all the courts. I don't have enough background information being a first year student yet. I need to go back to the beginning of the case."⁹⁰

In summary, the experts' ability to connect with the purpose of the reading seemed to affect the way in which they read. Whereas the novices focused upon "knowledge-getting," the expert readers "construct[ed] a rhetorical situation, trying to imagine a real author with a specific purpose, the context within which the writing occurred, and the actual effects on the audience."⁹¹ With a purpose in mind, the experts read more efficiently, both in terms of the time it took them to complete the reading task and their overall comprehension of the text.

If we want our students to adopt the reading strategies of legal experts, we should encourage them to read with a purpose whenever possible. Consider giving your students the purpose of being an attorney or a judge when assigning a case for class. There is evidence that law students who read with a purpose

89. Transcript of interview with participant 115 at 2 (on file with the author).

90. *Id.* at 7.

91. Berger, *supra* note 1, at 163 (citing Haas & Flower, *supra* note 67, at 176–78).

do better in law school.⁹² Minimally, novices who read with a purpose read the facts more closely, are more engaged with the text, and may understand the case more accurately.⁹³ Like legal experts, novices can use their connection to a purpose (something other than reading to prepare for class) to make their legal reading more effective.

1. The experts connected to their prior knowledge and experience

In addition to reading with a purpose, the experts used their prior experience to construct meaning within the text. Nine out of the ten experts connected to their prior experience consistently in their reading protocols, compared to only two novices.⁹⁴ We would expect experts who practice law to know “more” about the law. Yet this background knowledge and experience appeared to enhance the way in which experts read. A reader “builds meaning from a text using information provided by the author and knowledge and experience that the reader already possesses.”⁹⁵ What a reader understands “depends not only on the text and its context but also on the reader’s prior knowledge of and experience with similar texts and similar contexts.”⁹⁶ Because the experts in this study reflected back on what they read in relation to their prior experiences, they seemed to read the text more effectively.⁹⁷

How do experts use their prior experience when reading a case? One example comes from a commercial litigator at a large law firm who specializes in mass torts and antitrust litigation. Even after twenty years in private practice, she began her reading with genuine curiosity. As she read, she commented on the increasing problem of lawyers failing to reveal adverse authority to the court and drew upon her personal understanding of this issue. “I think this is an interesting case because I think [failing to disclose adverse authority] happens much more often than is brought to the attention of the courts

92. See Christensen, *supra* note 17, at 634.

93. *Id.*

94. Once again, the only expert that did not connect with prior knowledge was the expert with the least amount of practical experience, which was three years.

95. Berger, *supra* note 1, at 169.

96. *Id.*

97. *Id.* By virtue of being beginning legal readers, novices “[have] little prior acquaintance with either the typical legal text or the legal context.” *Id.* Therefore, it makes sense that novices struggle in this regard.

or [that] is ruled upon in this way by the courts. So I think the facts are going to be interesting.”⁹⁸

As she continued to read through the facts of the case, the expert commented upon the type of lawyers who, in her experience, were more often disciplined by a court.

Interesting that this matter is a DWI case. Not the kind of case that gets big law firms and teams of lawyers [to represent them] which is where . . . a lot of the abuses actually take place. So that kind of answers my curiosity about why this attorney is [being] disciplined; it tends to be smaller firms or sole practitioners who get disciplined and not the larger firm lawyers.⁹⁹

This expert placed the case within her personal context or understanding.

Similarly, a highly experienced civil litigator with thirty-six years of experience also related certain facts of the case to his own experience. It was meaningful to him that the respondent in the case, like himself, had significant practice experience.

I don't recognize any of the names here. I see it's pro se and it tells me in this case he's obviously an attorney, but that puts the question mark in my mind. . . . This matter is presented to this court by way of the commission. I pick that up. And they entered into an agreement with *Snowe* before for us for approval. . . . So he is an old practitioner like myself. Admitted in 1974. I've been in practice thirty-six years and he's been in practice thirty-two.¹⁰⁰

Some of the novice readers also attempted to connect to prior knowledge during the reading protocol, but this strategy did not always help the reader. For example, one novice, a first year law student, tried to make sense of the criminal procedure of the case by referring to a popular television program. “Right now I'm thinking that makes sense because when I watch *Law and Order* I see that they say, ‘do you understand these rights?’ and at the end of the videotape, how [is] . . . a videotape going to know if somebody is going to understand the[ir] rights?”¹⁰¹

A few paragraphs later, the student was still working through the criminal posture of the case.

