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In Quest of a Theory for Lawyering: Some Hypotheses and a Tribute to Dean Soia Mentschikoff

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I. INTRODUCTION

A conference on future research possibilities was held in San Francisco on September 27 and 28, 1974, by the Law School Admissions Council. The conferees devised research policy for approximately the next five years. Top priority was assigned to the study of career performance criteria for law school admission. In short, the L.S.A.C. will be asking: What is competence in lawyering? How can it be measured? How can it be predicted? Is there but one basic set of skills or a variety (depending upon role, function, etc.)?

Such research will break new ground. No test currently in use attempts to predict career competence. The law school admissions test and undergraduate grades, in weighted combinations, are heavily relied upon for law school admissions. However, their predictive power is validated only against first-year law school grade averages. We assume, but have no measured validation, that law grades are significant predictors of future career performance.

Research into what lawyers do and how they do it—how one thinks like a lawyer—may provide measurable criteria of independent value. Present predictors could then be revalidated and improved predictors designed. More flexible law school admissions standards could emerge, along with a more comprehensive system for counseling undergraduates and law students.1

* Professor Law, Indiana University, Indianapolis School of Law; Editor, Learning and the Law.
1. Thus would the L.S.A.C. be dealing with its real problems, as suggested by Professor Myres McDougal:
   Let me emphasize that your genuine problem is, as some of you have suggested, to attempt to anticipate those who will be successful in the profession.
   It's your job to know what kind of community you want and what role lawyers are to play in that community—not merely what roles they have been playing in the past,
The National Conference of Bar Examiners is interested in career performance research as a possible source for criteria against which to validate its multi-state bar examination. The Association of American Law Schools is likewise interested because of possible implications for curricula and teaching programs. The American Bar Foundation is interested in all forms of research involving legal education.

These three organizations and the L.S.A.C. recently joined in a research consortium. The consortium's first charge is to design and implement a research program on lawyer competency.

Regardless of which organization undertakes the research, its long range goal, as I see it, is to generate and test a comprehensive theory of lawyering for today and the foreseeable future. The complete picture probably should include the profession's context, organization, jobs, roles, functions, operations, skills, procedures and techniques. The concepts and relationships comprising the theory should explain and be capable of use in evaluating the efficiency of lawyering behavior (including the actions of government officials as well as private practitioners—specialized and general).

Such a theory must be based upon empirical observations and be subject to empirical verification. However, it is not easy to decide what you will begin to observe when your challenge is to develop a theory of lawyering—a comprehensive insight into what lawyers do and how they do it.

Further, there is the inevitable difficulty for research design that facts and theory have reciprocal interactions. It doesn't make sense to generate hypotheses not based upon empirical facts. But gathering facts without guiding hypotheses is apt to be wasteful.

This article attempts to break into the fact/theory cycle by suggesting several hypotheses and a few places for commencing the research. What is proposed is tentative and subject to revision. Other hypotheses would be welcomed. Indeed, it may be useful to work on several hypotheses at once, particularly if they contain some incompatible elements.

First, let me narrow the field. A complete description of what lawyers do would include the demography of the profession and its place in society's total workings. One would need to deal with the question of how well suited is the organization of the profession to make quality service readily available at affordable cost. The interaction between quality in lawyering and the quality of the law should also be explored.

Leaving those matters for another day, this article concentrates on

but what roles you wish them to play in the future. The relevant questions are: What capabilities and skills are required for the performance of these roles? How can one devise tests to anticipate these capabilities and skills? How can one positively encourage the interest of those with the relevant capabilities and skills?

McDougal, Beware the Squid Function, 1 Learning & the Law 16, 17 (Spring 1974).
A THEORY FOR LAWYERING

The behavior of lawyers who are competently lawyering. These questions are relevant: What are the fundamental functions and skills? What makes for degrees of excellence in performing, relating, sequencing, and concluding the use of specific lawyer skills? How can efficiency be measured? How can the skills best be taught? Can we separately measure individuals' developed ability and their teachability?

The article concludes with a tribute to Dean Soia Mentschikoff. An examination of her classes (a sample being supplied herein) provides explanation and some confirming evidence for hypotheses suggested. Also, her teaching strengthens important skills not reached by most classroom teachers. Thus, her work provides not only a guide for those who would inquire into lawyering but also a model for all law teachers who aspire to excellence.

II. A Theory of Lawyer Competencies

Lawyers reach and implement decisions. Decisions are reached by manipulating variables which make it more probable that the solution to a problem will appear.

Lawyers engage in problem-solving behavior to reach decisions in and for situations involving the possible application of power, usually governmental power. The law is almost always involved. Of course, the decisive considerations are rarely limited to how the law probably will apply to given facts. Also important are the values sought to be advanced or protected by the lawyer's advice and action, and the probable consequences of law application.

Lawyer decisions include advice by practitioners to clients, and votes by judges on cases and by legislators on statutes. Whatever the context, lawyer decisions result from combinations of at least three kinds of sub-decisions. First, the lawyer seeks to formulate the problem by describing and relating the elements of a total picture, including values and interests at stake. Then, the lawyer makes relevant predictions and evaluations. Usually they include how law applied to available and/or producible facts will affect relevant values and interests. Finally, action proposals become included in evaluations, and priorities emerge as deciding behavior approaches a solution.

Professor B. F. Skinner, in his book Science and Human Behavior, analyzed the behavior involved in decision-making. He pointed out that a number of techniques can produce solutions, including accidents and random exploration. Problem-solving behavior frequently is not efficient, he explained, because the reinforcements are often long delayed and not clearly connected with the relevant behavior. Thus, techniques of efficiency in problem-solving need to be taught in formal education.

As to what those techniques may be, Skinner suggests that improving or amplifying available stimulation is especially effective; we increase the chances of a solution when we look a problem over carefully, when we get all the facts, or when we point up relevant stimuli by stating a problem in its clearest terms. . . . A further step is to arrange or rearrange stimuli. . . . Another technique of problem-solving consists essentially of the self-probe. Tentative solutions, perhaps assembled for this purpose, are systematically reviewed.3

If Dr. Skinner is correct, one may well ask: Precisely what materials do lawyers arrange in the process of solving legal problems? And of what specific skills or techniques for dealing with that material is efficiency in problem-solving a function?

The following elements seem likely to be included in stating a legal problem in its clearest terms and in assembling tentative solutions:

1. Describing a legal problem in its clearest terms, i.e., deciding what are the real problems, will include relating:
   a. the client's version of past events and what is now wanted and expected (for judges, substitute "parties" for "client." For legislators, substitute "society" or some other constituency; for scholars, "the subject of study.") and
   b. behavioral and ethical factors in the relationship between lawyer and client (including values to which the lawyer is committed) which may facilitate or inhibit lawyer performance. (Note: The formulation of the problem will likely be amended as the lawyer reaches toward a final decision.)

2. Having formulated at least a tentative hypothesis or hypotheses on what are the real problems, the lawyer will devise possible courses of action, and make predictions for available and producible facts of the probable responses by individuals or institutions with power to affect the interests and values sought to be advanced or protected. (These responses usually include the application of law to the facts.)

3. In light of those probabilities the lawyer will engage in a cost/benefit evaluation of possible actions considering:
   a. the effect of likely outcomes on values and interests sought to be advanced or protected, and
   b. the resources required and available for taking the various actions.

Legal education traditionally has concentrated on supplying fu-

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3. Id. at 249–50.
ture lawyers with knowledge and skills that facilitate performance of the prediction and evaluation aspects of decision-making. There has been particular emphasis on predicting how law will be applied to given facts. Evaluations may then be made of the law and its application in terms of social values and legal reasoning techniques.

Much less instruction has been provided on

1. how to generate relevant facts in addition to those reported by a client or included in an appellate opinion,
2. the human and value aspects of legal problems, and
3. lawyering techniques and procedures (e.g., trial advocacy, negotiating and drafting), the efficacy of which enter into decisions on basic strategy for dealing with a problem.

The decision to concentrate on law application may have been justified by decisions that law schools taught law and not lawyering. It may have been judged that time was most efficiently spent manipulating legal variables within given fact parameters. Perhaps there was a hypothesis that skills developed in the context of law discussion would readily transfer to the other aspects of legal decision-making. And, in addition, it is relatively easy to collect case materials. It has been relatively difficult—at least until recent times—to collect reliable evidence of such things as lawyer-client exchanges and trial advocacy.

Whatever may be the reasons for past educational practices and theories, a number of ideas are currently competing in the market place for our future attention in research on lawyering and in teaching lawyering. For example, Myres McDougal has long urged that greater attention be paid to techniques for dealing with values and to the impact of legal decisions on a wider range of values than those of immediate clients. Study of fact skills has been urged by Irvin Rutter in connection with all lawyer operations. Materials are beginning to be available for teaching various lawyering techniques and procedures.

A number of law teachers employ teaching methods which leave fact matters at least partially open for student development. Dean Soia Mentschikoff does this in Commercial Law so that advanced students would have the opportunity to develop their own strategies and techniques. This approach allows for a more realistic simulation of the practice of law, where clients and situations are not as clearly defined and predictable as they might be in a traditional legal education setting.

4. One common conception of a profession is that it is a group that has not only a special skill but also a responsible concern for the goals and aggregate consequences of the exercise of this skill.

