

## READING (IN THE CLINIC) IS FUNDAMENTAL

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*Lawyers do a lot of reading. Much of what we think of as legal work involves reading, and there is real consequence if it's not done well. Yet this core professional activity does not attract much attention in the clinical and lawyering skills literatures, and it's easy to take reading for granted. This article argues that clinical teachers, who are charged with developing lawyer competencies and disciplines in their students, should think explicitly about reading as a professional activity. They should consider bringing an awareness of novice reading challenges and a reading development sensibility to the everyday work of the clinic, and take advantage of opportunities in that work for practice in, and reflection about, what it takes and what it means to read as a lawyer. The article includes a discussion of the scholarly literature relating to legal reading including several studies comparing expert and novice reading practices, some observations about the relevance and utility of that literature to the clinical instructor, and discussion of several specific teaching ideas.*

### INTRODUCTION

We lawyers read a lot. We read when we research or do due diligence. We read to prepare for interviews, counseling sessions, negotiations, and oral arguments. We read when we edit a colleague's or our own drafts, or review a brief or proposed contract from the other side. We read all kinds of things. Corporate lawyers read governance materials, contracts, financial disclosures, and transaction closing documents. Environmental lawyers read administrative records and technical studies. Intellectual property lawyers read patents. Criminal lawyers read police reports. Tax lawyers read letter rulings. Litigators read motions, briefs, transcripts, and the diverse documents produced in discovery. Just about every lawyer reads statutes, rules, forms, regulatory directives, judicial opinions, and memos. We're paid to read, and we're relied upon to do it well.

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Students and new lawyers often struggle with the reading given its variety and technical nature;<sup>1</sup> indeed, a great value of the law school clinic is that it provides students an initial exposure to the breadth of, and initial experiences and practice in reading, the materials of the trade. What's curious, though, is that the clinical teaching and lawyering skills literatures, as large as they are, don't talk much about reading. There is considerable discussion of lawyer activities such as interviewing, counseling, case theory development, and negotiation.<sup>2</sup> There is substantial writing about writing in the clinic.<sup>3</sup> The broader transactional skills literature does include articles and conference presentations about classroom use of contracts and other real-world materials, works that mention reading.<sup>4</sup> None of these literatures, though, seem to include much overt consideration of reading as a core activity of the lawyer, or of the research about reading comprehension.

Why is this? Is it because clinicians assume law students just know how to read, or that the ability to read, say, literary or scientific texts, translates easily to legal documents?<sup>5</sup> Or because we believe that students will learn to read legal materials effectively through the first-year curriculum? Or that being at sea with unfamiliar material is

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<sup>1</sup> See *infra* note 53. See also Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 485 (2002) (noting that "first-year and second-year associates exert a lot of misspent effort because they lack a basic understanding of why corporate documents look the way they do. . . Starting out in corporate practice is more disorienting and frustrating than necessary because of the alien nature of financial documents. . ."); Therese H. Maynard, Conference Presentation, *Teaching Transactional Skills Through Simulation in Upper-Level Courses — Three Exemplars*, 10 TRANSACTIONS: TENN. J. BUS. L. 23, 26 (Special Report 2009) (noting reports from practicing lawyers that "[f]irst year [corporate] lawyers are . . . largely clueless as to what was expected of them when they were given projects such as reviewing documents . . .").

<sup>2</sup> See, e.g., STEFAN KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* (2011) (containing chapters on interviewing, fact analysis, counseling, and negotiation). The lawyering skills section of a 2005 clinical education bibliography includes headings for skills generally, interviewing, counseling, trial advocacy, mediation, negotiation, and problem solving. See J.P. OGILVY & KAREN CZAPANSKY, *CLINICAL LEGAL EDUCATION: AN ANNOTATED BIBLIOGRAPHY* (2005), available at <http://faculty.cua.edu/ogilvy/Biblio05clr.htm> (last visited February 20, 2012).

<sup>3</sup> See, e.g., Tonya Kowalski, *Toward a Pedagogy of Teaching Legal Writing in Law School Clinics*, 12 CLINICAL L. REV. 285 (2010); Andrea McArdle, *Teaching Writing in Clinical Lawyering and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501 (2005).

