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**ADVANCING PUBLIC INTEREST PRACTITIONER RESEARCH  
SKILLS IN LEGAL EDUCATION**

*Randy Diamond<sup>1</sup>*

“Creative handling of *novelty*, therefore, is of the essence of professional practice.”<sup>2</sup>

**I. INTRODUCTION**

The computer age has rekindled concerns about attorneys’ research practices and proficiencies.<sup>3</sup> Lawyers who refuse to

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<sup>1</sup> Director of Law Library and Technology Resources, Associate Legal Research Professor of Law Designate, University of Missouri-Columbia. B.A. 1981, Bowdoin College; J.D. 1987, Fordham University; M.L.S. 1992, Kent State University. I wish to thank Resa Kerns, my colleague and co-instructor in Advanced Legal Research. Her ideas and teaching of this subject inspired many of the innovations described in Part V. I also thank Martha Dragich Pearson for her support and encouragement. This article is for T, K, & T.

<sup>2</sup> D. Don Welch, “*What’s Going On?*” *In the Law School Curriculum*, 41 HOUS. L. REV. 1607, 1611 (2005) (quoting Seward Hiltner, *The Essentials of Professional Education*, 25 J. HIGHER EDUC. 245, 246 (1954)). Welch pegs ‘novelty’ as the sine qua non of Hiltner’s “professional judgment”: “[N]o two situations confronting a professional are ever precisely the same. The professional is called on not merely to be well versed in her field, but to exercise appropriate judgment in drawing on that knowledge in one unique set of circumstances after another.” *Id.* Practitioner research skills are essential for exercising professional judgment in response to novel legal situations.

<sup>3</sup> New lawyers’ research and analytical skills are often called into doubt. Law professors note that legal analysis suffers from technology encouraging lawyers to look for isolated word combinations, “law bytes,” blurring the complexities of hard cases. Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85, 132-33 (1998) (bemoaning the “loss of appreciation for the social consequences of legal debate” when “the ability to locate ‘law-bytes’ and to chain-cite legal authority” becomes the objective of legal educators and lawyers). Cases in which judges critique lawyers’ reliance on overruled authority and failure to find applicable authority memorialize basic research deficiencies. See Mary Whisner, *When Judges Scold Lawyers*, 96 LAW LIBR. J. 557 (2004) (providing research strategies for finding cases in which

venture onto the information superhighway are warned that they may fail to meet minimum legal research standards,<sup>4</sup> but at the other extreme, so may Internet speeders who bypass print sources entirely. For ethically challenged lawyers, avoiding malpractice may be the prime incentive for scrounging up enough rudimentary research skills to get by. For most experienced and new lawyers, professional pride and genuine client concern motivate the development of sound research skills. With the rise of law practice globalization and new cutting edge practice areas, the scope and complexity of potential client problems grows rapidly, often beyond the most able counsel's expertise. Interdisciplinary research and expert consultation are hallmarks of twenty-first century practice.<sup>5</sup>

Successful law practice research requires skills beyond what students ordinarily obtain in the traditional law school curriculum. The research methods and sources attorneys use to solve client problems often differ from the research they conducted as law

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judges "scold" lawyers for incompetent research). Law librarians have long noted the effect poor research habits have had throughout the legal community. See Ann Hemmens, *Advanced Legal Research Courses: A Survey of ABA-Accredited Law Schools*, 94 LAW LIBR. J. 209, 212 (2002) (citing extensive literature on declining legal research skills). See *infra* Part III. A. on clinicians' legal research concerns.

<sup>4</sup> The proliferation of online resources (fee-based and Internet) has raised the bar on legal research standards. Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607 (2000).

<sup>5</sup> See, e.g., PETER W. ENGLISH and BRUCE D. SALES, *MORE THAN THE LAW: BEHAVIORAL AND SOCIAL FACTS IN LEGAL DECISION MAKING* (2005) ("Complex legal issues often involve contested facts that require expert knowledge. In such cases, legal decision makers look to experts from fields as diverse as the behavioral, social, biomedical, or physical sciences to help settle disputes."). *Id.* at book jacket, front flap; J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. MIAMI L. REV. 341, 381 (2005) ("Developments in scientific and technological knowledge will undoubtedly result in a continuing assault on precedents based on information rendered outdated by these advancements."). Attorneys and other legal decisionmakers increasingly treat non-legal information as persuasive authority. See *infra* Part III. D.

students.<sup>6</sup> Lawyers must be technologically sophisticated in their research, but even more sophisticated in applying research. Advanced legal research courses taught by law librarians are popular among students seeking to improve and sharpen their research skills for law practice.<sup>7</sup> Law librarians, many of whom have practiced law, provide expertise in law practice research expectations and trends, experience in using practitioner print sources, and cutting edge online research techniques. When these courses are taught well, students have a leg up on peers who are not similarly prepared.

The time is ripe to explore other advanced research instruction opportunities.<sup>8</sup> This article encourages clinical and law librarian

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<sup>6</sup> New attorneys often struggle with the transition from having mostly pre-packaged, sorted facts in law school to identifying the relevant facts on their own and translating real-life circumstances into a coherent research and problem solving plan. Apart from the shift in emphasis to factual research and investigation, when practitioners need to conduct substantive legal research, the sources they consult are often unfamiliar to law students—looseleaf services, practitioner manuals, continuing legal education materials, verdict reporters, etc. In addition to practitioner legal research techniques and to interdisciplinary research, attorneys must know how to conduct audience research. See Thomas Michael McDonnell, *Playing Beyond the Rules, A Realist and Rhetoric-Based Approach to Researching the Law and Solving Client Problems*, 67 UMKC L. REV. 285 (1998) (describing audience research's essential function in modern law practice). Audience research focuses on the interests and tendencies of all potential decision-makers in a dispute. It is grounded on what individuals do, not necessarily what they say. Predicting what individuals will do in a given situation is an inexact science, but research (legal, interdisciplinary and audience) makes this crucial law practice activity more consonant with judgment than haphazard speculation. See *infra* Part III.C.

<sup>7</sup> See discussion *infra* Part V.

<sup>8</sup> See Matthew C. Cordon, *Beyond Mere Competency: Advanced Legal Research in a Practice-Oriented Curriculum*, 55 BAYLOR L. REV. 1, 46 (2003) ("Suggestions for Research Instruction in Other Types of Curricula.")

Not every student has the opportunity or inclination to take an advanced legal research course. For all its strengths, advanced legal research, when taught as a stand-alone course, lacks context for students who have not clerked. In considering other courses in the curriculum that would benefit from an advanced research instruction component, clinical courses stand out because of the real life context in which they are taught. Sharing legal research pedagogy with clinicians mirrors trends among law library legal research instructors seeking to reach out to other legal education constituencies. See American Association of

collaborations to further prepare law students to conduct effective legal research in law practice. Clinical courses, because they closely resemble law practice, are ideal for students to practice many of the real-life research skills they will need after law school. As with any lawyering skill, students only become good at research by doing it and learning from their mistakes.<sup>9</sup> The clinical experience provides context for answering the why, when and how questions of practitioner research. As students gain research skill and confidence, they become better problem solvers. In turn, the community the clinic serves benefits directly from having better prepared students representing them, and indirectly, but perhaps more importantly, from having better access to legal information for community participation in problem solving.<sup>10</sup>

Clinical legal education covers many lawyering skills; as such, no one skill can be taught in the classroom component of a clinical course to the extent it might be covered elsewhere in the curriculum. Drawing from components in advanced legal research courses and other similar research instruction programs that are most applicable to the clinical experience and adapting the content and instruction method to meet the clinic's specific teaching needs makes the most sense. The aim is to quickly bring the students' research competencies in line with the clinic's requirements quickly to allow sufficient time for teaching and practicing other clinical skills.<sup>11</sup>

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Law Libraries Annual Meeting program "Publishing Outside the Law Library Box: Opportunities Beyond Law Library Publications" (2005) (on file with author).

<sup>9</sup> Welch, *supra* note 2, at 1620 ("The 'learn by doing' method is not just 'doing,' it is *learning* by doing . . . . It is important not only to have the experience—the practice—of exercising judgment, but also reflect in systematic, rigorous ways on that experience.").

<sup>10</sup> See discussion *infra* Part IV.C. for discussion and examples of how information resources promote community lawyering.

<sup>11</sup> Clinical students possess varying research proficiencies. Those who lack confidence in their research skills might benefit from taking an advanced legal research course beforehand or while enrolled in the clinic; others who have clerked or had similar practice experience may only need a refresher or more focused skill set as outlined in the sample clinical research instruction module. See *infra* Appendix 3.

Part II presents mold litigation as an example of researching novelty. Providing a practitioner research framework, this example of a rapidly emerging practice area scans legal research, interdisciplinary and expert resources and techniques students can enlist when researching other novel situations in practice. The case study highlights clinical pedagogy and advanced research instruction connections; still it barely scratches the surface of the research skills and resources new lawyers must possess and access. Part III attributes modern law practice research complexities in part to expanding boundaries of legal, interdisciplinary, and audience authority. Varied and unpredictable authority expectations (of judges and assigning attorneys), combined with unwritten laws and local legal customs that alter standard authority requirements, create a practitioner research environment that is far more complex than most law students expect.

In Part IV, the focus shifts from transition issues affecting new lawyers generally to specific research conditions challenging public interest lawyers and their clients. Public interest lawyers need to understand the impact of limited citation rules and practices and recent federal legislation limiting regulatory rulemaking consideration of scientific studies. Clients and communities that clinics typically serve may be prevented from reaping the full benefits of their lawyers' research because of these information limiting rules and practices. Community/lawyer information partnerships espoused in collaborative lawyering are also at risk because of these conditions. Greater public interest awareness of inequitable citation rules and information practices will hopefully spur further reform already underway.<sup>12</sup>

Advanced legal research courses offer law students the most concentrated curricular exposure to practitioner research. This instruction, in modified form, would be valuable in many clinical courses. Part V. describes advanced legal research instruction methods that have much in common with clinical teaching

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<sup>12</sup> See discussion *infra* Part IV.A.2. for discussion of proposed Appellate Rule 32.1 which would allow citation of unpublished federal opinions, orders, judgments, and other written dispositions issued after 2006. Federal Rulemaking: Rules Amendments Awaiting Final Decision, at <http://www.uscourts.gov/rules/newrules6.html> (last visited Nov. 12, 2005).

practices and objectives. Practitioner resources can be taught through a combination of lecture (minimal), hands-on practice (extensive) and support tools accommodating different learning styles. Research simulations give students experience in assessing client problems, formulating research plans, analyzing results, and recommending courses of action. Collaborative assignments and group exercises teach students that practitioner research (at least the end product) is rarely a solitary activity. Consulting with more knowledgeable and experienced colleagues, brainstorming and sharing information and research with practice groups and team members, and researching discrete pieces of a large group project are important collaborative aspects of practitioner research.

Hopefully this article will encourage creative and innovative research instruction collaborations enriching the clinical curriculum with new opportunities for students to learn about and experience practitioner research. The appendices provide some of the raw teaching materials, including a sample research instruction module for clinics.

## II. RESEARCHING NOVELTY

Researching novelty is a hallmark of professional practice: "As the corpus of knowledge grows, members of a profession commit general principles to memory and conduct research when necessary to inform themselves about specialized or unusual cases."<sup>13</sup> Online research allows practitioners in any locale to keep abreast of cutting-edge legal developments, making novelty less forbidding and more adaptable to local practice. Practitioners increasingly rely on the Internet for fact-finding and legal information. Although conducting in-depth *legal research* on the Internet pales in comparison to searching commercial legal databases (Lexis and Westlaw), it has become an invaluable source of *legal information* for legal professionals and laypersons.<sup>14</sup> The Internet has brought

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<sup>13</sup> Randy Diamond & Martha Dragich, *Professionalism in Librarianship: Shifting the Focus from Malpractice to Good Practice*, 49 LIBR. TRENDS 395, 401 (2001).

<sup>14</sup> This article treats practitioner *legal research* as a systematic approach to finding and analyzing the applicable law. The objective is to enlist knowledge

significant pieces of legal information to the attorneys' desktop from court dockets and pleadings to extensive coverage of current federal and state legislation and regulations. Through government, law school, law firm, bar association, and public interest web sites, it provides hard to find information needed in routine and specialized cases.<sup>15</sup> Commercial legal databases affordable<sup>16</sup> to

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and authority for client problem solving. Depending on the nature and scope of the problem, legal research may rely on a single authority or require location and synthesis of disparate sources. *Legal information* consists mainly of pieces of information that may be used to accomplish discrete tasks or that may be woven into the larger process of legal research. The two may overlap but are not interchangeable. Laypersons generally do better at finding legal information than conducting legal research. Successful practitioners know when legal information is sufficient and when to undertake more extensive legal research. The Internet has largely fulfilled its potential as a legal information source. Its lack of comprehensiveness, secondary sources, citators and other features that are available only in print and commercial online legal resources limits practitioners (and their clients) who rely on the Internet exclusively.

<sup>15</sup> Consider a local practice example from Boone County, Missouri. The governing local court rule on discovery, published in West's Missouri Court Rules pamphlet and available on Westlaw, is Thirteenth Judicial Circuit Court Rule 32.2. The rule requires parties in personal injury cases to use court approved pattern interrogatories. The rule further states that copies of the pattern interrogatories are included in the appendix. The pamphlet and online version note that the interrogatories are not included in the publication. Pre-Internet attorneys would have to obtain the interrogatories from the clerk's office. They are posted on the Boone County Bar site at <http://www.bocomobar.org/interrogatories.htm>. This modest example highlights Internet conveniences. The Internet is especially valuable when, as here, the information is not readily available in print or is not on a commercial database.

Numerous examples, more national in scope, abound. These include law school web sites at Pace (<http://www.cisg.law.pace.edu/>), University of Pennsylvania ([http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm)), Stanford University (<http://securities.stanford.edu/index.html>), and Washington University (<http://www.artsci.wustl.edu/~crlch/index.php>) respectively, providing unduplicated access to Convention on the International Sale of Goods materials, NCCUSL drafts of Uniform and Model Acts, federal class action securities fraud litigation, and civil rights litigation.

<sup>16</sup> Lexis (<http://www.lexisone.com/legalresearch/index.html>) and Westlaw (<http://west.thomson.com/store/product.asp?product%5Fid=Westlaw+subscription+options>) increasingly market their databases to solo and small firm practitioners. Lower cost pricing plans are available for subscriptions to portions of the database. FindLaw (<http://www.findlaw.com/>) and LexisOne



public interest lawyers support legal research well beyond the Internet's current reach. Law students, despite having virtually unlimited access to these databases, rarely graduate versed in the many specialized practitioner research materials that are crucial for researching novelty.

A multi-faceted, habitability problem borrowed from the clinical literature suggests opportunities for enriching the clinical curriculum with litigation research methods taught in advanced legal research courses:

Meanwhile the sessions on habitability heated up. Because of the building's disrepair, many of the tenants were living in apartments with water coming in during the rainy season. *As a result of the moisture, paint was peeling and many tenants suffered health impairments from mildew and mold exposure.*<sup>17</sup>

When the article containing this account was published in 2000, mold litigation was in its genesis. Soon thereafter, mold litigation evolved into a highly specialized practice area perhaps best described as a hybrid of toxic torts and construction law.<sup>18</sup> Its founders paved the way for a new cause of action for pervasive and persistent mold problems causing property damage and personal injury in homes, schools and government buildings.

For law students to truly become educated researchers they must know how to track new legal developments and emerging areas of the law so that they may provide additional remedies or options for their clients.<sup>19</sup> Teaching students how to draw on the

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(<http://www.lexisone.com/>) provide significant free content from the commercial legal databases.

<sup>17</sup> Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 174 (2000) (emphasis added).

<sup>18</sup> Lisa Belkin, *Haunted by Mold*, N.Y. TIMES, Aug. 12, 2001, (Magazine), at 28. Depending on which side is commenting, the advent of "mold litigation" has been described disparagingly, e.g., as the 'Mold Rush,' Patrick J. Perrone & Craig W. Davis, *Science Fiction and Science Fact: Recent Developments in Mold Litigation and What They (Should) Portend*, 4-12 MEALEY'S LITIG. REP. MOLD 25 (Dec. 2004) and more favorably by plaintiffs' lawyers, e.g., Alexander Robertson IV, *Toxic Mold Litigation The Asbestos of the New Millennium*, 1-8 MEALEY'S LITIG. REP. MOLD 21 (Aug. 2001).

<sup>19</sup> See Paul D. Callister, *Beyond Training: Law Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 LAW LIBR. J. 7, 35 (2003) ("[Students'] training must not be limited to simply using a given resource or

expertise and resources of specialists (in the case of mold litigation—attorneys, toxicologists, epidemiologists, and remediation experts) prepares students to stay on top of new legal theories and causes of actions.<sup>20</sup> In the mold problem scenario (and by extension to any new and rapidly developing area of the law of potential interest), the type of research described below would be essential, because traditional legal research avenues (treatises, law reviews, legal encyclopedias, digests, ALR, etc.) often lag as the story unfolds.<sup>21</sup>

### A. *Mold Litigation Case Study*

Assume a low-income homeowner with serious health problems contacted your clinic in August 2001. The prospective

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solving several different kinds of problems. Rather they must be sufficiently adept in adjusting their own mental construct of legal research to meet new research conditions”). See also Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359, 369 (1998) (“[T]he practice of law itself is an educational experience.” “The law has become more varied and complex, as it mirrors societal advances . . . . Lawyers must constantly learn of new case law and statutory changes.”).

<sup>20</sup> In addition to ongoing client matters, practitioner research skills are necessary for client development, continuing legal education (often in preparation for related speaking engagements), and current awareness expected of any professional. For current awareness, a state or local legal newspaper, e.g., MISSOURI LAWYERS’ WEEKLY, national legal newspapers, e.g., NATIONAL LAW JOURNAL and LEGAL TIMES, and bar association publications are essential reading.

<sup>21</sup> Practitioner-oriented newsletters, treatises and CLE materials are often the most useful sources for getting up to speed on an unfamiliar area of the law. TOXIC MOLD LITIGATION, an ABA publication edited and co-authored by Raymund King, fits the bill, but was not published until 2003, more than three years after the mold problem described in Marshall’s mold habitability problem. Similarly, the first Practising Law Institute (PLI) course handbook materials on this subject only began appearing in 2002. See, e.g., Michael A. Hamilton, *Introduction to Property Insurance*, in INSURANCE LAW: UNDERSTANDING the ABCs 157, 187, in 673 PLI LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES, No. H0-00H7 (April 2002); and Stuart Hammer, *Emerging Indoor Environmental Issues*, in 487 PLI REAL ESTATE L. PRACTICE COURSE HANDBOOK SERIES No. N0-00AM (2002). See also Kathleen L. Daerr-Bannon, *Cause of Action by Residential Owners and Tenants for Personal Injury and Property Damage Due to Toxic Mold*, 26 CAUSES OF ACTION 529 (2d ed. 2004).

client believed mold infestation caused her illnesses. Because of her deteriorating condition, she is afraid of losing her job and home. Consider the problem from separate but related research instruction angles: first, what the clinic student would had to have researched to develop a case theory in August 2001; second, the type of instruction the clinic could have provided to prepare students to conduct specific research in that particular matter and other cases. The homeowner tells you:

1. She purchased her home in 1997.
2. Her homeowner's insurance policy excluded coverage for mold damage.
3. In 1999 after a roof leak, mold was detected on the ceiling.
4. Mold spread.
5. Asthma and other respiratory conditions developed.
6. Insurance company refused to pay her remediation costs.
7. She now works part-time and is behind on her mortgage.

