

## Chapter Six

### Best Practices for Non-experiential Teaching Methods

#### A. Socratic Dialogue and Case Method.

##### 1. Introduction to the Socratic Dialogue and Case Method.

The principal method for teaching legal doctrine and analytical skills in United States' law schools is the Socratic dialogue and case method. Students read appellate courts' decisions in casebooks and answer professors' questions about the holdings and principles of law contained in the cases. This question and answer practice is loosely referred to as "Socratic dialogue."

Although the Socratic dialogue and case method is no longer the exclusive method of instruction in law schools in the United States, it is still frequently used in legal studies beyond the point where its benefits have been achieved, and many teachers use the case method exclusively even when other methods of instruction would accomplish their educational objectives more effectively. In this section, we describe best practices for using the Socratic dialogue and case method, though we recommend that its use be limited.<sup>622</sup>

Before discussing the best practices of contemporary law teachers in using Socratic dialogue, it may be useful to compare Socrates' methods with Langdell's. This description was taken from Peggy Cooper Davis and Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997). The authors graciously consented to our adaptation of their work. The language in the text is theirs, except for the segments that are offset with brackets.

##### a. Socrates' methods (as described by Davis and Steinglass).

While it is difficult to generalize about Socrates' methods, the literature on the early and middle Platonic dialogues does refer with consistency to a few basic elements. In general, the dialogues are said to begin with elenchus – a process through which Socrates' interlocutor is made to realize that he does not know what he thought he knew. After eliciting his interlocutor's position, Socrates asks a series of leading questions designed to elicit agreement with a series of related propositions. Socrates then reveals what he knew all along – that the statements to which his interlocutor has agreed contradict the interlocutor's original position. One scholar has described the process in this way:

His tactics seem unfriendly from the start. Instead of trying to pilot you around the rocks, he picks one underwater a long way ahead where you would never suspect it and then makes sure you get all the wind you need to run full-sail into it and smash your keel upon it.

This process engaged Socrates' audiences, if not his interlocutors. As

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<sup>622</sup> The reasons for limiting the use of the Socratic dialogue and case method are explained in Chapter Four in the section, "Use Multiple Methods of Instruction and Reduce Reliance on the Socratic Dialogue and Case Method."

Socrates tells us in the Apology, people enjoyed spending time in his company because they enjoyed hearing him “examine those who think that they are wise when they are not – an experience which has its amusing side.” But Socrates had a purpose beyond entertainment. He believed that learning could begin only with the acknowledgment of ignorance and the experience of perplexity, or *aporia*. Elenchus generated *aporia* and thus motivated genuine interest in learning.

The elenchus created the necessary conditions for what some analysts describe as the next stage of the dialogue – the *psychagogia*. This stage is not always identifiable in Socratic dialogues. The early dialogues – those thought to depict Socrates most accurately – consist primarily of elenchus, while the more Platonic versions of the dialogic method, as illustrated by the middle and later dialogues, place less emphasis on the elenchus and greater emphasis on construction of knowledge. In those dialogues in which the *psychagogia* does occur, it takes the form of a series of questions by which Socrates supports the construction of new understanding from what has already been agreed upon.

The course of both the elenchus and the *psychagogia* is fixed by a series of inauthentic questions – questions for which Socrates knows the answers. The inauthentic question has a special discursive impact that often causes offense. According to linguists, a question, or a request for information, is authentic when it fulfills three preconditions (each relating to the state of mind of the person being questioned whom we will call the respondent): the respondent must believe that the questioner believes (1) that the questioner does not already have the information; (2) that the respondent does have the information; and (3) that the respondent will not provide the information without being asked. Situations in which the respondent believes that the questioner already knows the answer constitute other types of speech acts, such as a request for display. Linguists also note that requests presume an obligation of deference on the part of the respondent. Because they carry this presumption, requests can easily cause offense. This potential for offense accounts for the fact that requests are usually softened by mitigating language, such as expressions of politeness. The risk of offense is greatest – and the expectation of mitigation is highest – when requester and respondent are peers or the respondent is superordinate. An adult may not mitigate a request made to a child, but it is likely that s/he will mitigate a request made to a supervisor. Genuine questions are mitigated by the questioner’s neediness. Requests for display lack this mitigating element. They therefore seem to presume an even greater discrepancy in power and, as a result, are more likely to cause offense.

Throughout the dialogues, Socrates asks questions to which he appears to know the answers. In dialogue with his equals, these questions sometimes seem offensively arch; in dialogues with subordinates, they seem more routine, but more conspicuously hierarchical. [Davis/Steinglass at 253-55.]

[A central philosophy of Socrates’ approach is that] “if the same questions are put to him on many occasions and in different ways, you can see that in the end he will have a knowledge on the subject as accurate as anybody’s.” Modern educators would put it only slightly differently: through repetition and variation, a student can construct, or internalize, an independent understanding of a problem and its solution, developing a sure and waking knowledge of [the subject]. [Davis/Steinglass at 258.]

[One of the significant problems with Socrates' approach is the harmful effect it could have on Socrates' interlocutors and their ability to learn. As Meno, the slave, said at the end of his dialog with Socrates], "Socrates, even before I met you they told me that in plain truth you are a perplexed man yourself and reduce others to perplexity. At this moment I feel you are exercising magic and witchcraft upon me and positively laying me under your spell until I am just a mass of helplessness. My mind and my lips are literally numb, and I have nothing to reply to you."

Socrates' questions have left Meno perplexed and willing to acknowledge his ignorance, but they have also left him helpless and silent. They have reinforced Meno's subordinated position, shifted his attention from virtue to Socrates' approach to virtue, and, implicitly, suggested that there is only one way to approach such problems. [Davis/Steinglass at 259.]

**b. Langdell's methods (as described by Davis and Steinglass).**

Christopher Columbus Langdell brought a version of the Socratic method to law school classrooms when he became Dean of Harvard Law School in 1870.

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Langdell immediately implemented a variety of reforms. Diplomas were granted only after examinations were passed. Students were expected to begin their studies at the beginning of the academic calendar, and they were obligated to complete seven required courses and seven electives over two years. But the reform for which Langdell is best known took place in his classroom. Everyone knew that Langdell was up to something when he began compiling cases and distributed them before classes began. A large crowd came on the first day to see what he would do. The Centennial History of the Harvard Law School describes the first few minutes of Langdell's class in this way:

Langdell: "Mr. Fox, will you state the facts in the case of *Payne v. Cave*?"

Mr. Fox did his best with the facts of the case.

Langdell: "Mr. Rawle, will you give the plaintiff's argument?"

Mr. Rawle gave what he could of the plaintiff's argument.

Langdell: "Mr. Adams do you agree with that?"

Though we are cautious about characterizing Langdell's method from the scant descriptions that we have, it seems certain that Langdell's approach was radically different than that of other professors. While his colleagues read to their students from textbooks outlining the rules of law and made occasional comments on their reading, Langdell questioned his students about cases they were expected to read and study in advance. In other classrooms, students passively received the thinking of others, but in Langdell's classes students were expected to think through the cases for themselves. Describing Langdell's method nearly fifty years later, Eliot took pride in the introduction of active learning techniques at the law school:

Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, Seguin, and Montessori; yet his method of teaching was a direct application to intelligent and well-trained adults of some of their methods for children and defectives. He tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions directly in the classroom. He led them to exact reasoning and exposition by first setting an example himself, and then giving them abundant opportunities for putting their own minds into vigorous action, in order, first, that they might gain mental power, and secondly, that they might hold firmly the information or knowledge they had acquired. It was a strong case of education by drawing out from each individual student mental activity of a very strenuous and informing kind. The elementary and secondary schools of the United States are only just beginning to adopt on a large scale this method of education – a method which is not passive but intensely active, not mainly an absorption from either book or teacher but primarily a constant giving-forth.