<sup>4</sup> See *infra* notes 22 – 24. Materials about the use of corporate and transactional documents in skills, contract drafting, doctrinal, and legal writing courses are contained or listed at a website maintained by the Center for Transactional Law and Practice at Emory University School of Law. <http://www.law.emory.edu/centers-clinics/center-for-transactional-law-practice.html>. (last visited January 22, 2012). See also Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 238 n. 22 – 29 (2011-12) (collecting references).

<sup>5</sup> See *infra* note 53.

part of the professional development experience? Or because, in this line of work, it's difficult to segregate "reading" from "thinking" (and for that matter "writing"), and that it all gets wrapped up in learning how to "think like a lawyer?"<sup>6</sup> That may all be so, but the absence of discussion still seems surprising given the size of the lawyering literature, the reality of reading as a central professional activity, and the likelihood that more than one clinician has looked at a student and thought (but suppressed the urge to say): didn't you *read* the document?

This article makes a modest argument. Reading really is fundamental to the practice. Given that, it is useful for a clinical teacher, charged with developing professional competencies and disciplines in her students, to stop and think about reading as a professional activity. There is utility in considering the materials students encounter in the clinic and what that encounter must be like to a novice. There is value in using the scholarly literature about reading comprehension as a tool to inform reflection about one's teaching practices. There are opportunities, in the everyday work of the clinic, to try to help students get better at something they will do every day. Choices about project development and work-product design, regular encounters with client documents, and exercises and discussions in the seminar, all provide opportunities for practice in, and reflection about, what it takes and what it means to read documents as a lawyer.

The article offers some ideas, based in part on experiences in a transactional clinic, about paying attention to reading. Part I offers some general observations about lawyer reading. Part II summarizes principal assertions of the legal reading literature, including its characterizations of the reading process, comparative studies of expert and student reading practices, and recommendations for legal education. Part III offers some observations about reading in the clinic. Part IV sets out several specific teaching ideas that draw directly on the recommendations of the legal reading scholars. Part V contains concluding observations. The teaching ideas here are largely suggestive and incremental; the broader notion is that clinical teachers should consider bringing an awareness of novice reading challenges, and a broader reading development sensibility and explicitness, to the work of the clinic.

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<sup>6</sup> Cf. Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867, 908 (2008-2009) [hereinafter *Wicked Problems*] (observing that "[l]egal literacy — the ability to work with legal texts and language — is central to thinking like a lawyer").

## I. LEGAL READING

We lawyers spend much of our days reading. We read for multiple purposes: discovering facts, finding legal authority, developing advice, learning about a client, editing a document, preparing for a meeting, studying a new law. Much of what we think of as legal work involves reading. Oftentimes, it literally *is* the work; lawyers are regularly retained to read documents. Clients send materials to lawyers, instruct them to read the documents, and take action based upon what the lawyer has to say after reading them. We are paid to read.

We look for a variety of things when we read documents. We read, of course, for comprehension. We need to understand the document. In a transactional practice, reading a contract means discerning the transaction structure, the asset ownership, the flow of value, the risk allocations, the events requiring actions or permitting exit, the conflict (or not) between obligations, the decision-making or dispute-resolution process, the deal plan. Reading a governance document involves recognizing the statutory, regulatory, market and other influences on the structures and processes contemplated by the document. In a litigation practice, reading a case includes looking for support or ideas for (or torpedoed of) an argument, how the law is developing, clues about a judge. We read for what a document says and what it doesn't say.<sup>7</sup>

We read documents for impact. We consider how documents may be perceived by potential readers, an inquiry that reflects in part the familiar lawyer stance of considering situations from others' points of view.<sup>8</sup> We think about how transacting parties, employees, investors, directors, auditors, competitors, regulators, media members, litigants, and judges may react to content or tone. We think about "optics," divergence from convention, precedent-setting, and reputational impact.