These facts would almost surely have prompted basic research for breach of contract, bad faith and other established insurance law causes of action. But would a general practitioner at that time have also been aware of the emerging specialty in mold litigation and know how to research it sufficiently to bring such a claim for the first time? Possibly yes, as to the former; probably no, as to the latter.<sup>22</sup> As for the student, probably no on both counts, unless from personal experience or a chance exposure in law school to the evolving legal theories associated with mold infestation.

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<sup>22</sup> David Hechler, *Mold Suit Isn't Always a Good Fit*, 26 NAT'L. L. J. 1 (Sept. 15, 2003). Mold litigation presents a classic example of the harm lawyers cause when they fail to adequately research an unfamiliar topic. A solo practitioner reported "that about 20 percent of his clients in mold cases were previously represented by lawyers who didn't know what they were doing—real estate lawyers, for example, who knew little about mold, construction defect or bodily injury." One lawyer specializing in this field reported "[seeing] lawyers unfamiliar with mold and environmental issues hire consultants who are untrained and issuing unreliable reports and the lawyers not knowing the difference." *Id.* at 1.

Boilerplate exclusions in the insurance policy could have diverted lawyers unfamiliar with the highly specialized field of mold litigation from pursuing a valuable emerging remedy for the client.<sup>23</sup>

Prior to 2001, a few pioneers of mold litigation had obtained verdicts and settlements on mold claims, but the breakthrough case, *Allison v. Fire Exchange* (“the *Marbury v. Madison* of mold cases”),<sup>24</sup> was in its pre-trial stages. When the Texas jury in *Allison* returned a \$32 million plaintiff’s verdict in May 2001, the defendant cried foul and the insurance industry took sharp notice.<sup>25</sup> Defendant appealed claiming that plaintiff had failed to establish medical causation. Plaintiff argued that the trial court had improperly excluded plaintiff’s medical expert’s causation testimony. A clinical student, presumably competent in standard legal research techniques learned in the first year, would have been hard pressed to find information about the *Allison* case, relying exclusively on traditional first year research methods. Prior to December 2002 when a Texas Court of Appeals reduced the jury award to \$4 million, the litigation flew under the radar of *traditional first year* research sources and techniques. Until the appellate decision became available on Lexis and Westlaw in early 2003, jury verdict reports,<sup>26</sup> practitioner-oriented litigation reports and newsletters<sup>27</sup> and newspapers would have been the main

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<sup>23</sup> Hamilton, *supra* note 21, at 187 (“Mold Exclusions—The Homeowners 3 Special Form contains an exclusion which on its face would appear to bar coverage for any claims arising out of losses caused by the presence of mold . . . . We do not insure, however, for loss . . . caused by . . . mold . . . .” Many other policy forms contain similar exclusions.”).

<sup>24</sup> Randy J. Maniloff, *Mold: The Hysteria Among Us*, 14 ENVTL. CLAIMS J. 1, 15 (2002).

<sup>25</sup> See Deborah Sachs Feit, *Toxic Mold Litigation: The Frenzy Continues*, 228 N.Y.L.J., Dec. 6, 2002, at 4; Gordon Stewart, *Was the Media the Medium for the Mold Crisis?* NAT. UNDERWRITER-PROP. & CASUALTY, Feb. 17, 2003 at 24.

<sup>26</sup> See, e.g., Westlaw’s Combined Jury Verdicts Review & Analysis database (JVRP-JV) and Lexis’s Jury Verdicts and Settlements database (follow link under “Area of Law by Topic—Litigation” on main screen).

<sup>27</sup> MEALEY’S LITIGATION REPORTS including MEALEY’S MOLD LITIGATION REPORTS are available on Lexis (follow link to “Mealey Reports & Conferences” under “Secondary Legal” link on main screen). Similarly,

sources a student researcher would have had to use on Lexis and Westlaw to identify and track this litigation.

Many students do not become familiar with these specialized sources in law school unless they take an advanced research course or special training. Nor do many become familiar with or adept at searching law firm web sites that often contain valuable current legal information. Firms specializing in new or developing practice areas often include substantive legal analysis on their web sites targeted to existing and potential clients.<sup>28</sup> In this example, the student could have received a crash course in mold litigation practice by visiting the web site of plaintiff's lawyer in the Texas case, Robertson & Vick ("RV").<sup>29</sup> On the RV web site the student would have learned of the Texas verdict, the Mealey's Mold Litigation Report (tracking mold litigation nationwide), the firm's other successful mold verdicts and settlements, and other useful data. Solely from a legal research perspective, the site summarizes theories of recovery in mold claims and points the researcher to source documents—complaints, motions, briefs, filed in all kinds of mold cases—that can be used as models in case preparation.<sup>30</sup>

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Andrews Publications, available on Westlaw, publishes the CONSTRUCTION DEFECT AND MOLD LITIGATION REPORTER (ANCDMLR database).

<sup>28</sup> Thomas Keefe, *Teaching Legal Research from the Inside Out*, 97 LAW LIBR. J. 117, 129 (Winter, 2005) (identifying law firm newsletters and practitioner-written articles on the Internet as critical sources for keeping on top of fast breaking legal developments, e.g., Sarbanes-Oxley). These publications intended for client awareness and development allow savvy researchers to draw on the intellectual capital of cutting-edge firms. The publications are not produced in print nor are they available on commercial legal databases. The best ways to find these are through LawKT.COM <http://news.surfswax.com/law/>, the Law Firm Articles section on FindLaw, <http://lp.findlaw.com/> and the Practice Areas section on LexisOne, [http://www.lexisone.com/legalresearch/legalguide/practice\\_areas/practice\\_areas\\_index.htm](http://www.lexisone.com/legalresearch/legalguide/practice_areas/practice_areas_index.htm).

<sup>29</sup> Robertson & Vick, LLP, <http://rvclaw.com/> (last visited Nov. 14, 2005).

<sup>30</sup> Robertson & Vick, LLP, [at http://rvclaw.com/resources/articles.html](http://rvclaw.com/resources/articles.html) (last visited Nov. 14, 2005). Experienced practitioners familiar with multi-volume and specialized litigation formbooks may not find what they need in these sources when researching novel legal claims. Treatises and formbook updates are rarely as current as online sources. The Internet is the best way to track newly emerging legal theories in law practice, but researchers must carefully assess the credibility and reliability of sites that contain promising information.

RV also gives the researcher a foothold into critical interdisciplinary materials that are needed to practice in this emerging field. Although a \$32 million verdict was sure to catch the attention of the personal injury bar, the medical causation ruling has continued to be a difficult obstacle for plaintiffs in similar cases.<sup>31</sup> Plaintiffs' attorneys new to the field would have to get up to speed quickly with existing medical studies about mold and its documented health hazards,<sup>32</sup> master the case law, and commission their own studies in working with consultants and experts to prove causation.<sup>33</sup> Most law students are unfamiliar with the scope of research conducted in law practice. Without knowledge of and access to the universe of mold research sources

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The same warning legal research instructors have long given to students about using formbooks applies as forcefully to Internet research. Formbooks are not a substitute for exercising professional judgment in determining whether the information is applicable to a client's circumstances, and will often require additional research in order to adapt the content to the client's needs and the jurisdiction's requirements.

<sup>31</sup> See Perrone & Davis, *Scientific Fiction and Science Fact*, *supra* note 18; Laurence S. Kirsch & Andrew J. Perel, *Defense Can Win Toxic Mold Lawsuits Difficulties in Proving Causation and Lack of Scientific Evidence Could be Key*, 227 N.Y.L.J., June 24, 2002, at S8.

<sup>32</sup> See, e.g., Mold Help Organization, <http://mold-help.org/index.php> (last visited Nov. 14, 2005). But see, Perrone & Davis, *supra* note 18 (containing "a chronological survey of the mainstream scientific literature" from 1997-2004 which the authors cite to support their position that "specific toxicity due to inhaled fungal toxins has not been scientifically established"). Law schools are increasingly urged to include interdisciplinary offerings. See Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH U.J.L. & POL. 11, 59-60 (2003) (including varied examples of interdisciplinary functions in law practice requiring business, psychological, and other non-legal instruction in law schools). Legal research classes have expanded their coverage accordingly. See Douglas W. Lind, *Teaching Nonlegal Research to Law Students: A Discipline-Neutral Approach*, 13 PERSP. 125 (2005) (course designed to instruct students in the methodology of interdisciplinary research generally).

<sup>33</sup> We teach students how to identify potential consultants and experts and how to verify their qualifications and suitability through additional research. See, e.g., ExpertLaw-Indoor Air Quality Experts, <http://www.expertlaw.com/experts/Indoor/Fungus.html> (last visited Nov. 14, 2005).

touched on in this section, legal assistance to the homeowner in this example would have been compromised.<sup>34</sup>

How do students learn to expand their research horizons to find specialized practice materials on web sites, interdisciplinary sources, and other factual information?

In advanced legal research at the University of Missouri-Columbia, we use the mold litigation example (and other scenarios) to illustrate general principles for conducting this type of research. The goal is not to develop students' expertise in one substantive area, but to provide a model using an unfamiliar, developing area of the law that is highly research dependent. Having studied the context in which a relatively novel cause of action matures into a recognizable legal claim, students will be more confident thinking outside the box in practice (beyond what they already know or can readily find). Examining research conditions as they once existed in a particular area of the law and comparing current conditions informs students about the ebb and flow of law practice.<sup>35</sup>

It helps to understand the context in which real life problems require research. Clinical education recognizes the importance of teaching case theory.<sup>36</sup> Advanced legal research emphasizes that

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<sup>34</sup> The Internet in combination with other low-cost commercial database options levels the research playing field far more than when Lexis and Westlaw were outside the reach of most clients. Online access of this breadth allows researchers for all clients to explore and test cutting edge legal theories as never before.

<sup>35</sup> Even with the causation hurdle keeping mold-related *personal injury* claims largely in check (*supra* note 31-32 and accompanying text), the insurance industry in 2003 reportedly paid \$3 billion dollars in mold claims. Curtis P. Cheyney, *Is Mold Toxic to Insurers?* FINDLAW, Oct. 27, 2004, <http://library.findlaw.com/2004/Oct/27/133605.html> Insurers have more to fear from mold-related property damage claims. High profile plaintiffs Erin Brockovich and Ed McMahon have sued for mold damage with McMahon's resulting in a \$7.2 million settlement. A cursory update suggests that mold litigation continues to be a viable specialized practice area, although not the "asbestos of the 21st century," as some had predicted after the Ballard case. On May 5, 2005, a California (non-celebrity) plaintiff was awarded \$1.5 million in punitive damages in a bad faith mold case. See *Radosevich v. Amco Insurance* and other recent mold verdicts on <http://www.morelaw.com>.

<sup>36</sup> Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293 (2002).

research sources and techniques are problem-solving tools, not ends in themselves. Pedagogical hooks should be used invigorate classroom instruction (and make the sources less abstract).<sup>37</sup> Before we go over the sources for researching a toxic mold case, students read “Haunted by Mold”<sup>38</sup> a New York Times Magazine article about the *Allison* case. This compelling account provides a more personal perspective than what the students would get just reading legal materials.<sup>39</sup> A wealthy Manhattan couple whose Texas mansion dream home turned into a mold-infested nightmare frames the drama. The husband, Allison, becomes disabled, suffering severe memory impairment. Melinda Ballard, Allison’s wife, between bouts of coughing up blood, battles with insurance companies and enlists a battery of attorneys, toxicologists and mold remediation experts leading up to the multimillion dollar verdict.

Although the article is written for a non-legal audience, it is replete with valuable practice lessons. It tells how a Texas jury responds to a wealthy east coast plaintiff, whose circumstances and perilous health condition could ordinarily generate great sympathy, but whose persistence and belligerence further complicate case management. The article describes mold litigation in other parts of the country involving less well-heeled and more sympathetic plaintiffs. It identifies legislative responses such as California’s toxic mold law and early regulation of mold remediation providers

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<sup>37</sup> *Id.* (discussing “how to build a case theory curriculum from the ground up, using examples from film, fictional accounts of lawyering, *newspaper articles about actual cases*, stories written by clinical professors about their cases and simulation”) (emphasis added).

<sup>38</sup> Belkin, *supra* note 18.

<sup>39</sup> Teaching with sophisticated, factually-laden real life examples is central to Welch’s goal of teaching students to examine “what’s going on”. See Welch, *supra* note 2, at 1617 (“The cases that appear in law school texts and classrooms are dramatically truncated samples of the real world . . . . [W]e should find ways to present [students] with cases that begin with much fuller, more detailed accounts of the facts surrounding the particular situation . . . . This more holistic approach to novel situations would include not only more detailed accounts of events, but a fuller place for other considerations such as professional, client, and community interests.”). Articles like “Haunted by Mold” serve this objective.



(a “cottage industry” of sorts).<sup>40</sup> Personal injury lawyers reading this article would gain a similar foothold into the medical studies and the language of mold found on the RV website. Law students would learn how Robertson’s construction background helped him become one of the nation’s leading mold litigators.<sup>41</sup> The article includes various experts and organizations attorneys would want to consult if handling their first mold case.

In sum, the article expands and promotes effective legal research by: (1) orienting the reader to a new and evolving practice area; (2) referencing a specialized practitioner source which (conveniently for our teaching purposes) happened to be Mealey’s Mold Litigation Reports; and (3) showing students that researching legal problems often depends on non-traditional legal research. Assigning a newspaper account of the rise in mold litigation introduces students to the broader societal ramifications of the mold problem.<sup>42</sup> This background helps students build frameworks for assimilating the law by encouraging them to think about how they might apply the mold resources we show them in an actual case.<sup>43</sup>

### III. PRACTITIONER RESEARCH TRANSITIONS

What skills do public interest lawyers need to conduct sophisticated practitioner research? For most new attorneys who possess basic technology skills, the shift in emphasis from print to online research (both fee-based and free sites) has been deceptively seamless. Beneath the surface of technical proficiency, many new

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<sup>40</sup> Belkin, *supra* note 18.

<sup>41</sup> Belkin, *supra* note 18.

<sup>42</sup> It also exposes them to reporting biases they will encounter in practitioner research. Within the same Mealey’s mold publication, they will generally find more coverage favoring insurance defense interests than homeowners. *But see* Robertson, *supra* note 18.

<sup>43</sup> The legal trials and tribulations of well-known figures provide ample fodder for teaching practitioner research. To suggest just a few: Martha Stewart for corporate governance and insider trading, Maurice Claret for challenging the NFL draft, and Brittany Spears for copyright infringement. Working in an occasional and timely high profile scenario helps to keep students engaged in the subject matter.

lawyers are unprepared for practitioner research complexities and applications. This section includes clinical concerns about students' basic legal research habits and their unfamiliarity with unwritten law and rules in practice. It also considers a broader series of research transition challenges. Expanding legal authority boundaries, researching relevant audiences, and determining judges' authority preferences may be unfamiliar concepts to most law students, but they are crucial to understanding and conducting effective practitioner research.

### A. *Clinical Legal Research Concerns*

The legal profession's longstanding dissatisfaction with new lawyers' research skills is also heard in the clinical literature. Wortham provides an excellent example of online excess from an exercise in which she required student externs to keep research logs and compare their results.

Almost all the students . . . began and almost exclusively used full text LEXIS and WESTLAW searches, which retrieved little or nothing of use to the problem. [The] librarians who taught a research strategy class on what could have been found in our library, found a comprehensive answer in two treatises available in our library. No student ever found them, and almost none looked at any secondary sources.<sup>44</sup>

Wortham's recent tribute to Bellow's and Moulton's foundational work, *The Lawyering Process Materials for Clinical Instruction in Advocacy* includes several of their concerns about law students' research skills.<sup>45</sup> Unfortunately, many of the deficiencies they observed still carry over to law practice.

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<sup>44</sup> Leah Wortham, *The Lawyering Process: My Thanks For The Book And The Movie*, 10 CLINICAL L. REV. 399, 439 n.150 (2003). Lien's "byting" and insightful analogy to the media succumbing to the "quick fix" of the video clip over reasoned discussion, highlights similar technological detriments to law practice quality.

[J]ust as television created 'sound bite' journalism and discourse, technology seems to generate 'law-byte' reasoning and hypertext analysis. Lawyers and law students increasingly focus on accessing, managing, and linking information, and devote less time and energy to careful analysis or critical evaluation of legal rules. Lien, *supra* note 3, at 88-89.

<sup>45</sup> Wortham, *supra* note 44.

*Bellow and Moulton were concerned that students:*

are not trained in law school to perform the kind of legal research and analysis necessary for preliminary legal research to consider how to “construct the case.”<sup>46</sup>

*Reaction:*

Legal research and analysis go hand in hand, but it takes practice and perspective to become proficient at both. Too often students lose sight of the big picture by hunting for the perfect case instead of thinking about how to construct the case. Preliminary legal research should provide a snapshot of relevant legal principles and rules, examples of successful and unsuccessful strategies from similar cases, and alternatives. Advanced legal research courses introduce students to case valuation methods (jury verdict and settlement research), to sources identifying the elements of potential claims, and to more extensive case development materials (forms, checklists, sample pleadings, etc.). These resources are often more productive than intensive case research when beginning to construct the case.<sup>47</sup>

*Bellow and Moulton argued that students:*

know only how to do complete, painstaking legal research necessary in briefing an issue for an appellate court but do not know how to do twenty to sixty minute visits to the library that will provide enough background to know what to seek in interviewing the client, drafting pleadings, and questioning witnesses.<sup>48</sup>

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<sup>46</sup> Wortham, *supra*, note 44.

<sup>47</sup> See discussion *infra* Part V.A.

<sup>48</sup> Wortham, *supra*, note 44. Lexis’s task based research holds much promise for helping students recognize the different research tasks that are needed throughout a case. Lexis organizes litigation functions into four categories: Legal Research and Drafting, Discovery, Investigation, and Current Awareness. The first two have sub-categories called “Task Based Searching” which bring up templates for finding sample pleadings, interrogatories, motions, etc. From a law student’s standpoint, this makes relevant (and often unfamiliar) content more readily available. A resource like this, which organizes and brings practitioner tools to the desktop, can provide valuable support in clinical and other skills course. See discussion *infra* Part V.A. (discussing practitioner resources in an advanced legal research course).

