

Your Brain and Law School

A Context and Practice Book

Marybeth Herald

THOMAS JEFFERSON SCHOOL OF LAW



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To Rosemary Dean Herald, my mother,
who taught me to read and encouraged me to learn.

Contents

Series Editor's Preface	xiii
Acknowledgements	xv
Introduction	xvii

Section 1

Pushing Your Brain Through Law School

Chapter 1 · The Brain Is a Creature of Habit	5
Conclusion: Setting the Stage for Automation	8
Chapter 2 · Playing the Long Game in Law School	9
Outwitting Your Brain: The Case Briefing Example	9
Conclusion: Establish a Good Foundation	14
Chapter 3 · Outlasting Your Brain	17
Brain Fatigue	17
Conclusion: Habit Helps You Outplay Your Brain	21
Chapter 4 · Can You Grow a Brain?	23
Adopting the Growth Mindset	23
Conclusion: Yes, You Can!	26
Chapter 5 · How to Grow a Brain	29
Stop Cursing Nature	29
Conclusion: No Secrets Here—Focused Practice	34
Chapter 6 · Being in Your Right Mind for Classes	37
The Pre-Class State of Mind	37
In Class and Encouraging Synaptic Activity	39
The Growth Mindset Post-Class	43
Conclusion: Persist	45

Chapter 7 · Learning the Law: Don't Get Stuck	
Just Memorizing	47
Remembering Rules—Necessary But Never Sufficient	47
Memorizing Made Easier—Trying to Understand	50
Helping the Brain to Organize the Information	52
The Outline and Why It Works, If You Do It	54
A Chunk at a Time	57
Conclusion	61
Chapter 8 · Wait, Wait, Don't Tell Me: Testing Yourself	63
Moving Past Your Outline and Learning to Apply the Rules	63
Your Brain Is Ready for Testing	65
Conclusion: Pre-Testing is the Key to Success	68
Chapter 9 · But Mom Thought It Was Great:	
Getting the Right Feedback	71
Learning to Live with Mistakes	71
Seeking Feedback	74
Finding Feedback Beyond the First Year	77
Conclusion: Actively Seek Feedback	78
Section 2	
Thinking Critically	
Chapter 10 · The Brain Edits: Why Seeing Should Not Mean Believing	81
Conclusion: Looking for Gorillas in Your Midst	85
Chapter 11 · Gut Reactions and Why to Suppress Them	87
Getting Past Truthiness	88
Conclusion: Become a Skeptic	91
Chapter 12 · Making Persuasive Arguments: The Need to Understand Our Cognitive Biases	95
Yes, Your Brain Has Biases	96
Conclusion: Know Thy Brain	99
Chapter 13 · You've Been Framed	101
The Framing Bias: Setting the Scene	101

Learning the Trick to the Question	106
Frame Yourself	109
Conclusion: Framing for Life	113
Chapter 14 · The Apple of Our Own Eyes:	
The Egocentric Bias	115
Surprise: You May Not Be As Special As You Think	115
The Egocentric Bias and the Law	117
Conclusion: Practicing Defensive Pessimism	120
Chapter 15 · Sticking to Our Story: Confirmation Bias, Selective Perception, and Rationalization	123
Starting with the Result and Working Backward:	
The Confirmation Bias	124
Confirmation Bias' Best Friends: Selective Perception and Rationalization	125
Critical Thinking: Combatting Confirmation Bias, Selective Perception, and Rationalization	129
Conclusion: Consider the Opposite	131
Chapter 16 · Our Brain's Limited View of the World: The Availability Bias	133
Living in Your Head	133
Spotting the Availability Bias in Law	135
Doing Battle with the Availability Bias in Law and Life	137
Conclusion: Take a Different Perspective	139
Conclusion	141
Index	143

Series Editor's Preface

Welcome to a new type of book for law school. Designed by leading experts in law school teaching and learning, Context and Practice books assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the

past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, this book makes it easy for students to adapt to law school.