   From this perspective, the social role of the lawyer is that of the specialist on authority and control who has a responsible concern for the common interests of all the communities of which he is a member. The function of the lawyer is to assist in the establishment and maintenance of the totality of a community's public order—to reduce the number of decisions taken by a mere naked power, to manage authority and control in a way that will maximize the production and sharing of all values, and to increase the civic domain in which people are free from all forms of coercion.


can see that what facts are relevant depends on applicable law, and also that what law is relevant depends upon what facts can be developed. Thus, there are alternative courses of action open at every stage of the way. Professor Andrew Watson teaches much the same lesson. However, the facts he leaves open relate to the humanness of the lawyering situation. The alternative courses of action relate to how a lawyer shall deal with a client's behavior, including emotions, and with the lawyer's own emotions about the client and the case.

Student-teacher exchanges provide excellent opportunities to study the behavior that goes into thinking like a lawyer. Many teachers are paying close attention to that aspect of what is being done in class. Frequently the class has been designed to deal quite explicitly with some skill thought fundamental for effective lawyering.

It may be more expensive and difficult, but close study should also be made of the decision-making behavior of practicing attorneys, judges and legislators. Professor Louis Brown has suggested a promising methodology: Go over with lawyers, in a kind of "legal autopsy," each step of a case. Inquire into what alternatives were recognized as available at each stage, and what went into discovering and refining those alternatives and choosing between them. Professor Brown has also suggested that much could be learned merely by studying lawyers' files.7

The design of that research might well be affected by hypotheses drawn from more readily available observations. As an example, let us see how Professor Watson analyzes and teaches skills needed for adequately formulating a legal problem. Watson's premise is that lawyers are frequently not sufficiently sensitive to the humanness of the situation and to generating data and hypotheses for reaching a decision on that aspect of a case.

In a class, transcribed in Learning and the Law and also available on film,8 Professor Watson acted as client Bradley and also asked questions as instructor. He used these dual roles to help the students reach sound lawyer decisions on the human aspects of the case.

Specifically, Professor Watson generated emotions in the students by an initial interchange in which he played the role of client Bradley. Then he had the students describe their emotions and relate them to causes and effects. Based on that analysis, the students predicted consequences for performing lawyer services, evaluated alternative proposals for dealing with the problems, tested several proposals, and then generalized to hypotheses for dealing in all cases instrumentally with the emotions inevitably present in professional relationships.

Professor Watson first set the scene: Mr. Bradley, usually a busi-

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8. Know Thyself, Know Thy Client, 1 Learning & the Law 45 (Spring 1974). The movie can be rented for $10 from the University of Miami Communications Service, Coral Gables, Florida 33124.
ness client, asserts vigorously to the lawyer (while his daughter, Judith, and his wife sit silently by) that the daughter's husband has been unfaithful and that Judith wants a divorce. When the students indicated to Mr. Bradley that they would like to talk to Judith, Mr. Bradley wondered why they would want to do that. "What do you want to talk to her about?" asked Watson, in his role as Bradley, "I just told you the facts. . . . You mean you don't trust me?"

The balance of the class can be analyzed by placing the complexity level of the question on the left, the specific subject in the middle and quoting Watson's questions on the right. Notice that Watson begins by addressing student attention to the observation of relatively simple things—their own emotions. Gradually he builds to the more complex behaviors he thinks necessary to deal with the problems.

<table>
<thead>
<tr>
<th>Complexity of Behavior Called For</th>
<th>Subject of Inquiry</th>
<th>Specific Questions Asked</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>describe</strong></td>
<td>behavior having just immediately occurred</td>
<td>Did you notice what you did then when you asked me that question?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>You just made another diagnostic observation, didn't you?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>What did he do? (Answer: half smiled; half frowned).</td>
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<tr>
<td></td>
<td>feelings</td>
<td>Don't you trust me?</td>
</tr>
<tr>
<td></td>
<td>your own</td>
<td>Am I crowding you?</td>
</tr>
<tr>
<td></td>
<td>immediate</td>
<td>Did you get your guard up?</td>
</tr>
<tr>
<td></td>
<td>a short while ago</td>
<td>Any thoughts about this father?</td>
</tr>
<tr>
<td></td>
<td>of others</td>
<td></td>
</tr>
<tr>
<td><strong>relate</strong></td>
<td>causes for</td>
<td>How am I crowding you?</td>
</tr>
<tr>
<td></td>
<td>your own feelings</td>
<td>How was the father trying to dominate you?</td>
</tr>
<tr>
<td></td>
<td>another's behavior</td>
<td>Why would the daughter perhaps not be able to discuss the case freely with you?</td>
</tr>
<tr>
<td></td>
<td>your conclusions about another's behavior</td>
<td>How did you arrive at the diagnostic decision that the father was a tough one?</td>
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<tr>
<td></td>
<td></td>
<td>How do you know when someone is domineering?</td>
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<tr>
<td></td>
<td>immediate effects</td>
<td>What are you doing to me now?</td>
</tr>
<tr>
<td></td>
<td>your behavior on others</td>
<td>What is your response when someone crowds you? (Answer: a response similar to the one given you).</td>
</tr>
<tr>
<td></td>
<td>other's behavior on you</td>
<td></td>
</tr>
<tr>
<td><strong>predict</strong></td>
<td>how others would respond in particular situations</td>
<td>Do you think you could get information from the daughter even when you get her alone?</td>
</tr>
<tr>
<td></td>
<td>difficulties created for professional problem-solving by emotional behavior your own</td>
<td>(Your feelings may get in the way if not understood)</td>
</tr>
<tr>
<td>Complexity of Behavior Called For</td>
<td>Subject of Inquiry</td>
<td>Specific Questions Asked</td>
</tr>
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<tr>
<td>clients' interactions between clients and you</td>
<td>(They may try to take over your role)</td>
<td>What is your risk in dealing with the daughter? (Asked by Watson to a dominating personality in the class).</td>
</tr>
<tr>
<td>evaluate</td>
<td>What is your risk in dealing with the father? (Asked by Watson to a more gentle-appearing member of the class)</td>
<td>What would your approach look like to Mr. Bradley?</td>
</tr>
<tr>
<td>client's proposed action goal</td>
<td>What might this girl's presence really mean? (Answers suggested: She may really want a divorce but maybe she wants someone to take her father out of the picture; or she may want assurance that she is the right party in a marital dispute).</td>
<td></td>
</tr>
<tr>
<td>a lawyer's proposed action goal</td>
<td>What do you think about Weinstein's point (that Mr. Bradley must be confronted by the lawyer)?</td>
<td></td>
</tr>
<tr>
<td>propose action</td>
<td>create a plan for dealing with this situation</td>
<td>How are you going to talk to Judith? How would you confront this father? Any ideas on how to cool down Mr. Bradley?</td>
</tr>
<tr>
<td>develop hypotheses as to the instrumental use of emotions</td>
<td>(Said Watson: “A good lawyer knows what he is like himself so that he can use his own characteristics. So that when you get a certain sensation you can immediately translate it into meaning.”)</td>
<td></td>
</tr>
<tr>
<td>implement decisions</td>
<td>carry out a plan</td>
<td>(This was really the opening of the class, with the students responding to Watson—as Bradley—before they had thought about what was really going on and how they might best deal with it. Presumably, in later sessions there would be opportunities to test their developing skills. Indeed, midway through this class Watson said, “Here I come, what are you going to do about it?”)</td>
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If we were to translate this class into organized hypotheses as to some of the skills needed for competent lawyering, that outline might look as follows:
Skills Necessary for Dealing Effectively with the Human Aspects of Lawyering

I. By attending to the total behavior of others and to your feelings as well as to your cognitive responses to the situation, compose tentative alternative hypotheses as to:
   A. inhibitors or facilitators for the successful performance of your professional functions, and
   B. ways to insure that
      1. you are getting the whole truth about the facts and what is really wanted, and that
      2. your advice is given serious consideration before judgments are made.

II. Test those hypotheses by:
   A. ruling out certain approaches when the facts are clear and the behavioral conflict strong, e.g., don't be submissive with a dominating client or come on too strongly with a submissive client, and
   B. asking questions, making suggestions and in other ways responding in accord with a promising hypothesis, while being alert to feedback in terms of that hypothesis and its competitors.

III. If no approach seems promising or your working hypothesis runs into difficulty, cycle back for more facts and hypotheses.

If the above theory as to necessary skills were correct, questions would immediately arise as to what even more basic problem-solving skills would permit lawyers effectively and efficiently to
   1. generate alternative hypotheses from available information (which may be minimal at the start of a relationship),
   2. generate needed additional facts to test hypotheses or generate additional hypotheses,
   3. subject hypotheses to confirming and disconfirming tests, and
   4. devise strategy for sequencing and relating the above operations to each other and to one's efforts to deal with other aspects of the problem, e.g., how the law may apply to the facts.

There is little research available from legal education or from actual practice which suggests answers to the above questions. This is so not only as to how legal problems are best formulated, but also as to how law application is predicted or action proposals evaluated.

However, in his unpublished teaching materials on interviewing, Professor Gary Bellow of Harvard makes reference to research conducted at Michigan State University on skills which lead to efficiency in diagnosing medical problems. The analogy between law and medicine seems strong in several respects: In both, the practitioner
scans the facts in light of models within which to classify those facts. Doctors and lawyers both reach decisions about and give advice on the best of alternative courses of action. Accordingly, the results of medical practitioner experiments may be transferable to lawyering.