98. Transcript of interview with participant 119e at 1 (on file with the author).

99. *Id.* at 2.

100. Transcript of interview with participant 125e at 1 (on file with the author).

101. Transcript of interview with participant 121e at 3 (on file with the author).

The opinion provides that convening a hearing is merely [a] discretionary option of the trial court which makes sense because . . . the court probably receives a lot of motions in a hearing and this would just clog the system. . . . [I]t appears that the court does not want to baby-sit every single person that gets brought into jail for drinking and driving in these cases. So I'm going to go back and read through [again].¹⁰²

Although the student was drawing on her general understanding of the legal system, i.e., that court dockets are overburdened with criminal complaints, she ended up needing to reread the paragraph again. Without the depth of experience and background knowledge of an expert, this law student struggled to understand the context of the case.

In this study, background knowledge and experience appeared to help the experts place the case in a personal context, thereby increasing the effectiveness of their reading. Without basic background knowledge, novice readers cannot comprehend legal text efficiently.¹⁰³ Whereas the new reader struggles with new terms and definitions, legal experts use background knowledge to their benefit.¹⁰⁴ "Background knowledge 'acts as a screen or filter' for what the expert reads."¹⁰⁵

As a law professor, you can provide your students with helpful background information about any case you may be introducing for the first time. What is the opinion's social and political context? What is the case's significance within that particular section of the casebook? You can give your students the knowledge and experience you already have to help them read like legal experts.

2. *The experts "contextualized" the case*

All of the experts in this study began their reading noting

102. *Id.*

103. Leah M. Christensen, *The Psychology Behind Case Briefing: A Powerful Cognitive Schema*, 29 CAMPBELL L. REV. 5, 8 (2006) (citing Dewitz, *supra* note 17, at 658).

104. *Id.*

105. *Id.* at 21 (citing Dewitz, *supra* note 17, at 661). Dewitz makes an excellent comparison between the expert reader and the expert chess player. When the expert reads in her field, it is like a chess master surveying a chess game. "The chess board is alive with predictable patterns that are easy to comprehend. To the novice chess player, the game board is a random array of black and white pieces." Dewitz, *supra* note 17, at 662.

the context of the case, i.e., the date of the decision, the parties, the court, and the type of decision. Like experts in other studies, the lawyers and judges paid more attention to the context of the case, “both the context within which they [were] reading and the context within which the case was decided.”¹⁰⁶ How does the context of a case help the legal reader?

The context within which they are reading provides expert readers with a concrete purpose that is reflected in the way they read. . . . In addition to situating themselves within a context, expert legal readers seek clues to the context out of which the opinion emerged, first overviewing the case for topic, decision, and length and checking jurisdiction, level of court, and date.¹⁰⁷

Establishing the context of the case appeared to enhance the experts’ reading in this study. The lawyers and judges immediately understood the limited precedential value of the study case, which affected how they read. For example, one of the experts began her protocol as follows: “This is *In the matter of Richard Thonert*, Supreme Court of Indiana. Right off the bat, I practice in Minnesota State Court so I see that this is a state court [in] Indiana case; I’m wondering what kind of precedent it has in my particular case?”¹⁰⁸ Another attorney began: “Well, first thing looking at this case, I glance at the title and it catches my eye frankly because there is only one party.”¹⁰⁹

In contrast, seven out of the ten novice readers ignored the case title (and thus the party’s name), and asked at various points: “What is this?” “Who’s getting disciplined?”¹¹⁰ The novices failed to pick up that the case citation only contained a single party’s name (the attorney being disciplined). One law student, like other novices in the group, did not note anything in particular about the parties or the caption of the case. The reader skipped the caption and began his protocol by looking first to the holding of the court, which he highlighted as he read. An example of this student’s protocol is as follows:

The first I would take out – I would take out my green

106. Berger, *supra* note 1, at 170.

107. *Id.*

108. Transcript of interview with participant 109e at 1 (on file with the author).

109. Transcript of interview with participant 106e at 1 (on file with the author).

110. Transcript of interview with participant 112 at 1 (on file with the author).

marker, which means . . . holding and I would mark the “Supreme Court.” This would get a thick line and then I would try to break up the different phrases of that sentence so that it would be easier to pick up with the explanation but it’s all in one sentence and it’s kind of confusingly written.¹¹¹

After approximately two paragraphs of the fact section, this student stated: “Right now, I’m thinking to myself, I don’t know exactly what happened here.”¹¹²

In addition to paying attention to the court and date of the decision, the experts also noted who wrote the opinion (i.e., the judge’s name and reputation). The novices, however, did not note the author of the opinion.¹¹³ For example, one expert, a judge with over twenty years of experience, began his reading by noting the type of decision and the limited precedential value of the case.