*Reaction:*

Law schools should integrate research instruction throughout the curriculum. Besides signaling its importance it would help students see that research is not a one size fits all process. Shorter research assignments in advanced legal research, client counseling, evidence, negotiation, pretrial litigation, and trial practice courses model different kinds of research needed for interviewing, drafting, and questioning. Impose shorter turnaround times, require oral reports and emails instead of memo writing, and have students apply research in drafting client letters, complaints, interrogatories, direct examinations, briefings for legislators, updating the partner's CLE presentation, etc. Teach students how to speed research when a preliminary answer is needed quickly; teach students how to confirm their findings and apply the information appropriately.

*Bellow and Moulton believed that their students:*

do not know how to handle statutes and regulations and do not have the needed skills to parse a statute and break it into elements.<sup>49</sup>

*Reaction:*

Many students do not fully grasp the distinctions between the two. Many new lawyers have not seen the CFR, Federal Register, or comparable state publications. Legislation and administrative law courses should include statutory and regulatory research components. Students need to understand how critical definitions, scope, and purpose sections are in understanding statutory and regulatory schemes. They also need to understand the advantages of researching statutes and regulations initially in secondary rather than in primary sources. Practitioners have long turned to looseleaf services for "one-stop" research, integrating statutes, regulations, agency decisions, and case law in a single area of the law. The editorial commentary provides basic background, context, and analysis. Finally, statutes and regulations have always been more difficult to research online than case law. With students' obvious preference for online research, teaching them in law school how to use new system features that allow researchers

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<sup>49</sup> Wortham, *supra* note 44, at 439.

to view a statute in the context of the sections surrounding it and to retrieve related sections is essential.<sup>50</sup>

*Bellow and Moulton observed that students:*

have trouble organizing large bodies of law in their head. Written guides, desk references and annual surveys can help to make judgments at stages about “what the law is.”<sup>51</sup>

*Reaction:*

Students need to learn how practitioners do this. Legal newsletters, litigation reports, and other current awareness tools are readily available on law school Lexis and Westlaw subscriptions. Law firm and legal organization web sites often provide cutting edge analysis of “what the law is.” Advanced legal research teaches students how to find resources that organize large bodies of materials for them, but also how to create these tools for themselves.<sup>52</sup>

*Bellow and Moulton noted the organizational, time management, and strategic aspects of research:*

Students do not know when to stop researching, thus do not develop usable research skills, and hence are less willing and able to do relatively simple research jobs. Harking back to objectives in creativity, the authors discuss with student readers the need to avoid “functional fixedness”—the tendency to see only routine stereotyped ways of solving problems.<sup>53</sup>

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<sup>50</sup> Westlaw’s most recent statutory interface makes researching and analyzing a statute in context much more manageable. Links to table of contents, prior versions of the statute, and sources interpreting the statute, cases, law reviews, treatises, forms and legislative history are just some of the improvements Westlaw has made to online statutory research. The “section outline” link is particularly useful for parsing lengthy statutes by providing a snapshot of the sub-headings within a section. Advanced research classes have the time and focus to teach the finer points of online research.

<sup>51</sup> Wortham, *supra* note 44, at 439.

<sup>52</sup> See discussion, *infra* Part V.B.1. (discussing student authored research guides in advanced legal research course).

<sup>53</sup> Wortham, *supra* note 44, at 439-440.

*Reaction:*

Not knowing when to stop researching is common. When different sources and research methods yield the same authorities, it is easier to wind down research than when no authorities have been found. Treasure hunt research exercises may be useful for familiarizing students with specific sources, but bear little connection to real life research. Fortunately, legal research pedagogy has become more sophisticated in recent years. Advanced legal researchers know there will not always be authority directly on point, but are persuasive in analogizing their client's "unique" circumstances to recognized principles and rules of law. They are similarly skilled in coping with adverse authority.<sup>54</sup> Teaching research in connection with other problem solving skills (e.g., as part of a clinical skills course) discourages functional fixedness and promotes informed creativity.

Bellow's and Moulton's observations and Wortham's example of her students' online dependence identify symptoms of poor legal research.<sup>55</sup> Some of these symptoms can be addressed in legal research courses, externships, and clerkships but, as explained below, traditional legal research fulfills only part of a practitioner's and client's research needs.

*B. Researching Unwritten Laws and Customs*

Exacerbating new practitioners' uncertainties, local legal customs and practices trump some of the fundamental research principles and rules students learned in law school.

Seielstad's warning about unwritten laws and customs in local legal cultures alerts students to a research curve that often catches them off guard.

None of these rules may be derived from any written source; indeed many are contrary to written rules that purportedly govern the proceedings. Such rules are applied, nonetheless, with sufficient regularity by particular courts and/or magistrates and enforced by local

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<sup>54</sup> See, e.g., J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. MIAMI L. REV. 341 (2005).

<sup>55</sup> See *supra* text accompanying notes 44-54.

practitioners such that they acquire the force of law and may be ascertained and predicted by the thoughtful and informed practitioner.<sup>56</sup>

Describing their first encounter with unwritten rules and local customs, Seielstad captures a common reaction (or perhaps overreaction). “For many, this poses a fundamental crisis—a clash between what they expected the practice of law to be like and what they find the actual practice to be like.”<sup>57</sup> Seielstad’s Ohio unwritten examples include a local domestic relations court, contrary to statutory law, granting divorce only on grounds of incompatibility; local practices discouraging evidentiary hearings in domestic relations cases; and non-accommodation of jury trials in forcible detainer actions where the statute explicitly provides for jury trial.<sup>58</sup> She expertly navigates these research landmines, offering sound advice on legal research case planning:

[s]tudents should be encouraged to expand their legal research plan to include information about the unwritten legal rules and sources of information . . . . [M]astery of the written law alone may not adequately prepare the student for all rules that may govern a case. Instead, the student will have to supplement his or her legal research

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<sup>56</sup> Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 130 (1999). Invoking “the rule” in Missouri provides a classic example of unwritten law and local practice. This authority is not found in standard state law sources, but is a basic trial management strategy for those fortunate enough to know about it through experience or otherwise. A common law veneer sanctions the rule:

Parents’ attorneys request that “the rule” be invoked to exclude witnesses from the courtroom is an established *practice* by trial attorneys. Most attorneys, when seeking to invoke “the rule,” however, do not cite to any statutory or common law authority. Although “the rule” has long been a part of Missouri law, no cases contain a discussion of the inception of “the rule” or of its integration into the laws of the state (emphasis added.)

Grab v. Dillon, 103 S.W.3d 228, 233-34 (Mo. Ct. App. 2003).

<sup>57</sup> Seielstad, *supra* note 56, at 129. When research, one of the few skills legal employers expect students to have mastered in law school, proves troublesome in practice, the new lawyer’s confidence may suffer. As their more research savvy colleagues ease through this transition, those who struggle to catch on may fall in the office pecking order.

<sup>58</sup> Seielstad, *supra* note 56, at 129-30.

plan with some strategies for determining what unwritten rules or local customs and practices may apply to the proceedings.<sup>59</sup>

Clinical students, more so than students in any other law school course, are likely to encounter unwritten local rules and customs. Conducting careful research and consulting with clinical faculty help these students scout local conditions and practices.

### C. “De-Legalizing Law”—Proliferating Non-Legal Authority

The study and practice of law have become increasingly interdisciplinary. As online content from law-related disciplines grows, lawyers have more information at their disposal than ever before for persuading judges and other interested parties. Price and Percy sketch the broadening landscape:

In preparing for trial, advising clients, and drafting legal documents, today’s practitioner is increasingly called upon to consider sources that were once not part of the legal research lexicon. Statistics, economic analyses, accounting rules, foreign countries’ cultural mores, and medical studies (among others) all may impact the situation that causes a client to seek legal representation. From legal academia—where classes and clinics expose students to a wide variety of scholarship, and where journals are devoted to multidisciplinary subjects—to law firms that employ non-legal professionals (economists, nurses, accountants, computer scientists), the legal environment places an increasingly high value on scholarship and expertise developed outside the legal profession.<sup>60</sup>

Schauer and Wise characterize the “phenomenon” of the rise of non-legal information in law practice as the “delegalization” of law. Their research documents courts’ increasing citation of “sources of information not part of the traditional hierarchy of legal authority.”<sup>61</sup> This development challenges traditional authority norms.

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<sup>59</sup> Seielstad, *supra* note 56, at 198-99.

<sup>60</sup> Jeanne Price & Kumar Percy, *CLE Legal Research Instruction: Teaching the Practitioner to Become Information Literate*, NOTER UP 6, 7 (Tobe Liebert ed., 2004) (for use with . . . FUNDAMENTALS OF LEGAL RESEARCH), (8th ed. 2002) and Roy M. Mersky & Donald J. Dunn, *LEGAL RESEARCH ILLUSTRATED* (8th ed. 2002).

<sup>61</sup> Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 496 (2000).



[L]aw, itself an authority-soaked practice, had traditionally drawn a distinction between good and bad authority, privileged and nonprivileged authority, and authorities that rank higher or lower in the hierarchy of authorities. Just as a recent decision of the highest court within the same jurisdiction as the deciding court ranks at or near the top of this hierarchy, so too are authorities outside of the traditional legal canon traditionally understood to be at or even below the bottom of the hierarchy of acceptable authority.<sup>62</sup>

But legal authority norms are clearly in flux. “Since 1990, the Supreme Court’s citation of nonlegal sources has increased dramatically, even as the number of citations has remained relatively constant . . . .”<sup>63</sup> The trend includes state courts to a slightly lesser degree.<sup>64</sup> As Internet legal and law-related information sources grow, the loosening of traditional notions of acceptable legal authority creates new advocacy opportunities for attorneys but also raises the bar on practice research expectations and standards.<sup>65</sup>

The shift in emphasis from substantive legal research to factual and other nonlegal research in law practice is difficult for new lawyers who did not expand their research horizons in law school beyond traditional legal research. Lawyers conduct research to orient themselves to unfamiliar areas of the law, but just as importantly to make sense of their clients’ often convoluted circumstances.<sup>66</sup> Lawyers must identify and research all potential

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<sup>62</sup> *Id.* at 497.

<sup>63</sup> *Id.* at 496 (citing a notable example: In considering what would make one an expert in tire failure, Justice Breyer writing for the court in *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999), “relied early in his opinion on three books about tires, none of which had been cited in the briefs, and one of which was entitled *How to Buy and Care for Tires*.”).

<sup>64</sup> *Id.*

<sup>65</sup> See MacLachlan, *supra* note 4.

<sup>66</sup> Welch, *supra* note 2, at 1614-15. The first question for professional judgment is “What’s Going On?” and in the real world, an attorney is required to slog through mounds of data and bits of information (much of it of no use to her) . . . in an effort to determine the parameters of the unique situation she confronts . . . . Attorneys must develop their own version of the situation at hand. Forcing students to [discover] and [sort] through facts before engaging in “higher level mental activities” [legal analysis] is important. This is practice in deciphering complicated situations [and] preparation for figuring out what’s

relevant parties and decisionmakers in a dispute.<sup>67</sup> Only when the lawyer becomes sufficiently oriented to the client's universe can problem solving begin in earnest. The client's universe includes, but is not limited to, legal concerns. Gouvin's reminder to business clinic students that "from the client's view the world does not revolve around legal issues" applies as forcefully to most clinics.<sup>68</sup>

Most clinical programs are premised on the idea that business lawyers must not only master the legal knowledge and analysis necessary for competent performance, but they must also understand the needs of their clients, the underlying business, and entrepreneurship in general. The initial client interview can be a real eye-opener for the students in this regard. Because their legal education has focused on the primacy of law, the students have to be re-educated to start their relationship with the client by learning a great deal of nonlegal information about the business, such as what it does, how it makes money, and what its short- and long-term goals are.<sup>69</sup>

McDonnell's "Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems" explains why researching the audience's needs and interests matters.<sup>70</sup> His thesis that standard legal research is a necessary, but not a sufficient, element of case preparation warns students that legal authority is just one piece of the research that lawyers use to persuade parties and decisionmakers.<sup>71</sup> McDonnell cites commentary suggesting it is a relatively insignificant piece.

As experienced lawyers work with clients, judges, and other lawyers, they make relatively little use of written law . . . . For every point they research, they make hundreds of applications of their *shared mental*

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going on in real-world cases. This is a first step in the crucial process of forming professional judgment. *Id.*

<sup>67</sup> McDonnell, *supra* note 6, at 311-312.

<sup>68</sup> Eric J. Gouvin, *Learning Business Law by Doing It: Real Transactions in Law School Clinics*, BUS. L. TODAY 53 (Sept./Oct. 2004).

<sup>69</sup> *Id.* at 54. See also Jill Schachner Chanen, *The Strategic Lawyer*, 91 ABA J. 43 (July, 2005)(subtitled "Companies are Placing Premiums on Advisers who Understand both Business and the Big Picture").

<sup>70</sup> McDonnell, *supra* note 6, at 290-301.

<sup>71</sup> McDonnell, *supra* note 6, at 296, 307-08.

*model* [in which they consider the audience and unwritten rules and practice].<sup>72</sup>

This suggests that lawyers' assessments of parties' and other potential decisionmakers' interests and needs shape their shared mental models more than their objective understanding and interpretation of the law.<sup>73</sup> According to McDonnell, lawyers attempt to persuade the relevant audiences in a dispute with arguments in part based on law, but more significantly based on their understanding of the "audience's needs and goals."<sup>74</sup> Evoking legal realism, McDonnell acknowledges the continuing importance of legal research but argues that it is not sufficient for predicting what a party or decisionmaker is likely to do in a given situation.<sup>75</sup>

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<sup>72</sup> McDonnell, *supra* note 6, at 289 n.18 (quoting Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1529 (1996) (emphasis added)).

<sup>73</sup> Since most lawsuits are not fully adjudicated, judges are not the only decisionmakers lawyers must research. To negotiate effectively, lawyers must also research the interests and needs of opposing counsel and their clients. McDonnell, *supra* note 6, at 295.

<sup>74</sup> McDonnell, *supra* note 6, at 296. Researching the written law is not enough: "Factors touching the decision-makers' goals, values, need, and background also count." McDonnell's examples include pressures: trial judges needing to move dockets quickly; cases of public interest involving controversial issues; client pressuring attorney to settle (or vice-versa); public interest lawyers working under enormous case loads; associates pressured to bill more hours. Other factors McDonnell discusses include national trends influencing the legal system—e.g., woman's rights and gay rights, the war on drugs, Mothers Against Drunk Drivers and other societal issues that potentially influence decisionmakers when exercising discretion. McDonnell, *supra* note 6, at 299-300.

<sup>75</sup> McDonnell, *supra* note 6, at 286.

Realism did not abandon rules or consider them unimportant or irrelevant. Rather, in the words of Karl Llewellyn, rules were helpful to the extent that they predicted what judges and other interpreters of the law would do when faced with a dispute. Otherwise, written rules, whether embodied in statutes, regulations, or case law are simply "pretty playthings." Law, according to the realists, is not contained in codes, cases, or regulations; law is what officials of the law do when faced with a dispute, nothing more. (citations omitted).

McDonnell, *supra* note 6, at 286.

Judges (mostly appellate), opposing counsel, and experts or consultants can be researched on Lexis and Westlaw to see how the former have ruled on similar issues and how the latter two have fared in court.<sup>76</sup> Directories provide biographical information and comments from practicing lawyers on individual judge's style and preferences.<sup>77</sup> Judges, prosecutors, and other government officials do not make decisions in a vacuum; advanced researchers dig deeper to find out information about what makes these individuals tick.<sup>78</sup> PACER, online newspapers, speeches and media statements are core investigational sources for conducting audience research. Word of mouth, public records, interactions with court clerks and other administrative personnel, and local lawyers' observations provide potentially valuable sources for conducting audience research.<sup>79</sup>

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<sup>76</sup> Segment searches on Lexis and Field searches on Westlaw mechanize this kind of research.

<sup>77</sup> See, e.g., *Almanac of the Federal Judiciary* (Aspen, July 2005).

<sup>78</sup> To better pinpoint the legal system's fault lines, lawyers should prepare as best they can for "jurists who are incompetent, self-indulgent, abusive, or corrupt." Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431 (2004) (extensively documenting recent incidents of judge malfeasance reported in newspapers, judicial commissions, and other sources readily available to legal researchers). Miller groups examples of "bad judging" into twelve categories, including "abuse of office for personal gain," "incompetence and neglect of duties," "overstepping of authority," "interpersonal abuse, and "bias, prejudice, and insensitivity."

Entirely separate from the consideration of bad judges is the due diligence lawyers should conduct to detect a judge's motivation, experience, and tendencies. See, e.g., *A Legal Quest Against the Death Penalty: Chance of Error is Too Great, Even for a Murder Victim's Brother*, N.Y. TIMES, Jan. 2, 2005, at 18 (detailing a federal district court judge's independent extensive research into constitutionality of the death penalty. Using the Internet (e.g., Death Penalty Information Center's web site) and his law clerk's research, the judge found thirty-two cases of exonerated death row prisoners who he concluded were 'factually innocent'—twelve were cleared through DNA testing and twenty through other means. In April 2004, the same judge issued a preliminary opinion—shortly thereafter overturned—finding the death penalty unconstitutional. Underscoring the human element and complexity of pegging a judge's predisposition is the fact that this judge's brother had been murdered in 1985.).

<sup>79</sup> From these and other sources, valuable insights (subject, of course, to corroboration and confirmation) may include identifying attorneys whose

#### D. *Authority Applications and Expectations*

Sophisticated practitioner research considers how judges and opposing counsel interpret and are likely to apply authority.<sup>80</sup> New attorneys must understand that among the potentially relevant sources in any dispute, a hierarchy of authority still exists. The hierarchy may be detected in part from general legal research principles learned in law school, but lawyers must supplement these principles by researching judges' citation practices and preferences:<sup>81</sup>

Court[s] may cite to a non-traditional source that is not necessarily a citation to an acknowledged 'authority,' in the sense that the source represents the law as promulgated by one of the branches of government or represents a persuasive secondary source authored by a legal scholar within a particular area of expertise.<sup>82</sup>

Courts decide whether Internet citations may be used for background information or are trustworthy in various motion

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courtroom aversions make them more prone to settling cases prematurely, judges whose peculiarities throw unsuspecting attorneys off their best game, prosecutors who are straight shooters or who are apt to bend the rules, public defenders who do the minimum or who fight tooth and nail, regardless of the case, etc.

<sup>80</sup> This differs slightly from audience research which considers pressures a party or decisionmaker is under from an institution, particular persons, or the public generally to reach a particular result. See note 74. Because the objective is to predict how decisionmakers will use authority, it is more closely connected to traditional legal research. Researching a judge's or court's prior authority applications and tendencies helps practitioners craft more persuasive arguments.