In the Michigan State research, actors trained to simulate patients were interviewed and examined by physicians instructed to conduct the examination as they normally would. The physicians could obtain laboratory results on request. The entire process was recorded on video tape, and the physicians were debriefed during as well as after the sessions. In short, the process was a step closer to reality than Louis Brown's proposed "legal autopsies."

One part of the research report compared the best and worst diagnostic work-ups. Dr. "Y," the best performer, had elicited 30 critical findings, recognized them all, and correctly diagnosed multiple sclerosis. Dr. "X" elicited 24, but recognized only 18 and erroneously diagnosed hysteria.

Professor Bellow reports the conclusions as follows:

Analysis of these cases . . . suggests that, in this example, a good medical work-up can be differentiated from a poor one in three ways:

1. The better work-up shows greater flexibility in generating alternative hypotheses based on minimal information. It is crucial for Dr. Y's success that he generate the hypothesis of multiple sclerosis the instant he encounters a strongly positive (++) finding for that disease. Having generated it, it implies for him a plan of search and a schema for organizing findings.

2. Therefore, the better work-up is characterized by greater sensitivity to critical findings. This feature is, in our opinion, contingent upon having a hypothesis available as an organizing framework for the data. Thus, early sensitivity to cues facilitates hypothesis generation which in turn facilitates sensitivity to findings emerging later.

3. Finally, the better work-up appears to exemplify a more comprehensive, efficient use of negative proof. But, this too is a consequence of having available for testing competing hypotheses so structured that data positive for one are negative for the other.

Thus, efficiency in diagnosis seems to be a function of not simply generating early hypotheses, but more specifically, of generating hypotheses which are strong conceptual competitors. Dr. X, in fact, generated and tested more hypotheses than Dr. Y, but none of his alternatives to hysteria were framed so as to be strong competitors. Perhaps his inability to generate strong alternatives was a function of defects in his knowledge, perhaps a result of premature closure on the
psychogenic hypothesis. Dr. Y seems to employ a method of multiple working hypotheses . . . A question for further study is what conditions of the problem setting or attributes of the problem solving increases the likelihood of using this method.9

Let us assume, for the moment, that the above findings are correct as to medical practitioners, and may also apply to legal problem-solving. Let us also assume that Dr. Skinner is correct in his assertion that efficient problem-solving behavior needs to be taught.

On these assumptions, it would be useful to specify in some detail each of the above noted problem-solving behaviors of which cost effectiveness in reaching decisions may be a function. The effort will show, I think, that law teachers are already aware of and teaching a number of the indicated behaviors. However, it also indicates that additional attention probably should be paid to several areas. Particularly neglected are skills in generating additional facts and in relating the use of various skills by some general strategy for problem-solving.

Problem-Solving Behavior of which Cost/Effectiveness in Reaching Decisions is a Function

I. Performance Characteristics
   A. Generating hypotheses
      1. Early generation of a number of alternative hypotheses

      Recall that Dr. Y generated the hypothesis of multiple sclerosis the moment he encountered a strongly positive finding for that disease. In law, as well as medicine, it is probably true that an ability to generate hypotheses depends upon background knowledge of principles, fact situations, and the methods for fact and rule research. The difficulties of Dr. X, according to the report, may have been due to defects in his knowledge. Hypotheses from facts were thought contingent on having hypotheses available as an organizing framework. John Dewey long ago pointed this out, saying,

      Systematic regulation of induction depends upon the possession of a body of general principles that may be applied deductively to the examination or construction of particular cases as they come up . . . . Except where there is a system of principles capable of being elaborated by theoretical reasoning, the process of testing (or proof) of a hypothesis is incomplete and haphazard.10

Legal education has long been designed in large part to provide such a background (as well as to provide research techniques for


10. J. DEWEY, HOW WE THINK 95 (1910).
enlarging the background as necessary). However, only recently have efforts begun to define performance standards for the skills involved in particular aspects of legal problem-solving. One example is Jean and Edgar Cahn's first draft of performance objectives for legal analysis. A section of that draft applies to the skill of alternative hypothesis formation for the application of law to facts. It suggests both a way for measuring the skill and a prescription for its teaching, as follows:

Given an intake memorandum stating certain facts obtained in an initial interview, the student should be able to write a legal memorandum that would

a. state those causes of action which the client does have if those are all the facts
b. state those causes of action which the client might have if additional facts were given
c. state those facts which, if subsequently discovered, would lead to the conclusion that
   i. as a matter of law the necessary elements of a cause of action were not present
   ii. the necessary elements of a cause of action might be found to be not present by a trier of fact based on a conflict in evidence
   iii. that defendant had a good defense, at law, to the original cause of action.
   d. justify each of the foregoing in terms of a statement of the applicable rule of law and the source of the rule of law, properly bluebooked.11

2. Generate hypotheses that are strong conceptual contenders such that the establishment of one will deny the other

Dr. Y worked with the strongest plausible alternatives and did not compare an emerging hypothesis with a "straw man." Dr. X generated more hypotheses than did Dr. Y, but none of X's alternatives were so framed as to be strong competitors.

An example of a law teacher engaged in teaching this skill (plus a few others) is provided by a transcription in the *Journal of Legal Education* of a class taught by Professor Harry Jones.12 Jones first helped the students describe the way in which Judge Hand held against prime contractor Baird and the way in which Judge Traynor later held for prime contractor Drennan on similar, but possibly distinguishable facts. Jones then insured that the students would develop the strongest conceptual contenders for dealing with the problem by first asking these questions:

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11. J. & E. Cahn (unpublished paper) [hereinafter cited as Cahn]. The Cahns are Co-Deans at Antioch School of Law, Washington, D.C.

1. What is the best argument for plaintiff Baird in California after the *Drennan* case?
2. Does he have a better case than the (winning) plaintiff had in *Drennan*?
3. Does he have a good enough case to win?

Then Jones had students explore the other side of the argument, asking:

1. What is the best argument for defendant Gimble?
2. Would you accept 40 cents on the dollar if you represented subcontractor Gimble and plaintiff Baird made that offer?
3. Your prediction as to the probable outcome is . . . ?
4. Does plaintiff Baird have an even better case factually than did plaintiff in *Drennan*, or just as good?
5. Did Traynor think the two cases reconcilable?

This kind of teaching should result in skill for implementing decisions by making strong arguments as advocates. It should also develop skill in reaching decisions as to the likely outcome of law application. Probably most important, it should encourage students to look for the strongest arguments “both ways” when analyzing a case.

The importance of an effort to create at least two strong sides to an argument is emphasized in what has been discovered about the behavior of law professors in grading student essay answers on law examinations.

In the Criterion Study of the Law School Admissions Council, 80 student essay answers were graded by 17 law school professors. Characteristics of the essays were then correlated with grades. The result was that

Students appeared to get better overall grades on their essays if they did the following things: (a) identified the major issues and limited their answers to them; (b) presented their arguments in an orderly manner (as indicated by their use of transitional phrases); (c) pushed for a particular conclusion strongly while arguing both sides of each issue; (d) used legal jargon; and (e) wrote neatly and did not make composition errors.\(^\text{13}\)

If students are to argue both sides of each major issue on an exam essay, they must develop skill in generating hypotheses that are strong conceptual contenders. The Jones class, and undoubtedly the classes of many other great teachers, deserve study to tease out more information about how this may best be done. “Legal autopsies” or active observation of lawyering in actual or simulated cases might also be productive.

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B. Testing hypotheses

1. A comprehensive and efficient use of negative as well as positive proof

Dr. Y's work-up, according to the Michigan State research summary, exemplified a more comprehensive, efficient use of negative proof. Dr. X became so committed to his early hypotheses of hysteria (a theory Dr. Y also had once entertained) that he did not effectively process negative evidence even when it became available.

Negative as well as positive proof is likely to be used anytime an effort is made to construct an argument "both ways." Some teachers ask students during case recitation to state what contentions were rejected and why. Others ask sequences of questions which call for students to develop both positive and negative proof when comparing cases. In the Jones class, for example, this series of questions appears:

1. Does defendant deny that he made an offer? (answered "no")
2. How was the offer made, in what form, and to whom? (to a large number of prime contractors in something approaching a form letter)
3. Might defendant have argued plausibly that it wasn't even an offer? (yes)
4. What consideration would he probably have stressed the most? (The offer was made to so many persons that, like a newspaper ad, it was merely an invitation to receive offers.)
5. What consideration would be decisive the other way? (The word "offer" appeared and the terms were specific and precise.)

2. Work with hypotheses which are competitors so that evidence positive for one may be negative for another

Dr. Y kept competing hypotheses in mind and sought evidence that would confirm or disconfirm one or the other. This does not appear to be part of law school teaching lore.

C. Generating Facts

1. Sensitivity to facts which suggest hypotheses or which can be applied in testing

The Michigan State report said this apparently requires in combination a sensitivity to fact cues as well as the availability of concepts from which to construct hypotheses. This appeared to be one of the crucial differences between Dr. Y and Dr. X.

