Legal Rules for Law Students

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How to Create Deep, Chunked Knowledge

Steven I. Friedland

SENIOR SCHOLAR AND PROFESSOR OF LAW

ELON UNIVERSITY SCHOOL OF LAW

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Introduction

A journey of a thousand miles begins with a single step.

—LAO-TZU

This book is based on the premise that law school, the bar exam, and law practice generally revolve around one thing—legal rules. Knowing rules is a core requirement for both a law student's and a lawyer's tool kit. While students and lawyers must know processes and how to apply those rules, the rules themselves are generally the foundation and commonality of what all lawyers know.

This book has two basic goals: to show law students what it really means to "know" legal rules deeply and sufficiently for examination (and law practice) purposes; and to provide a representative sampling of legal rules for use as a model for ready recall. Through these overriding objectives, this book intends to expose several of the misconceptions about the kind of effective preparation that is generally needed to succeed in law school, on the bar exam, and in law practice.

Neuroscience and Cognitive Thinking

The book examines rules using frameworks derived from cognitive neuroscience and what that neuroscience teaches us on how the brain works. We may think we know how to learn and how to learn well, but the recent advances in neuroscience over the past several decades have shown what likely will work better for the different phases of learning: initial encoding and retention in working memory, transfer to long-term memory, and especially ready retrieval or recall. As many people can guess, cramming just won't cut it—and is actually a poor strategy for long-term learning.

Significantly, most of our behavior is unconscious—our bodies breathe, get hungry, and slam on the brakes in ways that do not trigger our intentionality. This is useful, because otherwise, things might not get done. Yet, many of our unconscious habits, including learning, are not as effective as they could be. Step one in becoming an effective learner is becoming conscious about how we learn and more specifically, to how we pay attention to things.

Cognitive neuroscience tells us that paying attention generally starts the learning process. In essence, everyone pays attention to something, but that something is often

different between individuals, especially in the age of multi-tasking (which is just doing multiple things poorly at the same time). Think about taking a walk in the woods; some people pay attention to the trail, others might look for the animals or birds, and still others might look at landmarks adjacent to the trail. Interestingly, the neuroscience finds that our values and emotions help shape the things to which we pay attention.

Once we are paying attention to our studies, there are multiple steps in the learning process. First, bits of information must be stored temporarily in working memory. Notably, this information does not automatically become long-term memory. New neuronal connections must be activated frequently to strengthen the connection, and this suggests that repetition can be very helpful. Such repetition not only improves deep learning, but also physically changes the neurons by strengthening their connectivity. As one commentator noted, "The important message for all learners is that new learning requires a considerable amount of practice and a meaningful connection to other information in order to become a more permanent part of memory."[1]

Significantly, some emotion often attaches to cognition so that learning is both cognitive and emotive. That is why narratives—stories—are often remembered much longer than plain information without the narrative wrap. Pictures are also often more memorable—and remembered—than written notes.

Human brains create schemas or structures all the time to deal with the complexities of the surrounding world. Schemas are structures or frameworks which guide actions. They can be complex or simple and apply everywhere, from driving a car, to solving a math equation, to arguing with a friend. Good practices can be traced quite often to good schema. This book, in fact, shows what deep knowledge might look like using schema or structures (called the "4 EC's" in this book).

An exercise in conscious thought is very different from one in instinct. Instinct is swift but not subject to conscious oversight and therefore prone to inaccuracy. Conscious thinking, on the other hand, is generally slow, effortful, and uncertain. But it gives us engineering, physics, and other sciences upon which modern society is based. This book is an exercise in conscious organization and a way to chunk knowledge so it can be stored and, more importantly, readily retrieved when needed.

Student Misconceptions

Using the lens of neuroscience, it is easy to see how misconceptions about learning can flourish in students. Law students are no exception. Perhaps one of the most significant misconceptions held by law students involves the depth of knowledge required to answer essay and multiple-choice type questions. This misconception occurs for a variety of reasons. First, students naturally let coverage become a priority after confronting the enormous quantity of material tested. Mastery of the rules is lost in the rush to absorb the "great wall" of information. It is like drinking from the fire hose—too much to really absorb. Second, by the time examinations roll around, law school students often have well-formed preparation habits. Those students who were able to ride a wave of success in college while adopting a "skimming" approach to the rules and subjects often see no reason to modify their strategy for law school or bar exams. The students essentially believe that, "once a successful rules skimmer, always a successful rules skimmer." Third, even if students who

1. Terry Doyle & Todd Zakrajsek, The New Science of Learning: How to Learn in Harmony With Your Brain 5–6 (2013).

skim sense the dangers associated with such an approach, they simply do not know how to overcome those tendencies in the short time before examinations. Changing habits takes time.