Like Socrates, Langdell used questions to provoke critical thinking. But unlike Socrates, Langdell seemed to believe that he knew, and his students could be expected to discover, the truth of the matters being considered. Langdell held that law was a “science” and that doctrine could be applied to facts consistently and certainly. In the introduction to his casebook on the law of contracts, he wrote:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.

Believing the law to be a science, Langdell concluded that it should be studied as a science. Just as students of natural science derive the laws of nature from real-world phenomena, so should students of law derive legal doctrine from cases. From his theories of law and legal education, we infer that when Langdell posed questions about cases, he expected students’ answers to reference the “correct” underlying doctrine. We also infer that Langdell’s questions, like those of Socrates, were inauthentic in that they sought an answer that the questioner knew in advance. Based on these scant descriptions, we believe that Langdell’s method was similar to that of Socrates in terms of both its strengths and limitations. While Langdell required his students to construct doctrinal knowledge for themselves, he also constrained the process and the outcome of their learning.

Initial public response to Langdell’s method was critical. Unfamiliar with the method and wary of articulating novice opinions, students complained that they weren’t learning anything – not nearly what they would from lectures – and even suggested that Langdell didn’t lecture because he didn’t know anything. Soon only seven or eight students were attending the class. Langdell persisted despite criticism and declining enrollments for three consecutive years. Soon enrollment picked up again. Graduates of Langdell’s program were apparently well-prepared for employment and were getting good jobs. Within thirty or forty years, schools all over the country were using Langdell’s method. In 1914, the Carnegie Foundation

commissioned a report on legal education in the United States. The author, Josef Redlich, concluded that the Socratic method was quite effective, but he added that the context in which the method was used was central to its success. Redlich praised the professors he studied for using, in addition to the Socratic teaching method, textbooks, dictionaries and encyclopedias, being available to answer questions during office hours, and providing introductory lectures (although Redlich thought that they did not do so to the extent that they might have). [Davis/Steinglass at 261-64.]

## **2. Best Practices for Using the Socratic Dialogue and Case Method.**

### **a. Use the Socratic dialogue and case method for appropriate purposes.**

**Principle:** The school uses the Socratic dialogue and case method to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.

**Comments:**

Law teachers should only utilize the Socratic dialogue and case method when it will accomplish clearly articulated educational objectives better than other methods of instruction. Judith Wegner found three explanations for the staying power of the Socratic dialogue and case method.

[T]he case-dialogue method's legitimacy is rooted in at least three sorts of claims – its educational effectiveness, its resonance with professional norms, and its capacity to serve social and institutional agendas. These three sources of legitimacy are mutually reinforcing since they reflect an alignment of interests among three types of institutions (the university, the legal profession, and the social elite) and three corresponding sets of values. It can hardly be surprising that the case-method has continued to dominate legal education and resist fundamental change for more than a century.<sup>623</sup>

Regarding its educational effectiveness, even most of its critics concede that it helps students develop some of the key skills needed by lawyers better than the textbook and lecture method that preceded it. Paul Brest explained that “[c]oupled with the issue-spotting style of examination, this method of active learning turned out to be a superb way of inculcating the analytic skills and the skepticism about easy answers that are requisite to any career in the law.”<sup>624</sup> Myron Moskowitz also touted the virtues of the Socratic dialogue and case method over the lecture and textbook method.

Interaction with a Socratic teacher helped to sharpen students' minds. They learned to think on their feet, to express themselves, and to read cases – skills that a practicing lawyer needs and that the lecture/textbook method had done nothing to enhance. In addition, while the prior method taught students the rules of law, the case method gave them a deeper understanding of the rules: it

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<sup>623</sup> Wegner, *Theory and Practice*, *supra* note 46, at 9.

<sup>624</sup> Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 *LAW & CONT. PROBS.* 5, 7 (1995).

delved into policy considerations that persuaded judges to adopt them.<sup>625</sup>

Mark Aaronson described some of the specific competencies that the method helps develop.

[T]he case method provides students with simulated practice in how appellate courts formally reason, and predicting what courts will do is a core skill central to a lawyer's claim to professional expertise. . . . [F]eatures of the case method are also applicable when confronting problems in other contexts. These features include the grounding of analysis in facts, the comprehensive spotting of relevant issues and concerns, the search for governing rules, principles or standards by which to make decisions, the weighing of competing policy considerations in light of their consequences, the value placed on consistency and deference to past decisions, the utility of reasoning by analogy, the importance of reasoned justification, and the need to reach a conclusion and make a decision even if not perfect. Tailored and applied flexibly, the case method as a method of deliberation can provide a logical, overall methodology for approaching and thinking about all sorts of situations.<sup>626</sup>

Wegner uses the metaphor of “cognitive apprenticeship” to describe what the Socratic dialogue and case method can achieve when properly utilized.

Modern studies of apprenticeship systems have yielded new theories of “cognitive apprenticeship” with associated insights that shed helpful light upon the classroom dynamics associated with formal instruction in law and other fields. The “cognitive apprenticeship” theory of John Seely Brown, Allan Collins, Paul Duguid and others argues that faculty-student interaction associated with effective learning involves a sort of “apprenticeship” through which intellectual development occurs. Although the process of development parallels that found in traditional craft apprenticeships, it is less obvious because the complex cognitive patterns of teacher-experts are generally not explicit and are thus difficult for their student-novices to observe. Likewise, it proves difficult for teachers to discern errors and misunderstandings that may be occurring in students' minds. These difficulties are especially pronounced in large classroom settings such as those in which the case-dialogue method is often employed.<sup>627</sup>

“The metaphor of ‘cognitive apprenticeship’ resonates powerfully with classical understandings of the case-dialogue method, which exposes students

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<sup>625</sup> Moskowitz, *supra* note 160, at 244.

<sup>626</sup> Aaronson, *supra* note 33, at 6.

<sup>627</sup> Wegner, *Theory and Practice*, *supra* note 46, at 16 (citation omitted) (referring to John Seely Brown, Allan Collins & P. Duguid, *Situated Cognition and the Culture of Learning*, 18 *EDUC. RESEARCHER* 32-41 (1989); Allan Collins, John Seely Brown & Susan E. Newman, *Cognitive Apprenticeship: Teaching the Crafts of Reading, Writing, and Mathematics*, in *KNOWING, LEARNING, AND INSTRUCTION: ESSAYS IN HONOR OF ROBERT GLASER* 454, 454-55 (Lauren B. Resnick ed., 1989)).

to primary materials and teaches them to model themselves on the expert forms of thinking that faculty display. Many of the insights about teaching methods associated with this theory are already borne out in the established practices of legal educators, such as routine reliance on modeling, coaching, scaffolding, and fading tactics, and expectations that students articulate their insights explicitly, reflect on what they're learning, and explore related applications of ideas."<sup>628</sup>

Wegner also asks "[i]f these significant parallels are already apparent, might the metaphor of cognitive or intellectual apprenticeship be further exploited to identify further ways of enhancing effective teaching and student learning?"<sup>629</sup>

**b. Be skilled in using Socratic discourse.**

**Principle: The teacher is skilled in using all four steps of Socratic discourse.**

**Comments:**

Although Socratic dialogue has been the primary means of instruction in law schools in the United States for over a hundred years, there are not many written descriptions of the technique or how one should employ it. This description is adapted from Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997). In fact, except for these introductory comments and the form in which the principles are stated, this section was created mostly by quoting directly from the article. The language that is not from their article is offset with brackets.

Our description omits many of the helpful examples that Davis and Steinglass provide in their article, thus readers will be enlightened by consulting the original source. All but one of the footnotes in the Davis/Steinglass article are omitted.

We begin with the assumption that a teacher has chosen to use Socratic dialogue because it is the best tool for achieving the teacher's educational objectives. As noted by Davis and Steinglass, and others, this is not always the case in legal education. It is a technique that is overused. Nonetheless, this section describes best practices for using it when appropriate.