I welcome reactions, criticisms, and suggestions; my e-mail address is mhschwartz@ualr.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. The author can be reached at marybeth@tjssl.edu. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet she would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor
Consultant, Institute for Law Teaching and Learning
Dean and Professor of Law, William H. Bowen School of Law,
University of Arkansas at Little Rock

Acknowledgements

The idea for this book developed in my early years of practice when I encountered the disconnect between the theoretical approach of law school and the disorienting reality of practice. It was not as harsh as the disconnect between comforting Lamaze classes and actual childbirth, but it was close. In both cases, I later re-examined the educational texts that were supposed to prepare me for my actual experience, looking for the material that I must have missed the first time through. But no, I never found it. Either no one told me the real story or I was not listening. When I began teaching, I resolved to give my students a more realistic picture of practice, but my students often were preoccupied with making it through the next day, the final, or the bar exam. I began studying both learning theory and psychology in an effort to present a more coherent account of the study and practice of law and incorporating it within my classes.

The idea for a book on the subject began with a conference on “Humanizing Legal Education,” organized by Dean Michael Hunter Schwartz. My colleague, Professor Ellen Waldman, and I presented kernels of these ideas. The self-selected crowd of law professors at the conference was enthusiastic. Yet, I always had the feeling that the students needed a direct line to that information, rather than relying on the kindness of professors. The idea for a book of advice for law students took hold; not a novel idea, but one that took a more novel approach. No one talked me out of it, and five years and many drafts later, I have tangible proof that I need more forceful friends and family.

Thanks to my husband, Joel Bergsma, who has shared my life for over 30 years, including law school, a law practice, two kids, and this book. He read it several times and helped with editing.

My children, Brendan and Sarah, were supportive as well. You begin the parent project thinking you will teach your kids, but they teach you more than you can imagine. Shepherding them through their education taught me much about individual learning.

My law school family at Thomas Jefferson School of Law was generous with editing drafts, making suggestions, and providing encouragement. Professors Julie Greenberg, Ken Vandeveld, and Ellen Waldman were there when I needed them with assistance and support. They intuitively knew when *not* to ask me, “How is the book going?” I also received valuable help from Professors Ben Templin, Maureen Markey, Leah Christenson, William Byrnes, Ilene Durst, as well as TJSL’s Director of Academics, Kay Henley. Laurie Gibson, Jody LaSalle, and Eric Hammer provided excellent proof-reading and editing assistance.

My biggest debt of gratitude goes to my students over the last 23 years, who have been a source of inspiration and insight. I have learned much from them. I sympathized with their confusion over tangled constitutional law doctrines more than they may have realized. More specifically Toni Adeleke, Lanna Brown, Samantha Edye, Emily Fancher, Chelsea Halpine-Berger, Thomas Jarboe, Michael Klitzke, Ashley Kloenhamer, Sam Kossack, Stephanie Ng, Sara Robertson, Seth Schwartz, Raquel Tucker, and Andy Umāna undertook to read drafts of this book and offer suggestions and corrections from the perspective of students.

Thanks to Carolina Academic Press, especially Keith Sipe, Linda Lacy, Ryland Bowman, Grace Pledger, and Tim Colton, for providing a friendly and supportive home for these ideas.

Introduction

Why You Should Read This Book

If you are reading this book, you may be considering law school or you may be in law school. Your contact with lawyers may involve only sporadic (or excessive) viewing of television or movie characters. You may dream about being a prosecutor or public defender, a legal aid lawyer or a dealmaker in the entertainment industry, a small-town practitioner or a player in the field of international law; but the details of both the job and the journey are blurry. You may not know what you want to do other than be a lawyer, and at least three years of law school and a bar exam are required before you can legally practice. For those headed to law school, there are only a few movies and television shows about law school, such as *Legally Blond* or that golden nugget *Paper Chase*. (If you have not seen the latter, it highlights a professor using teaching methods that might be described as a form of enhanced interrogation.) You are not alone; many students enter law school with only a fuzzy but optimistic script of how the three years and beyond will play out.

Without a clear understanding of the process of learning the law, the incoming law student may be both hopeful and apprehensive. But after the irrational exuberance of making the decision to go to law school wears off, the day-to-day difficulty of learning to think like a lawyer emerges. Wading through the reading, trying to figure out what professors want, what employers want, and what you want, you may become less hopeful than your pre-law self, and more dazed and confused. This book will help dispel

some of your fears and anxieties. First, it explains the best way to learn your way through law school, avoiding haphazard, misguided, or downright delusional approaches to the project. Second, it focuses your law school gaze on the more subtle forces at play in the fields of decision-making and persuasive argument that will assist you during and after law school. You should explore these problems before you hit the streets with a degree and an irrational expectation of human behavior. Third, it connects what you are learning in class to the actual practice of law and the problems you will encounter when you take on the responsibility of representing a client.