<sup>81</sup> Mandatory/persuasive authority-based distinctions and primary/secondary source-based distinctions provide general hierarchical principles. There are no uniform rules however, for determining, whether a source is persuasive and whether it may be cited. Does the judge consider ALR annotations and state and national legal encyclopedias persuasive authority, or should the attorney use them only to locate primary authority and not cite them? Does the judge routinely cite the same commentator(s) in certain types of cases? Attorneys who are unprepared in this respect may needlessly damage their credibility, especially if opposing counsel's work product is more in tune with the judge's expectations.

<sup>82</sup> Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 420 (2002) (general encyclopedias and dictionaries are often cited and even newspapers, songs, poems, books and movies).

practice settings.<sup>83</sup> Courts sometimes cite Internet sites for ease of information access, taking care not to endorse the web author's viewpoints.<sup>84</sup> Courts undertaking Internet research of their own volition may run afoul of judicial boundaries,<sup>85</sup> cite vanishing authority,<sup>86</sup> and incur the wrath of judicial activist opponents.<sup>87</sup> Skilled researchers seek and apply authority consistent with judicial authority requirements (whether procedurally, substantively, or idiosyncratically determined).

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<sup>83</sup> *Wetland v. U.S.*, 153 F. Supp. 2d 1133, 1143 (E.D. Cal. 2001) (indicating Internet citations appropriate for background information); *EEOC v. E.I. Du Pont De Nemours*, No. 03-1605, 2004 WL 2347559 at \*1 (E.D. La., Oct. 18, 2004) (rejecting defendant's characterizations of all Internet information as inherently unreliable); *St. Clair v. Johnny's Oyster & Shrimp*, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999) (finding Internet "evidence" insufficient to withstand motion to dismiss: "[T]he court continues to warily and wearily view [the Internet] as one large catalyst for rumor, innuendo, and misinformation); *Commonwealth of Pa. v. Brown*, 839 A.2d 433, 435-36 (Pa. Super. Ct. 2003) ("An Internet site determining distances [MapQuest TM] does not have the same inherent accuracy as do professionally accepted medical dictionaries, or encyclopedias, or other matters of common knowledge within the community.").

<sup>84</sup> *See, e.g., In re Simon II Litigation*, 211 F.R.D. 86, 135 (E.D. N.Y. 2002) ("[T]he court cites to some of the extensive information on tobacco litigation available online through the Tobacco Resource Center at Northeastern University School of Law [web citation omitted]. Citation to this website is for informational purposes, since consolidated information is otherwise difficult to locate; it is not an endorsement of the positions that organization has taken in lawsuits.").

<sup>85</sup> *NYC Med. and Neurodiagnostic v. Republic Western, Ins.*, 798 N.Y.S.2d 309, 2004 WL 2978289, at \*3 (Sup. Ct. N.Y., 2004) ("In conducting its own independent factual research, the court improperly went outside the record."); *Hernandez v. Texas*, 116 S.W.3d 26, 33 (Tex. Crim. App. 2003) ("The difficulties that result from appellate courts relying upon material outside the record manifest themselves most clearly in the current trend of citing to internet sources in appellate opinions.").

<sup>86</sup> Barger warns appellate courts that the "Internet citations in their opinions may not bring up the same material that the judicial authors viewed at the time they wrote the opinions. In the worst case, 'the referenced authority for judicial notice is not even accessible at all.'" Barger, *supra* note 82, at 433-434.

<sup>87</sup> Gebe Martinez, *DeLay amplifies knocks on judges: International law and Web shouldn't sway Kennedy's decisions, he says*, HOUS. CHRON., Apr. 20, 2005, at A5. (House Majority Leader faulting Justice Kennedy for conducting Internet research).

Delving into prior opinions may shed light on individual citation practices and preferences helping the researcher tailor arguments and briefs to a judge's authority standards and expectations.<sup>88</sup> Discerning readers will note the judge's adherence to or departures from traditional notions of legal authority, reliance on and distinction among secondary authorities, and preferred sources.<sup>89</sup> In turn, they will be able to better craft and refine their arguments to suit judges' authority predilections.<sup>90</sup>

The research challenges discussed in this section apply to most new lawyers. The next section identifies specific research conditions affecting public interest lawyers and their clients.

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<sup>88</sup> This is not about Bluebook citation. It is about gaining entrance into a judge's information seeking and reliance tendencies to better predict what the judge will be inclined to do in your case. See, e.g., Jeffrey Toobin, *Swing Shift, How Anthony Kennedy's Passion for Foreign Law could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, at 42, available at [http://www.newyorker.com/fact/content/articles/050912fa\\_fact](http://www.newyorker.com/fact/content/articles/050912fa_fact) (noting the Court's liberal members' and more recently Justice Kennedy's increasing use of "foreign and international law as an aid to interpreting the United States Constitution").

<sup>89</sup> See, e.g., Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581, 582 (2004) (critiquing judges' "excessive reliance" on copyright treatises; particularly, Nimmer on Copyright).

<sup>90</sup> Based on its reputation (and Bartow's data showing the frequency federal judges cite it, *Id.* at 590), copyright litigators ignore NIMMER ON COPYRIGHT at their client's peril. Similarly authoritative treatises in other practice areas include: WEINSTEIN'S EVIDENCE and WEINSTEIN'S FEDERAL EVIDENCE (cited in over 4,500 cases on Westlaw); WHITE & SUMMERS' UNIFORM COMMERCIAL CODE (cited in over 1,300 cases); DOBBS (remedies treatise, over 2,000 case citations); SCOTT ON TRUSTS (over 3000); WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE and MOORE'S FEDERAL PRACTICE (Westlaw stops counting at 10,000—both of these two major federal procedural treatises easily surpassed this limit). See MELVILLE NIMMER, NIMMER ON COPYRIGHT (Aug. 2005); JACK WEINSTEIN, WEINSTEIN'S EVIDENCE (1997); JACK WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE (2d. Oct. 2005); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: SALES (2001); DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (1992); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, LAW OF TRUSTS (1987); CHARLES ALLAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE (2005); JAMES WILLIAM MOORE, ET. AL., MOORE'S MANUAL-FEDERAL PRACTICE AND PROCEDURE (Aug. 2005).

#### IV. PUBLIC INTEREST LAW RESEARCH ENVIRONMENT

Clinical education helps prepare motivated and talented students for public interest legal careers. These students will have different and in most cases far fewer resources than classmates who practice with corporate law firms. Criteria for selecting information and research sources for clinical teaching and service missions should be tailored to the kinds of routine and specialized research public interest lawyers do.<sup>91</sup> Clinical research instruction should also address research conditions negatively affecting public interest lawyers and their clients. Citation rules and practices limiting the use of unpublished opinions and recent federal law (curtailing regulatory consideration of research studies often favorable to economically disadvantaged groups) pose special challenges. These conditions may limit new public interest lawyers, even those who are adept legal researchers, from fully exploiting the fruits of their research. Community information access, a vital part of collaborative lawyering, is also at risk because of these conditions.

##### A. *Limited Citation Rules' Impact on Law and Society*

The addition of a vast body of unpublished case law on Lexis and Westlaw and to a more limited extent on court web sites, expands research opportunities and expectations. Studies show that attorneys regularly read unpublished decisions and believe that

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<sup>91</sup> An advanced research instruction component for a clinical course would not explore looseleaf services in as much depth as it might in a similar research offering for a business law course. Most looseleaf services are oriented and marketed to business lawyers, with some exceptions—CONSUMER CREDIT GUIDE (CCH) and CRIMINAL LAW REPORTER (BNA) to name just two. Their pricing also makes access more difficult for public interest lawyers. Customized public interest law research training should address when looseleaf services are preferable to other sources and information seeking strategies for overcoming access limitations to looseleafs in public interest practice. For detailed pricing and content information on practitioner research materials see KENDALL F. SVENGALIS, *LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL* (9th ed. 2005).



it is incumbent upon them to do so.<sup>92</sup> Often of uneven quality and limited as precedent, unpublished cases help sophisticated legal researchers craft additional arguments and gauge what a particular judge might do based on rulings in similar cases.<sup>93</sup> Currently, the “2nd, 7th, 9th and Federal Circuits ban citation of unpublished opinions outright, while six other circuits discourage it.”<sup>94</sup>

Although the Internet’s steadily increasing legal content has somewhat leveled the information resource playing field, limited citation rules and institutional litigant authority-limiting strategies negate much of these gains by roping off favorable precedent from

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<sup>92</sup> Martha Dragich Pearson, *Citation of Unpublished Opinion as Precedent*, 55 HASTINGS L.J. 1235, 1284 (2004) (footnote omitted).

<sup>93</sup> See REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Sept. 2005) [hereinafter SEPT. 2005 JUD. CONF. REPORT], available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=51> (last visited Nov. 14, 2005). The report concurred citing an exhaustive study by the Federal Judicial Center finding “that over a third of attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not. Unpublished opinions are often read and cited by both judges and attorneys precisely because they do contain valuable information or insights. Many unpublished opinions include lengthy discussions of legal issues and may also include a dissenting opinion.” *Id.* at Rules-Page 11 (citations omitted).

With so many unpublished cases available on Lexis, Westlaw and the Internet, students may find the term “unpublished opinion” confusing. West’s FEDERAL APPENDIX case reporter consisting of selected federal courts of appeal unpublished decisions heightens the confusion. The term only begins to make practical sense in the context of court rules limiting citation of unpublished opinions. This has been one of the main reasons for teaching students how to locate and apply such rules in advanced legal research.

<sup>94</sup> Tony Mauro, *Judicial Conference Supports Citing Unpublished Opinions*, LEGAL TIMES (Sept. 20, 2005) at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1127207109763>. See also Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23 (2005).

For analysis of state court rules and practices on citation of unpublished opinions, see J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in Trial Courts*, 47 ARIZ. L. REV. 419, 422-23 (2005) (suggesting that there may be a “discernible trend” towards relaxation of citation prohibitions at both the state and federal level, but also noting several states continuing to firmly prohibit citations or limit precedential value assigned to these opinions—e.g., Kentucky, Florida, and Wisconsin).

many of society's disadvantaged.<sup>95</sup> Stated from a legal ethics perspective: "The simple fact is that 'no citation' rules often unfairly compromise counsel's ability to effectively represent a client, whether at trial or on appeal."<sup>96</sup>

### 1. *An Inequitable Precedent System for "Marginalized Groups"*

Penelope Pether contends that unpublished opinion practices and limited citation rules corrupt the "system of precedent" by "structurally subordinat[ing] some kinds of litigants and privilege[ing] others . . ."<sup>97</sup> "[R]epeat-player litigants" and "unethical judges" manipulate precedent at the expense of marginalized groups.<sup>98</sup> Marginalized groups disadvantaged by "unpublication"<sup>99</sup> and related practices include "pro se" plaintiffs, gays and lesbians, and [Marc Galanter's] "one-shotter" litigants: [e.g.,] abortion rights proponents, members of other minority groups, and indigent persons.<sup>100</sup> Contrast these sobering assertions against the more familiar "concern about unfair, uneven access to unpublished opinions, which was the principle [public justification] for the promulgation of restrictive citation policies [before the Internet largely addressed the access problem]."<sup>101</sup> The unfair, uneven access rationale sought protection for disadvantaged groups in the crafting of unpublished opinion rules. Pether's research suggests that private judicial practices undermined whatever uneven access protections restrictive citation rules initially afforded.<sup>102</sup> Contrary to protecting rights, private judging

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<sup>95</sup> See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004).

<sup>96</sup> Sullivan, *supra* note 94, at 419.

<sup>97</sup> Pether, *supra* note 95, at 1504.

<sup>98</sup> Pether, *supra* note 95, at 1504.

<sup>99</sup> "Unpublication," as Pether defines it "means that an opinion is not designated for publication in the jurisdiction's official reporter, if it has one; to a greater or lesser extent it makes the opinion difficult to find; it *limits or destroys the precedential value of the opinion*; and in most jurisdictions, citation to an unpublished opinion in documents filed in court or in argument is either banned or severely limited." See *supra* note 95, at 1436-37 (emphasis added).

<sup>100</sup> Pether, *supra* note 95, at 1505. (footnotes omitted).

<sup>101</sup> SEPT. 2005 JUD. CONF. REPORT, *supra* note 93, at Rules-Page 8.

<sup>102</sup> Pether, *supra* note 95, at 1443-44.

eviscerated precedent for certain classes and generated mistrust of the legal system.<sup>103</sup>

Pether's historical mining of federal judicial civil and prisoner rights judicial case management reveals private judging practices she attributes to "a discourse of dismay and irritation at the volume of appeals emerging from civil rights litigants and prisoners making *pro se* postconviction appeals."<sup>104</sup> In an Appendix ["Haynsworth Report"] to a 1972 published decision,<sup>105</sup> Pether finds evidence in the Fourth Circuit's response to the volume of appeals problem to support her thesis that private judging undermines precedent. The crafting of a summary disposition procedure "for disposing of *pro se* postconviction appeals without the appointment of counsel, without hearing, and via unpublished opinions" provided dubious judicial oversight of the procedure and inadequate judicial protection of the system of precedent for this class of litigants.<sup>106</sup> The procedure employed habeas clerks [who were also the 'advocates for the appellants'] to handle what amounted to half the court's new cases each year.<sup>107</sup> The Haynsworth Report goes to great lengths to emphasize the "judicial involvement in the process."<sup>108</sup> After the clerks prepared memoranda and supporting materials, the judges took over, but it is unclear how much of the review of the habeas clerks' work was actually done by the judges or their [non-habeas] clerks.<sup>109</sup> Neither *pro se* plaintiffs (seeking a fair shake) nor judges (seeking

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<sup>103</sup> Pether, *supra* note 95, at 1441. The Judicial Conference agreed with these concerns about the ban on citation to unpublished federal decisions. "[No-citation rules]... tend to undermine public confidence in the judicial system by leading some litigants—who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past—to suspect that unpublished opinions are being used for improper purposes." SEPT. 2005 JUD. CONF. REPORT, *supra* note 93, at Rules-Page 15.

<sup>104</sup> Pether, *supra* note 95, at 1444 (recounting 9th Circuit judge speaking of the 'private history' of the practice of unpublication at a public forum, panel discussion).

<sup>105</sup> *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091 (4th Cir. 1972).

<sup>106</sup> Pether, *supra* note 95, at 1460.

<sup>107</sup> Pether, *supra* note 95, at 1461.

<sup>108</sup> Pether, *supra* note 95, at 1462.

<sup>109</sup> Pether, *supra* note 95, at 1462-63.

efficiency) appear satisfied. Pether notes a striking paradox in the Haynsworth Report's pains to document judicial oversight of summary disposition procedures.

The Report claims that "the postconviction cases disposed of without a formal hearing [in fact, without any hearing] require almost as much *judicial time* as if they were fully heard."<sup>110</sup>

In the case referencing the Haynsworth Report,<sup>111</sup> the Fourth Circuit refused to treat as precedent an unpublished *memorandum decision* ordering a government provided transcript for *pro se* postconviction appeal because it conflicted with subsequent published decisions. The court appeared poised to address its unpublished doctrine:

This excellent petition for rehearing is deserving of our most careful attention. Not only is the petitioner entitled to a complete explanation of an apparent disregard of precedent, so also is the bar, and we are grateful to able and persistent counsel for affording us a long awaited opportunity to explain to the bar and the public some of our internal procedures in the disposition of what has become an enormous caseload.<sup>112</sup>

What follows, according to Pether, is the court's circular reasoning for doing away with precedent for a particular class.<sup>113</sup> Although the "court concedes that 'any decision is by definition a precedent,'"<sup>114</sup> memorandum decisions fall outside the definition. "[I]t is 'reasonable to refuse to treat memorandum decisions [confined at the time to *pro se* cases] as precedent within the meaning of the rule of stare decisis.'"<sup>115</sup> The court's rationale is based on an increase in the number of postconviction appeals (empirically provable) and the court's (subjective) perception that a "substantial proportion" of them are frivolous.<sup>116</sup> Pether retorts: "[J]udicial experience and observation are here invoked as

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<sup>110</sup> Pether, *supra* note 95, at 1463 (emphasis added).

<sup>111</sup> *Jones v. Superintendent*, Va. State Farm, 465 F.2d 1091 (4th Cir. 1972).

<sup>112</sup> *Jones*, 465 F.2d at 1092.

<sup>113</sup> Pether, *supra* note 95, at 1459.

<sup>114</sup> Pether, *supra* note 95, at 1459.

<sup>115</sup> Pether, *supra* note 95, at 1459.

<sup>116</sup> Pether, *supra* note 95, at 1459.

authority akin to judicial notice to substantiate the proposition that a ‘substantial proportion . . . are frivolous.’”<sup>117</sup>

In an example from 2003, two of her students working on a same sex couple adoption case, where the jurisdiction’s adoption statute is silent on the matter, found persuasive unpublished authority allowing a same-sex couple to adopt. Although noted as a matter of first impression in the home jurisdiction, the court rules did not allow plaintiffs to cite unpublished cases.<sup>118</sup> Pether asks: “Why was it that those couples were allowed to adopt without their cases providing a precedent for others to rely on?”<sup>119</sup> The inequity of prohibiting citation to unpublished opinions is especially palpable in a case of first impression where persuasive authority counts most. As Dragich Pearson notes, when The Advisory Committee on Appellate Rules considered proposed new Rule 32.1 of the Federal Rules of Appellate Procedure (requiring courts to permit the citation of unpublished opinions), the Committee Note stated:

[p]arties have long been able to cite in the courts of appeals an infinite variety of sources [e.g., federal, state, and foreign case law, law review articles, treatises, newspaper columns, Shakespearean sonnets, advertising jingles] solely for their persuasive value’ . . . . [I]t is difficult to justify a system that permits parties to bring to a court’s attention virtually every written or spoken word in existence *except* those contained in the court’s own “unpublished” opinions.<sup>120</sup>

From a legal research perspective, Pether’s incisive private judging critique alerts public interest practitioners to significant obstacles<sup>121</sup> preventing them from applying research to their

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1486. See also Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 112-13 (1995) (“Although it may be impossible for a judge to be politically neutral or to decide cases only on the basis of logic, at the very least, once precedents are established litigants should not have unequal opportunities to profit from or to erase them.”).

<sup>119</sup> Pether, *supra* note 95, at 1486.

<sup>120</sup> Pearson, *supra* note 92, at 1248, n.103 (citing attachment to memorandum from Judge Samuel A. Alito, Jr. to Judge Anthony J. Sirica (May 22, 2003)) at <http://www.uscourts.gov/rules/app0803.pdf>, at 32-33.