What exactly is "skimming"? Rules skimming occurs when test-takers learn a little bit about a lot of rules, usually without fluency, precision, or depth. A skimmer knows that with respect to *res ipsa loquitur*, for example, "the thing speaks for itself." However, the skimmer cannot state the phrase's exact meaning or name the precise elements of *res ipsa* (the inference of negligence, exclusive control by the defendant, causing damages). Skimmers abandon the mastery of the rules needed to effectively answer highly focused questions. Instead, skimmers substitute guessing at some level of the analysis.

Many students are unaware of these misconceptions and the importance of such misconceptions until it is too late for effective exam preparation. Just as most law school courses rest almost entirely on summative feedback in the form of one graded final exam, so does the bar examination. While students might expect commercial study guides or bar review courses to act as lighthouses and warn them of hidden dangers, such expectations are often unrealistic. The commercial guides and courses do what they can, providing students with feedback through practice problems, mock exams, and lectures. The feedback, however, often cannot diagnose and treat specific individual preparation ills, such as "rules skimming," or alter poor learning habits. Furthermore, even when the feedback is on the mark for individuals, the students might not equate the feedback with their own preparatory issues and instead might stick to a sunnier forecast about their chances.

Even for those students who acknowledge both the importance of mastery and their own propensity to skim rules and principles, recognition is only step number one. While recognition matters, it is no easy feat to move to step number two—to change firmly entrenched behaviors and overcome or minimize the problem in the heat of a timed examination.

A Taxonomy of Thinking Skills and Rules Mastery

It is important to define the relevant terms of art discussed in this book. One of the book's goals, to promote a "deeper understanding" of legal rules, refers to "mastery" or "fluency." Fluency is most often used in the context of learning a foreign language, which provides an apt analogy. Rules fluency, which incorporates a deeper understanding of the rules, is much more than memorizing the vocabulary of the law. It also involves various forms of active thinking. The following schema contains levels of cognitive thinking skills. The schema is based on Benjamin Bloom's famous taxonomy of learning and illustrates the thinking levels required to master a single legal rule or principle.[2]

The lowest order of cognitive thinking, level one, is rote knowledge, which is equivalent to the memorization of terms. The learner has familiarity with the words, but not necessarily what the words mean and how the words are used in application. In the legal education context, possessing knowledge might mean the learner can precisely recite the elements of causes of actions, claims, and defenses, but the learner cannot explain them. For example, the definition of murder at common law is "the unlawful killing of another human being with malice aforethought." Being able to express the definition reflects knowledge, but the definition alone does not suggest the learner is

2. The taxonomy is a variation of the one posited by Benjamin Bloom in the mid 1950s for the cognitive domain. Benjamin Bloom, Taxonomy of Educational Objectives, Handbook 1: The Cognitive Domain (2d ed. 1956).

able to adequately explain the concepts of "malice" or "unlawful" or how the concepts apply to specific situations.

Level two is about understanding, connoting that the learner knows not only the words, but also, in a brief and direct fashion, the meaning of those words. The concept of understanding is central to this book and can be explored in the context of what will be called "the 4ECs": the elements, explanation of those elements, examples, exceptions (including defenses), and comparisons to other rules. Reaching the second level of understanding is extremely important for bar exam purposes since questions generally require a modicum of understanding for proper assessment. It is simply insufficient for students to know the words and not how or when they apply. The bar exam is equally difficult for learners who can only explain terms in a circumlocutory and lengthy manner, particularly for multiple-choice questions that demand very quick responses. For example, a learner who exhibits an understanding that "malice" is composed of several different mental states, including gross recklessness, knowledge, and purpose, is better prepared to answer a question about mental states than test-takers stuck at level one.

Level three involves drawing inferences from facts about potential legal issues. This type of cognitive thinking includes spotting legal issues from fact patterns, part of what is known in the vernacular as "issue spotting." Applying the skill of issue spotting means the learner not only can recite a definition and explain it, but also can observe when facts trigger, relate, or apply to the legal rule or principle. It is the action of relating an understanding of a rule to a fact pattern that makes the knowledge useful. No matter how much knowledge or understanding students have, if they cannot connect the information to problem solving, the information usually is of little value. To illustrate, issue spotting involves relating facts, such as using a loaded pistol as a can opener at a crowded fraternity party, to legal consequences, such as the gross recklessness required for murder if the gun goes off and kills someone.

