

TEACHING TECHNIQUES PANEL

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*Occasionally using Examples in Nonlegal Contexts to
Introduce Students to New Concepts of Legal Method, Analysis, or Doctrine*

I. Overview:

A. The goals of the exercise are:

- to help new students to gain comfort with uncertainty in legal analysis; and
- to introduce them to concepts of legal analysis such as analogizing or distinguishing precedent and looking for rationales that help explain holdings,
- in an interactive simulation that appeals to students who respond well to concrete imagery, collaborative learning, and active participation.

B. The general methods of the exercise are to use cases

- from universally familiar contexts, to build a bridge from the familiar to the unfamiliar; and
- from a nonlegal context, so that students will not be distracted by “law” but will focus their attention, albeit through analogy, entirely on matters of *legal method*.

II. Premises - the need for the exercises:

A. **Dealing with Uncertainty in the Law** - New students often clamor for the “answer” to legal questions that have no certain solution, and they resist explanations about the indeterminacy of the law, believing instead that the instructor is “hiding the ball.”

B. **Doctrine v. Method** - We instructors profess to use doctrine largely as a vehicle for teaching method and theory, but students typically are obsessed with absorbing doctrinal rules, sometimes diverting their attention from larger lessons of method.

III. The Exercises

A. **The Grocer’s Question** (will be demonstrated at the conference). As presented in Charles R. Calleros, *LEGAL METHOD AND WRITING* 94-95 (4th ed. Aspen L. & Bus. 2002), the exercise is:

EXERCISE 6 - 6

Gaining Comfort and Experience with Uncertainty in the Law and with Making Arguments for Both Sides - The following exercise is set in a nonlegal context but effectively illustrates some fundamental features of common law analysis.

A grocer explained to her employees that she places produce either in the display case in the window or in the produce section in the middle of the store. As a general standard, she explains, she places produce in the window display case if it would have a tendency to draw impulse shoppers into the store. Employees have witnessed her apply this standard in two cases. In the first case, she arranged a crate of sweet, round, red apples in the window display case. In the second case, she placed a crate of unwashed, unpeeled carrots in the produce section in the interior of the store. On Monday morning, the grocer left to attend family business for a day. She instructed employees to promptly display any goods that arrived in her absence. On Monday afternoon, a crate of round, red tomatoes arrived. Where should the employees place the tomatoes? In analyzing this problem, consider the following:

1. In the abstract, one may not be able to identify a single correct answer to this question. In practical terms, the “answer” is the location that will most please the grocer when she returns, but that is the “answer” only because the grocer is the boss and not because reasonable minds could reach only one conclusion on the best location for the tomatoes under the grocer’s general standard. Moreover, in the meantime, employees must display the tomatoes in the grocer’s absence and so must predict where she would place them.
2. To better predict where the grocer would place the tomatoes, employees might wish to explore the grocer’s apparent reasoning in the previous two cases. They might ask two questions: (1) On what basis did the grocer conclude that the apples satisfied the grocer’s general standard of placing produce in the window only if it would attract customers into the store? (2) Does that rationale also explain why the grocer concluded that the carrots did not satisfy that standard? If the employees can identify a rationale that explains both of the previous cases as a consistent application of the grocer’s general standard, then perhaps the employees could apply the same rationale to the tomatoes. In that way, they might be able to better predict whether the grocer would conclude that the tomatoes satisfied her standard of attracting customers into the store. Assuming that the grocer did not explain her reasoning in the previous two cases to her employees, the employees may need to speculate on possible rationales.
3. Are the previous two cases potentially explainable on the basis of two or more equally plausible rationales? Do competing rationales sometimes point to different conclusions about where the employees should place the tomatoes? Does this explain why reasonable judges and attorneys can disagree about the application of a general rule to new facts and about the interpretation of previous judicial decisions? If so, maybe your professors are not playing “hide the ball”

when they raise legal questions and state that they have no answers to the questions. Perhaps your task really is to identify issues, analyze the facts and the law, recognize arguments for both sides of the dispute, and either advocate for one party or make a prediction about the outcome, rather than look for a single, correct “answer.” After all, cases are litigated precisely because the outcome is uncertain and the parties cannot predict with certainty how a judge or jury will view the dispute. Perhaps an appellate court in the jurisdiction will eventually provide a definitive ruling in the dispute, providing its authoritative “answer.” In the meantime, however, the dispute presents an opportunity for each party to work with law, facts, and policy in an effort to influence the judge, jury, or appellate panel in reaching a conclusion.