Well, first thing looking at this case, I glance at the title and it catches my eye frankly because there is only one party. It says *In the Matter of Richard Thonert*, and of course, already that is uncommon in my field of bankruptcy to see cases like that is pretty rare. . . . So that has caught my interest right away. I see it’s the Supreme Court of Indiana. Of course, as I’m sitting here in Minnesota (and I’m supposedly a lawyer here in Minnesota), I think it’s perhaps interesting but I know that it’s not binding on anything here in Minnesota, so I may read it differently. . . . I always look to see who the Judge is in a case because in my field as a bankruptcy judge, . . . I actually know many of the authors of the bankruptcy court opinions I read. Even if I don’t know them, I have an opinion of their reputation.¹¹⁴

For this expert, the case’s unique context altered the way in which he read the law. The judge noted that a case from Indiana would have less authority than a case from Minnesota. Like Lundeberg’s experts, this expert used the initial details of the case to situate himself within the context of the opinion.¹¹⁵ As Berger described, “expert legal readers seek clues to the context” in order to facilitate their reading, first previewing the

111. Transcript of interview with participant 114 at 1 (on file with the author).

112. *Id.*

113. Eight out of the ten experts noted the author of the opinion. None of the novices noted the judge authoring the opinion.

114. Transcript of interview with participant 106c at 1–2 (on file with the author).

115. Lundeberg, *supra* note 17, at 412.

case for “topic, decision, and length and checking jurisdiction, level of court, and date.”¹¹⁶ All of the experts in this study appeared to use the context in this way.

Novices can benefit from the simple reminder to preview the opinion before they begin to read. We want our students to note the context of the case. Was the case brought in state or federal court? Is the decision published or unpublished? The type of court, the date of the decision, and the particular judge may affect the weight of the opinion’s authority, the credibility of the decision, or the quality of the writing. Expert readers use these details to situate the case in a legal context. Using the context of the case enhances the effectiveness and efficiency of a legal expert’s reading.

3. *The experts evaluated the case as they read*

Like Lundeberg’s experts, the lawyers in the present study were not afraid to evaluate the “quality” of the decision.¹¹⁷ The experts commented upon whether they agreed or disagreed with the outcome of the case. Consider the statements of the same bankruptcy judge referred to in the prior example:

I stop here to comment that having read this whole discussion, a lot of it seems superfluous since there was sort of this stipulation of both the facts and the disposition. It seems to be rather a long-winded way of saying he knew about the *Fletcher* case because he was the lawyer. He knew it was important and he didn’t disclose it to the Court of Appeals. It all could have been said in about one or two sentences and made the reading for law students or a lawyer’s job a lot easier.¹¹⁸

The judge was not afraid to critique how the opinion was written. Like Lundeberg’s experts, the experts in this study were willing to voice their agreement or disagreement with the judge’s decision.¹¹⁹ Through their evaluation of the text, the experts illustrated their “sophisticated view of judicial decision

116. Berger, *supra* note 1, at 170.

117. Lundeberg, *supra* 17, at 414–15. In Lundeberg’s study, only a single novice voiced approval or disapproval about the opinion in contrast to ten experts. *Id.* at 415. The results were somewhat different in the present study. Comparing law students to lawyers, five law students expressed their approval of the judge’s decision (in a broad sense) as compared to eight experts.

118. Transcript of interview with participant 106e at 5 (on file with the author).

119. Lundeberg, *supra* note 17, at 415.

making as a creative process.”¹²⁰ In other words, the experts realized that the law is created in part by how the reader receives it, i.e., “[i]t is the reader who, by providing the context, gives significance to particular opinions or to aspects of a single opinion.”¹²¹ In this study, the experts used this creative process when they expressed their own opinions and evaluated the case.