**(1) Begin by asking a student to "state the case."**

**Principle: The teacher begins Socratic discussions by selecting a student and asking that she "state the case," that is, that she engage in a fact-and-rule-fit analysis.**

**Comments:**

["Stating the case" is to engage in a fact-and-rule-fit (FARF) analysis.] The first step in a FARF analysis is to cull from an appellate opinion (1) the facts of the matter before the court, and (2) the rule of law that has been applied. The rule is parsed into a definitional component (prescribing the circumstances under which the rule attaches) and an outcome component (prescribing the result once the rule attaches). FARFing consists of establishing the fit between the facts of the matter

<sup>628</sup> Wegner, Experience, *supra* note 50, at 54.

<sup>629</sup> *Id.*

and the definitional component of the rule, so as to justify the result prescribed by the rule's outcome component. It is understood as a deductive process: The rule says that if X happens, Y will be the consequence. X has happened; therefore, Y.

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This is an exercise in reading and recitation. [The teacher] and her students will learn whether [the student who is called on] has read the case with enough care (or found some other means) to be able to identify and recite its facts, the governing law, and its central holding. They will also learn whether [the student] is flustered or able to recite with poise. If the case is complex, the identification of dispositive facts and law and the court's central holding may require sorting through tangential or subsidiary facts, rules and conclusions, but [the student's] initial task has not been daunting. If he has prepared for class and he is calm, he should find it easy to [give the correct response]. [Davis/Steinglass at 265-66.]

**(2) Use closed hypotheticals to relate the case at hand to prior cases.**

**Principle:** The teacher uses closed hypotheticals that relate the rules and facts in the case at hand to rules and facts in cases studied earlier.

**Comments:**

Once the case has been FARFed, it is likely that [the teacher] will move on to the more difficult terrain of the closed hypothetical [that is, a hypothetical to which there are correct answers known to the teacher and, perhaps, her students]. . . . Answering the closed hypothetical is a step – albeit a rather close step – from reading and recitation. It requires [the student] to recall and consult more material, and it requires him to replicate the deductive process that governed an earlier case by applying the process to a new set of facts. But these processes are not daunting. If [the student] is able to remember (or quickly find) the earlier case and to think calmly, the question should pose few difficulties. [The teacher] will quickly get a correct answer, either from [the first student] or from some better prepared or more composed student, at which point she will undoubtedly turn to something more challenging.

**(3) Use open hypotheticals to demonstrate complexity and indeterminacy of legal analysis.**

**Principle:** The teacher uses open hypotheticals to demonstrate that simple fact and rule fit analyses often conceal complexity and indeterminance and that the outcomes of cases are not rigidly determinate.

**Comments:**

Until now, [the teacher's] questions have not been authentic; she has been asking questions for which she already had an answer. [The student's] recitations have served, perhaps, to give him practice at public speaking under some stress, but their more important function has been to set before the class a set of principles that will be the subject of discussion for a while. At this point, [the teacher], who understands that doctrinal analysis involves a great deal more than recall and recitation, is likely to shift from requests for recitation and simple deduction and



demand that [the student] engage in interpretive work. And at this point the development and integration of [the student's] lawyering capacities begins in earnest. [The teacher] has carefully chosen her FARF and closed hypothetical inquiries so as to juxtapose legal rules that she thinks are mutually illuminating. Her choices have facilitated some lines of inquiry and made others less likely. . . . Still, the discussion might take a variety of directions from this point, and its direction will be guided, at least to some extent, by additional choices that [the teacher] must now implement. [Davis/Steinglass at 267.]

[The domains that the teacher may choose to explore include:

- *Textual exegesis:* The teacher may choose to] direct the discussion toward the meaning of the statutory terms that embody the rule or the terms of prior opinions that clarify its meaning. If she does this, she is likely to want the discussion to reveal ways in which a rule is ductile.

- [• *Rule choice:* The teacher may choose to] direct discussion to whether the [rule applied by the court to decide a case] was the correct or only rule to apply in [the situation]. If she does this, she is likely to want the discussion to reveal a range of choice in fitting complex life situations into legal categories.

- [• *Fact development:* The teacher may choose to] direct her students' attention to facts in the record that were neglected in the majority opinions, to the way in which those opinions interpret the facts, or to how the facts might have been developed before and during trial. If she does this, she is likely to want the discussion to reveal ways in which the facts were ductile.

- [• *Contextual and policy analyses:* The teacher may choose] to focus on how the facts and context [of the situation] test the contours and legitimacy of the rule. If she does this, she is likely to want the discussion to reveal relationships between the identified function of a rule and its interpretation; she is also likely to want to discuss ways in which case facts suggest a rule's functions and test its efficacy. Of course, she may also want to have a broader discussion of the functions, wisdom and efficacy of the rule, in which case the discussion will turn to policy analysis.

- [• *Narrative development:* The teacher may choose to discuss] cultural and narrative patterns that the rule – or the courts' interpretation of it – seems to follow. If she does this, she may want her students to consider the difference between imagining the case [as the plaintiff's or defendant's, or from the perspectives of others who were involved in the case or may be affected by the court's decision]. She might ask students what associations they have with the idea of [legal concepts related to the case]. She will want them to see that proverbial stories and cultural expectations can shape the interpretation of a rule.

A well-rounded legal education requires exploration of all of these domains, for textual exegesis, rule choice, fact development, contextual analysis, narrative development and policy analysis are all integral to sophisticated lawyering. Any of these domains can be explored in the format that is described by the term Socratic teaching, as that term is used in law schools.

[If the teacher's] approach to case analysis acknowledges indeterminacy, her questions will soon become genuine. She will move from establishing the shared

premises for discussion to exploring matters as to which reasonable minds in her classroom might well differ. The structure of the exchange between [the teacher and the student] may convey the impression that there are right and wrong answers to all of [the teacher's] questions, but in truth the demand on [the student] at this stage of the class moves from recitation to analysis. [Davis/Steinglass at 267-68.]

**(4) Draw lessons about the nature and processes of lawyering and judging.**

**Principle: The teacher draws from the discussion lessons about the nature and processes of lawyering and judging.**

**Comments:**

When [a teacher] has explored as many aspects of the presumption of legitimacy as pedagogic judgment counsels her to explore, she may draw from the discussion lessons about the processes of lawyering and judging. [Depending on the situation,] she might say: “So it seems, Mr. [Student], that the interpretation of the . . . statute has depended on a particular understanding of [a person's] needs and circumstances;” or, “So it seems, Mr. [Student], that the outcome of the litigation may have depended on whether it was conceived as a constitutional challenge of the [statute] or as a constitutional challenge of the . . . rule as interpreted by the California courts;” or, “So it seems, Mr. [Student], that the rule responds to different sets of cultural assumptions about [such matters].” However, recognizing the value of active learning, [the teacher] might also, over time, shift responsibility for drawing such conclusions to her students, by asking authentic questions, such as, “Mr. [Student], how might you explain the different outcomes in the cases [we just studied]?” [Davis/Steinglass at 270.]

**c. Do not intentionally humiliate or embarrass students.<sup>630</sup>**

**Principle: The teacher does not intentionally use Socratic dialogue as a tool for humiliating or embarrassing students.**

**Comments:**

[We understand, as do Davis and Steinglass, that some thoughtful people believe that a Kingsfieldian approach to using Socratic dialogue is an effective way to prepare students for the rigors of law practice. While we agree that calling on students randomly encourages effective preparation, we disagree with the notion that intentionally embarrassing and humiliating students is, on balance, a tactic that should be endorsed or employed by law teachers. Our position is consistent with modern trends in legal education and learning theory.

The following excerpts from the colloquy in Davis and Steinglass' conclusion reveal their thoughts about this issue.]