The Learning Project

Why should learning to think like a lawyer be so hard? After all, entering students probably have been thinking—at least on a part-time basis—for many years. The entering law student brain has processed information from kindergarten through college: reading, writing, and taking tests. How could law school wreak more emotional havoc on the brain than high school or be more intellectually challenging than college?

Law school is **different**. Yes, one has to read a large amount of text in the form of cases and statutes (thousands of pages). Some of it is boring and some of it is poorly written, so excellent reading skills (and caffeine) will come in handy. You need to learn how to translate the reading into the recognized components of a legal opinion—sorting out facts, issues, rules, and policies. Some opinions are well written. More often, your mind will have to slog through some sludge to uncover the hidden messages. Moreover, law students have to memorize a significant amount of new information, so the ability and discipline to take notes, make an outline, and memorize rules is necessary. Finally, clear writing is an important part of law school and practice, so being able to communicate ideas more formally than texting is essential.

Law school, however, is more than a refinement of reading and writing skills. Law school takes these skills and brings them to a new level. Not only do you need to read cases separately and figure

out the individual stories, you also need to weave them together in a coherent way—to synthesize them. Synthesizing means taking a group of materials (cases, statutes, facts, or combinations of all) and explaining how they make sense together—weaving together a coherent story that incorporates each of the separate elements. Explaining the similarities and differences can be both complex and maddening. There is never only one story or answer. There is more than one solution to these puzzles. (As a side note, that is why the Socratic Method is a win-win for law professors. Answer the professor’s question one way, and the professor points out another side to the dispute.)

But wait, there is more. After acquiring these building blocks, you begin learning the real work of lawyers: problem solving. You apply the synthesized rules to new situations and facts, anticipate complications, and keep an eye on policy implications. Of course, the relatively calm setting of the law school classroom does not mirror real-world conditions. You will also need to figure out how to deal with clients, courts, opposing lawyers, witnesses, jurors, and miscellaneous actors in the legal process who can upset carefully laid plans with messy complications. Feeling dazed and confused is understandable.

In fact, recognizing the magnitude of the task is the first step on your path. As a famous jurist, Louis Brandeis, once said to his frustrated daughter, “My dear, if you would only recognize that life is hard, things would be so much easier for you.”¹ The young Ms. Brandeis, like most recipients of such sage parental advice, might not have appreciated the general wisdom imparted. Indeed, she might have appreciated more specific assistance. So when you are told that law school is difficult, and it is, you can be forgiven for acknowledging the point and moving on to getting some specific help, which conveniently brings us back to why you should read this book.

Mastering the art of thinking like a lawyer requires some knowledge about the fundamentals of learning and thinking. This

1. Anthony A. Lewis, *In Memoriam: Paul A. Freund*, 106 HARV. L. REV. 16, 18 (1992).

book explains those fundamentals in the specific context of law school. The first part of this book explains how your brain learns. You will not find examples of how to write case briefs and outlines (plenty of good guides exist for those tasks anyway), but *why* you should write case briefs and outlines if you are going to be a successful law student and lawyer. Why worry about the gritty details of how you learn? If you know and understand the process of learning and thinking—known as metacognition²—you can use the best methods to survive and thrive in law school, even when others perceive law school as a threat to sanity. Rather than following or ignoring advice for law students (brief cases, don't waste your time, make an outline, buy a commercial outline), you need to understand how your brain learns a new skill set and then devise a plan to maximize its potential. Moreover, if you understand why you should do certain things, you will have an incentive to do them, even when difficult, while your confused colleagues muddle through the process hoping for insight miraculously to descend upon them.

Be forewarned that accepting some of the recommendations in this book requires abandoning hope of finding a magic pill, an easy road, or a quick fix. Cutting-edge research supports what your elementary school teacher, parents, coaches, and piano instructor probably advised: you need to work hard. Understanding the underlying process of learning, however, returns some control of that process back to you, the student, as you engage in a very intensive experience.

The good news is that the process becomes easier as your brain adapts and conquers the new territory. Your brain does not need to work as hard on tasks it has mastered; these tasks become automated. With practice, your eyes find it easier to pick out the issues and rules and spot the key facts. Your professor's questions become semi-coherent, and you may even detect some patterns in class. Your goal is to automate, but you need to automate the right stuff. If you understand why certain strategies are a waste of time, you

2. J. METCALFE AND A. P. SHIMAMURA, *METACOGNITION: KNOWING ABOUT KNOWING* (1994).

will be able to work smarter. Ditching the futile quests and tackling a challenging assignment directly saves time, energy, and the aggravation inherent in fruitless searches.