The level after issue spotting, level four, is perhaps the cognitive focal point of most law school exams—problem solving. This level of thinking involves more than just "thinking" about a problem; it extends to the act of resolving legal issues. Once an issue is spotted and framed, problem solving depends on legal analysis—the application of the pertinent rules to the fact pattern. This application requires a critical inquiry into whether each element of the rule has been met, and, if so, whether any defenses apply. It often involves a technique of weighing the merits of conflicting reasonable conclusions and deciding which position is likely the most defensible.

The pyramid of the cognitive thinking taxonomy continues with several levels not always directly tested on exams: synthesis and judgment. Synthesis refers to the ability to build complex cognitive structures covering a group of rules to form a legal doctrine. It also refers to understanding a bigger picture—the combination of larger legal subsets, that is, of several doctrines together, or even of multiple courses. Synthesis is particularly important on the bar exam, which includes the subject matter of six different courses for the Multistate Exam (without noting which course is involved in the questions) and often a much larger number of courses for the state portion of the test. The concept of judgment goes beyond the judgment used in problem solving, specifically, which party will most likely prevail. It also refers to the judgment exercised in various legal advocacy contexts, such as when the attorneys must rank arguments and approaches within the context of a case.

The six levels in the taxonomy of cognitive legal learning illustrate the scope and difficulty of true knowledge mastery. Further, the six levels suggest that students who engage in rule "skimming" are playing with fire and likely will get burned. If mastery is the goal, exam studying should

be designed with mastery in mind. Achieving mastery can be difficult, even with a framework or game plan. (Just because people have been passengers on a plane does not mean they are then prepared to be the pilot.)

The Basic Process Guiding the Rules Framework: Course-Area-Rule-Exception

The 4EC's framework that follows is a derivative of a more general protocol, namely a thinking framework from large to small. This just means thinking about rules goes from big pictures first and then to details, or, simply stated, first from the forest and then to the trees. In law, that framework can be described as determining first what Course is involved, then what Area in the course, then the applicable Rule in that Area, and finally whether an Exception is implicated. This analysis is very useful to see if the brain is taking a shortcut right to the specific rule and skipping the Course and Area. The 4ECs really start with the area and then with the rules, breaking them down to their elements and explanations before proceeding to exceptions.

A Framework for Understanding Rules Deeply: the 4ECs

The 4EC framework (**E**lements, **E**xplanations, **E**xamples, **E**xceptions, and **C**omparisons) offers one possible method for obtaining a deep understanding of legal rules and principles. This schema serves as the foundation of the rules described in this book. The framework posits that mastery of the rules at a minimum requires all of the following abilities: 1) to state the precise elements of the causes of actions, claims, or defenses; 2) to understand what the elements mean, including explanations of those elements in a concise and precise manner; 3) to provide pithy examples of each of the elements; and 4) to describe the exceptions, defenses or exclusions of the rules.

While the 4ECs create a floor of competency, mastery requires being able to advance at least one more step—comparing the rule and its elements to other rules and their elements. Thus, true fluency revolves around the "4ECs." For example, learning the 4ECs of murder is inadequate if the test-taker cannot distinguish murder from manslaughter (short answer: murder requires malice, manslaughter does not) or larceny by trick from false pretenses (short answer: larceny by trick involves obtaining possession by fraud, false pretenses involves obtaining title by fraud).

Within the 4ECs, the term "elements" refers to the basic core components of the rule through identifiable and essential descriptions. The elements are the issues to be proven in the case, those things that are listed in the complaint, information, or indictment. Elements exist not only for claims and causes of actions, but also for affirmative defenses such as self-defense or assumption of the risk.

In organizing the elements of a rule, students can benefit from the cognitive learning theory of "anchoring" on a word or two—like focusing on "custodial interrogation" as a prerequisite for *Miranda* warnings—or from creating a visualization for remembering rules (*e.g.*, adverse possession equals the mnemonic, "OCEAN for 20," meaning Open, Continuous, Exclusive, Adverse and Notorious for 20 years, or visually, a big, blue OCEAN with 20 scattered boats).

"Explanations" of the elements are crucial to understanding the rules, which should be viewed as the minimum resting point, not bare knowledge. Each case read in law school is but one example of how to understand and apply a legal rule. Merely memorizing the words of the elements—*e.g.*, murder is the "unlawful killing of another human being with malice"—does not help much unless the speaker can explain what the words mean. (What, exactly, is "unlawful" or "mal-

ice"?) These explanations should be brief, largely because of the time pressure of the test and the importance of accessibility of the information. Additionally, if too many words obscure the essential components of the rules, ready recall will likely be diminished.