The Cahn's have prepared a performance criterion for legal analysis which appears to deal with the above skill:

Given a set of facts, students should be able to state which additional questions need to be answered in order to ascertain
a. supplemental facts which, if found, would negate the client's claim
b. supplemental facts which, if found, would strengthen the client's claim
c. questions to be asked to ascertain those facts—either in terms of facts known to the client or leads to persons who might be able to supply those facts.14

2. Sensitivity that a single fact or source of facts may have more than one point of relevance

Dr. Y used this as part of his strategy. He sought to find evidence that would establish one hypothesis while disconfirming another.

Inconsistent implications can be a real problem for the lawyer in preparing a case. How to deal with the situation is not frequently taught in law school. However, it is the focus of a class on Trial Tactics taught by Professor Robert Keeton, transcribed in Learning and the Law and available on film.15 In that class, Keeton has students examine and cross-examine a witness at the simulated trial of an automobile negligence action. The witness Milford can testify favorably for plaintiff that the defendant, while getting out of his car after the accident said, “I must have been going too fast.” Milford will also testify, if asked, that defendant previously had passed him on the road and was then driving quite fast. This testimony raises the question of how, if defendant was driving more rapidly than the witness, they both arrived at the scene of the accident at about the same time. Perhaps the defendant stopped, although there was no reason to stop on the stretch of road. Or perhaps the witness was not telling the truth about defendant's speed or his own speed. Thus, perhaps he was not giving a fair picture of what the defendant said as he got out of his car.

The plaintiff's lawyer has to decide whether the gain from having an additional source for the inference that defendant was driving too fast is worth the risk that witness Milford will successfully be impeached. During the class, the plaintiff's lawyer decided to ask the speed questions. The defendant's lawyer successfully objected to the questions—thus giving up an opportunity for impeachment. During the critique, these strategy decisions were evaluated. Professor Keeton pointed out that there was no single right answer. But he helped the students specify a number of considerations relevant in deciding what ought to be done. They included an assessment of how impressed a jury would be by the speed testimony and an assessment by counsel of his skill in being able to undertake an impeachment.

D. Devising Strategy

It is not clear whether Dr. Y had an explicit theory that guided his work-up and problem-solving activities. However, it would seem that

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14. Cahn, supra note 11.
15. Class Action, 1 Learning & the Law 22 (Summer 1974). The film is available from the Communications Service of the University of Miami. See note 7 supra.
other practitioners, having learned the various skills used in his approach, could seek consciously to use those skills in their own diagnostic efforts. Medical schools could teach those skills as part of a work-up procedure.

The same is surely true of lawyers and legal educators. Of course, we need to take the preliminary step of conducting research into the significance of devising strategy and the value of the particular strategies used by Dr. Y.

II. Relating the Various Functions

A. Draw from each hypothesis a plan of search and a scheme for organizing findings

This was what happened, according to the Michigan State report, when Dr. Y generated an hypothesis. In law, an hypothesis as to a cause of action should suggest tests for various elements of the action and consideration of possible defenses. And, of course, there are other classification schemes which lead into legal research materials, e.g., parties, procedure, key words and cases.

B. Recognize the reciprocal interaction of facts and applicable general principles

Dr. Y was sensitive to cues, said the report, which facilitated hypothesis generation which, in turn, facilitated sensitivity to findings emerging later.

Dean Mentschikoff's teaching method shows students that what facts are relevant depends on the rules of law which might be brought to bear. Also, it becomes clear that what law is relevant depends on the facts that have emerged or might be developed. It is likely that teaching this sensitivity depends, in large part, on the teacher providing no more than hints and prompts as to fact or law relevance. Thus, the students must make initial judgments as to relevance. These judgments can then be reinforced, if sound, and subjected to critique.

III. Sequencing and Concluding the Problem-Solving Behavior Involved in Reaching a Decision

A. Avoid premature closure, i.e., don't settle too soon on one hypothesis

Dr. X may have prematurely closed on his erroneous hypothesis.

B. Look for more than corroborative evidence

Dr. X tended to look only for corroborative data. Dr. Y was seeking disconfirming as well as confirming data.

C. Flexibility in moving between the generation of hypotheses or additional facts and testing hypotheses

Dr. Y jumped quickly from facts to hypotheses which generated schema for searching and organizing findings.

I am not aware of any law school or lawyer data on the above
matters. They do have a common sense appeal and seem at least vaguely analogous to many class experiences and to introspective review of lawyering experience.

D. Strategy for concluding problem-solving behavior

It is not clear by what strategy Drs. X and Y decided that the work-up should terminate and that they should move on to treatment. Strategy for sequencing and concluding various functions seems much in need of study and teaching.

The usually helpful Dr. Skinner is incomplete on this point. He notes that

[T]he process of deciding may come to an end before the act is executed when some relatively irrevocable step is taken—for example, we may decide about the vacation by making a down payment to hold a reservation. A common conclusion is simply to announce our decision . . . . Deciding is also brought to an end when the techniques begin to be applied toward a single outcome—when we throw away the pamphlets describing the seashore and continue to work to strengthen the behavior of going to the mountains. We are then behaving as if we had been told to go to the mountains for our health and were simply accumulating material which made it possible to carry out the order (perhaps in competition with aversive variables which strengthened staying home or going elsewhere).  

16

Dr. Skinner also points out that conflicting alternatives lead to an oscillation between incomplete forms of response which, by occupying a good deal of an individual’s time, may be strongly aversive. Thus, there is reinforcement in any decision which permits escape from indecision. The deliberated response may have a net advantage not only in permitting escape from indecision, but also in increasing the probability that the response eventually made will achieve maximum reinforcement.

Although Dr. Skinner thus accounts for the fact that we do eventually stop our behavior of deciding and move on to some kind of action, it is difficult to infer from his remarks a theory of strategy on the matter. Of course, his point about the aversive quality of indecision is true for the practice of law. Only so much time can be devoted to a particular case. A judgment must be made as to when deciding shall cease and action be taken. Probably the considerations include resources available for the case, the declining benefits of continued effort, the need for feedback from implementing action, the tolerance for error permitted by the importance of the values and interests at stake, and the probable success of implementation based on what is presently available. All of these considerations, and perhaps others, seem relevant to decisions on when to seek more data, generate new

16. SKINNER, supra note 2, at 244.
hypotheses, conduct more tests, move to another phase of deciding, (e.g., move from describing or relating to prediction, evaluation or proposing action), or decide and move on into implementation.

Skinner points out that “[t]he ‘difficulty’ of a problem is the availability of the response which constitutes the solution.” In the absence of a general theory or practical wisdom for strategy in legal problem-solving, a lawyer must face the burden of developing basic strategy for each case—unless his practice is routine or specialized. Much less energy need be devoted to general problems of strategy if, because of training and/or experience, the lawyer has ready a number of highly relevant responses to the particular kinds of problems that comprise his or her practice. For the specialist, problem-solving can be limited to dealing with the special features of particular cases. Thus, in addition to other motivating factors, there is a continuing psychological pressure for the development of specialization.

An implication for research is that more may be learned about basic legal problem-solving strategy, at least initially, by research directed toward the work of general practitioners than of specialists. On the other hand, research into the education of specialists may reveal useful data as to widely shared strategic assumptions that have gone into creation of the special techniques and procedures of specialists.

In traditional legal education, the development of skill in strategy may be stunted by the directive force of the Socratic method. When the teacher remains in control of class questions, the students do not have to make decisions as between seeking facts, generating hypotheses, or making tests. They do not decide whether the next step should be description, relating, prediction, evaluation, proposals for action, or action. Skills for allocating time and energy between these functions and arranging them in an efficient sequence is thus not likely to develop.

For the teaching of strategy skills, it seems necessary that students should have the opportunity to make strategy decisions which provide the raw material for further discussion—just as did the students' emotional behavior in the Watson class and the student interrogations in the Keeton class. It is believed that Dean Mentschikoff's problem method of teaching provides a maximum opportunity for students to make strategy decisions. And, thus, she has an opportunity to teach strategy skills probably not taught by most law teachers, at least outside of clinical programs.

III. Teaching Strategy Skills for Reaching Lawyer Decisions: A Class Taught by Dean Soia Mentschikoff

It seems likely that of all the skills relevant to problem-solving, the most fundamental is skill in devising strategy for sequencing and
relating such functions as fact and hypothesis generating and testing. When are you ready to act? When should you cycle back for more information, another organization of ideas, another plan, a new hypothesis, more corroborative evidence, or a new way to test an hypothesis? When should you work with and attend to only one idea? Two? On one level or several levels at once?

Sometimes the entire process of deciding and giving advice goes very fast, as it may during a lawyer/client consultation. There may be cycles of lawyer decisions, advice to client, client decisions, lawyer or client implementation which creates new questions, etc. At other times, the lawyer has an opportunity to proceed at a more reflective pace. Almost always, however, the lawyer faces questions as to whether the best thing to do next is to gather more facts, seek a new theory, implement a plan already made, etc.

If strategy skills are to be taught, as Skinner asserts we must do, the teaching situation must be one in which the students have freedom to make the kinds of choices which call for the exercise of problem-solving strategy. However, in most law classes I have observed (and this includes observations of over 700 different teachers), the students did not have this freedom. Sometimes the teacher held the reins of discussion too tightly. Many times the materials being dealt with did not create the need for students to make decisions about different directions of inquiry or action.

In her Commercial Law problem-method classes, Dean Mentschikoff creates a situation in which the students are forced into strategy decisions. When the following class began, the students had only a statement as to the nature of a sales contract between the client and the Marmalox corporation. They knew also that deliveries under that contract had been made to X, but that X had refused to take the eleventh of the 12 shipments due.