<sup>121</sup> Depublication, stripping an opinion of an intermediate appellate court of precedential value without appeal or hearing, exacerbates the legal system

client's full benefit.<sup>122</sup> In a similar vein, noting that attorneys in two Ninth Circuit cases were "ordered to show cause why they should not be sanctioned for citing unpublished cases in contravention of the rule," Dragich Pearson warns that "attorneys may well find themselves in an impossible position if they believe that diligent representation, compliance with the requirements of Rule 11, or the duty to call relevant adverse authority to the court's attention requires citation of an unpublished decision."<sup>123</sup> As the next section examines, partial relief to the inequities restrictive citation rules pose to marginalized groups and their attorneys may be at hand.

## 2. *Lifting the Ban on Citation to Unpublished Opinions*

In September 2005, the Judicial Conference of the United States,<sup>124</sup> the federal courts' major policy-making body, endorsed a proposed new Federal Appellate Rule that would allow lawyers to

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inequalities. Pether charges "repeat-player lawyers" with deliberately manipulating the process (e.g., ex parte interventions) to prevent adverse case law from having a destructive precedential effect on their clients' interests (one appellate practice advertised 'the cases it had gotten decertified' for the benefit of non-party clients). See *supra* note 95, at 1514 (footnote omitted).

<sup>122</sup> This article does not [nor does Pether's] discount concerns about the dubious quality of unpublished case law. Liberalizing citation of unpublished opinions without improving their quality will not eliminate all inequities discussed in this section. See, e.g., William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 291-92 (1996) (critiquing judges' increasing delegation of decision making to clerks and staff as disproportionately impacting the poor: "A belief that staff, not judges, are playing a decisive role in decision making and opinion writing undermines the legitimacy of the court's decision making process . . . . This loss of legitimacy is all the more acute because the effect of staff participation is felt most keenly in cases brought by the poor—the group most in need of the services of the federal judiciary."). Citation reform efforts, e.g., proposed Federal Rule of Appellate Procedure 32.1, are more directly within the scope of this article than reforming judicial management practices, but the two are certainly connected. See *infra* note 125 (citing the proposed Federal Rule).

<sup>123</sup> Dragich Pearson, *supra* note 92, at 1238-39 (footnotes omitted).

<sup>124</sup> Judicial Conference of the United States, <http://www.uscourts.gov/judconf.html> (last visited Nov. 14, 2005).

cite unpublished opinions under certain conditions.<sup>125</sup> The proposed rule (to take effect on December 1, 2006<sup>126</sup> if the Supreme Court approves it and if Congress leaves it untouched) would prevent the federal circuits from banning citation to unpublished federal decisions issued *after* 2006,<sup>127</sup> but notably would not prevent the individual circuit courts from setting their own rules about the *precedential* value unpublished opinions can be given.<sup>128</sup>

Critiquing no-citation and other citation limiting rules and practices in clinical and other research instruction programs might inspire more public interest lawyers to participate in efforts to reform citation practices and rules that harm their clients. Teaching law students how to research precedent limiting court rules is an essential part of a public interest lawyer's advanced research education and routine practice checklist.<sup>129</sup> As reforms in

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<sup>125</sup> Proposed Amendments to the Federal Rules of Appellate Procedure, <http://www.uscourts.gov/rules/newrules6.html>. Proposed Rule 32.1(a) Citation Permitted provides: "A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." SEPT. 2005 JUD. CONF. REPORT, *supra* note 93, at Rules App. A-2 at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=51>.

<sup>126</sup> Pending Rules Amendments Awaiting Final Action, <http://www.uscourts.gov/rules/newrules6.html> (last visited Nov. 14, 2005).

<sup>127</sup> Judicial Conference Action: Sept. 2005, <http://www.uscourts.gov/rules/index.html#judicial0905> ("Approved new Appellate Rule 32.1 only applies to decisions issued on or after January 1, 2007.") (last visited Nov. 14, 2005).

<sup>128</sup> See Mauro, *supra* note 94 at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1127207109763>. The political nature of this rule change is illustrated in part by an amendment that made its application prospective only, its leaving the determination of precedential value of these prospective unpublished opinions to the individual circuits, and the support that newly confirmed Chief Justice, John Roberts showed for the rule change. "As a private practitioner and then as a judge on the U.S. Court of Appeals for the D.C. Circuit, Roberts served on the advisory committee that recommended the new Rule 32.1" *Id.* "'A lawyer ought to be able to tell a court what it has done,' Roberts said at the April 2004 meeting at which the advisory committee first endorsed the rule." *Id.*

<sup>129</sup> See, e.g., Melissa M. Serfass & Jesse Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2004) (an excellent reference source for federal and

the unpublished arena take hold, advanced research instruction must prepare attorneys to cope with politically negotiated rule changes that on balance should improve research conditions discussed in this section, but that also raise the bar on technical and analytical legal research skills.

If proposed Appellate Rule 32.1 takes effect as currently recommended, consider how rule's prospective application<sup>130</sup> to unpublished decisions issued after 2006 will require online researchers to distinguish between which federal court opinions they may cite and which they may not.<sup>131</sup> Recognizing the cutoff date for the purpose of observing the rule should be simple enough, especially if Lexis and Westlaw clearly reference the new rule at the beginning of each case. Currently, cases displayed on both systems alert researchers to applicable unpublished rules for federal court of appeals opinions (and provide similar conventions for state unpublished cases).<sup>132</sup>

More significantly, attorneys should closely monitor citation patterns in unpublished federal court of appeals cases after 2006. Will judges cite pre-2007 unpublished cases knowing that the

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state court citation rules); Jason B. Binimow, *Precedential Effect of Unpublished Opinions* 105 A.L.R.5th 499 (2003); and FEDERAL LOCAL COURT RULES (West Group 3d ed. 2001).

<sup>130</sup> Judicial Conference Action: Sept. 2005, *supra*, note 127.

<sup>131</sup> Sophisticated legal researchers are experienced in accounting for variations among jurisdictions' restrictive citation rules. The new rule would provide a measure of uniformity among the circuits that is currently lacking by lifting *citation* prohibitions (as emphasized, the precedent assigned to post-2006 unpublished federal opinions may continue to vary among the circuits). Legal researchers will have to become accustomed to separating their unpublished search results *for citation purposes* by internalizing red light prohibitions for unpublished federal cases prior to 2007 and green light permissions for unpublished cases decided on or after January 1, 2007. This politically-negotiated authority boundary (presumably drawn to appease opponents of lifting the ban on citing unpublished opinions) stands to disrupt the flow of research and analysis as researchers adjust to chronological restrictions.

<sup>132</sup> See, e.g., *Stowe v. U.S.*, No. 05-2510, 2005 WL 2385937 (8th Cir.), citing the following rule reference at the beginning of the case:

This case was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. Eighth Circuit Rule 28A(i). (FIND CTA8 Rule 28A).



opinion they are writing may be cited (even if it is unpublished), but the older unpublished “authority” they are relying on may not, depending on the jurisdiction? On this possibility, consider these comments valuing unpublished opinions in the September 2005 Judicial Conference Report:

The fact is, however, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by *judges* (again, even in circuits that have imposed no-citation rules).<sup>133</sup>

It is hard to predict, but the potential for unanticipated or new kinds of precedent-related research anomalies should not be overlooked. For pro se litigants who increasingly have Internet access, the proposed rule opens up new avenues of research subject of course to their understanding and observing the rule’s prospective application and limited scope i.e., leaving the assignment of precedential value exclusively to individual circuit determination.<sup>134</sup> Clearly, precedent negating aspects of unpublished doctrine remain and require further reform.

### B. *Information Quality Act*

Imagine researching a toxic torts claim, finding a government report essential to your case, and then not being able to use it. Procedural and evidentiary hurdles should be expected, but what if government information policy resulting from undue political influence creates insurmountable barriers to using the report? It is not hard to imagine the lengths well-heeled corporate defendants would go to keep unfavorable scientific studies out of the courtroom and outside the reach of agency rulemaking.<sup>135</sup> Criticisms levied against The Information Quality Act (“IQA”)

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<sup>133</sup> SEPT. 2005 JUD. CONF. REPORT, *supra* note 93, at Rules-Page 10-11 (emphasis added) (citing *Harris v. United Fed’n of Teachers*, No. 02-Civ. 3237 (GEL) 2002 WL 1880391, at \*1, n.2 (S.D.N.Y. Aug. 14, 2002) in which the court cited an unpublished opinion in absence of published Second Circuit authority).

<sup>134</sup> SEPT. 2005 JUD. CONF. REPORT, *supra* note 93, at Rules-Page 5.

<sup>135</sup> Tobacco litigation, for instance.

raise significant public interest information law concerns about this precise issue.<sup>136</sup>

The Act is fraught with political, economic and social implications for community decisionmaking. It subjects federal regulatory agency rulemaking use of scientific studies to reliability standards and screening procedures similar to district court judges' *Daubert/Joiner* mandate for "keeping 'junk science' out of the courtroom."<sup>137</sup> Keeping junk science out of the regulatory arena (and court) is undoubtedly sound policy, but McGarity warns that the IQA, as OMB interprets it:<sup>138</sup>

appears to be a perfect vehicle for [risk-producing industries] to attack [the] science underlying health and environmental regulatory decisionmaking,[similar to the strategy litigants use in *Daubert* challenges].<sup>139</sup>

McGarity argues that this "corpuscular approach," already an effective "accountability-avoidance strategy" for these industries in preventing the application of health and safety protections in court, may now allow them to derail regulatory enactment of new or revised protections.<sup>140</sup> McGarity's examples demonstrating this

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<sup>136</sup> See, e.g., Thomas O. McGarity, *Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 913-14 (2004); Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63, 76-77 (2003).

<sup>137</sup> McGarity, *supra* note 136, at 910 (citation omitted).

<sup>138</sup> McGarity, *supra* note 136, at 924 (citing *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 FED. REG. 8452 (Feb. 22, 2002)).

<sup>139</sup> See also *id.* (citing Wagner, *supra* note 136, at 69) (IQA petitioners "can allege through a formal process that a study should be excluded from regulatory decisionmaking because it is too unreliable to be useful, an allegation taken more seriously if the study plays an 'influential role' in a policy decision.").

<sup>140</sup> McGarity suggests that risk-producing industries have succeeded in using an appropriations rider, the IQA, to "dismantle" unfavorable health and environmental regulations. *Id.* at 924-25. See also Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339 (2003-2004).

trend include a recent challenge to the EPA's "Guidance for Preventing Asbestos Disease Among Auto Mechanics."<sup>141</sup>

With the newly available tool of the IQA to facilitate corpuscular attacks on government documents, the law firm of Morgan, Lewis & Bockius attempted in 2003 to force EPA to withdraw a 1986 publication aimed at protecting auto mechanics from asbestos-caused diseases. Who would go to the trouble of hiring a high-powered Washington D.C. law firm to launch a corpuscular attack on an aging guidance document? Companies who were the targets of toxic tort claims from thousands of auto mechanics who had contracted asbestos-related diseases in the workplace.<sup>142</sup>

In the information age, defensive lawyering strategies to remove or rope off potentially damaging information should be anticipated. These and other similar information-related tactics should be explored in advanced research instruction in clinics. If one agrees with McGarity's IQA assessment, the Act, like the "private judging" practices Pether critiques, further skews the playing field against clients and communities clinics typically represent by disabling information they sorely need to fully participate in decisions and actions affecting their well-being.<sup>143</sup>

### C. Community Information Resources

Clinics that teach and promote collaborative lawyering include their clients in informed decisionmaking.<sup>144</sup> Similar impediments

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<sup>141</sup> McGarity, *supra* note 136, at 925-26.

<sup>142</sup> McGarity, *supra* note 136, at 926.

<sup>143</sup> The opposing view—that the Act may be good for consumers—also makes the issue ripe for discussion in advanced research classes. *See also* Shapiro, *supra* note 140, at 340 (contending that "the IQA may turn out to be a useful good government reform or a serious impediment to the protection of individuals and the environment, depending on how the courts ultimately interpret its terms"). While recognizing (and applauding) the improving access public interest lawyers have to legal information sources, this access may be seriously undermined by policies that prevent reasonable use of the information. This article seeks a broader attorney awareness and discussion of how information policy affects public interest law practitioner research.

<sup>144</sup> Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 456 (2004).

Collaborative lawyers . . . make conscious efforts to interact with clients in ways that encourage them to speak and share their thoughts;

to public interest lawyers' research jeopardize community information resources essential to informed decisionmaking. In an information-driven economy, the digital divide marks the gap between those people and communities who can access and make effective use of information technology and those who cannot.<sup>145</sup> When information access is unequal (or cost prohibitive), poorer communities are further isolated from participating meaningfully in democratic life.

True "democratic participation" entails more than self-governance; it makes for a "democratic culture" in which "ordinary people gain a greater say over the institutions and practices that shape them and their future."<sup>146</sup> Attorneys embracing this view facilitate democratic participation and change. López links knowledge to change bringing us to the core of the digital divide: "disparities in knowledge reinforce market, democratic, and civil inequalities."<sup>147</sup> The maxims "knowledge is power" or

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to involve clients in the definition and investigation of facts; to refine their own abilities to translate between the legal and lay cultures. . . and to look for opportunities to boost the status and role of clients when they interact with other parties and counsel. If collaborative lawyers seek a world in which their clients and clients' communities are treated as fully human equals entitled to participate fully in society, those lawyers believe they must engage with their clients and their communities on exactly such a basis. In the words of López, the practice of collaborative lawyers 'must itself reflect and occasionally even usher in the world we hope to create.' Rather than simply viewing an egalitarian, participatory democracy as the ultimate end, supporters of collaborative lawyering believe that egalitarian, participatory democracy is the necessary means to attaining that end. [citations omitted].

<sup>145</sup> See Andy Carvin, *Mending the Breach: Overcoming the Digital Divide*, George Lucas Education Foundation at [http://www.edutopia.org/php/article.php?id=Art\\_439&key=188](http://www.edutopia.org/php/article.php?id=Art_439&key=188).

<sup>146</sup> Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004). "Far more than just a set of procedures for resolving disputes," Balkin's vision of democracy empowers individuals to effect changes in institutions, practices, and customs. *Id.*

<sup>147</sup> Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59, 62 (2004).

“information is power,” even if empirically suspect, connote motivation and power to effect change.

Consumer, feminist, and educational equity movements, to name only some, regularly invoked the expression [knowledge is power] . . . . They stressed how access to sophisticated and intelligible information could improve—even dramatically improve—individual decision making, available choices, and the overlapping systems that create and distribute opportunities.<sup>148</sup>

Access to sophisticated and intelligible information similarly empowers community participation and decisionmaking. An examination of lawyer/community information seeking collaborations discussed in the clinical literature provides additional reasons for enriching the clinical curriculum with advanced research instruction.

### 1. *Information Partnerships (Lawyer/Community)*

Piomelli’s environmental justice scenario values community information resources. Surrounding the affluence of San Francisco are poor neighborhoods home to the city’s two electric power plants and most of its industrial facilities.<sup>149</sup>

An out-of-state energy conglomerate is proposing to expand its existing power plant in the neighborhood. The new generator will produce

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Although not targeted to this cause, a law and economics perspective gives the information disadvantaged additional rhetoric to build on. See F. Scott Kieff, *The Case against Copyright: A Comparative Institutional Analysis of Intellectual Property Regimes*, SOCIAL SCIENCE RESEARCH NETWORK, at 16, available at Stanford’s Olin Program in Law and Econ., Working Paper No. 297; Washington U. School of Law Working Paper No. 04-10-01 (2004), available at <http://ssrn.com/abstract=600802>, stating:

There are a number of significant problems associated with information and these are generally referred to collectively as information costs. In order for individuals to even make the many decisions associated with acting through either the market or *political processes*, they must be able to obtain and use information appropriately

(emphasis added) (footnotes omitted).

<sup>148</sup> López, *supra* note 147, at 63.

<sup>149</sup> See Piomelli *supra* note 144, at 401 (stating that residents in these neighborhoods “are overwhelmingly people of color, whose incomes are much lower—and rates of respiratory illnesses are much higher—than those of other city residents”).

much more electric power for the city . . . and much more pollution for the neighborhood.<sup>150</sup>

Power plant permitting battles are waged before the state energy commission. “The commission holds informational hearings, accepts discovery requests, and allows interested groups to intervene.”<sup>151</sup> One of the issues the commission staff has identified that will be of particular interest to the community is “environmental justice/public health, aris[ing] from the disproportionate concentration of industrial uses in the neighborhood and its rates of respiratory disease and cancers.”<sup>152</sup>

Piomelli compares conventional and collaborative lawyering functions. The conventional approach emphasizes the attorney’s “knowledge of the legal system,” expertise in substantive and procedural law, and inclination to work largely alone, consulting experts as needed.<sup>153</sup> The focus is on providing technical legal skills to overcome the imbalance of power between those representing the energy conglomerate’s interests and the community that depends on attorneys to protect its interests.<sup>154</sup> The collaborative approach adds a community building dimension.<sup>155</sup> Although incorporating the same technical legal skills in the

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<sup>150</sup> See Piomelli *supra* note 144, at 401.

<sup>151</sup> See Piomelli *supra* note 144, at 401. “Its staff issues preliminary and final assessments, which are then the subject of a hearing before a committee of commissioners. The committee issues a proposed decision, which is voted on by the full commission.” *Id.*

<sup>152</sup> See Piomelli *supra* note 144, at 402. “Several longtime residents of the affected neighborhood have contacted a nonprofit environmental law office in the city. . . . Blaming the existing plant for the cancer deaths of their spouses and the respiratory illnesses of their children and acquaintances, the clients want to stop the expansion of the plant.” *Id.*

<sup>153</sup> See Piomelli *supra* note 144, at 402.

<sup>154</sup> See Piomelli *supra* note 144, at 404. Legal research would be among the technical skills. (E.g., [Piomelli] “would also research what options exist if the commission does approve the application, assessing the possible grounds for a subsequent court challenge, perhaps under Title VI of the Civil Rights Act or the Endangered Species Act.”) *Id.* (citations omitted).

<sup>155</sup> See Piomelli *supra* note 144, at 404, *see also* Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445 (2002).

conventional approach, collaborative lawyering would be much less hierarchical and solitary.<sup>156</sup> Piomelli “would build and use productive partnerships with clients and other actors in the neighborhood or allies outside it to *collectively* fight the conglomerate’s plan.”<sup>157</sup> He would aim not just to defeat this particular power plant application, but “also to enhance the clients’ and neighborhood’s prospects in future struggles as well.”<sup>158</sup> Bringing his full legal arsenal to bear, he would engage in legal maneuvering and strategizing but “with a different orientation—not just to work *against* the plant’s expansion, but also *with* [his] clients and neighborhood and potential allies.”<sup>159</sup>

In a collaborative model, the lawyer, clients and other members of the neighborhood “work together to frame strategies that all . . . would implement . . . shar[ing] the hard work and limelight.”<sup>160</sup> Several of the “partnerships” Piomelli describes require community accessible research and information seeking mechanisms and present opportunities for including students in community building.<sup>161</sup>

[The] collaborative lawyer engages with clients and neighborhood residents as partners in a joint effort: *partners in fact investigation* (locating and mapping toxic and polluting sites, as well as identifying residents with respiratory health problems); *partners in identifying people from whom they can learn*; partners in recruiting potential allies . . . partners in ‘encouraging city officials to conduct a formal health assessment . . . partners in presenting their neighborhood—not

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<sup>156</sup> Piomelli, *supra* note 144, at 404.