Not only is this information important for successfully navigating law school, but law practice requires lifelong learning. The sooner you understand the fundamental principles of how humans learn, the easier it will be to use these principles as you master any number of subjects in practice. A personal injury case may require you to understand certain medical procedures, a corporate case may require you to acquire knowledge of the client's intricate production techniques, and a criminal case may require you to know about forensic investigations. Law practice requires constant learning, and knowledge of the learning process is a powerful tool. The good news is that if you master this process, as detailed in this book, you will be better prepared for both law school and practice.

The Thinking Project

Although the first part of this book concentrates on *how* you learn in law school, the second half looks at *what* you are learning. First-year classes are often occupied with reading cases where judges explain their rulings. One law student described reading a four-page case as akin to “stirring concrete with my eyelashes.”³ You pull apart the cases (often in excruciating detail) and there are so many unfamiliar words to look up. The professor will often seem inordinately preoccupied with how the judge arrived at the conclusion. How did the judge decide the case under this rule and these facts? Unable to accept the decision like you and move on with life, the professor wants to know what if the offeror laughed, the tortfeasor was six years old, or the murderer was drunk. Would it change the result, and why? Why, why, why—your professor sounds like a petulant three-year-old taxing everyone's patience. The central thread underlying many of these queries is “Why did the decision-maker come to this decision?”

3. SCOTT TUROW, *ONE L* 31 (1978).

You will have reactions as to who should win cases, but the focus is on *why* one side *should* prevail over the other side. The method of reaching the conclusion—constructing the winning legal argument—is the critical factor. There are formal methods of legal reasoning, e.g., deduction, analogy, and induction, that you will learn in the process of constructing sound legal arguments.⁴



Logic and reason are necessary parts of learning persuasive argument and predicting actions. Human beings, however, are not always rational decision-makers. Our decision-making methods are often flawed. We act irrationally on a regular basis. This book focuses on a more subtle skill required in practice: the ability to make persuasive arguments where logic and reasoning may not be the sole factors influencing the decision-maker. A strictly rational

4. For an excellent guide on that subject, see KENNETH J. VANDELDELDE, *THINKING LIKE A LAWYER* (2010), a comprehensive and engaging review of the standard techniques of legal reasoning.

approach often, sadly, does not translate into success in the real world. It makes sense to figure out how people actually think and behave if you need to persuade them and predict their actions. As the cartoon above illustrates, the hierarchy of the legal world dictates that your arguments be persuasive to key decision-makers. Your goal is to learn how to solve legal problems for your future clients. That goal will elude you if you do not understand some basic dynamics of the quirks in human reasoning.

Oddly enough, we do not think much about the subject of thinking because much of it occurs in the backrooms of our brains. And why should we care what is going on behind the scenes in our brain? Isn't it hard enough to deal with the conscious part of our brain on a day-to-day basis? Is not ignorance bliss? Well, we should care because lawyers are in the business of persuading others to make certain judgments, so it is critical that we understand how people make decisions. The ability to look beneath the surface reasoning allows us to examine the work of cognitive biases in the resolution of a case. For example, how a judge writing the opinion "frames" a case affects our view of the law and facts, and understanding that frame may allow us to predict the result before even finishing the opinion. Does the writer begin with a discussion of the sympathetic circumstances of the defendant's situation or focus on the victim? Understanding how frames work will keep us from unwittingly adopting our opponents' frames, while simultaneously being able to fashion frames that highlight our case in its best light.

Moreover, what facts are key to the opinion writer may depend on the writer's life and cultural experiences because that evidence is the most "available" to the writer. The writer might not even be consciously aware that certain evidence resonates more because of life experience. This bias may help explain what seems like casual acceptance of some points and rejection of others. If you understand this bias, you can be alert to spotting it and correcting it in your own presentation of arguments. Your own "egocentric" perspective can blind you to the other side of a story, leaving you muttering about fools, rather than figuring out what picture the other participants see from their angle of vision. Awareness that you have a

tendency to look for confirming evidence of decisions, rather than the weak points, gives you the potential to self-correct.