The students were challenged to play the role of practicing lawyers. They were to interview Dean Mentschikoff, who played their client. She also shifted into other roles, including helpful critic (a role which, hopefully, was being internalized by the students to help guide future action in similar circumstances).

Before the class began, Dean Mentschikoff explained that she was using the problem method for four reasons:

1. To teach skills of statutory interpretation.
2. To teach counseling skills—including the interview. The students were not provided in advance with all of the relevant facts or rules so that they would learn that which facts are relevant depends on knowledge of the rules of law which might be brought to bear. And if they are looking forward to litigation, she said, they have the added problem of figuring out how to prepare a record for court.
3. The students have to discern which sections of the Uniform Commercial Code are or might be relevant to the facts which have emerged or which might be developed by appropriate questions.

4. The students are alerted to the fact that there are alternative courses of action at every stage.

The last of these four purposes I take to be her invitation for students to consider questions of strategy. In light of that purpose, a preview of the class is here provided:

The opening question by Dean Mentschikoff, playing the client, calls upon the full range of lawyer problem-solving skills, without suggesting any specific direction. After explaining that the buyer has refused to pay for the goods despite the tender of a bill of lading, she simply asks, "What should I (the seller) do in this situation? I want to get paid."

Whether to begin by giving advice or seeking further information is left for the students to decide. As the script below indicates, the students began, quite correctly, by asking questions on what had happened.

After providing some answers to a student's fact questions, Soia interjected as instructor (in response to a question on whether she had any written memos on due dates for shipment), "What difference does that make?" The student was thus challenged to state the hypothesis on which he was proceeding, and to justify it by reference to a section of the UCC whose language would be relevant to possible answers evoked by his question. Upon that section being discovered and cited, Soia provided the fact answer requested.

This pattern was repeated several times during the class. However, there were variations in the pattern which provided opportunities for the exercise of other skills.

For example, she pointed up opportunities for negative tests, i.e., for clearly disproving a hypothesis by the evidence or by statutory language:

SMITH: What led you to believe . . .
MENTSCHIKOFF: Wait a second. Does it make any difference what I personally believed?
SMITH: Well, I imagine it would be . . .
MENTSCHIKOFF: What's the statutory language?

When the students seemed to be having trouble developing a hypothesis, Soia dropped a fairly directive hint by saying,

I used to have a lawyer and that lawyer said that when we had an installment contract, you don't have to worry about these little discrepancies because the buyer has to pay anyhow. Was he wrong?

This sent the students scurrying to the Code. They came up with
section 2-612 which Soia insisted they read very carefully in order to formulate issues for further questions. She likewise insisted on precision in theory when dealing with fact questions. Witness this exchange:

KLEIN: We also need to know a couple of things under cure.
MENTSCHIKOFF: What's relevant?

As counsel for the seller, the students grappled with issues of Statute of Frauds, cure, waiver, breach by seller if shipping instructions were delayed, importance of correct data on the bill of lading, endorsing the bill of lading in blank and stoppage in transit. They still had not reached a clear decision on what was the legal position of the seller and what strategy advice should be given to the seller. Finally, Mr. Steinberg asserted that the buyer had failed to make a payment due, and thus had committed a breach of contract. This acted as a direction-giving hypothesis which Soia then encouraged the students to examine "both ways."

The students foraged through the facts and the UCC to determine whether the tender of documents was adequate (even though the bill of lading was for 36,418 pounds rather than the contract amount of 36,000 pounds); whether conforming goods were put at the buyer's disposition; whether buyer waived by failing to reject; and whether a course of performance permitted this form of tender.

The students initially held onto the hypothesis that there had been a breach because the seller placed conforming goods at the buyer's disposition, and either the variation in the bill did not substantially affect the value of the shipment or that objection had been waived. Soia then reminded the students that there are at least two sides to every problem by giving them an opportunity to hear the buyer's side of the case.

To enhance the dramatic intensity of that presentation, she became the buyer, X, and the students shifted roles to attorney for buyer. It then developed that X's president (Soia) never saw the bill of lading and, thus, contends that she waived nothing. Further, she objected to delivery because X's resale contract was to be paid by a letter of credit issued against a bill of lading to show shipment of 36,000 pounds. The students discussed the organization's duty to provide notice of the bill to its president. They did not reach a firm conclusion on whether the buyer was in breach by refusing to accept the bill of lading. However, they appeared to be somewhat shaken in their resolve after considering the practical implications of a non-conforming bill of lading when payment was to be by a letter of credit.

Soia then switched back to being the seller. Since the students were now better informed, she suggested that they start again at the beginning and cycle through the whole problem afresh, enlightened by
their new grasp on facts and law. And she tried to prompt them to open their imagination to new vistas, saying,

What are your clients going to do? Is there anything that I can do that would be at all helpful in terms of getting my money?

The students then explored seller's remedies in the event of breach, citing various sections of the Code and struggling with whether this was a proper case for recovery of the price. However, no student drew back from the seller/X relationship to survey the entire scene. Soia had to prompt for this, asking whether she should tender to Marmalox because

They are very honest, upright people. And when I tell them that X has refused to pay, are they obligated to pay . . . . Are they still on the contract or are they off the hook?

Time expired before this question could be fully explored. Obviously, more remained to be done before the client's problem was solved. The students would have to deal once again with the question of non-conforming documents. Marmalox's liability would have to be determined. Perhaps the company which supplied wrong-sized casks to the seller had incurred a liability. And what is the potential of a conference with X, X's buyer, and the bank which issued the letter of credit?

Notice the high level of interaction throughout the class between teacher and students. Note also that the students have been actively engaged in the process of seeking to reach strategy decisions. Here, as in Watson's class on behavioral dynamics and Keeton's class on trial tactics, student responses to the problem constitute raw material worthy of discussion and critique. How well did the students organize their search for a solution to the problem? Are they satisfied that they set out on a promising path? If not, why not? How could their inquiry have been improved? For most law school classes these questions could not be answered because the teacher would have been in full charge of the directions for inquiry.

It seems clear that Soia has reflected on strategic possibilities in designing the problem and in teaching the class. Her evaluation of the process might well be a useful supplement to the record.

Here, then, is a transcription of the class. Because "Mentschikoff" is a bit long for use in a script, "SM" has been substituted. Some of the students' names are correct. I could not identify others from the taped transcription, and so a few fictitious names have been employed.

SM: Today we are dealing with the problem of that installment contract which relates to the sale of potash and soda. I will, as usual, sometimes act as the seller or the buyer or your senior partner or any other character required by the situation.

We will start with the proposition that I am the seller and I have
come to consult you. I have walked in your office. Mister Terran, what should I do in this situation? This fellow X says that he is not going to pay the price. He has turned me down, and I do want to get paid.

TERRAN: First, I want to ask you some questions regarding the agreement that you had with X. What was your agreement as you understand it? What have you got to show for that agreement?

SM: What do you mean, what do I have to show you?

TERRAN: Well, do you have any pieces of paper, memorandums, invoices—anything?

SM: It was a year ago in March that we entered into this agreement. And actually I didn’t enter into it with X. I entered into it with the Marmalox Manufacturing Company. We agreed that I would ship these carloads of potash and bichromate of soda each month. They were supposed to tell me where it was going to be shipped and they were going to pay against the documents. I was to have the choice of which plant I was going to ship it from because, as you know, I have several plants.

TERRAN: Do you have any memorandum of that agreement or anything regarding the due dates for the shipments, and so forth?

SM: What difference does that make?

TERRAN: Well, it would be very important because if you made any particular notations, assuming that you don’t have a written contract, then under section 2-201 of the Uniform Commercial Code, it tells us that “Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.”

SM: I have made 10 shipments. This is my eleventh shipment. The Marmalox contract is for 12 shipments. And of course X took and paid for all of the others. This is the first time he has refused to pay.

TERRAN: Other than the shipments themselves you just have the notations of the various and sundry shipments? You have nothing to cover the entire agreement?

SM: Not with X. But I have a written contract with Marmalox.†

TERRAN: Did you get notification when Marmalox sought to assign to X?

SM: Sure. Marmalox said to me, “Now follow the instructions of X,” and I said, “Certainly.”

WALKER: At that time did you ask X or send any notification to D demanding or asking from him an assurance?

SM: Why is this relevant?

† So the Statute of Frauds hypothesis, i.e., that it may prove a barrier, is substantially shattered.
WALKER: Well, you had a right at that time to get an assurance from X, and this would help your case if you did.
SM: Why? Is there any section in the Code which says that?
WALKER: Yes. Section 2-210 gives the seller a right to demand from the assignee assurances as soon as he learns about the assignment.19
SM: What portion of that section? It seems to have a lot of subsections.
WALKER: Subsection 2-210(5).
SM: Well, I just said to X, "Marmalox said to follow your instructions. So send me your instructions."
WALKER: At that time did X say he was going to pay or did he indicate then that he would pay?
SM: He has paid for 10 months.20
WALKER: Well, this leads me to my second question. I understand that each of the previous shipments was for 36,000 pounds. Is it true that the buyer is now objecting because the eleventh shipment was overweight by 418 pounds?
SM: That's right. 418 pounds.
WALKER: Were any of the previous shipments overweight, or were they all exactly 36,000 pounds?
SM: Well, they were all 36,000 pounds, as near as I can remember.
WALKER: Can you prove that? I mean, was there a weight on each of these shipments?
SM: Sure, we have all the copies of the invoices. They were always 36,000 pounds. The thing that happened this time was that some of the casks were a little underweight. We got the casks from this company Y and they didn't get them quite right as to size. So when we filled them up, they had a little underweight. So what we ended up with was overweight because we didn't want to send off just a quarter of a cask, which is what it amounted to in order to get it exactly up to weight.21


(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609).