Another example of an expert who evaluated the text is from a seasoned mediator with over thirty-five years of practice experience. This expert agreed with the court’s ultimate decision but critiqued the court’s failure to require the respondent to pay restitution to his client.

The parties agree that the respondent should be publicly reprimanded and agree that a public admonishment is appropriate given the negative impact on the efficient resolution of the client’s appeal occasioned by the respondent’s lack of disclosure and its intended deception. Here we go. . . . Now that’s where I come down on this . . . and I would give him the money back.¹²²

Although the lawyer agreed with the court’s conclusion (i.e., “Now that’s where I come down on this”), the lawyer felt the respondent should have been required to pay back the \$5000 in client fees the lawyer took from his client (i.e., “I would give him the money back”).¹²³ This expert appeared to place himself in the role of the judge.

Although some of the novices stated that they “agreed” or “disagreed” with the outcome of the case, they were less comfortable expressing their own opinions about the decision. Perhaps the novices felt compelled to agree with the result in the case because a “judge” made the determination. Lundeberg called this phenomenon an “alternate conceptual framework” in which jurisprudence is “a strictly mechanical, rule-following process.”¹²⁴ Novices may feel that “legal decisions [are] more or less cut-and-dried; therefore, because the law rather than the judge [is] responsible, his or her decision shouldn’t be evaluated.”¹²⁵

120. *Id.*

121. Oates, *supra* note 17, at 143.

122. Transcript of interview with participant 125e at 3 (on file with the author).

123. *Id.*

124. Lundeberg, *supra* note 17, at 415.

125. *Id.*

Several novices appeared to adopt this more mechanical framework. Following the reading protocol, I asked one student whether she agreed with the court's conclusion in the case. Despite the fact that the case involved a clear violation of the professional rules of conduct, the student was unclear about how *she* felt about the case.

Q: Do you think the court in this particular [case] came to the correct conclusion?

A: Well, I'm not so sure. Especially the first part of it. It kind of talked about the responsibility [that you have] directly to a court and indirectly to your client. And then, also, what you should tell your client. And I believe—I agree with them saying, "Yes, they should . . . tell the client about the adverse and favorable case" . . . And it seemed like maybe they were leaning on the fact that he did represent that other case and he was consciously trying to deceive the court and turn around something.¹²⁶

This student had been a successful student after her first semester of law school (she was in the top 25% of her class) yet she still struggled to formulate her own opinion about what happened in the case.

What do experts gain from evaluating the text they read? When an expert appraises or assesses a case, the expert is "assum[ing] the role of a judge, evaluating the credibility of the parties, [and] the merits of their 'stories.'"¹²⁷ When experts evaluate, they read more actively and "[talk] back to the text."¹²⁸ They become more engaged in their reading process. Professor McKinney points out that:

Expert readers evaluate what they read. They don't assume the author is an authority whose written contributions are beyond their reach. Rather, to "make meaning" of text, expert readers make judgments about the content of what they're reading as they read, learning from the author but also forming opinions about the content, style, validity, and power of what they're reading.¹²⁹

126. Transcript of interview with participant 103 at 11 (on file with the author).

127. Oates, *supra* note 17, at 152.

128. *Id.* at 158; see also Elizabeth Fajans & Mary Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 163–64 (1993).

129. MCKINNEY, *supra* note 3, at 153. McKinney goes on to suggest that when novice readers read their casebook, they should evaluate what they are reading in four ways: "(1) Evaluate your thoughts and feelings about the reading *before* you actually

Novices can benefit from adopting the reading strategy of evaluation. Although many novices may want to automatically agree with the result of the case, we want our students to go further into the text. Like experts, we want novices to assume the role of a judge and assess the credibility of the parties and their arguments.¹³⁰ We want students to do more than simply gather the information they need to complete their case briefs.¹³¹ Using the strategy of “evaluating” brings the novice readers one step closer to reading like legal experts.