We read for legal craft. We study documents for communicative effectiveness, writing quality, and technical integrity. We read to confirm that the document responds fully to legal requirements relating to content and form. We read for internal consistency, within the document itself and with related documents, and with respect to voice for group-produced work-product. We read for drafting quality: we look

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<sup>7</sup> Document analysis includes "identifying significant omissions. . .and assessing the implications of these omissions for the present factual and legal theories." AM. BAR ASSN. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION 169 (1992) [hereinafter MACCRATE REPORT].

<sup>8</sup> *Id.*, at 173 (describing "fundamental lawyering skill" of communication as including "effectively assessing the perspective of the recipient of the communication").

for accuracy of cross-references, consistency between section caption and content, correct citation and table of authority form, and typographical error.

Lawyer reading is important. Clients, as well as judges, regulators and investors, rely on us to be good readers. The ethical obligation to act competently demands diligence, learning, and skill in all we do for clients. The ethical obligation to act with candor toward the tribunal demands thorough and honest reading of precedent.<sup>9</sup> Clients count on us to protect them or to achieve a particular legal result. A lawyer who is a poor reader — who skims but does not study, who fails to fully comprehend a document or identify technical error or contemplate external reaction — can do harm to his client. He can also lose his credibility, client base, job, assets, and even license.

We read for all these purposes at the same time. Reading for lawyers, it seems, is a layered, iterative, consequential activity. It requires both disciplined and imaginative habits of mind.

It is easy, as conveyed in a recent book by a neuroscientist about reading, to take the act of reading for granted.<sup>10</sup> It is easy in a law school clinic, where clinicians work with graduate students who have taken the first-year and often second-year courses, to assume that students can read legal and other documents. It is understandable that an activity as familiar as reading is not often called out as a fundamental lawyering skill but instead is viewed as inhering in and enabling other skills.<sup>11</sup> It is also understandable to question whether one can mean-

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<sup>9</sup> Rule 3.3(a)(2) of the American Bar Association's Model Rules of Professional Conduct provides that "a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3(a)(2) (2010), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_3\\_candor\\_toward\\_the\\_tribunal.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html) (last visited February 20, 2012).

<sup>10</sup> See STANISLAS DEHAENE, *READING IN THE BRAIN: THE NEW SCIENCE OF HOW WE READ* (2009).

<sup>11</sup> For example, reading is not explicitly named as a fundamental professional skill in the MACCRATE REPORT but is noted in the discussions of several of the named skills. The discussion of "legal research" provides that a "lawyer should be familiar with . . . specialized techniques for reading and analyzing court decisions." MACCRATE REPORT, *supra* note 7, at 159. The discussion of "factual investigation" calls out "document analysis" and notes that a lawyer should be "familiar with the skills and processes required for analyzing the documents, including identifying significant passages or portions of the documents and assessing the implications." *Id.*, at 169. Cf. Ian Gallacher, "Who are those Guys?": *The Results of a Survey Studying the Information Literacy of Incoming Law Students*, 44 CAL. W. L. REV. 151, 181 n. 51 (2007) (noting that reading is not identified as fundamental skill in the MACCRATE REPORT but is "presumably subsumed within the 'legal analysis and reasoning skill.'"); Lyndal Taylor, *et.al.*, *Reading is Critical*, 3 UTS L. REV. 126 (2001) (noting that the "fundamental skill of reading is often overlooked in the range of skills necessary for a law graduate to be considered a competent practitioner"). Reading is not expressly named in the curriculum requirements of the ABA accreditation standards. AM.

ingly isolate and assess reading performance from the thinking, writing, editing, and proofreading tasks performed by lawyers.

It doesn't really matter, though, that reading is rarely identified as an independent lawyering skill, or that reading may be hard to separate out from other head and hands activity of the lawyer. The facts are that the act of reading represents a huge proportion of what lawyers actually do all day, reading as a lawyer is multidimensional, and reading effectiveness is a determinant of success in other lawyer activities. At a practical level, student ramp-up time is at a premium in the clinic, and the casebooks, outlines, papers, and briefs of the first year bear little resemblance to the policies, contracts, bylaws, and environmental impact reports encountered in practice. Those are reasons enough for a clinician to contemplate reading. Moreover, the clinic is a place where students and instructors regularly break down and assess elements of lawyer performance and students are pushed to challenge their own assumptions. Reading may be a subject where we would benefit from challenging our own assumptions, and from reflecting on this aspect of lawyering and how we introduce students to the materials of practice. As with so much in the clinic, it never hurts to begin at the beginning. A source of ideas is the scholarly literature about legal reading.