20. It appears that there may have been a contract between Marmalox and X on which seller acquired rights. However, that is not finally established by these questions.

21. The reader may find it useful at this point to consider, as did some of the students, Uniform Commercial Code § 2-612:

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if
“But,” I said to X, “you can have it with a price allowance. Or we will take out the 418 pounds because that is no problem—except that the goods are on board the railroad cars and on their way, and it’s pretty hard to stop them mid-stream. But once they arrive,” I said, “we’ll take out the 418 pounds.” He said “no” to that. And I said to him, “Well, if you don’t want to do that just pay for the 36,000 pounds and forget about the 418.”

But you know, I think he has gone to see his lawyer because he sent me a notification in writing that the proposed delivery was “not in accordance with the contract.” Legal language. “In that the carload contained 36,418 pounds,” and for that reason he refused to accept delivery. Now that isn’t the way he normally talks. So I think he has been to see his lawyer and what I want to know is whether he has a right to refuse to pay the bill. I have made out the bill of lading to my own order but I have endorsed it in blank. And I have tendered it to him. I have done all of the things that I have always done under this agreement. And it seems to me that he has to pay. Because the contract with Marmalox, as you could see if I were to show it to you, says “cash against documents.”

WALKER: Well, there seems to be a real problem here. All of the previous contracts and deliveries were for 36,000 pounds.

SM: But that’s all one contract.

WALKER: Right, but all of the deliveries under this contract were in accordance with the contract. This delivery appears to be not in accordance with the contract.

KLEIN: Did you always send 36,000 pounds, or did you send approximately 36,000 pounds? I mean, how did you usually work it in the industry that you are in?

SM: Well, you know, it was about 36,000 pounds. It might be a few pounds more or less but not very much. And, I explained to you why it was this time 418 pounds overweight. However, it doesn’t make any difference, I don’t think, to X.

KLEIN: Did he ever object before when a variation from 36,000 pounds was apparent to him?

SM: No, we have had no trouble at all. Usually he has told me at the beginning of the month when he wants the shipment and to whom he wants it shipped. I follow his instructions. This time I had real trouble getting directions from him. He was late.

the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Note that there are two kinds of non-conformity: non-conformity in the goods or in the required documents.
HERSKOWITZ: When he sent the shipping instructions to you, did he indicate anything as to the weight? In other words, did he indicate that the weight indicated on the invoice was acceptable or not acceptable at that time?
SM: He never said a word. That's why I think he must have seen a lawyer. Of course, what has happened is that the price for potash and soda has dropped quite a bit.
JONES: Do you happen to know the use for which D purchased these goods? Do you know whether he subcontracted to someone else for the exact amount of 36,000 pounds?
SM: Oh, he must have. Well, I don't know whether it would be for the exact amount, but, of course, he must have subcontracted because he is a broker.
JONES: Did he have a large warehouse where he stored these goods? Does it matter to him whether he bought 36,000 or 36,418 pounds?
SM: No, it is the same number of casks.
JONES: The same number—so it doesn't matter.
SM: But I don't know whether he has any storage facilities or not. I don't think he does. You see, he has his office in his hat. He buys from me, sells to somebody else. I get shipping instructions to different people in different cities. This time he told me to ship to Miami.
JONES: So, he's just a broker. He passes the goods on to someone else he's contracted with?
SM: I used to have a lawyer and that lawyer said that when we had an installment contract, you don't have to worry about these little discrepancies because the buyer has to pay anyhow. Was he wrong?
KLEIN: Well, it is not as clear cut as that.
SM: Is there any section in the Code that is relevant?
KLEIN: The most relevant would be 2-612 if you have an installment contract.
SM: That's what I've got isn't it?
KLEIN: Right.
SM: Well, what does 2-612 have to do with this?
KLEIN: Section 2-612 talks about installment contracts and . . . .
SM: What does it say? Remember, you can't paraphrase a statute.
KLEIN: Section 2-612 is the one we are really concerned with. What we have to do is to try to establish that this installment did not so far substantially deviate that . . . .
SM: Is that what it says? "Substantially deviated?"
KLEIN: No, it says, "if the non-conformity substantially impairs the value of that installment . . . ."
SM: Is that all the buyer need show to establish breach?
KLEIN: And that it cannot be cured.
SM: What is this cure stuff?
KLEIN: That is section 2-508.22

(1) Where any tender or delivery by the seller is rejected because non-conforming
SM: And what does that section do? You know, I offered to take back the 418 pounds. I offered not to charge him for the 418 pounds. Did I cure?

KLEIN: We also need to know a couple of things under cure.

SM: What's relevant?

SMITH: The seller's belief as to whether the goods would be acceptable. When you loaded those goods you had a good idea that you were loading, like you say, you knew the casks were different in this case, so you had a pretty good idea that you were loading more than 36,000 pounds.

SM: I could have done it either way.

SMITH: You believed that they would be acceptable to him?

SM: Sure. Does it make any difference what I personally believed?

SMITH: Well, what led you to believe . . . .

SM: No, wait a second. Does it make any difference what I personally believed?

SMITH: Well, I imagine it would be . . . .

SM: What's the statutory language?

SMITH: "Reasonable grounds."

SM: Well, I might be a nitwit to believe it, so it wouldn't make any difference would it? What's relevant?

HERSKOWITZ: On what basis did you believe that he would accept the goods?

SM: Well, I didn't think he would care very much.

HERSKOWITZ: Why not?

SM: It was only 418 pounds out of 36,000. Actually, when I said don't pay for the 418 pounds I thought X would take it. You know, I told you, the market has gone down. I didn't think there'd be a problem.

MORRIS: I think your reasonable grounds for belief would in part be predicated on whether the time for performance had expired. I'd like to know whether the contract mentioned that you were to deliver monthly, or did it specify . . . .

SM: Monthly. But, you know, as I told you, I actually put the casks on the railroad car on the 27th, and the end of the month is the 28th because it's February. He didn't give me any instructions until the 28th. I got my bill of lading dated the 28th. I got it dated the 28th because I thought that with a dropping market that might be important. Was I right about that? Would it have been material if it had been dated on March 1?

TERRAN: It certainly would ordinarily. But you could be excused for delay if it resulted from the lack of proper shipping instructions.

and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.
SM: What? What says that?
TERRAN: One of the sections tells us.
SM: Which one? Pick a section from one to a hundred.
TERRAN: Section 2-311.23
SM: What does it say?
TERRAN: It says that if shipping instructions are not seasonably forthcoming the seller has several options. He can be excused for delay.
SM: I don't see language about "When shipping instructions are not seasonably forthcoming."
TERRAN: In subsection (3).
SM: Where? It doesn't really say that, does it?
JONES: You have to read 2-319(3) and then go back to 311.24
SM: What's 2-319(3) got to do with this?
JONES: Section 2-319(3) says that when the contract calls for F.O.B. place of shipment the buyer must give the needed shipping instructions seasonably and if he fails to give the needed instructions the seller may treat the failure as a failure of cooperation under section 2-311. Then we refer back to 2-311 to see what the seller may do in this case.
SM: Probably it wouldn't have made any difference then if I hadn't dated the bill of lading on the 28th? Would it still have been a conforming tender?
HERSKOWITZ: First, on these facts, didn't you offer to tender earlier in the month?
SM: I couldn't. What did I need to tender?
JONES: Instructions.
SM: But what did I have to do? What section tells you what I had to do?
JONES: Shipping documents, according to your contract.
SM: Well, what did I need?
MILLER: Sections 2-503 and 2-504.25

   (3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies
   (a) is excused for any resulting delay in his own performance; and
   (b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

   (3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

   (5) Where the contract requires the seller to deliver documents
A THEORY FOR LAWYERING

SM: So what did I need under 2-503?
MILLER: Under 2-503 in order to be able to tender you had to deliver the documents.
SM: What kind of documents? What subsection of 2-503 are you reaching for?
MILLER: Section 2-503(a). Where the contract requires the seller to deliver documents he must tender all such documents in correct form.
SM: What's correct form here?
MILLER: Well, we'll have to go back to see what is the definition of shipping documents. Shipping documents, I believe, are defined in section 2-310(c).
SM: As what? I gave him an order bill of lading which I had endorsed in blank. Was it in correct form? I don't have a copy now—but I can get it. It's in my office. You know, he refused it. What it says is to the order to seller—it's endorsed in blank.
ANDERSON: When you shipped previously to this particular buyer, did you use an order bill of lading endorsed in blank?
SM: Why sure. You see, if I make it out to his order and then he refuses to pay, to whom could the railroad deliver the goods?
ANDERSON: The railroad can't deliver the goods.
SM: What do you mean, "It can't?" Would they just ride around forever? Do you think that section 2-705, Mr. Jarvis, would relate to this? In other words, if I had made out the bill of lading to the order of X, and he had refused, just as he did in this case, what would have happened? Could I get the goods? Could I stop delivery? The bill is physically in my possession. Is that enough? Does section 2-705 really tell me, or would I have to go over to article 7 to get the whole law?
TERRAN: The railroad has the right to deliver to anyone to whom the bill of lading is filled out for.
SM: Well, suppose I tell the railroad not to do that.
TERRAN: Then they have to comply with what you say.
SM: What says that?
JARVIS: Section 2-705.
KLEIN: Section 2-705 gives it to the seller.
SM: Oh, no, it doesn't necessarily here.
STEINBERG: The goods come under the power of the seller where the buyer fails to make a payment due.
SM: Did he fail to make a payment due?