<sup>157</sup> Piomelli *supra* note 144, at 404 (emphasis in original).

<sup>158</sup> Piomelli, *supra* note 144, at 404.

<sup>159</sup> Piomelli, *supra* note 144, at 404.

<sup>160</sup> Piomelli, *supra* note 144, at 404.

<sup>161</sup> Sielestad envisions client counseling roles under close faculty supervision as students build trust within the relevant community. The counseling aids decision making and problem-solving in the community and includes a strong information seeking and research component. “[C]linical students could assist in identifying and evaluating client goals and alternatives, including legal and non-legal considerations. . . . Students could engage in legal research about the substantive and procedural legal issues raised by the community building and planning. They could research strategies and models that have been tried in other community contexts. Structuring the clinic’s involvement in such a fashion . . . may provide an excellent way to involve students effectively in community building.” Sielestad, *supra* note 155, at 511.

just in words, but through their actions—as unwilling to accept additional unfair health burdens . . . and *partners in learning from similar efforts elsewhere to combat undesirable land uses*.<sup>162</sup>

In all of these efforts, “a collaborative lawyer would seek to reshape the orientation of her lawyering practice; striving not simply to win ‘the case,’ but also to facilitate the clients’ and neighborhood’s active informed exercise of their democratic liberties.”<sup>163</sup> Potentially, each of Piomelli’s partnering initiatives benefits from advanced research practices this article suggests incorporating in clinical courses. Valuable contacts and models to help this community mobilize against the proposed power plant are readily available on the Internet. A Google search for power plants and environmental justice brings up sweeping grass roots efforts to reject proposed power plants in New York,<sup>164</sup> Connecticut<sup>165</sup> and the Southwest,<sup>166</sup> among others. Communities that have just learned about proposed power plants encroaching on their neighborhoods will find in-depth accounts of legal proceedings and legal issues, articles documenting associated health hazards, key contacts, and miscellaneous efforts and events to encourage individual and group participation.

Community mobilization examples on the power plant opposition web sites may inspire similar local initiatives.<sup>167</sup> They

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<sup>162</sup> Piomelli, *supra* note 144, at 456-57 (emphasis added).

<sup>163</sup> Piomelli, *supra* note 144, at 457.

<sup>164</sup> Greenpoint/Williamsburg Waterfront Task Force, <http://www.stopthepowerplant.org/> (last visited Nov. 13, 2005).

<sup>165</sup> Conn. Coalition for Environmental Justice, <http://www.environmental-justice.org/> (last visited Nov. 13, 2005) (“The mission of Connecticut Coalition for Environmental Justice is to protect urban environments primarily in Connecticut through educating communities, through promoting changes in local, state, and national policy, and through promoting individual, corporate and governmental responsibility towards our environment. We define environment as including the places that we live, work, play and go to school.”).

<sup>166</sup> Greenaction for Heath and Environmental Justice, <http://www.greenaction.org/index.shtml> (last visited Nov. 13, 2005) (“Greenaction mobilizes community power to win victories that change government and corporate policies and practices to protect health and to promote environmental justice.”).

<sup>167</sup> Clinics and similar organizations serving smaller, rural populations may not have power plants to contend with, but the Internet may provide similar



also provide valuable teaching opportunities for exposing new lawyers to broader practice horizons to bring about meaningful social change.<sup>168</sup> Law and legal remedies are essential, but not sufficient, components of social change. Lawyers must also be adept at influencing decision making in non-legal contexts.

While collaborative lawyers do not by any means reject the importance of the court system or administrative adjudication, they insist that lawyers must recognize both the strengths and limitations of such institutions. Lawyers need to understand and convey the remedies the law can provide, the norms and mechanisms it will use in doing so, and also the ways in which a legal framing of a situation can change the nature and contours of a dispute. Collaborative lawyers must be adept at helping clients to successfully navigate these judicial and administrative arenas. But they also strive to be alert to, and skilled in taking advantage of, *opportunities to engage in other arenas of persuasion*: in other public and political settings, in the media, and in networks of relationships within and between communities.<sup>169</sup>

The power plant opposition sites model several opportunities to engage in other arenas of persuasion through information sharing, research and advocacy training, and community activities.<sup>170</sup>

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resources for local legal concerns. See, e.g., Mary M. Beck, *Family Violence Tutorial*, at <http://law.missouri.edu/fvc/cali/tutorial/index.htm> (referencing an Internet-based tutorial on domestic violence written for Missouri judges); Young Lawyers Section of Missouri Bar, *Domestic Violence and the Law: A Practical Guide for Survivors*, available at <http://www.mobar.org/pamphlet/domviol.htm>; Self Help Legal Center of Southern Illinois, at <http://www.law.siu.edu/selfhelp/>; Farmers' Legal Action Group, Inc., at <http://www.flaginc.org/>; National Agricultural Law Center, at <http://www.nationalaglawcenter.org/research/>.

<sup>168</sup> In turn, this may prepare law students for teaching opportunities in the community. See Kovach, *supra* note 19, at 382 (suggesting a role for clinics in teaching citizens about the law).

<sup>169</sup> Piomelli, *supra* note 144, at 462 (emphasis added).

<sup>170</sup> See Bayview Hunters Point Mothers Environmental Health & Justice Committee, et. al. *Pollution, Health, Environmental Racism and Injustice: A Toxic Inventory of Bayview Hunters Point, San Francisco*, at <http://www.greenaction.org/hunterspoint/documents/TheStateoftheEnvironment090204Final.pdf> (Sept. 2004) (detailing a collaboration between the tenants association and Greenaction, the objective of which "was to mobilize, train, and empower community mothers in the fight for environmental health and justice in [the community]. Participants received skill training in basic computer skills, computer research on environmental issues, leadership and community organizing, environmental health, public speaking, media skills, and working

Examples like these of large-scale community mobilization efforts are indicative of the kinds of information that can be found on the Internet to promote community building and problem solving skills on many fronts.<sup>171</sup> Clinics can use these sites as teaching tools in student training and community outreach

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with government agencies that regulate the environment. During the year they collected information about their community, attended and spoke at governmental informational meetings and hearings, and visited government agencies and met with government officials to advocate for their community.”) (emphasis added). *Id.* at 2.

See also Connecticut Coalition for Environmental Justice, *English Station Power Plant Victory* at [http://www.environmental-justice.org/issues/english\\_station.html](http://www.environmental-justice.org/issues/english_station.html) (reporting hard fought victory in agency denial of power plant permit: “It is also a significant victory because, according to [Department of Environmental Protection] staff, all permit conditions were met. By exercising his authority to protect the citizens of Connecticut by denying the permit, [DEP Commissioner] Rocque has essentially said that the *conditions under which a power plant can operate are not necessarily protective of public health.*” (emphasis added); Community Update, Greenpoint/ Williamsburg Waterfront Task Force, [http://www.stopthepowerplant.org/html/whats\\_happ/comm\\_update.php](http://www.stopthepowerplant.org/html/whats_happ/comm_update.php) (last visited Nov. 13, 2005) (Slide show capturing community post card signings of 10,000 GreenPoint Williamsburg residents opposing TGE proposed power plant); Speak Out, Greenpoint/Williamsburg Waterfront Task Force, [http://www.stopthepowerplant.org/html/whats\\_happ/speakout.php](http://www.stopthepowerplant.org/html/whats_happ/speakout.php) (last visited Nov. 13, 2005) (activist fact sheet containing sample protest letter and state and local government contact information).

<sup>171</sup> Similar mobilizing examples abound outside environmental justice. Consider just these three issues and sites as examples of the Internet’s range of legal advocacy sites providing community resources: Downhill Battle, “*Eyes on the Screen*,” <http://www.downhillbattle.org/eyes> (last visited Nov. 13, 2005) (Downhill Battle is a civil rights advocacy group, seeking to make the PBS documentary *Eyes on the Prize* available to a new generation of viewers who have not been able to see the film because of copyright and licensing restrictions. The site promotes community screenings of the film and grass roots campaigns to bring the film to the public domain); <http://www.wnyc.net/pb/docs/SNTOutline.pdf> (Selfhelp Community Services, Inc. training materials for elderlaw advocates on setting up supplemental needs trusts for Medicaid-eligible New York city senior citizens technically qualifying for home care assistance but forced into nursing homes because of arcane Medicaid regulations); Center for Corporate Policy, <http://www.corporatepolicy.org/index.htm> (The Center for Corporate Policy is “a non-profit, non-partisan public interest organization working to curb corporate abuses and make corporations publicly accountable.”).

efforts.<sup>172</sup> Although Piomelli cautions against “empowerment” as a collaborative lawyering objective,<sup>173</sup> “empowerment,” in the discrete context of improved community access to information, articulates an egalitarian advancement in lawyer/community relations vital to collaborative lawyering.<sup>174</sup>

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<sup>172</sup> This article does not consider the Internet to be more than a *resource* to promote problem-solving and democratic participation; it does not replace sound legal advice or make communities self-sufficient in legal and political arenas. It may inform valuably or poorly depending on the quality of the information and how it is interpreted and applied. The Internet when properly used is a powerful community resource.

Without commercial publishing and librarian filters, Internet researchers must be capable of independently verifying Internet information. See Dr. Bob Swisher, *Assessing Quality on the Internet*, at <http://www.ou.edu/itp/webhelp/quality/> (Feb. 1997) (last visited Nov. 14, 2005) (urging Internet searchers to ask these and other questions: “Are criteria for inclusion of information stated?” “What is the authority of the author or creator?” “Is the treatment neutral or biased, advocacy, promotional, public relations?” “What is the stability of the information?”). See also Resa Kerns & Cindy Shearrer, *Internet Legal Resources—Free Resources*, CALI lesson, 2005 at <http://www2.cali.org/index.php?fuseaction=lessons.lessondetail&lid=lr18> (Interactive exercise teaching students when it is appropriate to use the Internet as a research tool in legal practice, how to evaluate the quality and reliability of free web resources).

<sup>173</sup> Piomelli, *supra* note 144, at 472. Piomelli’s preferred definition of power “is the capacity to achieve desired outcomes, to get one’s way over the opposition of others. It is the capacity to defeat others when an actual dispute arises. And, recalling some political science from college, power is also the capacity to get an issue on the agenda or to keep it off--by dissuading others from even trying to contest the outcomes that the powerful have engineered or desire.” Piomelli, *supra* note 144, at 403.

<sup>174</sup> This article considers existing possibilities for community information resources to further community lawyering. Forward-thinking public interest lawyers will also recognize that society may be on the verge of powerful changes in the “public sphere” with far reaching ramifications for public interest clients beyond information access. See Jerry Kang and Dana Cuff, *Pervasive Computing: Embedding the Public Sphere*, 62 WASH. & LEE L. REV. 93 (2005). Kang and Cuff envision the public sphere as “a space open to individuals in their multiple roles as community members, consumers, employees, passerby, and citizens [that] fosters social interactions of both confrontation with otherness and shared experiences that facilitate a communal sensibility overall.” *Id.* at 117. They use “pervasive computing” to describe the convergence of ubiquitous computing (access to information—what society currently uses the Internet for) with computing melded into the physical world.” *Id.* As computing becomes

## 2. *Information Partnerships at Risk*

Community information resources noted in the previous section may be weakened because of government-sponsored information limiting policies. Environmental justice advocates share McGarity's concerns about these policies.<sup>175</sup> The Center for Progressive Regulation ("CPR") promotes public participation in "fora where important environmental decisions [are made]."<sup>176</sup> Because of unequal bargaining power (limited funds, time, and

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more woven into the physical fabric of everyday life, individuals and communities stand to *benefit* from an expanding public sphere e.g., "political shopping" where "peer-to-peer" interactions negate the "mall's" plenary power over the information environment. *Id.* at 97. Devices these authors identify as imminent portend an open information environment in a simple shopping experience.

Imagine a person buying a coffeemaker. She scans it with her communicator, which identifies the electronic product code, then provides a flurry of counter-information: an environmental group reminds her of coffee production's role in deforestation; the store on the next level offers the same item at a cheaper price; a competing manufacturer sends an advertisement for its brand bundled with a an electronic "free latte" coupon immediately redeemable at the Starbucks's three stores down.

*Id.* at 128-29.

To be of real benefit to the consumer, "the information should not overwhelm or spam us; rather, the information should be highly context-sensitive so as to be timely, relevant, and chosen to be received . . . . [W]ithin these constraints, a whole new range of sociopolitical intermediaries could help facilitate 'political shopping' by providing not only information about quality and price, but also social, environmental, and justice consequences." *Id.* at 129.

While this environment holds much promise for enabling community building and social justice (e.g., "[b]efore buying an overpriced shirt at Abercrombie & Fitch, the National Asian Pacific American Legal Consortium might provide a reminder about the firm's sorry history with racial minorities," *Id.* at 129-30), public interest lawyers must be prepared to protect individuals and communities from overzealous government surveillance and other potential privacy threats.

This brief glimpse into a more pervasive (and animated) Internet environment suggests how important it is for public interest lawyers to be both sophisticated information seekers and knowledgeable information policy advocates.

<sup>175</sup> See McGarity, *supra* text accompanying notes 136-143.

<sup>176</sup> Center for Progressive Reform, *Environmental Justice*, at <http://www.progressiveregulation.org/perspectives/enviroJustice.cfm> (last visited Nov. 14 2005).

resources compared to conventional stakeholders) meaningful community participation is difficult resulting in bad decisions harmful to the public health.<sup>177</sup> The CPR argument against the IQA (and other information limiting policies) seeks to protect essential community information resources.

Because local environmental justice organizations operate on such slender budgets, they must rely heavily upon publicly available information.... The administration's expansive interpretation of exemptions under [FOIA], the information-limiting features of the Homeland Security law... and the administration's aggressive implementation of the Data [sic] Quality Act [IQA]... threaten to curtail the amount of information available to people of color and poor persons and other groups.<sup>178</sup>

In this same passage, the CPR identifies specific threats to the community/lawyer information partnerships suggested in Piomelli's environmental justice scenario.<sup>179</sup>

In concert these initiatives may allow firms to withhold information about hazardous emissions, accidents, and other risks posed by power plants, nuclear facilities, refineries, chemical plants, and other large facilities. Historically, *communities where environmental justice is an issue have relied heavily upon publicly available information* not only to find out about the risks they face, but also to help demonstrate racially disparate patterns of exposure. As these communities have learned in the past two decades, information is power, and the move toward greater secrecy will surely serve to disempower our most environmentally vulnerable communities.<sup>180</sup>

Public interest lawyers at a minimum need to be aware of negative research conditions in their field, and ideally should challenge laws and practices that create such conditions.

## V. ENRICHING LEGAL EDUCATION WITH ADVANCED RESEARCH INSTRUCTION

Remediating poor legal research habits, cultivating advanced research skills, and coping with negative research conditions require broader exposure throughout the law school curriculum

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See *supra* text accompanying notes 149-174.

<sup>180</sup> Center for Progressive Reform, *supra* note 176 (emphasis added).

than stand-alone advanced legal research courses can provide. Because clinics closely resemble law practice, they are ideally suited for including customized advanced research instruction. Bastress and Harbaugh were surprised to learn in a recent law practice technology survey that legal professionals are mainly using the Internet for factual investigations rather than for traditional legal research.<sup>181</sup> They advise their colleagues who teach fact investigation in clinical programs to incorporate Internet research strategies:

In our experience, law library professionals are adept in developing such online information research plans. Perhaps we need to consider how to integrate presentations by librarians into our clinical curriculum.<sup>182</sup>

This article agrees wholeheartedly and encourages clinical faculty to consider possibilities for integrating customized research instruction in their courses. Given the clinic's time constraints and need to address a broad range of skills, librarians who like to teach and who are good teachers can partner with clinicians to improve clinical students' research skills. Advanced legal research, largely law librarian taught, is well established within the mainstream law school curriculum,<sup>183</sup> like other skills courses it continues to evolve by refining its pedagogy and content<sup>184</sup> and connecting instruction

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<sup>181</sup> See Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 CLINICAL L. REV. 115, 122 n.29 (2003-04).

<sup>182</sup> *Id.*

<sup>183</sup> See Hemmens, *supra* note 3 (noting that 72 of the 111 ABA-accredited responding schools reported offering an advanced legal research course); see also Peter Schanck, *Mandatory Advanced Legal Research: A Viable Program for Law Schools?*, 92 LAW LIBR. J. 295 (2000) (describing mandatory course requirement at Marquette).

<sup>184</sup> Readings may be assigned from a rich array of sources, e.g., traditional first year legal research texts. See Hemmens, *supra* note 3, at n.49 (reporting Jacobstein's FUNDAMENTALS OF LEGAL RESEARCH and Berring & Edinger's, FINDING THE LAW as the most widely assigned textbooks in ALR courses); PERSPECTIVES TEACHING LEGAL RESEARCH AND WRITINGS, PERSPEC database (Westlaw) ("This newsletter contains articles on ways to develop and improve legal research and writing skills, and provides critical information on electronic legal research, and solutions to legal research problems."). In 2004, Thomson West published the first advanced legal research course textbook of which this author is aware. See J.D.S. ARMSTRONG & CHRISTOPHER A. KNOTT, WHERE

to problem solving. The MacCrate Report, as Cordon notes, "recognizes that legal research is not a distinct skill, but . . . is part of a process of problem solving."<sup>185</sup> Since most clinical courses teach problem solving skills, it would benefit students to have advanced research instruction in these courses. (The appendices to this article include sample course materials from advanced legal research at the University of Missouri-Columbia and suggestions for adapting these materials to a smaller clinical research instruction module.)

In some ways the advanced legal research course at the University of Missouri-Columbia differs from a traditional advanced legal research course. With the objective to help students see research as a problem solving tool rather than an end in itself, it emphasizes research planning and strategy as case development and case management tools. It also requires more substantive legal analysis than students might expect in a traditional research course. Although research is still the instructors'<sup>186</sup> expertise and course focus, the teaching attempts to include lessons from other skills courses that are relevant to practitioner research.<sup>187</sup> Traditional and innovative research instruction methods add variety to the course. These include teaching practitioner research sources, simulating law practice research, and inverting the classroom. Self-learning and collaborations prepare students to research independently and to work cooperatively in strategizing, analyzing, and applying research.

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THE LAW IS: AN INTRODUCTION TO ADVANCED LEGAL RESEARCH (Thomson West 2004).

<sup>185</sup> Cordon, *supra* note 8, at 5.