The ability to understand the intricacies of human decision-making is an essential, but largely unexamined, skill required of the successful lawyer. For example, you have to forecast future contingencies and actions to draft a contract or advise a client on strategy. You have to evaluate your judge or jury in order to decide whether to settle or litigate a case. More important, lawyers need to understand how people routinely make mistakes in making decisions. Not understanding these issues can cause problems interviewing clients, negotiating with other counsel, assessing witnesses, or evaluating evidence. In your future life as a lawyer, this knowledge of human behavior will be as important in your success as knowing the legal rules and applying them to new fact situations.

You may not be an expert on the psychology of decision-making when you finish this book, but you will understand that the process of making a decision, and the process of influencing a decision, require some fluency with the basics of cognitive biases.

The Client Project

Predicting the future is a difficult task for humans. We have trouble imagining our future selves, in part because we are heavily steeped in present circumstances.⁵ A sign I read, exhausted and miserable at mile 10 of a half-marathon, captured the problem. The sign said: “It seemed like a good idea when you signed up.” In fact, I flashed back to signing up on my computer, comfortably contemplating the completion of the goal, not at all focusing on the sweaty, hard training and actual race. If I had to sign up for another long run, I would not do it within a few weeks of the last race. But the memory fades and the afterglow of completing the race leads present me to sign future me up for the run.

Present feelings (“Just please let me live through this Torts final!”) may overshadow any vision of our future as practicing lawyers. Your discomfort in any given moment may cloud your vision of

5. See generally, DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2007).

the future. It may be difficult to imagine the link between your Criminal Law class and your future vision of yourself as a transactional lawyer. In addition, you might have little idea of what lawyers actually do in their day-to-day jobs. It is easy to think that whatever you are doing now will not have any relevance to your future as the lawyer you will be, whatever that is. Even if you know that it will be relevant, in-the-moment rewards such as sleep, a favorite television show, or a night with friends can present tantalizing temptations to discount the future.

Because we are so imperfect at imagining our future, it is wise to keep in mind one likelihood: we will have clients. Those clients will depend on us to help them through what might be a difficult and frightening experience in the legal system. It is too easy to focus on your present needs and wants in law school, which may overshadow what your future clients will need. Just as a patient would rather have a doctor who paid attention during Anatomy, as opposed to one who gamed the class away, so too will your future unnamed clients have the same fervent wish as they seek your guidance in keeping them out of legal trouble or even out of prison.

My own experience taught me this lesson. I went through law school resolved that I would never be a courtroom litigator. I shunned trial advocacy classes. Although I hoped to help people and “do good” in the world with my law degree, I was sure courtroom ventures could be sidestepped. Frankly, it is hard to reconstruct what I could have been thinking. Somehow, shortly after law school, I ended up working for Micronesian Legal Services. Although I knew that legal services work might involve the courtroom, I counted on motions and good research to keep me from any trials for the term of my year-long contract.

About a month into my job, I met with one of my first clients. He had bought a boat for a fishing business with a loan from the government. The government was encouraging local business ventures. Alas, my young client’s dreams were too optimistic (see Chapter 14 on the egocentric bias). He had fallen behind in loan payments and the government had repossessed the boat. The government was now suing for the deficiency, the price between the

loan and the repossessed boat, a large sum of money by my client's standards. To say the client was distraught is an understatement. When his business had failed, he had joined the military to escape the pressure of the situation. When he returned from a three-year stint, the government had served him with a complaint a few days after he came back to the island. He did what many clients do, acted irrationally, and did nothing until the government diligently served him with a notice of trial. Then he waited some more. That placed him in my office the day before trial, agitated and visibly shaken.

Young, inexperienced, but wanting to help, I told him I would go to court with him the next day so he could get a continuance and then obtain counsel for trial. The next day, I dutifully asked for a continuance. The judge and I, however, had different mental images of what the word "continuance" met (see Chapter 16 on the availability bias). I thought it meant several months, adequate time to substitute in a new attorney. The judge thought the case was simple, that I was now the attorney of record, that I should copy the government's file for discovery, and that a three-day continuance was sufficient.