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(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and
(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.
STEINBERG: He sure did.
SM: So there was a breach. We are all agreed on that? Well, that's really what I wanted to know. Mr. Steinberg, under what section of the Code do you say that the buyer failed to make a payment due? Now, it's true in fact that the buyer didn't make a payment, but that's not all the Code means by saying that he failed to make a payment "due." How was he in breach?
STEINBERG: I would say that he is in breach because of 2-612(2). Under that section the buyer may reject any installment which is not conforming.
SM: But he's not rejecting. He's just refusing to pay.
STEINBERG: Which amounts to a rejection.
SM: Is there no section of the Code which deals with failure to pay?
JARVIS: Section 2-507 creates a duty to pay. The tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them.
SM: All right. So if I've made an adequate tender, then what?
JARVIS: I believe you've made an adequate tender.
SM: Just by tendering the bill of lading, even though the bill said it represented a shipment of 36,418 pounds?
JARVIS: This would depend, I believe. Section 2-503(1) says that tender of delivery requires the seller to put conforming goods at the buyer's disposition.
SM: Well, wasn't this conforming? You see, what X is saying is that it is not conforming. That's why he didn't pay.
JARVIS: Section 1-201(3) defines "agreement" as the bargain of the prior dealings with him and what are the dealings in your trade.
SM: Why would that be relevant?
JARVIS: Section 1-201(3), defines "agreement" as the bargain of the parties as found in their language, or by implication from other circumstances, including course of dealing or usage of trade or course of performance.
SM: What's this course of performance?

27. UNIFORM COMMERCIAL CODE § 2-507.
(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.
(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

28. UNIFORM COMMERCIAL CODE § 2-503.
(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular
   (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but
   (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.
JARVIS: Course of performance, I believe, is defined in 1-205.
SM: Oh, I kind of doubt that.
JARVIS: Section 2-208, sorry. In a situation like we have here, an installment contract, when there are repeated occasions for performance, we're interested in what happened in these other performances. Were those shipments underweight or overweight? And what was X's reaction to that? You implied to me that previously X was more willing to deal and more willing to take shipments that were a few pounds overweight or underweight.
SM: Yes, he was. No doubt about that. What difference does that make? If he did do that, is my case clear now?
WALKER: Well, it's clearer. For this reason: This shipment which you made did not conform to the 36,000 pounds and is not in accordance with terms of the agreement. However, if these past shipments were over or under 36,000 pounds and he made no objection, then this may act as a waiver of the express part of the agreement and it will act as an agreement to accept this kind of shipment.
SM: I thought that your colleague here, your partner, had just told me that if it was a course of performance and it varied, that you could use that to determine the meaning of the agreement. And not as a waiver.
WALKER: Well, you can. Under section 2-208 you use this course of performance to determine the meaning of the agreement.
SM: But if you don't get that far then you say that I can, under 2-208(3), use it to establish a waiver?
WALKER: No. You have to use this course of performance to determine the agreement, and, once you do this, if you have such a thing as a course of performance which affects the agreement, then you can use this to waive the express part of the agreement, namely, the 36,000 pounds, in particularity.
SM: So that I can get at it both ways. Now, notice, 2-208 talks about the course of performance as being relevant to show a waiver or modification of any term inconsistent with such course of performance. This is really not a term that's inconsistent, although it might be, arguably, but you still have 2-209, which gives you the possibility of arguing waiver in any event by virtue of the invoice showing the excess shipment.

Now, suppose I were to tell you that I'm the buyer and I want to see my lawyer. You can be my lawyer, for a minute, while I tell you

   (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
   (3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.
what you told me. I am wondering about it now because I hear that the seller has been to see his lawyer.

When I went to see my lawyer I told him about this situation, and I said to him, now, the truth of the matter is—I'm the president of the outfit—I never saw that bill. The first time I knew that it was 36,418 pounds was when I came back to the office that afternoon after having talked to you about whether or not I had to accept this shipment and you told me I did. And I got back there and I looked at it and saw it was 36,418 pounds. So then I decided I wasn't going to accept it. And I didn't see any of this before that. Is that relevant?

TERRAN: Under section 1-201 you may have knowledge when you should have knowledge of it. You may have actual knowledge or may have received notice of it, or from all the facts and circumstances at the time in question you have reason to know of it. And if it was received at your business that would be notice under subsection 26, and that indicates that you had notice.\(^3\)

SM: Why would it be notice under 27? I would argue on behalf of the buyer that it sure as heck wasn't notice under 27. It might be notice under 25 but it isn't notice to me because I never knew anything about it.

TERRAN: But if it was received by your organization, under 27 it says notice, knowledge or a notice or notification received by your organization is effective for the particular transaction from the time it was brought to the attention of the individual conducting the transaction.

SM: It was right at the last minute when I saw the bill of lading. It was not when they gave me the invoice.

JARVIS: Well, I think that if your agent got the notice it would apply.

SM: That's not what it says. Twenty-seven says that “Notice received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting the transaction.”

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31. \textit{Uniform Commercial Code} § 1-201.

(25) A person has “notice” of a fact when
   (a) he has actual knowledge of it; or
   (b) he has received a notice or notification of it; or
   (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

(26) A person “notifies” or “gives” a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person “receives” a notice or notification when
   (a) it comes to his attention; or
   (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence.
TERRAN: But it goes on to say, "In any event from the time that it would have been brought to his attention if the organization had exercised due diligence."
SM: Well, then, what do you want my organization to do?
TERRAN: Exercise due diligence.
SM: What is due diligence? This fellow says that he sent the invoice over the 27th. I've been out of the office ever since. First time I got back to the office I saw the bill of lading. That was the first of March.
TERRAN: Under the Code it's the obligation of your organization to communicate such information to you.
SM: Even if I'm out of the office?
TERRAN: Even if you are out of the office.
SM: Do you all believe that?
KLEIN: Well, you had to send shipping instructions and you sent shipping instructions which included the extra 418 pounds.
SM: Well, I knew who they were to be shipped to because we had a resale contract. The trouble is that I've got my resale contract under a letter of credit because I knew that the market was going to drop. So I asked for the letter of credit, and I have it. I can only get paid under a letter of credit if it's 36,000 pounds. They're going to turn it down. And I'm not going to take it. The market has dropped.
ADAMS: The invoice and bill of lading were received by the organization on the 27th. Yet the shipping instructions were sent from the organization on the 28th.
SM: The fact that the bill was received in the office doesn't mean that there was notice to me does it?
STEINBERG: Who received the notice?
SM: They gave it to the clerk.
STEINBERG: Is it ordinarily a part of that particular clerk's job to get such notice?
SM: Sure, but he has nothing to do with payment. He doesn't know what the terms are.
STEINBERG: Subsection 27 of 1-201 defines due diligence, and it does not require that an individual acting for the organization communicate information unless such communication is part of his regular duty or unless he has reason to know of the transaction and that the transaction would be materially affected by the information. This clerk was not responsible for making the payment. But if it was part of his job to receive information and know what's going on, then it would also have been part of his job to communicate.
SM: To receive and know that what was going on?
STEINBERG: The fact that the 418 pounds was included.
SM: But he doesn't know what our contract is. All he knows is that when he gets notification from the seller for this shipment he is supposed to tell the seller that this shipment is to go to my resale customer.
STEINBERG: He does have the right to do that?
SM: Yes, to give shipping instructions. He's just a shipping clerk. He doesn't know what the terms of the contract are. Does that make any difference?
STEINBERG: I wouldn't say so under subsection 27.
SM: Even if you were my lawyer, you wouldn't say that?
STEINBERG: I couldn't at this time, no.
SM: If you were the lawyer for the seller, could you say the opposite?
STEINBERG: If I were the lawyer for the seller I'd stress this point. If I were your lawyer I'd try to find something else to help you.
SM: You mean this wouldn't help me?
STEINBERG: It wouldn't appear to me that it would be of any help to you. I think it might hurt you at this time. But there are other questions that are important too. This 418 pounds. Would this make a substantial difference to you—forgetting for the moment the price in receiving 418 pounds more than you contract for?
SM: You know, I've just finished telling you that I have a letter of credit from my buyer and the letter provides that I'll get paid against a bill of lading showing shipment of 36,000 pounds and the bank isn't about to pay me if the bill shows 36,418.
STEINBERG: Even if the price was only for 36,000 pounds?
SM: Sure, the bank can't change the terms of the contract. You know that.
STEINBERG: And the person with whom you contracted for the assignment from the original wouldn't cure the situation?
SM: How can he cure it?
KLEIN: He's willing to take that 418 pounds back.
SM: That doesn't change the bill of lading does it? Under a letter of credit, or are we off in an area where we shouldn't be, would it make any difference whether in fact there were 36,000 pounds if the bill of lading said 36,418? When is there a right to payment against documents? And when is that excused? There is a section in article 2 that deals with that. Anybody remember it?
ANDERSON: Section 2-605(2) provides for payment against documents. It provides that you are precluded from recovery of the payment if the defects are apparent on the face of the documents. And here you have a defect which is apparent on the face of the document. So no one would pay against it.
SM: So, no bank and no person would really do it would they? And actually, under letter of credit practice, if the bill of lading showed anything other than 36,000 pounds and the letter of credit required 36,000 pounds, it wouldn't make any difference what the sales contract said or whether or not there had been a change in the terms or even if there had been a modification. You see, the bank would have the authority to pay only against a bill of lading showing a shipment of 36,000. So if I say to you I have a letter of credit, the market is falling, and I do not trust my sub-buyer, that's why I don't want to take this unless I can simultaneously deliver the document to the bank and get
payment. The document has to comply with the terms of credit. Now, that may put me in breach, possibly, of my own sales contract with my sub-buyer, but it doesn't change whether or not I'm going to get paid. And that, of course, might bear on the issue that you people have raised under 2-612 of whether or not there was a substantial impairment of the value of this tender even though it was only 418 pounds. The bank might even refuse to pay if we have stated March 1st if it called for February shipment. Actually, it's dated February 28th.