"Examples" provide context and a better way for the mind to remember the rules. The examples are striking narratives, and us humans remember full stories much better than bits of unconnected information. Legal cases are really just examples of how rules apply in certain situations.

A memorable example helps students access and use rules. For example, the case involving a falling flour barrel brings students squarely back to first year torts and assists their grasp of the doctrine of *res ipsa loquitur*. The *Palsgraf* case offers a seminal illustration for understanding negligence, and *Marbury v. Madison* is the guidepost to the power of judicial review. For those reasons, this book uses brief examples of each of the rules.

"Exceptions" are crucial to understanding the parameters of the rule. With the torts doctrine of *res ipsa loquitur*, for example, the inference of negligence created by the doctrine is merely an inference, meaning that the inference is refutable through evidence offered by the defendant. Thus, when dealing with *res ipsa loquitur* problems, students should look for evidence negating the inference of negligence, such as prior use of the thing in question.

Comparisons show whether each rule is really understood by contrasting similar components, if they exist (*e.g.*, the mental state requirements are similar for murder and arson), as well as dissimilar ones (*e.g.*, the act of arson is different than the act of murder). Some subject areas have common comparisons, like the mental state of crimes (*e.g.*, murder requires a mental state of malice, while criminal battery only requires negligence). This book offers some possible comparisons but does not complete that tributary of the rules. Instead, the actual comparisons suggested in the book are discussed in detail in other books on the comparisons of legal rules and principles.

Illustration

Res ipsa loquitur is more than simply, "the thing speaks for itself." It is a doctrine in Torts that falls within the area of negligence. As a negligence shortcut, *res ipsa* does not require the traditional negligence elements of duty-breach-causation-damages, but rather different elements—inference of negligence-exclusive control by the defendant(s)-causation-damages. An inference can be explained as a mechanism that allows a person to draw conclusions from a fact. When used in the doctrine of *res ipsa*, it does not require a trier of fact to do so. This distinguishes the inference from a presumption. The *res ipsa* doctrine simply allows a plaintiff to get to the jury for its consideration of the facts; it does not direct the jury to find that the inferred facts exist and the jury is free to reject the inferences it could draw. One example of an inference of negligence is when a flour barrel falls out of a second-story window of a building, injuring a person below, without any eyewitnesses to the event. An exception to this doctrine occurs when there is no exclusive control by the defendant or defendants, such as an incident at a party with a number of people who could have controlled the thing causing the accident. Lastly, *res ipsa* can be compared to negligence per se, which is a different type of negligence shortcut involving statutes and their violation.

How to Use This Book

You miss 100% of the shots you don't take.

—WAYNE GRETZKY

This book does not contain an exhaustive list of legal rules. Instead, it is intended to be a guide to understanding the process of mastery, offering a head start in beginning the deep understanding needed to confidently attack the subject matter of questions in any legal area. As a guidebook, the descriptions and explanations of the rules do not duplicate treatises. Rather, the seemingly cryptic nature of the explanations, examples, and exceptions is intended to illustrate the necessary brevity for learning and recalling rules under time constraints, particularly for timed multiple-choice examinations. The skeletal framework of the 4ECs is designed to identify the full scope of knowledge required to answer the questions efficiently, and to reveal any misconceptions about the depth of understanding needed to handle intricate, precise, and analytical legal questions.

Components of a Rule

This book breaks down rules into component parts. These parts can be used as a mental progression—a way of thinking, learning, storing, and recalling rules. The general progression is from "large to small" or "big picture to minute details." This structure is a schema—a consistent framework that allows the brain to store and recall rules more easily. Below, you will find an explanation for the component parts of the schema.

- **Headline:** The rule is housed in this general area. It is the first stop on the GPS.
- **Elements:** Most rules have required elements that must be proven by a party through the introduction of evidence. Elements are different from factors. Factors are points that can be considered to determine if a standard is met, such as the *Daubert* factors indicating whether expert testimony is based on a reliable theory. Elements, however, must be proven individually.
- **Explanations:** This component shows what the elements mean in context. For example, in *res ipsa loquitur*, there must be an inference of negligence, mean-

ing negligence can be inferred based on what occurred. An inference of negligence is different than a presumption of negligence or a finding of negligence. Explaining the meaning of elements shows understanding of the concepts and not just mere knowledge of the vocabulary.