Now, of course, I was more distraught and agitated by a long shot than my client. I was holding down the office myself for the next few weeks so there were no experienced souls to consult. I was on a small tropical island in the Pacific, before the Internet, a time that is hard to imagine ever existed. I discussed settlement but the opposing attorney, smelling blood, and sizing me up as a novice, would not budge from a deal for the full amount plus interest. I suppressed my gut reaction to flee the island (see Chapter 11). Although I did not label it at the time, I adopted a "growth mindset" (see Chapter 4). I feverishly began preparing the defense (intermittently cursing my stupid decisions, including the one not to take Trial Advocacy). I was reduced to devouring the sole trial guidance resource available, a Nutshell series book aptly titled *THE FIRST TRIAL: WHERE DO I SIT? WHAT DO I SAY? IN A NUTSHELL*.⁶

6. STEVEN H. GOLDBERG, *THE FIRST TRIAL: WHERE DO I SIT? WHAT DO I SAY? IN A NUTSHELL* (1982).

Discovery was blissfully short. I received copies of the government's documents. It turned out that the government's file was a goldmine of useful information. First, the government agency had not given my client notice of the sale of the boat, which provided an excellent statutory defense to the action. That time learning to research statutes and contracts in law school proved useful.

Second, I learned why the government might have forgotten to give the notice. They had inadvertently let the boat sink in a storm. When the government sold the recovered hull, it was not surprising that they received a mere pittance for the salvage, leaving them to chase my client for the remaining amount of the boat loan.

The trial took two days. I had the opportunity to demonstrate self-taught courtroom skills: cross-examining the government's witnesses. It was not pretty, but I did put on record that the government did not give notice of the sale and that the boat had sunk. At the end of day one, I felt I had presented a better frame for my client—victim of government ineptitude rather than deadbeat (see Chapter 13). The opposing attorney seemed unimpressed (renewing the offer to settle for the full amount), and the judge was frankly grumpy that a simple matter was taking so long. That night, I prepared my own client and witnesses for their testimony, and our emotional levels varied from anxious (client and witnesses) to panic-stricken (me).

When it was my turn to present a defense the next day, I made a motion for judgment as a matter of law based on the lack of notice. (Yes, Civil Procedure proved a useful class as well.) The opposing attorney objected, "She can't do that!" The judge, luckily, said that I could; then I waited anxiously during a long break while the judge considered the motion. The judge came back and announced he was granting my motion. Perhaps he did not want more of this trial either, but my legal authority provided a sound basis for him to end our misery. I resisted the urge to scream, "We won, we won!" and jump up and down. Luckily, the Nutshell book had alerted me that those types of demonstrations were inappropriate in a courtroom setting. The opposing attorney looked stunned and may have regretted his decision not to offer more reasonable settlement terms (see Chapters 14–16).

After that experience, I signed up for several week-long trial advocacy programs through the National Institute for Trial Advocacy, which relies on intensive practice and feedback (see Chapters 5 and 9). That experience was available in law school, but I had not realized how important it was. I now knew that if I was to do my job well, I had to be prepared to go to trial. It was not about me but about my clients, who depended upon my readiness to help them through some tough times. I might not have been a “natural” for the job, but with enough practice, I was able to represent my clients well. I did have more trials, and numerous motions and appellate arguments because my year in Micronesia turned into 10 years in practice. Who could have predicted that? Not me. As I said, it is hard to predict our future selves. You may not know what type of law you want to practice either, and that is natural at the beginning of a journey. Just do not let that serve as an excuse to avoid taking classes that will challenge and prepare you.

As you navigate through law school, adopt strategies to become the lawyer that you would want your beloved family members to have if they were in trouble. Make law school less about present you, and more about your future clients.

The point is that it is easy to lose sight of the goal of representing clients when you enter law school. You have no clients until much later, if at all, during law school. But in studying for torts, contracts, or evidence, the ultimate consumers are the clients, and you will want to have an excellent legal foundation and skills for their benefit. Clients will be counting on you. You may also not know where you will end up, so it is best to pick classes and programs that will give you a challenging and varied background in research, writing, trial advocacy, drafting, negotiation, and mediation. Squeeze as much as you can out of law school when you are there. As this book details, there are numerous opportunities for you to gain valuable knowledge, insight, and experience that will prepare you to help the clients who will look to you to assist them through a sometimes frightening legal process.

Conclusion

So why should you read this book? Even after 16+ years in the educational system, there are some important things you need to understand about how the brain learns and you should know them for law school. You may also think you know how to think, but there are some tricks to that too, which will come in handy as both a law student and lawyer. Law school is a big investment. Make the most of it—for yourself and your client.

Further Reading

DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2007)