4. The experts read flexibly and efficiently

Finally, the expert readers in this study read “flexibly and efficiently, varying both the order of their reading and the time allotted to different sections.”¹³² The experts tended to read the initial details of the case closely, i.e., previewing the date, court, and type of decision. The experts then skimmed the headnotes and legal issues in the case. Another legal scholar, Professor Linda Berger, noted the following about expert readers:

The expert first seeks background information—what court decided the case (citation); what the case is about (the summary and headnotes); who won (the decision at the end) After an overview for context, the expert reads the whole case, but the expert spends more time overiewing, reading the first page and the facts to picture what happened, and rereading the most important parts.¹³³

In this study, I noted that after gaining an understanding of the case, the experts moved through the opinion efficiently. They would stop and reread difficult sections to ensure their comprehension of new facts or law. In addition, the experts were able to synthesize different elements of the opinion as they progressed. Their reading included regressions in which the experts noted important matters and then looked back to check on the facts or rules.¹³⁴ The experts skimmed the text

start to read (as discussed in Chapter 8); (2) Evaluate the judge’s writing style as you read; (3) Evaluate the judge’s possible biases, assumptions, and perspectives; (4) Evaluate the intellectual content of the reading.” *Id.* at 154.

130. See Oates, *supra* note 17, at 155.

131. See *id.*

132. Berger, *supra* note 1, at 170.

133. *Id.*

134. *Id.*

frequently.

I also noticed that the experts read large “chunks” or paragraphs of text before they stopped to think aloud. In contrast, the novices would typically read a sentence of text followed by a vocal statement about what they had just read. As a result, the novice readers took twice as long to read the case as compared to the experts. The average reading time for novice readers (engaged in the think aloud) was thirty-eight minutes. The average reading time for the experts was nineteen minutes.

Consider the following example which illustrates the flexibility with which one expert read. This expert was an attorney with over twenty years of experience in appellate litigation. She read the opinion with great flexibility, skipping and skimming various parts of the opinion while re-reading other parts carefully to make sure she understood the section before moving on. It took her fourteen minutes to complete the reading and think aloud process. She began her protocol referring to the context of the opinion and her purpose for reading:

I would probably . . . just look at the last name of the parties. I would look at the name of the Supreme Court of Indiana as well as the date. Supreme Court of Indiana and I'm counseling a client about a problem. I'd assume they are hiring me because their problem is in Minnesota and so Supreme Court of Indiana would be some sort of persuasive authority

Beginning with the summary headnote. [Reads headnote] . . . That's a useful summary to me. It sounds to me as though I have a concern about an attorney's obligation to disclose to an appellate tribunal controlling authority, which is known to the attorney. I normally would skip the headnotes unless I was trying to read a very long decision and trying to zero in on the parts of the decision that are relevant to me. Because this is short, I would probably skip it and go ahead to see who the counsel of record are.

[Reads first paragraph] I am looking back to see that they did, in fact, adopt this statement of circumstances because I'm checking to see if I understand the results of the case before I get into the analysis. . . . Ok, I can't completely answer that based on the . . . synopsis at the top. So I will read ahead.

[Reading second paragraph] Skip citation. . . . There is a

footnote there. I am skipping that.

[Reading fact section] We finished the fact section and I usually pause a bit and think a bit about the facts. Although I don't generally go back and reread the entire [facts] unless I need to do so to understand parts of the courts analysis. . . .

[Completes reading] Other than that, I think my reading is done. I don't see any need to go back and reread the facts. I sometimes do that after I read the court's analysis, but I have no need in this particular case.¹³⁵

This expert read flexibly. She began with careful detail, setting the context of the case and engaging with her purpose for reading, i.e., meeting with a client. She then skipped footnotes and citations, moving on to the fact section. The expert re-read text when necessary, ensuring her understanding of the particular paragraph before moving on. The experts read fluidly; they read the whole case, but did not follow a particular order.

The novices appeared to continue struggling with the basics of case structure and legal terminology (even after completing their first-semester of law school). Accordingly, they read the "judicial opinions inflexibly, from beginning to end and at the same rate of speed and attention."¹³⁶ This was less efficient for the novice readers because they were unable to distinguish between relevant and irrelevant material in the case. They read the opinion slowly believing that all aspects of the opinion were relevant. Accordingly, they seemed overwhelmed by the details.