- **Examples:** Examples help provide concrete applications of the elements and rules overall, creating guideposts and analogies for differing fact patterns. Examples can often be found in case law. In effect, each case provides an example of how a rule or rules are applied to facts.
- **Exceptions:** Legal rules generally have exceptions. These exceptions are based on public policy or developed over time due to a variety of reasons. For example, if a law prohibited vehicles in a park, there likely would be an exception for emergency vehicles responding to an emergency in the park or riding lawn mowers mowing the grass in the park.
- **Comparisons:** This last component allows one to understand a rule more thoroughly by exploring its similarities and differences to other rules. This takes conscious thinking, but that is why legal analysis is often so difficult. Comparisons can play an important role in a case, especially one of first impression.

Use of Memory Techniques

This book also seeks to assist students with memory techniques, including mnemonic devices and visualizations. These tools promote recall, an integral part of mastery. It is worth noting that the more memorable the example, the more likely students will retain it.

Context and Exams

In using the book, it also may be helpful to keep in mind the perspective of the creators of exam questions, and particularly how exam creators might select one cause of action among many and one element of a rule among many for an entire multiple-choice question or as part of an essay. The exam creator can test what an element means or focus on what exceptions apply to an issue. To illustrate, an exam may test an exception to the Statute of Frauds, such as "part performance," and not the basic doctrine itself. Further, multiple-choice questions are likely to contain answer choices that are incomplete (but true), incorrect, or irrelevant to the question at hand. Without a thorough knowledge of the rules, students won't be able to distinguish the best answer choice from these other inappropriate choices, aptly called "distracters."

While the bar exam does not cabin questions by course, the rules included below are grouped by law school course labels to promote comparisons. Further, because bar examiners jump around from course to course with their questions, having a "headline" for each rule is useful in locating the question and its subject matter quickly. The problem of location is often a significant one for many test-takers, who are used to discussing a topic within the confines of a course and an area based on a syllabus or Table of Contents subheading. The lack of either on exams can readily throw students off.

The rules included here were chosen based on the relative emphasis placed on them in law school classes and on the bar exam. Yet, there is no guarantee these rules will be tested. Only 100-plus rules were chosen to serve as representatives of the thousands of rules in the various legal subjects. Students can add their own rules and augment and modify the existing rules presented in this book to create "ownership" of them.

"Reclaim" the Rules for Ready Recall

It is important to note that once a rule is learned, most people need to "reclaim" it regularly to keep it intact in their memory for ready recall. Otherwise, the rules evaporate into thin air—and leave the memory—all too quickly. Thus, repetition of these rules should occur throughout the preparation process. This point relates to another important part of studying—it is not the inputs that matter, but the outputs. It does not matter how many pages are read or number of courses taken; it is what is retained, recalled, and used that counts the most.

Make Your Own Deep Knowledge Rules (4ECs): (Using Constitutional Law as a Backdrop)

- **Step #1:** First figure out the **area** in the course where the rule lies—is it about the court's power to hear a case and whether there is a live Case or Controversy? Is it about the powers of the Federal or State government? Is it about rights or limits?
- **Step #2:** Gather all the **cases** you have read about the rule. What rule is it? Whether the issue is moot or ripe? The power to tax, spend or borrow? The Dormant Commerce Clause, The Privileges and Immunities Clause? The Takings Clause?
- **Step #3:** Create numbered **Elements** (or factors, if appropriate) that must be shown to meet the requirements of the rule. For Privileges and Immunities of Article IV, must there be discrimination? If so, against whom? Would out of state commerce suffice or must it be against out of state residents (citizens)?
- **Step #4:** **Explain** what these elements mean in a concise and clear way. What constitutes discrimination for the purposes of Privileges and Immunities of Article IV? What does it mean to be an out-of-state resident for the same clause? Relevant cases can assist greatly in explaining the meaning of individual terms.
- **Step #5:** Show **Examples** of the rule. These can be hypos from a class you took, ones you make up, or perhaps best yet, from actual cases. Each case provides a story with an ending.
- **Step #6:** Every legal rule has **Exceptions** of some form—limits beyond which it does not go. These exceptions can be affirmative limits, such as constitutional rights of speech, free exercise of religion, or equal protection, or limits in the definitions, such as no commerce clause power for Congress in regulating gun possession near schools.
- **Step #7:** **Compare** the rules with other rules or concepts. For example, standing and ripeness are both concepts within justiciability but are different. The Dormant Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause all prohibit government discrimination, although against different things.

Note

The rules in this book may have been modified since the book's printing. Check to make sure these are the latest versions. Also, you may have learned these rules with a different structure or content. The primary purpose of this book is to demonstrate how rules can be chunked for deep learning.