<sup>186</sup> I have taught the course at Missouri since 1998 and co-taught it twice with Resa Kerns, Educational Technologies Librarian, who has been instrumental in implementing many of the teaching methods discussed in this section.

<sup>187</sup> Cordon, *supra* note 8, at 4-5. Legal research supports and is integrally linked with client counseling, pre-trial litigation, negotiation trial advocacy and other skills course.

### A. *Teaching Practitioner Research Sources*

Because practice materials are ordinarily covered only briefly in first year legal research classes, most students are not familiar with the major sources lawyers consult unless they clerk or take an advanced legal research course. An advanced legal research course exposes students to looseleaf services,<sup>188</sup> formbooks,<sup>189</sup> continuing legal education materials,<sup>190</sup> and to advanced database content,<sup>191</sup> search strategies<sup>192</sup> and search features.<sup>193</sup> These new tools and competencies help students connect legal research to law practice.

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<sup>188</sup> BNA, CCH, and RIA looseleaf publications have long been staples of practitioner research. They are excellent current awareness and comprehensive research tools in the subjects they cover (mainly business law topics). Their migration to online formats is well under way, but the richness and density of their content does not always translate from print to online as seamlessly as other sources.

<sup>189</sup> Drafting forms is always easier when the inexperienced lawyer has a model to work from. Practitioners increasingly turn to in-house databases containing the firm's work product when needing a form. Major formbook sets are still useful when a satisfactory in-house form does not exist. AM. JUR. LEGAL FORMS and WEST'S LEGAL FORMS are two of the major transactional sets; AM. JUR. PLEADING AND PRACTICE FORMS, WEST'S FEDERAL FORMS, and BENDER'S PLEADING AND PRACTICE FORMS are among the major pleading sets. Local practitioners should first turn to state specific formbooks, e.g., West's MISSOURI PRACTICE. Downloading forms from Westlaw and Lexis to the desktop for editing is efficient, but free forms (of varying quality) and pay-per-view forms are increasingly available on the Internet.

<sup>190</sup> See, e.g., Practising Law Institute at <http://www.pli.edu/> (last visited Nov. 14, 2005) (including links to scholarships for legal aid, government attorneys, and law students to attend PLI seminars); ALI-ABA at (<https://www.ali-aba.org/index.asp>) (last visited Nov. 14, 2005); state bar programs and publications.

<sup>191</sup> Lexis and Westlaw have thousands of databases. Most attorneys will only need a small number of these regularly, but we teach students how to mine these systems for specialized content.

<sup>192</sup> Comparing the strengths and weaknesses of natural language and boolean searching, field and segment searching, digest searching print and online; evaluating and editing search results, etc.

<sup>193</sup> Advanced Shepard's and KeyCite; saving results and scheduling automated system updates (Eclipse and WestClip); Lexis's Search Advisor and Westlaw's KeySearch, etc.



At the University of Missouri-Columbia, a practitioner-oriented library tour introduces students to many unfamiliar resources. We show how longstanding practitioner sets, many available online, support case development and case management research.<sup>194</sup> Determining the elements of a cause of action,<sup>195</sup> valuing the case,<sup>196</sup> drafting pleadings, discovery, pre-trial motions,<sup>197</sup> negotiating settlements,<sup>198</sup> and proving the case in

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<sup>194</sup> There has never been a better time to teach students the big picture of litigation research. Until recently, Lexis and Westlaw law school subscriptions had sparse litigation content compared to law firm subscriptions. In recent years litigation materials have increasingly become available on free Internet websites. Organizations like the ACLU post briefs, complaints, and other documents in major cases. Now Lexis and Westlaw have opened up extensive litigation sources to law schools. Supreme Court briefs, post-1978, have always been available, but now law students can also search a growing body of state court and lower federal court briefs. Dockets, pleadings, motions, and briefs arranged by topic and pattern jury instructions and jury instructions filed in selected cases are just some of the resources Westlaw has made available to students. Lexis' "Litigation Research Tasks" feature organizes these resources in searchable templates, integrating access to free Internet websites with proprietary content. Both Lexis and Westlaw are pushing the envelope on content and access. Many of their practitioner resources, not just litigation, are underutilized in skills courses. Some students may stumble upon them accidentally, but practitioner research components in skills courses would significantly improve practice readiness.

<sup>195</sup> See, e.g., CAUSES OF ACTION, COA database (Westlaw) (consisting of nearly five hundred articles that focus on a wide variety of causes of action that arise in personal injury, civil rights, family law, bankruptcy, insurance, professional, malpractice, commercial, business, and many other contexts. Each article identifies the elements of the cause of action, provides guidance on how to bring and defend such an action, and sample litigation forms).

<sup>196</sup> See, e.g., Jury Verdict Research, <http://www.juryverdictresearch.com/index.html> (last visited Nov. 14, 2005) ("[N]ationwide database of more than 245,000 plaintiff and defense verdicts and settlements resulting from personal injury claims. The data are reported, tabulated and analyzed to determine values, trends and deviations for more than 400 injuries and 300 liabilities including vehicular liability, products liability, business negligence, medical malpractice and more.").

<sup>197</sup> Traditional formbook sets include AM. JUR. PLEADING & PRACTICE FORMS, MOORE'S FEDERAL PRACTICE, WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE and BENDERS' MODERN DISCOVERY FORMS. Public Access to Electronic Court Records (PACER) is an excellent, affordable resource for federal dockets and pleadings at <http://pacer.psc.uscourts.gov/>. Litigation

court<sup>199</sup> are some of the nuts-and-bolts practice considerations and expectations that are still fuzzy for many upper-level students.<sup>200</sup> By giving them a meaningful, context-based introduction to these resources, the students develop some confidence that they might actually know where to begin when dealing with a real-life client in a real-life situation.<sup>201</sup> Judging from the looks on their faces

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content has become increasingly available on Lexis' and Westlaw's law school educational subscriptions. *See supra* note 194.

<sup>198</sup> *See, e.g.,* ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS, ATNEGGUIDE database (Westlaw) (including sample settlement agreements); Henry G. Miller ART OF ADVOCACY: SETTLEMENT (Matthew Bender); STRUCTURED SETTLEMENTS (West).

<sup>199</sup> Traditional case preparation sets include AM. JUR. PROOF OF FACTS and AM. JUR. TRIALS. Also available in the combined AMJUR-POFTR database on Westlaw, which describes PROOF OF FACTS:

[as] discuss[ing] the elements of proof, practice and evidentiary considerations, and defense considerations, and provides model discovery. It is organized and indexed so you can find facts-in-issue, sample proofs, and collateral references quickly and easily. Question-and-answer dialogues guide lawyers in assembling facts, preparing factual issues for settlement or trial, and examining every type of witness. Technical, scientific, and medical information help the user speak the language of the experts.

AM. JUR. TRIALS is touted on Westlaw as:

Authored by a virtual "Who's Who" of the American trial bar, AM JUR TRIALS shares the techniques and strategies that spelled success in the actual cases of more than 300 prominent trial attorneys, judges and other legal experts. Details successful techniques point-by-point in its hundreds of informative model trial articles that cover the spectrum of personal injury, business, and criminal litigation. Provides step-by-step guidance through all the phases of trial—from initial client interview, discovery, pleadings, motions and trial itself, to posttrial motions and appeals.

Features/Benefits in this database:

- Checklists

- Model pleading, discovery, and motion forms

- Sample opening statements and final arguments

- Sample litigation aids—photos, maps, diagrams, charts, tables, graphs, and more

<sup>200</sup> Seeing examples of how law is practiced and learning how to research and adapt such examples to new situations eases the transition to actual practice.

<sup>201</sup> *See infra*, Appendix, Practitioner Resource Tour.

when they see these resources for the first time (and from comments outside class), we know we have relieved some of their fears about the unknown aspects of law practice. They begin to understand what is expected of them. By showing how these sources can help them complete specific lawyering tasks such as drafting a complaint, removing a case to federal court, crafting interrogatories, serving and filing motions, etc., students accept (some even embrace) legal research as a powerful law practice ally, instead of a rite of passage or grunt work.

Concurrent with practitioner print materials, we introduce specialized electronic resources and have students practice advanced electronic searching techniques. Although advanced legal research students have been using Westlaw and Lexis since starting law school, few have ventured much beyond the cases, statutes, and journal databases. Topical litigation newsletters, verdict reporters, public records and docket files, looseleaf alerts, practice libraries and other similar resources expand the practitioner's information seeking and research options. The goal is not for students to memorize lists of specialized resources, but to know that resources of this nature exist and how to find them.<sup>202</sup>

A practitioner's print tour and advanced electronic resource instruction can easily be downsized from the broader content covered in a semester long advanced legal research course to smaller modules more targeted to clinical work. The print tour should focus on sources directly supporting the clinic's mission and the online instruction should provide ample free Internet research instruction and also cover commercial databases the clinic has access to.

### *B. Simulating Practitioner Research*

To become independent researchers, students must be motivated to seek and learn how to use resources on their own.

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<sup>202</sup> See, e.g., Kendall F. Svengalis, LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL (Rhode Island Law Press, <http://rilawpress.com>); THE LEGAL RESEARCHER'S DESK REFERENCE 2004-05 (Arlene Eis ed.); LEGAL LOOSELEAFS IN PRINT, and LEGAL NEWSLETTERS IN PRINT (InforSources Pub.), (<http://www.infosourcespub.com/publications.cfm>).

The pedagogical challenge is how to move beyond canned treasure-hunt exercises and engage students in directing their own information-seeking activities. Customizing individual research assignments, despite increasing the instructors' workload, motivates student learning far more than having them all work on the same problems could. The varied subject matter also gives the class a busy law office feel and opportunities for the students to share information and new-found knowledge on wide-ranging procedural and substantive issues.

### *1. Mentoring (Instructor/Student)*

As their main project or capstone, advanced legal research courses, ours included, often have students prepare research guides (sometimes called pathfinders) on a legal or law-related topic. A typical research guide collects and organizes the sources one would need to conduct research on the topic.<sup>203</sup> We encourage students to choose a topic that closely matches their interests in practicing law, or a topic that would be useful to them if they were pursuing a non-traditional legal career path.<sup>204</sup> We require a "substantially complete"<sup>205</sup> draft early in the semester. In the first month of class we review basic research skills and sources, conduct the print tours and introduce specialized online practitioner resources. As we cover each subject (e.g., statutory, regulatory, court rules, etc.), we prompt students to build their draft incrementally by having them find equivalent sources on their

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<sup>203</sup> See, e.g., *A Pathfinder on Asset-Backed Commercial Paper*, <http://www.fordham.edu/law/lib/path/example1/> (last visited Nov. 14, 2005) (not updated since 1999, but nonetheless an excellent example of how a pathfinder or research guide can help organize research on a complex or unfamiliar topic).

<sup>204</sup> A sampling of research guide topics chosen shows broad ranging interests: Three Strikes Law, Special Education Law, Medical Malpractice Defense in Missouri, Internet Domain Names, Cybersquatting, Patient Rights, Corporate Governance and CEO Liability, Environmental Site Assessments in Real Estate Transactions, RICO, Pharmaceutical Malpractice, OSHA, Prosecuting Patent Infringement, and Missouri Election Law.

<sup>205</sup> Frontloading the work on the guide gives the instructors just enough time to create customized research assignments that allow students to put the guide to use and shore up their final drafts.

topic. Student feedback indicates that those who conscientiously participated in these bite-sized assignments find the production of the research guide fairly painless.

Minimizing pain helps, but rarely inspires. While the students are working on their draft, we research and prepare customized research assignments that put their guides to immediate use. The assignments are handled as research simulations in one-on-one meetings, with the instructor playing a senior attorney with an actual client problem. Assignments include both short<sup>206</sup> and lengthier research projects.<sup>207</sup> We create the fact patterns based on the student's research guide topic and try to design the problems around unsettled or complex issues.<sup>208</sup>

The students sometimes find that they know exactly how to research the problem because of background and resources gathered while preparing their research guide. Already knowing the statutory and regulatory landscape of their subject and secondary sources they could turn to helps make their research more efficient and effective than starting from scratch. Students who are stumped by their research assignments see where their research guide draft falls short. Either, or both, of these realizations are instructive to the students.

We provide for frequent one-on-one mentoring throughout. Although time consuming and research intensive for us, the individual meetings and assignments applying the guides are

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<sup>206</sup> *E.g.*, researching jury verdicts and case settlements; KeyCite or Shepard's to validate a case (usually one that has been partially reversed); statute of limitations; court rules; opposing counsel and judges; potential expert witnesses' qualifications. The shorter assignments are sometimes sent as "urgent" emails requiring an answer the next day. They are framed in the context of an ongoing client matter with the research often feeding into larger assignments.

<sup>207</sup> *E.g.*, researching circuit court splits, issues of first impression, motion practice authority.

<sup>208</sup> If there is a Supreme Court case pending on their topic, we may ask for a draft letter advising how the Court's ruling will affect their clients. If there is a pending regulation, we may ask for a draft comment to the agency advocating or opposing the regulation. Research memos helping senior attorneys prepare CLE and bar presentations are also instructive. The common denominator is that the assignments expose students to some aspect of practitioner research they are likely to encounter.

invaluable in capturing “teachable moments” with students. They are delving into a subject that interests them, they have already made some attempts to ferret out information, and they are beginning to realize where they need direction. Giving them attention and help at this moment exposes the students to the wider realm of practitioner sources available on their topic and the value of a “colleague’s” research experience and expertise. It also conditions students to ask the right questions: “is there another resource out there that might meet my needs (and how can I find it)?” and “is there someone who could help direct me to information I might otherwise miss?”<sup>209</sup>

We are more interested in how students exercise judgment in organizing, evaluating and applying their research than in finding a single pre-determined answer. When giving the assignment, we downplay our objectivity preferring to see how students reconcile client demands with adverse authority. We expect students to correct our intentionally client-biased preconceptions and to suggest creative (reasonable) alternatives when the law does not favor the client.<sup>210</sup> This may entail recommending new avenues of research or helping clients adjust their goals and expectations. Many students find it difficult to work through uncertainties and ambiguities in their research assignments. Their frustration over not knowing exactly what our expectations are (when role-playing the assignments) teaches them how to work through “real life” research assignments that are rarely straightforward and often poorly negotiated.<sup>211</sup>

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<sup>209</sup> It is hard admitting not knowing what to do, but it is better than finding out after the fact that help was nearby for the asking.

<sup>210</sup> See Sullivan, *supra* note 54.

<sup>211</sup> See Kimm Alayne Walton, J.D., WHAT LAW SCHOOL DOESN'T TEACH YOU... BUT YOU REALLY NEED TO KNOW (Harcourt Legal & Prof. Pub.) (2000) (Chapter Five, *How to Crush Research and Writing Assignments*, illustrates common mistakes summer associates and new attorneys make on research and writing assignments, many of which are not because of inability to do substantive work, but result from poor communications and misunderstandings with assigning attorneys).

## 2. *Inverting the Classroom (Self-Directed and Peer Learning)*

Students bring diverse research skills and experiences to advanced legal research courses. Those who have already mastered research basics usually expect to start off learning advanced skills and will be impatient with too much first year review. Students who believe they did not learn legal research very well the first time around may benefit from taking a second pass at the material from a different perspective. Devoting significant class time to remedial work, and lecturing extensively, even on advanced subjects, would limit opportunities for experiential learning. Although knowledge of basic research sources and techniques is a prerequisite, students develop advanced legal research skills by working in situations closely resembling what they will experience in practice.

In order to provide appropriate instruction for widely disparate research abilities and time for skills practice, we incorporate a methodology called “inverting the classroom” to deliver traditional instruction outside class. Although instructors have undoubtedly used similar techniques for years, Lage, Platt, and Treglia are credited with coining “inverting the classroom” as a documented teaching methodology.<sup>212</sup> These economics educators observed that a typical classroom included students with a wide variety of learning styles—many of which are incompatible with the instructor’s personal or preferred teaching style.<sup>213</sup> To accommodate multiple learning styles, students had to become responsible in part for directing their own learning outside of class.

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<sup>212</sup> See Lage, Maureen J. Lage, Glenn J. Platt & Michael Treglia, *Inverting the Classroom: A Gateway to Creating an Inclusive Learning Environment*, 31(1) J. ECON. EDUC. 30-43 (Winter 2000).

<sup>213</sup> There is a large body of literature on learning styles, adult learners, and what that means in a classroom setting. A fuller discussion of those topics is instructive, but outside the scope of this article. The Lage article, *supra* note 212, contains a brief discussion of learning styles. For discussions of learning styles in the clinical and legal research literature, see Paul S. Ferber, *Adult Learning Theory and Simulations-Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417 (2002); see also Kristin B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning Through Learner-Centered Assessment*, 94 LAW LIBR. J. 59 (2002).

For class preparation, students selected the tools the professors provided that were most suitable for their learning the basic material before class.<sup>214</sup> It was the students' responsibility (or burden) to assess their own research skill and comfort levels, and to use supplementary materials (or consult us individually) as needed to bring themselves up to speed. This approach models the commitment to self-learning that practitioners will need in their legal careers.

We use classroom time to build on the basic knowledge, answer questions, explore topics in greater depth, and discuss practitioner research expectations. Inverting the classroom also facilitates peer instruction such as small group research exercises, problem solving activities in which students apply their research, and peer review of research assignments in progress. Regardless of preferred learning (and working) styles, potential lawyers must master collaborative skills.<sup>215</sup> From day one, students are encouraged to talk with their classmates, colleagues, employers, and librarians about their research problems. Law is not practiced (or is not practiced very well) in a vacuum, neither is legal research. Inverting the classroom gives us time and freedom to oversee the practice of collaborative research skills and provide immediate instructor and peer feedback. Classroom law office simulations add context and a real-life atmosphere to advanced research instruction that lectures and library exercises ordinarily lack.

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<sup>214</sup> Tools we used to invert the advanced legal research classroom included self-assigned readings in legal research texts and nutshells, CALI research lessons and other self-paced tutorials, course page links to legal research resources and instruction sites, lecture notes and PowerPoint slides, videos, and other resources.

<sup>215</sup> Welch, *supra* note 2, at 1618. ("In contrast [to law students], business and medical students are more thoroughly immersed in a group process when doing their problem solving for a case, and this more collegial style of responding is often typical of the practice world into which they will graduate. The same holds true for the practice setting that most law school graduates will enter . . . . Law schools should search for ways to involve students more in collegial deliberative processes with an eye toward developing the kinds of professional judgment skills that will be required in practice.").



*Group Strategizing and Research Planning.* With the instructors once again role-playing senior attorneys, we use a group exercise to practice McDonnell's audience research concepts discussed in Part III.C.<sup>216</sup> The firm's junior associates are summoned to a brainstorming and planning meeting. Students are given a file memo in advance of the meeting.<sup>217</sup> Together, we identify and bat about legal issues, while discussing the various "audiences" that we need to understand, persuade, and convince. Then, each table is assigned one "audience" to work on in greater depth.<sup>218</sup> The groups brainstorm and develop a research plan that addresses the facts and issues we want to know more about associated with that "audience." Each group proposes options that might solve or manage the "problem" their client encounters with that particular audience. Many of the recommendations do not call for traditional legal action but are practical suggestions for

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<sup>216</sup> See McDonnell, *supra* text accompanying notes 70-75.