I asked one expert, a federal court judge, how her reading has changed over time. She explained:

At the beginning, I would say it's much more mechanical and very focused. And I think as time has gone on, I think the focus has changed to instead of what the little, tiny particular facts are in a particular case . . . to what does this mean to my client? Good? Bad? Indifferent? . . . [My reading of cases has] really broadened.¹³⁷

These comments remind us once again that experts read differently than novices. Experts appear to develop their own

135. Transcript of interview with participant 126e at 1-4 (on file with the author).

136. Berger, *supra* note 1, at 170 (citing Dewitz, *supra* note 17, at 669-70).

137. Transcript of interview with participant 117e at 7 (on file with the author).

way of approaching or organizing the information they read. "To be an expert in a field, it is not enough to possess a large body of factual information; an organizational system with structure and procedural knowledge is necessary to apply the relevant factual information to the problem to be solved."¹³⁸ In essence, experts have a "cataloging system for their knowledge," which they use to read more efficiently and effectively.¹³⁹

Without a question, the legal experts in this study possessed more factual and background knowledge about the law than the novice readers. But the experts also appeared to read flexibly, which helped them move through text quickly while comprehending more along the way.

VII. CONCLUSION

In summary, the results of this study support the prior research on expert/novice legal reading. Expert legal readers use different reading strategies than novice readers. In this study, the experts used rhetorical reading strategies more often than novice readers and used default reading strategies less often. The experts went beyond the text and interjected their own experience. They evaluated the decision by agreeing or disagreeing with the end result. In addition, the experts placed the opinion into a context. They noted the date of the decision, the court deciding the case, and the parties involved.

The experts also read consistently with a purpose. They appeared to use the purpose of their task to engage with the text and seek out relevant information more effectively. In addition, experts also read more flexibly and efficiently. The experts in this study varied the order in which they read and the effort they expended doing so. They skimmed irrelevant material and re-read complex material. Additionally, the experts appeared to "chunk" information to increase the efficiency with which they read.

What do these results mean for novice legal readers? If our goal as legal educators is to prepare our students to practice law, we want to teach them the reading strategies used by legal

138. Fernando Colon-Navarro, *Thinking Like a Lawyer: Expert-Novice Differences in Simulated Client Interviews*, 21 J. LEGAL PROF. 107, 115 (1996).

139. *Id.* at 116.

experts. Remind students that expertise is made and not born. Expertise is something gained by practice and repetition. As students read more cases, they will gain important structural and textual knowledge that will enhance their legal reading.

In addition, have students use the strategies that expert legal readers use as they read through a case: (1) read with a purpose, (2) use background knowledge to situate the case, (3) establish the context of the case before beginning to read, (4) evaluate the case and have an opinion about its outcome, and (5) read flexibly; skim and skip when appropriate.¹⁴⁰

Finally, consider that motivation may be the most important factor in the development of expertise. In the legal academy, we often assume that innate intelligence counts more than hard work or effortful study. Yet consider how one becomes an expert. In any field, one gains expertise by work and repetition. Most of us strive to be experts in our field. Yet the distance between novice and expert, although seemingly great at times, is surmountable. The legal expert reads differently than the legal novice. But we can teach students the way in which a legal expert reads the law. The earlier they achieve these skills, the better for the individual students and the better for the legal profession as a whole.

140. I say “skim” and skip” *when appropriate* because this would not be prudent advice for first year law students who are beginning to learn legal analysis and legal reading. I am suggesting this strategy for second and third year law students who are beginning to make that transition from reading casebook annotations to “real” cases.

APPENDIX A

Listing of “moves” identified in the think aloud protocols

D = Default Reading Strategy

P = Problematizing Reading Strategy

R= Rhetorical Reading Strategy

O= Other

| | |
|-----------------------------------|------------------------------------|
| Analogizing P | Making Margin Notes D |
| Clarifying D | Noting Aspect of Legal Structure D |
| Commenting on Difficulty D | Noting Purpose R |
| Confirming Understanding D | Noting Important Detail D |
| Confusion re: Term D | Noting Structural Signal D |
| Connecting with Prior Text R | Paraphrasing D |
| Connecting with Prior Knowledge R | Planning P |
| Connecting with Purpose R | Predicting P |
| Contextualizing R | Questioning D |
| Disconnection with PurposeD | Reevaluating Tentative ConclusionP |
| Distinguishing P | Reporting Distraction O |
| Drawing Conclusion P | Reporting Typical Process O |
| Drawing Tentative Conclusion P | Rereading D |
| Evaluating P | Reviewing Text D |
| Hypothesizing P | Synthesizing P |
| Highlighting D | Skimming D |
| Identifying Holding D | Stating PurposeR |
| Locating Information D | Summarizing D |
| Making AssumptionD | Voicing ConfusionD |
| Marking Action D | Voicing Lack of KnowledgeD |