Liz: But suppose, Peggy, that every student was required to read a proscribed sequence of cases and to attend large classes in which at any moment s/he might be

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<sup>630</sup> This section appears here because it was in the Davis/Steinglass article about Socratic dialogue and because many of the complaints about classroom abuse of students involve the misuse of Socratic dialogue. Obviously, a teacher could embarrass or humiliate students using any method of instruction.

interrogated about the lessons to be found in those cases. Don't we have to assume, Peggy, that it would be humiliating to be called upon in such a class and shown to be unprepared or uncomprehending?

Peggy: Yes.

Liz: And since you have already told me, my friend, that every person prefers admiration to humiliation, we are left with no alternative but to conclude that under this method students will learn the lessons of their assigned cases. For it is only by doing so that they can avoid humiliation and hold some hope of earning admiration.

Peggy: It seems that you are right, Liz.

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Peggy: Well, there are lots of things that I like about Socratic method. But it's a mixed bag. Students tell me that if I call on them without warning and rough them up a bit when they are unprepared, they read more and are more alert in class. But others tell me that constant fear of humiliation interferes with their ability to concentrate.

Liz: I see what you mean. Every study I've seen shows that calling on people is better than taking volunteers from the standpoint of ensuring the participation of women, or of any other group that tends to be less impetuous in conversation. On the other hand, if you call on people only to rough them up, they may feel inclined to retreat. Still, if uninterrupted lecture is the only alternative, then maybe it does make sense to use questioning to force students to be more active. But break out groups would make more students active, and simulations can make them all active.

Peggy: I confess that sometimes I enjoy testing students by coming up with a counter argument for their every argument. But those are cheap shots; I've been thinking about my fields for nearly thirty years.

Liz: Maybe students would feel better if they knew the rules of the game – knew that you refute their arguments not because they are wrong, but to push them to develop their skills in the realm beyond recitation where open and genuine questions are debated.

Peggy: Could be. I do agree that Socratic teaching can be broad ranging enough to address a variety of lawyering contexts and to develop intellectual versatility. Open questions about a case can lead students to reconstruct and critique the processes of fact development and counseling, for example. Or to explore an advocate's or a judge's narrative choices.

Liz: I suppose, but there must be better contexts for getting students to appreciate the complexities of fact development. I would think that always working from appellate opinions down would be limiting; why not do some bottom up work?

Peggy: This may sound stuffy, but tradition is important. Students expect a little One L action.

Liz: I think it was Socrates who said that ideas are apt to run from the mind unless you tether them by working out the reason. I don't feel that I'm working out reasons when I'm being marched through deduction games. You didn't either.

Peggy: I understand. But sometimes Socratic discussion nicely explores the reasons for a result or a rule. It can also foster the development of professional consciousness by modeling a process of thinking through the multiple dimensions of a problem and the consequences of alternative decisions.

Liz: I think students might find it hard to think things through for themselves in a discourse structure designed to demolish rather than weigh their arguments. And in a structure that is so controlled and dominated by the teacher.

Peggy: But you had a good idea for addressing these problems: I think it makes sense to demystify the process for students by making it clear that questions are open and genuine and that it's in the nature of the game that even the best argument will be refuted. You know, there's truth to the notion that Socratic teaching models a style of argumentation that is often used in practice.

Liz: My guess is that it's used because you law professors keep modeling it.

Peggy: Not because it's good?

Liz: In this I really am Socrates: I do not know what goodness is.

[Davis/Steinglass at 277-79.]

### **(1) Explain why Socratic dialogue is used.**

**Principle:** The teacher explains why she uses Socratic dialogue.

**Comments:**

It is difficult for students to learn from questioning when teachers don't talk about why they do it. In the absence of explanations, students imagine for themselves. Not knowing, in combination with being anxious about performance, makes it easy for students to accept the worst that they have heard or to conclude that their professors' motives are self-aggrandizing or malevolent. As Redlich pointed out eighty years ago, the success of the Socratic method depends on the social context in which it is used. In a community of homogenous fellowship and privilege, a sequence of questions that moves past one's understanding may be experienced as a playful rite of passage. But in a large, relatively competitive and impersonal class, students may feel (and be) more vulnerable. Moreover, in a heterogeneous context in which race, gender, ethnicity, social class, sexual preference and other categories of difference play a role in shaping interpersonal dynamics and the realities of people's lives, Socratic testing will carry different, and sometimes unfortunate, meanings for different students. For example, a student socialized to expect and prefer what Deborah Tannen refers to as "report talk,"<sup>631</sup> may delight in inauthentic questions,

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<sup>631</sup> Tannen distinguishes "report talk," which serves the function of asserting independence and achieving status by displaying knowledge, and "rapport talk," which serves the function of establishing connections and negotiating relationships. She observes that in many settings men are more prone to engage in report talk, women to engage in rapport talk. DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* 76-77 (1990).

seeing them as an opportunity to display knowledge, but a student socialized to expect and prefer “rapport talk” may think inauthentic questions rude. [Davis/Steinglass at 272-73.]

**(2) Reassure flustered students and move to another student if a student is unprepared.**

**Principle:** If a student becomes flustered, the teacher reassures the student without trying to harass or embarrass the flustered student. If a student is unprepared, the teacher moves on to another student without trying to harass or embarrass the unprepared student.

**Comments:**

If [a student] is unable to FARF a case, he may be in for the kind of hazing that the general public has come to associate with law school applications of the Socratic method. [The teacher] may respond to a wrong answer with a Kingsfieldian comment like, “Well, [Mr. Student], there’s always medical school.” But most contemporary law teachers think this sort of hazing rude and pointless. A wrong answer is likely to lead [the teacher] to reassure [the student] if he is flustered or move on to another student if he is unprepared. [Davis/Steinglass at 266.]

**(3) Do not use successive questions and answers that leave students feeling passive, powerless, and unknowing.**

**Principle:** The teacher does not use successive questions and answers to the extent that they leave students feeling passive, powerless, and unknowing.

**Comments:**

Steps three and four in [contemporary Socratic discourse] allow [the teacher] to avoid many of the risks associated with the Socratic method. By asking authentic questions about the law, [the teacher] suggests that there are multiple ways of thinking about legal problems and that her students are capable of such analyses. However, each step in the dialogue, including steps three and four, presumes that “question and answer” is a valuable method of teaching. This presumption becomes problematic in light of literature that suggests that successive questions can leave a respondent feeling passive, powerless, and unknowing.

As the linguist’s distinction between genuine and inauthentic questions suggests, question and answer interactions presume or attempt to enact a power differential. Only if a questioner has higher status will the respondent tolerate successive questions and not attempt either to resist answering or to turn the tables by asking a question in return. The questioner enacts his or her higher status by presuming authority to command information or display and by determining the topic and direction of the conversation. The respondent enacts his or her lower status by submitting to the question and by allowing the questioner to ask the next question and to determine the direction of the conversation. With successive questions the respondent takes less and less responsibility for the conversation and grows increasingly passive. Some research suggests that with each successive question a respondent’s answers will grow shorter and shorter. A sequence of similar questions, which implicitly suggests that the answers given have been inadequate, may have

the additional effect of making the respondent defensive about his or her previous answers and/or hopeless about providing the right answer.

In his interdisciplinary review of the literature on questioning, Dillon shows that teachers' presumptions about the value of questioning are the opposite of those of scholars and practitioners in other disciplines. Whereas teachers ask questions to elicit critical thinking, survey researchers and litigating attorneys typically use questions to curtail respondents' answers. Personnel interviewers and psychotherapists avoid questions because they can be silencing; instead, they make statements and remain silent to promote thoughtful discussion. By asking students questions, the teacher may in fact make it more difficult for them to answer and to do the critical thinking she wants them to do. [Davis/Steinglass at 270-71.]