B. Rules for Monica (will not be demonstrated at the conference, but a videotaped enactment of the “cases” is available by e-mailing the presenter at charles.calleros@asu.edu). As presented in Charles R. Calleros, *LEGAL METHOD AND WRITING* 133-34 (4th ed. Aspen L. & Bus. 2002), the exercise is:

EXERCISE 8 - 1

Imagine that a parent, Carmen, is developing family rules for the social activities of her teenage daughter, Monica, during the school year. Carmen wants to ensure that Monica sets aside adequate time for sleep and homework, but she is unsure about the specific rules she should impose to advance that general standard. Consequently, Carmen has not clearly articulated any rules; instead, she provides guidance to Monica by admonishing her when she disapproves of her actions and expressing satisfaction when she approves. Imagine how Monica might use inductive reasoning to infer specific rules from the following events:

1. *Case #1: The Pizza Hangout.* On Friday, October 1, Monica attended a high school football game, which ended at 9:45 p.m. She then joined some friends for pizza and arrived home at 11:15 p.m. Carmen scolded her for being late, saying: “Well next time, after the game, don’t *hang out* at the pizza parlor. You need your sleep, and you’ve got plenty of homework to do.”
2. *Case #2: Pizza Reprise.* On Friday, October 8, Monica attended a high school football game, which ended at 9:45 P.M. She then joined some friends for pizza and arrived home at 10:55 P.M. Carmen greeted her at the door cheerfully and stated: “Hi. How was your evening? It’s just about 11. If you hurry, you can get to bed by 11:30.”
4. *Case #3: Saturday Night at the Movies.* During the week of October 11-17, Monica attended a school volleyball game on Tuesday night and a high school musical production on Friday night, returning home by 11:00 P.M. on each night. Carmen expressed no disapproval. On Saturday afternoon, Monica asked Carmen whether she could go out with a friend to an early evening showing of a movie.

Carmen responded: “No. You’ve been out twice already this week, and that’s enough for one week. You need to catch up on your sleep and your homework.”

5. *Case #4: The Obligatory Birthday Party.* During the week of October 18-25, Monica went to a movie with friends on Thursday evening and to the school dance on Friday night, returning home by 11:00 P.M. on each night. When Monica returned on Friday night, Carmen announced that Monica would be joining Carmen and other family members to attend the 50th birthday party of Monica’s uncle. Monica expressed surprise, expecting her mother to insist that Monica stay focused on homework all weekend. Carmen responded: “Well you probably should, but the whole family is going. We can’t miss an event like this.”

As students synthesize the “cases,” they find that the first case is susceptible to a number of reasonable interpretations and that the uncertainty in the first holding is cleared up by synthesizing that case with a second case that reaches a different result on slightly different facts. With the third case, they see a new element added to the rule, and the fourth case brings a surprising twist that at first makes the “court” seem arbitrary but can be reconciled as an exception in the form of a balancing test. Later exercises ask students to outline the rules that they derive from these cases and then to apply these standards to analyze the following question:

On Wednesday night, Monica, who is a junior in high school, attended an evening volleyball competition at her school. She returned home by 10:30 p.m. On Friday night, Monica went to the school dance with a date, Pat. When Monica and Pat returned from the dance at 10:55 p.m., they parked in the driveway at Monica’s house, within view of Monica’s mother, Carmen, who was sitting in the living room. While parked in the driveway, they talked, laughed, and held hands for twenty minutes. After Pat kissed Monica goodbye and drove away, Monica entered her house and greeted Carmen at 11:15 p.m. On Saturday afternoon, Monica asked Carmen whether Monica could go with friends to the high school basketball game, to watch Monica’s brother play in the first of more than a dozen home games in the basketball season. Carmen plans to attend some home games during the season, although not this first one.

Fully discuss whether Monica’s action on Friday and request on Saturday are consistent with Carmen’s rules regarding Monica’s social activities. For every issue that you identify, summarize the rule or sub-rule that helps to resolve that issue, apply the rule to the relevant facts, and reach a conclusion. Whenever possible, discuss both sides of the question.

IV. Bibliography

A. The exercises outlined above are discussed in detail in Charles R. Calleros, *Using Demonstrations in Familiar Nonlegal Contexts to Teach Unfamiliar Concepts of Legal Method to New Students*, 7 *Leg. Writing* 37 (2001); and in Charles R. Calleros, *Legal Method and Writing: Teacher's Manual*, 19-20, 23-27, 28-30, 34 (4th ed. Aspen L. & Bus. 2002). For a description of a more ambitious version of the Grocer's exercise, see Suzanne E. Rowe & Jessica Enciso Varn, *From Grocery to Courthouse: Teaching Analytical Skills to First-Year Law Students*, *The Second Draft* (newsletter of the Leg. Writing Inst.) 14 (May 2000).

B. Other sources relating to schema theory, in which instructors seek to relate new concepts to students' existing base of knowledge:
Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 *La Raza L.J.* 140, 149-50 (1995).
Robert E. Floden, *What Teachers Need to Know About Learning*, in *Teaching Academic Subjects to Diverse Learners* 181, 182-86 (Mary M. Kennedy ed., Teachers College Press 1991).
Anton E. Lawson, *What Teachers Need to Know to Teach Science Effectively*, in *Teaching Academic Subjects to Diverse Learners* 31, 42-43 (Mary M. Kennedy ed., Teachers College Press 1991).
Paula Lustbader, *Principle 7: Good Practice Respects Diverse Talents and Ways of Learning*, 49 *J. Legal Educ.* 448, 455-56 & n.17 (1999).

C. Source on General Learning Theory and Simulations:
Gerald Hess and Steven Friedland, *TECHNIQUES FOR TEACHING LAW* 3-19, 193-222 (Carolina Acad. Press 1999).