<sup>217</sup> See *infra*, Appendix 2, "Mad Michael" file memo, including background for the brainstorming and research planning meeting.

<sup>218</sup> The problem raises intellectual property, breach of contract, and non-competition legal issues, but students must first sort out the competing interests among several audiences with varying business and personal concerns. As Welch reminds us, "The importance of 'the facts' is often overlooked in exercises in 'applying the law.' In order to determine what the law means in a specific set of circumstances, one must first know what that set of circumstances is. In the classroom, and in excerpts of appellate opinions in casebooks, we routinely tell students one version of what the circumstances are. In legal practice, it's a different story. Attorneys must develop their own version of the situation at hand. Thus, forcing students to attend to discovering and sorting through facts before engaging in 'higher level mental activities' is important. This is practice in deciphering complicated situations. This is preparation for figuring out what's going on in real-world cases. This is a first step in the crucial process of forming professional judgment." Welch, *supra* note 2, at 1615. In the advanced legal research exercise above, the main legal theories that must be researched are fairly easy to derive from the problem, the actual research is substantially harder and perhaps most challenging is figuring out what additional facts are needed (through interviewing clients and witnesses and conducting discovery) to support the legal theories. The brainstorming session is designed to show students that practitioner research is closely linked to fact finding and case management.

addressing a client's problem.<sup>219</sup> Those who brainstorm legal remedies discuss the research they would need to conduct before reporting back to the assigning attorney or client.

*Collaborative Research.* In another group exercise, we divide the class into "practice groups" based on their research guide topics. We assigned students as much as possible to groups that have complementary interests (past groups have included family law, bankruptcy, personal injury, and intellectual property). We then assign one student the role of senior attorney and devise a research scenario based on that student's research guide topic. The senior attorney is responsible for assigning research tasks to his/her team, guiding the team to helpful resources, and evaluating research findings. The senior attorneys already have some knowledge about the topic from their draft research guides, but it is up to their junior associates to research specifics. The students are given class time to meet with team members and to conduct part of their research. The simulation concludes with the entire team meeting as a group with an instructor, who facilitates a discussion of the research results, and, perhaps more importantly, a "post-mortem" of the process and an evaluation of the performance of all participants.

*Consulting.* Throughout the course, we encourage collaboration with experts outside of the class. Because students chose their own research guide topics, many already have some

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<sup>219</sup> Welch cites the need for more collaborative experiences in law school. Exam preparation, moot court teamwork, and negotiation exercises, etc. "are exceptions to the solitary nature of most of a law student's study and preparation. Law schools should search for ways to involve students more in collegial deliberative processes with an eye toward developing the kinds of professional judgment skills that will be required in practice." Welch, *supra* note 2, at 1618. A collaborative approach to advanced legal research instruction is one such way. Clinical methods of "communication and storytelling in which the student practitioner learns to communicate his or her client's story using a variety of techniques in a variety of contexts" should include advanced research instruction as one of its techniques. See Seielstad, *supra* note 56, at 190. Audience research holds much promise for supplementing clinical teaching objectives such as "comprehensive client counseling that leads to clear understanding of the client's goals and priorities and prepares clients for processes and outcomes other than those predicted by traditional trial." *Id.*

relationships with “experts” in their field—professors, attorneys, co-workers, etc. Students who take advantage of these opportunities learn to value people as much as books or databases for their research; positive affirmations from respected figures go a long way toward building skills confidence.<sup>220</sup>

## VI. CONCLUSION

This article hopes to raise awareness of the many challenges in making the transition from law school research to practice research and to seek new opportunities in the law school curriculum for providing advanced research instruction. Clinical courses provide unique opportunities for law students to gain experience with and appreciation of the complexity of information seeking, analysis, and application skills in a practice setting. Much of the difficulty and frustration with practitioner legal research can be attributed to inexperience in managing the abundance of material that is available and the tendency to be overwhelmed by it. Librarians with good teaching skills possess the knowledge, expertise, and empathy to make research less mysterious and forbidding. There is much more to practitioner research than traditional legal research. This article recommends that clinicians and librarians work together to develop customized research instruction modules in the classroom portion of the clinic. In this collaboration, the clinical professor knows common and complex questions students will need to research in a clinical setting; librarians know how to shape those questions into a research instruction plan.

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<sup>220</sup> One student reported, with much pride, that upon review of his research guide, a professor commented that the student “could teach his course.”

## APPENDICES

### *Excerpts from Advanced Legal Research at University of Missouri-Columbia*

#### 1. PRACTITIONER RESOURCE TOUR<sup>221</sup>

You are preparing your first lawsuit, a medical malpractice action, in Boone County Circuit Court. A colleague has reviewed the substance of the petition and you are ready to file it. You also need to draft defendant interrogatories.<sup>222</sup>

Partner gives you her client notes and asks you to research the elements of an Equal Pay Act claim. Then she wants you to prepare a memo highlighting the major hurdles in litigating this case and to draft a complaint.<sup>223</sup>

You are assigned to draft a set of interrogatories in a restaurant food poisoning case.<sup>224</sup> Opposing counsel objects to several of the interrogatories and provides incomplete responses to others. After several failed attempts to resolve this discovery dispute with opposing counsel, you are asked to prepare a motion to compel discovery. The parties are diverse—the case is in federal court, the U.S. District Court for Kansas. You need: (1) an authoritative source providing background/guidance for preparing your first motion to compel;<sup>225</sup> (2) a current version of Federal Rules of Civil

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<sup>221</sup> See *supra* text accompanying notes 194-202.

<sup>222</sup> *Supra* note 15 (pattern interrogatories required by local court rule, available only through local bar association web site).

<sup>223</sup> James Lockhart, *Cause of Action for Violation of Equal Pay Act* [29 USC § 206(d)], 12 CAUSES OF ACTION 191 (updated October 2004) (article includes these sections: Prima Facie Case, Defenses, Persons Entitled to Bring Action, Persons Potentially Liable, Jurisdiction and Venue, Limitations, Recovery, Statutory Text, Sample Complaint and Sample Answer).

<sup>224</sup> See 8C-166 BENDER'S FORMS OF DISCOVERY, *Interrogatories Form 4—Plaintiff's Interrogatories to Defendant—Action Against Restaurant for Serving Spoiled Food*.

<sup>225</sup> See 7-37 MOORE'S FEDERAL PRACTICE, *Chapter 37 Failure to Make Disclosure or Cooperate in Discovery: Sanctions*; 8A (Wright and Miller)

Procedure Rule 37<sup>226</sup> and any applicable local court rule;<sup>227</sup> (3) case law under Federal Rules of Civil Procedure Rule 37;<sup>228</sup> and (4) sample motions.<sup>229</sup>

Three days before trial a harried senior associate asks you to draft jury instructions for the food poisoning case<sup>230</sup> and jury instructions for a copyright trial next week in which the main issue is contributory infringement.<sup>231</sup>

You did such a fine job on the jury instructions that the senior associate “invites” you to serve as second-chair at the food poisoning trial and to assist in preparing the direct examination of the plaintiff.<sup>232</sup>

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FEDERAL PRACTICE AND PROCEDURE, Rule 37, *Failure To Make Disclosure Or Cooperate In Discovery; Sanctions*.

<sup>226</sup> Federal Rules of Civil Procedure: With Forms, <http://judiciary.house.gov/media/pdfs/printers/108th/civil2004.pdf>.

<sup>227</sup> Fed. R. Civ. P. 37.1 Motions Relating to Discovery, U.S. District Court District of Kansas Rules of Practice and Procedure for District and Bankruptcy Court (effective March 17, 2005), <http://www.ksd.uscourts.gov/rules/localrules05.pdf>. (on file with the North Carolina Journal of Law and Technology).

<sup>228</sup> *Supra* note 197 (motion practice authority). See also 28 U.S.C.A. FED.R.CIV.P. 37 (Notes of Decisions), Federal Rules Service (West).

<sup>229</sup> 3B WEST’S FEDERAL FORMS, District Courts-Civil § 3699 (5th ed.) (“Motion To Compel Answer To Interrogatories”); Trial Motions (*motions*) database on Westlaw (motion types include motion to compel discovery); 8-37 BENDER’S FEDERAL PRACTICE FORMS (e.g., Form 37:10 Motion to Compel Answers to Interrogatories 1).

<sup>230</sup> 13B AM. JUR. PL. & PR. FORMS, *Hotels, Motels and Restaurants* (“Instructions to Jury—Liability of Restaurateur for Serving Unwholesome Food” sec. 145).

<sup>231</sup> Kevin F. O’Malley, Jay E. Grenig & Hon. William C. Lee, 3B FED. JURY PRAC. & INSTR. § 160.29 (5th ed.) Part VII. Instructions For Civil Actions Governed by Federal Law Chapter 160. Copyright Infringement (17 U.S.C. § 101 Er Seq.) C. Essential Elements of Plaintiff’s Claim § 160.29 Contributory Infringement (2001).

<sup>232</sup> 47 AM. JUR. POF 3d 47 *Proof of Liability for Food Poisoning* (“Testimony of Plaintiff”).

Your firm has a growing practice in health care law. How do you stay current on the latest health care law developments?<sup>233</sup>

Your busy litigation practice requires you to stay on top of Supreme Court and important lower federal court cases.<sup>234</sup>

## 2. RESEARCH PLANNING SIMULATION<sup>235</sup>

**Memo to File:** (Distributed prior to class. In class students are divided into groups representing the major audiences—Waters, Mooney, Michaels, WNF, Inc., PRU, Inc. and the Children’s Toy House, Inc. Students brainstorm audience interests and needs,<sup>236</sup> common and conflicting interests among the audiences, possible solutions (legal and non-legal) and research plans to protect their “clients” interests. Simulations of this nature based on representative clinical cases would be a valuable part of a clinical research instruction module.)

Bob Waters spent the first half of his career creating many popular characters on children’s public television programs. In 1987, he left television to start his own business, the “Warm /N Fuzzy Toy Factory” (“WNF”), in [City], [State]. WNF began as a regional toy manufacturer, marketing its own line of nurturing, cuddly-type toys primarily to smaller, non-chain toy retailers in New England and along the Atlantic coast. WNF began turning a profit in 1992, enjoying steady growth through 1996, when annual sales peaked at [fill in amount].

Waters is philosophically opposed to producing toys that encourage or promote violence. His nephew, who spends most of his free time playing video games, has a history of violent, delinquent behavior. Waters has steadfastly rejected suggestions from WNF managers/product developers to establish online

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<sup>233</sup> HEALTH CARE DAILY REPORT (BNA), <http://www.bna.com/products/health/hdln.htm> (last visited Nov. 14, 2005) (on file with the North Carolina Journal of Law and Technology).

<sup>234</sup> U. S. LAW WEEK (BNA), <http://www.bna.com/products/lit/uslw.htm> (last visited Nov. 14, 2005).

<sup>235</sup> See *supra* text accompanying notes 216-219.

<sup>236</sup> See *supra* text accompanying notes 66-79.

products for children, because he believes the medium lacks proper safeguards for protecting children from violent influences. Unwilling to embrace the preferences of the video generation for action entertainment, WNF's business has stagnated in recent years. In 1999, Waters was forced to sell [fill in amount] of his WNF interest to "Profits R Us" ("PRU") to save the company.

PRU's CEO, Moore Mooney, and Waters who stayed on as WNF's president, have had a rocky relationship. PRU owns many national businesses, but WNF is its first venture into the toy industry. Mooney believes that WNF must establish a national presence, like other PRU businesses. Not surprisingly, Waters prefers to concentrate on regional growth so that WNF won't get spread too thin or compromise its [his] mission to produce wholesome toys.

In 2000, at Mooney's urging, Waters hired Todd Michaels to turn WNF around. Michaels was considered a rising star in the toy industry, combining sound business acumen with a creative streak for designing toys that captured children's imagination and parents' pocketbooks. Michaels signed a non-competition agreement providing that he would not compete within [ ] miles of WNF's headquarters for two years after leaving the company. The agreement also provided that WNF would retain exclusive rights to Michael's work product created at WNF.

Michaels succeeded in increasing WNF's regional toy sales through 2002, but became frustrated over Water's refusal to expand online. Under the guise of market research, Michaels developed a video game and web site featuring hipper versions of the traditional WNF line of characters. Michaels' game would likely be "E" rated and presumably suitable for Waters audience. Several members of WNF's management team agreed with Michaels that this would be an excellent opportunity to take the business online without compromising the traditional image of most of its major characters. Waters and a few of the more senior managers disagreed and nixed the project.

WNF's business plummeted in 2003. Michaels decided he had enough of trying to breathe life into the stale and dated WNF line of toys and invented "Mad Morton," a smart-talking, no-nonsense,

in your face action figure. Market tests indicated that 6-8 year old boys would fall hard for Mad Morton. Mad Morton bears a striking resemblance to “Magnificent Marty,” an original WNF character. (Remove Mad Morton’s nose ring and tattoos and you have Magnificent Marty.) Waters was appalled and halted production before the first Mad Morton hit the assembly line. Michaels resigned.

In 2004, Michaels set up his own company in [city], [state], 85 miles from WNF headquarters. He sells “Mad Michael” (Morton minus the nose ring) on his web site, but doesn’t have the production capacity PRU could have provided to fill all his orders. His web site receives orders for Mad Michael nationwide. Along with his production woes, Michaels is not all that happy about his new home. The cost of living is higher in [new city] than in [old city], the schools aren’t as good (Michaels has six and eight year old daughters), and he misses working with most of his former WNF colleagues.

Waters wants to sue Michaels for breaking the employment contract, stop him from selling Magnificent Marty’s “evil offspring,” and shut down his web site. Michaels claims that he is not competing with WNF since WNF doesn’t sell its products online. He also believes that WNF has no legal right to Mad Michael.

Mooney, PRU’s CEO, believes there’s still money to be wrung from WNF, but not without completely overhauling its outdated product and marketing philosophy. Michael’s web site intrigues Mooney as a base for building PRU’s toy business, but it was Mooney who originally insisted that Waters require Michaels to sign the non-competition agreement. Non-competition agreements have been required as a matter of course in all PRU businesses. Mooney is concerned, however, about alienating potential PRU and WNF customers if Waters succeeds in shutting down Michaels.

The “Children’s Toyhouse” which is based in [City], [State] and which operates primarily in southeastern states, has contacted Waters about merging the two companies. Children’s Toyhouse claims to be on solid economic footing. Based on their initial



approach, Waters is encouraged that Children's Toyhouse's corporate values appear to be compatible with his. He believes that a deal could be struck quickly subject, of course, to Mooney's approval. The Children's Toyhouse is especially interested in the old Magnificent Marty character, which it sees as a valuable asset with a little sprucing up and some clever marketing.

*The following preliminary summary of the law (including the fictional Uniform Law described in the summary) is made up solely for the purposes of this exercise. Assume it is accurate for purposes of this exercise.*

Courts in WNF's home state have traditionally weighed the employer's interest strongly when construing non-competition agreements. The cases are based on common law principles set out in a 1973 state high court decision. Three years ago, the National Conference of Commissioners on Uniform State Laws approved the Uniform Non-Competition Act, which, in part, attempts to bring the law of non-competition agreements in line with modern e-commerce business practice.

Commentators suggest that the Act is employee-friendly. New York, Michigan, Connecticut, Texas, and Maine enacted versions of this Act in 2003. Massachusetts and California, Pennsylvania, and WNF's home state enacted similar versions this year.<sup>237</sup>

### 3. CLINICAL RESEARCH INSTRUCTION MODULE

*Basic Research Refreshers: Cases, Statutes, Regulations, Legislative History, Secondary Sources (Orienting Yourself to Unfamiliar or Complex Subjects)*

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<sup>237</sup> This fictional account of the law facilitates discussion about legislation changing the common law, about the importance of Uniform Laws in practice, and the nuances of researching persuasive authority when there are no cases interpreting a Uniform Act recently adopted in the home jurisdiction. The fact pattern raises a host of other potential legal research issues ranging from jurisdiction and injunctive remedies to intellectual property rights in the Marty-Morton-Michaels devolution. The primary goals of the simulation are to help students appreciate research (factual, investigative, and legal) as a driving force in case construction and to practice collaborative research planning.

The type of clinic will determine which of these topics need to be addressed, and how extensively. For most of the topics, it should be the students' responsibility to assess their own research skill and comfort levels, and to use supplementary materials as needed to bring themselves up to speed outside of class time. These supplementary materials, identified/provided by the instructor, might include readings in legal research texts, CALI lessons, self-paced tutorials, lecture notes, PowerPoint slides, videos, etc.

If one (or more) of these topics is particularly significant in the clinical experience, we would suggest combining the self-study mentioned above, with a classroom discussion that can answer questions about basic knowledge, and explore the topic in greater depth with a practitioner-oriented focus.

### *Practitioner Research Transitions*

Unwritten Laws and Customs<sup>238</sup>

Audience Research<sup>239</sup>

Non-legal Authority<sup>240</sup>

Public Interest Law Research Environment<sup>241</sup>

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<sup>238</sup> Clinical faculty will know best what the unwritten laws and customs are in their locale and can teach students accordingly. Recommended reading: Seielstad, *Unwritten Laws and Customs*, *supra* note 56.

<sup>239</sup> Recommended reading: McDonnell, *Playing Beyond the Rules*, *supra* note 6.

<sup>240</sup> Recommended reading: Schauer & Wise, *Non-Legal Information*, *supra* note 61.

<sup>241</sup> Recommended reading: Pether, *Inequitable Injunctions*, *supra* note 95; McGarity, *Our Science is Sound Science*, *supra* note 136; Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, *supra* note 92. See also Lynn Foster & Bruce Kennedy, *Evolution of Research: Technological Developments in Legal Research*, 2 J. APP. PRAC. & PROCESS 275 (2000); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001); William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429 (2002-03); Serfass & Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, *supra* note 129 and Lien, *Technocentrism*, *supra* note 3.

*Practitioner Resources*<sup>242</sup>

Introduction to a customized selection of relevant practitioner materials that could include looseleaf services, formbooks, continuing legal education materials, etc.

Free internet research instruction, including evaluation of internet resources

Commercial databases available to clinic

Advanced database contents, search strategies, and search features

Topical litigation newsletters, verdict reporters, public records and docket files, looseleaf alerts, practice libraries.

*Customized Clinical Research Simulations*<sup>243</sup>

Short legal research assignments (derived from prior clinical cases)

Collaborative planning sessions (integrating research with case construction)

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<sup>242</sup> See *supra* text accompanying notes 188-202.

<sup>243</sup> See *supra* Part V.B.