**(4) Use Socratic dialogue to illuminate lessons, not to expose students' lack of understanding.**

**Principle: The teacher uses Socratic dialogue to illuminate lessons, not to expose students' lack of understanding.**

**Comments:**

Each step in the dialogue is also colored by the social context in which it takes place. Students' experiences of their professors' questions are inevitably influenced by the classroom setting.

As he explains in the Apology, Socrates used the dialogues to test the wisdom of his interlocutors. Often Socrates engaged Sophists who were certain about the answers to his questions and sometimes even said that his questions were too easy. Believing that intellectual humility was a necessary first step to serious philosophical inquiry, Socrates considered it a duty to demonstrate the limitations of his interlocutors' understanding. Before [a teacher] applies Socrates' method, she might ask herself to what extent her context is similar or different. Are law students so confident of their answers or their knowledge that their lack of understanding must be demonstrated? Depending upon their previous experience and learning, some students may come to law school believing that they understand some areas of the law. However, given the age and limited professional experience of many students, it seems likely that many arrive aware of their ignorance and anxious about their capacity to learn what is expected. Already uncertain, students may experience sequences of Socratic questions as an indication that they have not answered adequately and do not have the necessary capacities.

The one-shot system of evaluation used in many law school classes may make students especially likely to react badly to Socratic testing. Because most law students are formally evaluated only at the end of each semester, students are prone to seek out other opportunities to assess their learning. In effect, every classroom exchange becomes an opportunity for self-assessment. Aware, or simply imagining, that she is being evaluated (by the professor, her classmates, and herself), the student naturally wants to use each interchange to demonstrate knowledge and understanding. For a student working in a self-evaluative mode, it may be particularly difficult to tolerate sequences of questions designed to move past what the student has already thought through. Moreover, in a public forum, before professor and peers, it is easy to imagine that the experience of not knowing would be humiliating. Yet, because Socratic teaching depends heavily on public

questioning that displays the limits of students' understanding, [some] teachers . . . tend to challenge students no matter what they say, and to extend their very public questioning beyond issues the responding student has considered in advance. While some students might respond to this experience determined to return to fight another day, others will be equally determined to avoid a repetition by avoiding class participation. All of this may make it very difficult for students to focus on learning rather than performing. [Davis/Steinglass at 271-72.]

**d. Do not rely exclusively on Socratic dialogue.**

**Principle: The teacher does not rely exclusively on Socratic dialogue.**

**Comments:**

[T]he Socratic method can be used to explore multiple dimensions of lawyering and to develop a broad range of capacities. Nonetheless, the method may be less effective than others with regard to some of our goals.

For example, we have found it difficult to compose Socratic questions that will lead students to adopt critical meta-analytic perspectives on the application of doctrine. Moreover, Socratic discussion of appellate cases clearly is not the best context for learning about crucial aspects of lawyering, such as fact development and problem analysis. Using appellate opinions to organize discussions narrows the focus of the conversation. Appellate opinions follow, and therefore do not readily expose, the significant decisions that lawyers and judges make as a matter moves from problem to resolution.

We have found it easier to foster meta-analysis and to develop capacities for interpretive and problem-solving work in simulation and clinical contexts. In these contexts, students can have the experience of managing a matter from the articulation of a problem in the world to its legal resolution. As a result, they are positioned to see how interpretations of fact and law evolve as lawyers and other relevant parties interact. Moreover, they are able to appreciate the significance of lawyers' choices. For example, if students, in-role, are privy to multiple responses to the same simulated problem, they naturally compare responses. Additionally, a negotiating team involved in multiple negotiations can analyze the implications of key decisions and contextual factors. [Davis/Steinglass at 274-75.]

**(1) Allow students to exercise some control.**

**Principle: The teacher allows students to exercise some control over their learning.**

**Comments:**

Developmental psychologists have, of course, explored the ways in which learners construct knowledge. According to Piaget and his followers, children construct knowledge independently from their experience in the world. Typically, children make sense of their experience from the perspective of their current understanding. However, faced with phenomena that call their understanding into question, children accommodate and develop new perspectives. Alternatively, Vygotsky and his followers posit that children construct knowledge intersubjectively, through interactions with teachers who perform such functions as "shielding the learner from distraction, . . . forefronting crucial features of a problem, . . .

sequencing the steps to understanding, . . . or some other form of ‘scaffolding.’” Though significantly divergent, both theoretical perspectives suggest that if it is to be remembered and understood, new knowledge must be connected, in an active, thoughtful process, to old knowledge.

Educational research supports these theories. Whether engaged in independent exploration or in social interactions, learners benefit from active learning experiences in which they maintain a measure of control over their work. For example, third and fourth grade writers learned more from collaborative interactions when they were able to exercise control and ensure that the interactions addressed their concerns. Similarly, research on high school classrooms associated high quality instruction with teachers’ use of authentic questions. In response to their teachers’ authentic questions and responses, students were able to discuss and build on their previous conceptions.

This literature suggests that Socratic dialogues which are tightly controlled by the professor may be less effective than authentic discussions. . . . [D]ialogues which are tightly controlled by the questioner tend to track the questioner’s thinking, not the respondent’s. Such dialogues do not necessarily facilitate the respondent’s efforts to link the new material to his or her previous conception. [Davis/Steinglass at 273-74.]

**(2) Ask all students to jot down their thoughts while engaging one student in dialogue.**

**Principle:** The teacher asks students to jot down their thoughts while she is engaging in Socratic dialogue with other students.

**Comments:**

[During a Socratic dialogue, a teacher uses] a variety of techniques with the potential to engage many students at many levels. But inevitably, many students have not participated in the dialogue; some, overwhelmed by the relief that they were not the one called on, have not even listened attentively. To ensure that her observers are learning, [a teacher] may want to incorporate other methods into her repertoire. By asking students to jot down their thoughts (and not just take notes), she may ensure that every student is actively participating and thinking. These jottings might then provide a basis for discussion, perhaps encouraging those who rarely speak to do so. Students might also bring written responses to class where they could share them in pairs or small groups. [Davis/Steinglass at 275.]

**(3) Use variations on the Socratic dialogue and casebook method.**

**Principle:** The teacher uses variations on the Socratic dialogue and case method.

**Comments:**

[If law teachers do not replace the Socratic dialogue and case method entirely with discussion and context-based instruction, they should consider using variations on the Socratic dialogue and casebook method. Some law teachers have developed innovative and creative techniques that make the case method come alive for students. Other teachers have extended considerable energy on breaking down the



ambiguous term “to think like a lawyer” into concrete objectives such as teaching how to read a complicated statute.

Judith Wegner observed law teachers who incorporated variations into the traditional use of the Socratic dialogue and case method that seemed to produce more engaging and educationally effective classes.

Taken individually, these variations demonstrate the flexibility inherent in the case-dialogue method, a flexibility whose potential is infrequently realized. Taken together, they reveal the flexibility and the limitations of the case-dialogue method, the importance of teachers’ backgrounds and values in shaping their instructional choices, and the powerful ways in which characteristics and expectations of students can shape the learning that takes place.<sup>632</sup>

Wegner described three variations that she thought were particularly effective. The first variation “involves an intensified focus on the needs of diverse learners, evidenced by professors’ conscious use of a wider range of instructional materials, expanded forms of classroom dialogue, and explicit efforts to make the thinking process visible to all concerned.”<sup>633</sup> Wegner reported that many of the teachers she observed “seem to foster learning throughout the class by endeavoring to draw a substantial portion of the class into active participation.”<sup>634</sup>

Sometimes, for example, classes are asked to engage in collective brainstorming, generating lists of possible questions or possible meanings for the term “mistake” in order to ground the group’s understanding in their shared and diverse experience, and warm up for further interaction with lower stakes and a lesser sense of threat. Faculty members may compliment or thank students for their mistakes in recitation, observing in subsequent interviews that it’s harder to teach to the class as a whole if they receive quick, correct answers, than if they can see and work with students’ potential misunderstandings. In other classes, the traditional roles of faculty and students may be reversed at least at times, with students actively asking a multitude of questions and faculty building on these questions to illuminate difficult points. All of these forms of expanded or reconfigured dialogue appear geared to engaging students actively in the process of comprehension and analysis. They stand in sharp contrast to the alternative that is also well-represented across the range of schools in classes in which the professor continues to use more traditional Socratic questioning that focuses at length on a single student, but shifts into more extended lectures if a series of students displays limited comprehension, preparation, or analytical skill.<sup>635</sup>

The second variation “involves the introduction of imaginative instructional techniques that build on principles previously discussed in order to ask more of

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<sup>632</sup> Wegner, *Theory and Practice*, *supra* note 46, at 34.