But, let's get back, you know, you can be counsel for seller once more, and let me ask you this question. Assume, now, that the buyer is in breach. You've arrived at that conclusion, and you feel confident enough about it that you say to me, "Don't worry, Mr. Seller, if we get into a law suit we'll take care of you. You're sure to win it." Of course, if you say that, you're out of your minds—but that's another question.

What are your clients going to do? Is there anything that I can do that would be at all helpful in terms of getting my money?

WALKER: I'll have to ask you a couple of questions. I think we have arrived at the conclusion that X is not a merchant, he is a broker. Is that correct?

SM: Oh, isn't he a merchant under the Code? What's the definition of a merchant under the Code?

WALKER: Ah ha.

SM: Where do we find that?

TERRAN: Section 2-104.

SM: Section 2-104(1). What does it say?

TERRAN: A merchant means a person who deals in goods of the kind . . . .

SM: Isn't that Mr. X?

WALKER: Yes. O.K.

SM: So, he's a merchant.

WALKER: Now we know he's a merchant. Now, the next question is do you have an agent at the location where X carries on his business?

SM: X is right here. You see, we live in the same city. That's why my clerk kept running over there with these pieces of paper. Otherwise we might have a problem.

WALKER: The reason I asked this is that under 2-603, if he is a merchant, and if you don't have an agent where the market is, then he is under an obligation after rejection to carry out your instructions with respect to the goods.

SM: But he can't do that. How can he get the goods? I've got the bill.

WALKER: The goods are in transit at the moment?

SM: They're chugging along. The bill of lading is in my hot little hands. It's endorsed in blank. Clever of me not to endorse it specifically to X. So, what can I do?

TERRAN: You have several options. In addition to the one we
mentioned before under 2-705, the right to stop in transit, you also have the right under 2-703 to withhold delivery of the goods. You can stop delivery as it says, and proceed under 2-704 to resell the goods and recover the damages under section 2-706, or you can recover damages for non-acceptance or, in a proper case, even the price. Or you can cancel the contract.

SM: Is this a proper case for the price?
TERRAN: I think it is.
SM: What does 2-709 say?
TERRAN: The reason I think it is a proper case for the price is because, if I remember right the facts of the contract, he failed to reject the contract. X had notification by looking at the documents that 36,418 pounds were being delivered and he failed to reject within a reasonable time under 2-602(1).

SM: He failed to pay.
TERRAN: He failed even to reject when he saw the 36,418 and it didn't conform to the 36,000 he ordered. If he wanted to reject, and reject for that reason, he should have done so then.

SM: What difference does that make?
TERRAN: Well, because if he fails to reject within a reasonable time, this results in an acceptance under section 2-606(1)(b).

SM: What do you mean? He says to me, “I'm not going to take the bill of lading. I'm not going to pay against it.” And that's acceptance?
TERRAN: No.
SM: But that's what he said, isn't it?
TERRAN: But he had the documents in his possession for some 24 hours.
SM: He didn't have the bill of lading in his possession for two minutes.
TERRAN: But he was aware, according to the facts . . . .
SM: I tendered the bill of lading.
TERRAN: That's all you have to do, according to 2-602.
SM: But then he said, “I won't take it and I won't pay it.”
TERRAN: But he should have rejected at that time.
SM: But what is rejection? What else could he say except “I won't take it”?
JARVIS: Well, then, under 2-708 you can reroute the goods and endorse the bill of lading to the new seller and sue X for the difference between the sales price and the market price.
SM: Yes. But I want to get back to the action for the price. Is there any possibility of his getting the price if we say that X said, “I'm not

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price . . .
(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
going to take the bill of lading,” which is really saying “I’m not going
to take the goods,” isn’t it?
TERRAN: Yes, because if he does reject, if this rejection will result,
if he should have rejected but he didn’t . . . .
SM: But he did reject. How can you doubt it? I say to him, “This is
my tender. Here is the bill of lading.” And he says, “Go away, I’m not
going to take it and I’m not going to pay; for it is defective delivery.”
TERRAN: Well, you may still wind up with the price in any event
under section 2-708.
SM: No, 2-709 would be the only way I could get to the price.
STEINBERG: Under 2-709(1)(b) you can get the price of goods
identified to the contract if the seller is unable after a reasonable effort
to resell them at a reasonable price.
SM: That’s correct. But I have to make the effort.
STEINBERG: That’s correct.
SM: But I can resell.
STEINBERG: It would appear that under 2-706, with a dropping
market, you might be able to resell at a lower price and get damages
for the difference.
SM: Let me ask something else. Marmalox is my buyer. Should I
tender to them? They are very honest, upright people. And when I tell
them that X has refused to pay, are they obligated to pay—are they
still on the contract or are they off the hook?
JARVIS: They are not responsible.
SM: Do you mean that they can, on their own action, get off the
hook of a contract with me?
JARVIS: Under contract law, as assignor, they would be . . . .
SM: Is there anything in the Code on assignment?
JARVIS: Section 2-210.
TERRAN: It would depend on the circumstances.
SM: What circumstances? I told you the circumstances. They called
me up one day and said, “Follow the instructions of X and he’ll pay
you.” And I said, “Fine, I’ll follow the instructions of X.” And I did
follow the instructions of X and now he won’t pay me.
JARVIS: Under 2-210(1) it says no delegation of performance relieves
the party delegating of any duty to perform or any liability for breach.
SM: So, would you recommend that I proceed against Marmalox?
Well, I see that our time is up. Tomorrow we will finish our
discussion of this problem.

IV. ADDENDUM

Law professors, bar examiners and practicing attorneys already
know a great deal about (or have promising hypotheses on) the skills
which bring efficiency to lawyer problem-solving behavior and which,
herefore, underlie lawyer competence. We should build on that knowl-
dge (and those hypotheses) in seeking additional information and
designing research. Thus, I suggest that field research into actual and simulated law practice, making use of experienced lawyers or law students, go hand in hand with studies of

1. the simulations of law practice one finds in classrooms and clinics,
2. the tests for skills designed by law professors and bar examiners and evaluated student responses to those tests, and
3. the skills intended to be evaluated by the law school admissions test.

Whether coordinated or not, it is clear that in the next few years a great deal of research is going to be conducted on lawyer competencies. If the research is at least monitored on a national basis, with ready access by all inquirers into hypotheses being tested and work underway, the result will be a more practically useful body of information.

For example, formulation of the multi-state bar examination should surely take place in light of

1. an up-to-date understanding of what is being taught in law school and what questions are being framed on law school tests, and
2. the most complete information available on the knowledge and skills which tend to insure that decisions by practitioners have practical justification.

Similarly, law school evaluation and design of teaching programs and curricula should be undertaken in light of theories on lawyer skills and information about the bar exams. The law school admission test should perhaps be redesigned so as to predict, perhaps on two or more different scales, first-year law grades and career performance in the use of certain crucial skills.

The general point is that those who design research into lawyer competencies should make maximum use of the insights, systematic knowledge, and research already finished or underway by those whose professional careers are based at least in part upon seeking and/or having knowledge of such competencies. In large part, this article has been an attempt to set forth in an organized way, as a basis for research designs, some of the things about lawyer competencies that are already widely understood. And in part, of course, it has been an attempt to reach out for some new ideas.

I hope it is understood that to encourage research on lawyering does not imply a conviction that the primary objective of legal education is to impart skills. It may ultimately be determined that the most useful theory of lawyering centers on understanding the adjudicative, legislative, and professional processes in which lawyers
participate—with skills training a fortunate by-product of working with problems in the context of those processes. At the moment, however, I am inclined to believe that a law school offers a better teaching program if at least some of its faculty members follow Karl Llewellyn's assertion that craft skills should be taught—including the art of making reasonably sound decisions on policy. And I strongly suspect, from the materials discussed at length above, that whether the challenge be to analyze a process or to create a product, the strategy aspects of problem-solving behavior are more likely to emerge from teaching in which

the problem is presented as one for solution, as a problem not with its answer in hand but as one to which possible answers are to be worked out in class.33