<sup>633</sup> *Id.*

<sup>634</sup> *Id.* at 37.

<sup>635</sup> *Id.*

and draw more from students as they envision their responsibilities in full-fledged professional roles.”<sup>636</sup> These teachers “stretch their students’ horizons by causing them to imagine themselves in significant professional roles.”<sup>637</sup>

In important ways, learning is thus “situated” in a demanding context that requires students to ask a good deal of themselves either on an occasional or recurring basis . . . . While attention continues to be paid to important intellectual tasks such as analysis and synthesis, students seem especially engaged, suggesting that instructional tactics such as these may hold larger lessons from which more faculty learn.<sup>638</sup>

The final variation “concerns some faculty members’ deliberate efforts to stretch the perimeter of the traditional case-dialogue method by integrating additional disciplinary, professional, and social perspectives into traditional intellectual tasks.”<sup>639</sup> These teachers endeavored “to address not only ‘legal reasoning’ but also other central aspects of ‘thinking like a lawyer’ – the roles of lawyers and the broader intellectual world of law. . . .”<sup>640</sup> The teachers talked explicitly about what lawyers do and important questions about professional norms.

Although she noted that few professors have the experience and interest to focus students’ attention on professional roles and that casebooks often lack the kind of materials that would provide a meaningful context for discussion of professional roles, Wegner also recognized the vital importance of having such discussions.

Students are often unformed in their understanding of lawyers and the law and may not know their own goals or possibilities implicit in new roles, yet become set in their impressions and attitudes very early. In the absence of other leavening influences, they may conclude, based on their first year experience, that lawyers are two-dimensional beings whose values, responsibilities, and struggles are not worth knowing about since they are invisible from view.<sup>641</sup>

We encourage teachers who employ Socratic dialogue to use the variations described by Wegner.]

**(4) Use other methods of instruction to complement Socratic dialogue.**

**Principle:** The teacher uses small group discussions, on-line discussions, roleplaying, in-class discussions of problems, and other methods of instruction in addition to Socratic dialogue.

**Comments:**

[A teacher] might also use what are called “break-out groups,” organizing her classes to include small group discussions in which students can speak more

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<sup>636</sup> *Id.* at 34.

<sup>637</sup> *Id.* at 38.

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* at 34.

<sup>640</sup> *Id.* at 45.

<sup>641</sup> *Id.* at 47.

comfortably and develop ideas that can then be discussed in the larger group. [Davis/Steinglass at 275.]

[A teacher] might also experiment with the use of on-line discussions. . . . [O]n-line formats elicit different kinds of discussions than classroom contexts. On-line discussions appeal to a broader group of students: students who are wary of speaking in public or of speaking extemporaneously are often more comfortable sharing ideas that they have composed in private and at their leisure. We have also found that on-line discussions allow us to address a broader range of subject matter than can be addressed in time-limited classes. [Davis/Steinglass at 275.]

[A teacher] might also foster a wider-ranging class discussion, and the development of a greater range of capacities, by asking students to analyze cases in role. By looking at cases from the perspectives of the parties, of their lawyers, of other individuals who might be involved or might be in similar situations in the future, and of the appellate court, students are more likely to grasp the significance – and learn the techniques – of interpretive, interactive, narrative, and problem-solving work. [Davis/Steinglass at 275.]

[A teacher] might also choose to develop [a greater range of] capacities by assigning problems, such as those commonly used in evidence courses. [Davis/Steinglass at 275.]

[Although Davis and Steinglass suggest that law teachers should add simulation and clinical teaching to their repertoire] “outside the constraints of a large, lecture class” [Davis/Steinglass at 276], [we encourage the use of simulations in large enrollment classes. The scope of the simulations and whether to have students participate in them during class or outside of class will depend on the educational goals of the course and the purposes of the simulations. However, simulations in which students assume the roles of lawyers, parties, witnesses, or judges can be designed for any size course without significantly affecting other classroom activities.

A teacher might also have students experience real life situations related to subjects being studied in the course. This was not among the suggestions made by Davis and Steinglass, but exposure to actual law practice can benefit students in ways that cannot be duplicated by other methods of instruction. Exposure to real life situations can range from something as simple as requiring students to observe judicial or administrative proceedings related to the subject of the course to something as complex as coordinating a course with an in-house clinic in which students assume responsibility for providing legal services to clients.]

### Conclusion

[When a law teacher chooses to use the Socratic dialogue method of instruction, she should ensure that she is skilled in its use, she should demystify the process as much as possible by explaining its goals and techniques, she should not intentionally humiliate students, and she should not rely exclusively on the Socratic dialogue and case method of instruction.]

**B. Discussion.****1. Introduction to Discussion.**

Discussion is a technique used to some extent by all law school teachers, even in courses currently dominated by the Socratic dialogue and case method. We believe it should be used more often.

Discussion is a non-hierarchical technique, unlike Socratic dialogue and lecture. Students' opinions, ideas, and experiences are valued as well as their understanding of assigned readings. Discussion features "two-way spoken communication between students and teacher and direct interaction among students themselves."<sup>642</sup>

Some of the positive attributes of discussion were described by Lynn Daggett.<sup>643</sup>

- it provides an active learning role for students.

Research shows that students learn more and retain learned information longer when their role in the learning process is active. Discussion provides a more active role for more students than lecture, in which the student role is passive, and Socratic teaching (in which only one student at a time may have an active role).

- it encourages students to listen and to learn from each other.
- it involves high level thinking, perhaps like Socratic teaching and unlike lecture.
- it exposes students to viewpoints other than their own.
- it helps students develop oral advocacy and other skills.
- it makes learning less teacher centered and more student centered.
- it provides feedback to the teacher about the level of student learning.

During a lecture, the teacher must rely on student questions and nonverbal cues to determine if the lecture is effective. During a Socratic dialogue, the teacher tacitly assumes that the knowledge and skill displayed by the student being questioned is representative of the class. In contrast in discussion, because a wide variety of students participate, and because of the opportunities for the teacher to probe responses, the teacher gets substantial feedback about levels of student performance.

- it gives students a chance to bring their opinions and feelings to the study of law.

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<sup>642</sup> HESS & FRIEDLAND, *supra* note 304, at 55.

<sup>643</sup> Lynn Daggett, *Using Discussion as a Teaching Method in Law School Classes*, in THE SCIENCE AND ART OF LAW TEACHING: CONFERENCE MATERIALS (1995).

Discussion gives students a chance to explore and air their affective responses to the law. Teacher feedback during discussion can help students to integrate their affective and cognitive responses to the material.

- it teaches the teacher.

For all its merits, however, discussion involves risks that require skill and planning to avoid. For example, a teacher can lose control of the class or get sidetracked or bogged down. Sometimes, the teacher's efforts to provoke discussion may be met with silence or produce poor quality discussion, and discussions can become unstructured if not carefully planned and guided.<sup>644</sup> Therefore, careful preparation and thoughtful execution are required for effective use of discussion.

## 2. Best Practices for Discussion.

This section contains a preliminary description of best practices for using discussion as a teaching method.<sup>645</sup>

### a. Use discussion for appropriate purposes.

**Principle:** The teacher uses discussion to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.

**Comments:**

Discussion is a good method for engaging students and helping them learn a subject more deeply. Discussions help students “to retain information at the end of the course, to develop problem-solving and thinking skills, to change attitudes, and to motivate additional learning about a subject.”<sup>646</sup>

Discussion not only helps students develop cognitive abilities, it has benefits in the affective domain as well. Through effective discussions, students are exposed to diverse viewpoints, which helps students develop values and change attitudes. In addition, for many students, discussion makes learning more interesting and increases their motivation to work harder to learn more.<sup>647</sup>

As mentioned in the section on the Socratic dialogue and case method, educational theory suggests that discussion is a more effective method than Socratic dialogue for helping students acquire and retain new knowledge and understanding.

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<sup>644</sup> The potential problems with discussion are described in more detail in *id.* at 4-8, and HESS & FRIEDLAND, *supra* note 304, at 56.

<sup>645</sup> The principles in this section are drawn from Daggett, *supra* note 643, at 4-8, and HESS & FRIEDLAND, *id.* The Hess & Friedland book also describes some specific discussion techniques, beginning on page 64.

<sup>646</sup> HESS & FRIEDLAND, *supra* note 304, at 55.

<sup>647</sup> *Id.* at 55-56.

**b. Ask effective questions.****Principle: The teacher asks effective questions.****Comments:**

Questions should be clear. Questions should be open-ended, not calling for yes or no answers. Questions should be asked one at a time. Various types of questions should be used. Teachers should consider giving students questions in advance and asking them to prepare to discuss them in an upcoming class.

Perhaps the most important attribute of an effective questioner is patience. After asking the question, the teacher needs to be silent and wait for students to process the question and formulate responses. Research reveals that most teachers wait less than one second after asking the question before answering it themselves, rephrasing the question, or calling on a student. However, research shows that if the teacher waits three to five seconds after the question is posed, more students will respond, the complexity of the responses will increase, and more students will ask questions. One way teachers can increase the “wait time” and make the silence less uncomfortable is to tell students to jot down notes of their responses and questions before taking oral responses.<sup>648</sup>

**c. Encourage students to ask questions.****Principle: The teacher encourages students to ask thoughtful questions.****Comments:**

Teachers should encourage students to ask thoughtful questions. Teachers can facilitate student questions by expressly asking for questions, by giving students sufficient time to formulate thoughtful questions, and by giving positive reinforcement to students who ask good questions.

When answering student questions, teachers can shape the discussion and create an environment that encourages student participation. Make sure the class can hear the question. If necessary, have the student, rather than the teacher, repeat the question so that students learn to listen to one another, not only to the teacher. Either the teacher or another student should answer the student’s question directly – when students do not get direct answers, they quit asking questions. When the teacher is responding, talk to the entire class so that all students feel part of the conversation. Finally, check back with the student to see whether the question was addressed adequately.<sup>649</sup>

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<sup>648</sup> *Id.* at 60-61.

<sup>649</sup> *Id.* at 62 (they also give some advice for handling troublesome questions).

**d. Maintain a somewhat democratic classroom.****Principle: The teacher maintains a somewhat democratic classroom.****Comments:**

“Classes where the teacher keeps all the power to herself are unlikely to be good ones for discussion. Students are unlikely to take the risk of speaking candidly in classes where the teacher is authoritarian.”<sup>650</sup>

**e. Validate student participation.****Principle: The teacher validates students’ efforts to join the discussion and praises students when it is deserved.****Comments:**

“Give positive reinforcement for appropriate responses. If at all possible, find some positive aspect of the student’s comment. Memorialize the contribution. Refer to the comment by the student’s name (“Mary’s idea” or “John’s theory”). Acknowledge new ideas (“Gee, I never thought of that before. I appreciate the new way of looking at this problem.”)<sup>651</sup>

**f. Use caution in responding to students’ errors.****Principle: The teacher uses care in responding to wrong information in student comments.****Comments:**

“Students should not be left with the wrong impression, but the teacher also should not exacerbate the loss of face for the student whose comment includes something inaccurate. Find something worthwhile and positive in what was said, and praise the student for that at the same time you correct the wrong part.”<sup>652</sup>

“Handle ‘wrong’ answers tactfully. Focus on the answer not the student. See if the mistake is common to other students. Demonstrate that it is acceptable to make mistakes in the classroom because mistakes can lead to learning. Admit your own mistakes.”<sup>653</sup>

**g. Keep your views to yourself.****Principle: The teacher keeps her views to herself at the beginning of the discussion of a topic.****Comments:**

At least until the students have a chance to express their views without being influenced by the teacher’s views. “Limit your own comments. Teachers need not respond to every student contribution. Otherwise the focus of the discussion rests on the teacher.”<sup>654</sup>

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<sup>650</sup> Daggett, *supra* note 643, at 14-16.

<sup>651</sup> HESS & FRIEDLAND, *supra* note 304, at 62.

<sup>652</sup> Daggett, *supra* note 643, at 14-16.

<sup>653</sup> HESS & FRIEDLAND, *supra* note 304, at 62.

<sup>654</sup> *Id.*

- h. Do not talk too much or allow the discussion to go on too long.**

**Principle:** The teacher does not talk too much or let the discussion go on too long.

**Comments:**

“Inexperienced discussion leaders tend to make two mistakes: talking too much themselves or letting the discussion go on too long.”<sup>655</sup>

- i. Announce when the discussion is about to end.**

**Principle:** The teacher announces when the discussion is about to end.

**Comments:**

“When ready to close the discussion, the teacher announces that it is about to end so that students can make final comments. Then the teacher can provide closure to the discussion by summarizing key points, comparing student ideas to the ones the teacher prepared before class, referring students to material that is on point for the key ideas discussed, and giving students a bit of time to add to their notes.”<sup>656</sup>

- j. Establish an environment conducive to discussion.**

**Principle:** The teacher establishes an environment conducive to discussion.

**Comments:**

If students feel intimidated or do not believe their views will be respected, they will not participate meaningfully in discussions.

Teachers need to establish a social environment conducive to discussion and rapport with their students to facilitate student participation. Teacher behavior that promotes rapport with students includes demonstrating an interest in each student and each student’s learning, encouraging students to share their thoughts about class assignments or policy, and encouraging students to ask questions and to express personal views. Perhaps the single most important step that a teacher can take to improve the classroom environment is to learn the students’ names.<sup>657</sup>

- k. Give students time to reflect on the questions being discussed.**

**Principle:** The teacher gives students time to reflect on the questions being discussed.

**Comments:**

Not all learners process information the same way. Some

<sup>655</sup> Daggett, *supra* note 643, at 21.

<sup>656</sup> HESS & FRIEDLAND, *supra* note 304, at 62.

<sup>657</sup> *Id.* at 57 (some techniques for learning students’ names are included in the book).



learners process information visually; some orally. Some think best by talking through a concept; others through hands on activities. Some learners think well on their feet; others need time to reflect on issue before discussing it.

Provide the class with the next discussion question at the end of the previous class. This allows reflective learners to digest the topic so they can effectively participate in the discussion. As a bonus, giving all students time to reflect often raises the level of the discussion.<sup>658</sup>

## C. Lecture.

### 1. Introduction to Lecture.

If we can avoid lecturing students, we should. “One of the most common mistakes by lecturers is to use the lecture method at all.”<sup>659</sup> Unfortunately, lectures are an indispensable and unavoidable part of any academic enterprise. Lectures are where we explain things to students.

Lectures do not have to be boring or ineffective. Lectures are the primary method of law school instruction in countries other than the United States. In some countries, lecture is used for economic reasons. Lecturing hundreds of students in large lecture halls is the only way for students to acquire information about the law. Printed course materials are not available; therefore, students create their own study materials by writing down what teachers read to them. Students who are able to gain access to published materials need not attend lectures. The roll is not taken, and the faculty neither call on students to answer questions nor try to engage students in a discussion of the subjects being studied.

Even in some countries with above average resources where students are able to acquire course materials, the lecture method is the traditional and preferred method of instruction. As expressed by Eckart Klein:

In Germany, in contrast to the United States, law professors use the systemic presentation of material. This method which developed during the medieval period, involves lectures by the faculty.

. . . .

Even though the external realities mentioned above [the unfavorable student-teacher ratio and the exclusive focus on teaching theoretical, not practical, aspects of law] in the university encourage German law teachers to present material in a systematic fashion, most German law professors would be inclined to present the material in this way whether or not the external pressures existed.<sup>660</sup>

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<sup>658</sup> Daggett, *supra* note 643, at 17.

<sup>659</sup> BLIGH, *supra* note 389, at 148.

<sup>660</sup> Eckart Klein, *Legal Education in Germany*, 72 OR. L. REV. 953, 953 (1993).

The strengths of the lecture method when it is properly utilized were described by Clive Walker as follows:

[A] good lecture will do more than paraphrase a textbook. It can provide a helpful updating service on the latest cases and developments. In some cases the lecturer may be a leading researcher in the subject and therefore be able to impart expert insights and information not yet available in the books. . . . The lecturer may choose to put forward challenging views or criticisms which stimulate more debate than the private study of books is likely to achieve.<sup>661</sup>

Nigel Savage, however, points out that students in lecture halls are usually passive learners, and the large sizes of the audiences and lecture halls make it difficult to engage in any dialogue.<sup>662</sup> There is no data available about the effectiveness of the average lecturer, but the norm seems to be that most do little more than dictate from their notes to the students, and there is almost no opportunity for contact between students and lecturers.<sup>663</sup>

In some countries, lectures are supplemented by tutorials in which relatively small groups of students meet to discuss legal issues with a member of the faculty, most notably in England and Wales.<sup>664</sup> This is the exception, however, not the rule.

We recommend limiting the use of lecture because of its passive learning nature. To the extent that lectures are unavoidable, however, we should use best practices for lecturing.

## 2. Best Practices for Lecture.

This section provides a few tips on best practices for using lectures, though one must keep in mind that effective lecturing is as much an art as any other form of teaching. “Except on obvious points, such as the need to face the class, to be audible and to avoid irritating mannerisms, there are few rules to lecturing.”<sup>665</sup>

### a. Use lecture for appropriate purposes.

**Principle:** The teacher uses lecture for appropriate purposes.

**Comments:**

Lectures should be used to elaborate on the assigned material, give examples, or help put the material into context.<sup>666</sup> “Also, because texts often lag behind current

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<sup>661</sup> Clive Walker, *Legal Education in England and Wales*, 72 OR. L. REV. 943, 946 (1993).

<sup>662</sup> Nigel Savage, *The System in England and Wales*, 43 S. TEX. L. REV. 597 (2002).

<sup>663</sup> See, e.g., Joanne Felder, *Legal Education in South Africa*, 72 OR. L. REV. 999, 1002 (1993) (reporting that “lecturers [in South Africa] stand in front of groups ranging from 40 to 250 (depending on the law school) and dictate. There is thus almost no opportunity for contact between students and lecturers”).

<sup>664</sup> See Walker, *supra* note 661, at 947.

<sup>665</sup> BLIGH, *supra* note 389.

<sup>666</sup> Florida State University, *Lecturing Effectively*, in INSTRUCTION AT FSU: A GUIDE TO TEACHING AND LEARNING PRACTICES 7-1 (2005) [hereinafter *Lecturing Effectively*], available at <http://online.fsu.edu/learningresources/handbook/instructionatfsu/PDF-Chptr7.pdf>.

knowledge, lectures are valuable methods for presenting new information.”<sup>667</sup> Lectures are also good for quickly giving students specific information or facts.<sup>668</sup>

Donald Bligh concluded that while lecture is as effective as any other method for transmitting information, but not more effective than some, it is not as effective as more active methods for promoting thought, changing students’ attitudes, or teaching behavioral skills.<sup>669</sup>

**b. Limit the length of lectures.**

**Principle: The teacher limits the length of lectures.**

**Comments:**

“[R]esearch has shown that after 10 to 20 minutes of continuous lecture, assimilation falls off rapidly.”<sup>670</sup>

**c. Do not read the text.**

**Principle: The teacher does not read the text.**

**Comments:**

Too many professors make the mistake of lecturing the text, that is, they read the important parts of the text to the students.<sup>671</sup> This discourages students from reading the material themselves because they know the professor will give them the information they need in class.<sup>672</sup>

**d. Organize the lecture.**

**Principle: The teacher organizes the lecture.**

**Comments:**

Prepare a loose outline or notes for yourself, using the “tell them what you going to tell them, tell them, and tell them what you told them” format, and also prepare a brief outline of the lecture for the students to follow.<sup>673</sup> Make sure to emphasize and repeat key points and be able to link them to each other so that students can assimilate the items in their own minds.<sup>674</sup>

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<sup>667</sup> *Id.*

<sup>668</sup> Grayson H. Walker Teaching Resource Center, University of Tennessee at Chattanooga, *Lecturing with Style!* [hereinafter Walker Center], <http://www.utc.edu/Administration/WalkerTeachingResourceCenter/FacultyDevelopment/Lecture/index.html>.

<sup>669</sup> BLIGH, *supra* note 389, at 3.

<sup>670</sup> Drummond, *supra* note 143.

<sup>671</sup> *Lecturing Effectively*, *supra* note 666, at 7-1.

<sup>672</sup> *Id.*

<sup>673</sup> Teaching Resources Office (TRACE), University of Waterloo, *Lecturing Effectively in the University Classroom*, <http://www.adm.uwaterloo.ca/infotrac/tips/lecturingeffectively.pdf> (last visited June 1, 2005).

<sup>674</sup> *Id.*

**e. Employ effective delivery techniques.**

**Principle: The teacher employs effective delivery techniques.**

**Comments:**

Be enthusiastic, speak loudly and clearly so that everyone can hear, vary your tone of voice, and maintain eye contact with the audience.<sup>675</sup> When possible, lecture by storytelling as this actively draws students into the material. Another benefit of storytelling is that because interest in the subject is piqued and the students are more personally involved, they can listen longer and the 10 to 20 minute rule does not apply.<sup>676</sup>

**f. Use other techniques in conjunction with lecture.**

**Principle: The teacher does not rely on lecture alone.**

**Comments:**

“The idea that lecturers should use the lecture method and no other for fifty minutes on end is absurd . . .”<sup>677</sup> “[T]he inherent defects of the lecture method mean that, on its own, it is rarely adequate. Therefore, if not replaced, it will need to be combined with other methods in some way.”<sup>678</sup>

**g. Have reasonable expectations.**

**Principle: The teacher has reasonable expectations.**

**Comments:**

Remember that the “less is more” mentality is especially true for lecturing.<sup>679</sup> Do not try to present too much information as most of it will be “lost in translation.” “Unless the learner can encode the information in a rich context with good examples and reasons for remembering it, the information won’t stay in memory very long.”<sup>680</sup> It is more important to make sure students are learning the material than to “cover ground.”

One suspects that law teachers in the United States lecture more than we care to admit. If so, this is all the more reason to use best practices whenever we decide that using lecture is the most effective way to teach our students.

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<sup>675</sup> Walker Center, *supra* note 668.

<sup>676</sup> Drummond, *supra* note 143.

<sup>677</sup> BLIGH, *supra* note 389, at 70.

<sup>678</sup> *Id.* at 252.

<sup>679</sup> *Lecturing Effectively*, *supra* note 666, at 7-1.

<sup>680</sup> *Id.*