## II. LEGAL READING LITERATURE

The legal reading literature focuses largely on an event frequently observed in the clinic: initial student encounters with legal texts. It comprises a range of materials produced by educational researchers and law professors.<sup>12</sup> There are, for example, two advice books for law

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BAR ASS'N STANDARDS AND PROCEDURES FOR APPROVAL OF LAW SCHS. §302 (2009 – 2010), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_standards\\_chapter\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_standards_chapter_3.authcheckdam.pdf). Reading is not included as one of 26 lawyer “effectiveness factors” identified in a recent study. Marjorie M. Shultz & Sheldon Zedeck, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND PREDICTORS FOR SUCCESSFUL LAWYERING (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353554). Both the ABA standards and the Shultz and Zedeck study call out activities such as research, legal analysis, factual investigation, and organizing and managing work that necessarily involve reading.

<sup>12</sup> A 2008 study noted that “the ‘issue’ of reading in law school is fairly recent. . .It is somewhat ironic that the conversation began with nonlawyers. . .[citing researchers].” DOROTHY H. EVENSEN, ET AL., LAW SCHOOL ADMISSION COUNCIL GRANTS REPORT 08-02, DEVELOPING AN ASSESSMENT OF FIRST-YEAR LAW STUDENTS’ CRITICAL CASE READING AND REASONING ABILITY: PHASE 2 38 (2008), available at <http://www.lsacnet.org/LSACResources/Research/GR/GR-08-02.pdf>. [hereinafter *LSAC Report*]. The literature is not particularly large. One group of scholars observed that the “limited nature of the literature available reflects a general lack of focus on reading skills which is particularly striking in a subject area and a profession which has language and the manipulation of language as its core business.” Taylor, *et.al.*, *supra* note 11, at 140. The authors of the *LSAC Report*

students about reading skills.<sup>13</sup> Books about law school learning include chapters about reading.<sup>14</sup> Articles report on studies of differences in how experts (like experienced judges and practitioners) and novices (like law students) read legal texts, and several discuss the relationship of reading practices to academic performance.<sup>15</sup> A recent article discusses the reading practices of law students with attention deficit disorder.<sup>16</sup> A Law School Admissions Council report reviews a study of first-year students' critical case reading ability.<sup>17</sup> Several articles discuss reading comprehension generally, including factors contributing to comprehension such as domain knowledge and the use of varied reading strategies.<sup>18</sup> Reading of legal texts is noted in a survey

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note that they studied case reading and reasoning skills because the topic is "under-researched relative to its importance, and because critiques of legal education by legal educators themselves continue to suggest serious problems with the way the majority of law schools approach instruction developing these skills." *LSAC Report, supra*, at 1 - 2. Reading is also not particularly visible in the broader legal education literature. A 2011 article that provides an overview and selected bibliography of the "learning" and legal education literatures, including materials relating to legal research and writing, "thinking like a lawyer," and the law school experience generally, cites the McKinney, Mertz, and Schwartz books noted below but does not cite any of the legal reading articles cited here in notes 15, 16 or 18. See Donald J. Kochan, "Learning" Research and Legal Education: A Brief Overview and Selected Bibliographical Survey, 40 SW. L. REV. 449 (2011).

<sup>13</sup> See RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* (2005); CRAIG K. MAYFIELD, *READING SKILLS FOR LAW STUDENTS* (1980). McKinney maintains a website relating to her book. <http://www.unc.edu/~ramkinn/Reading.html> (last visited January 22, 2012). Another, wider-ranging book targeted to students includes chapters providing guidance about how to read and analyze judicial opinions and statutes. See HELEN S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, *WRITING AND ANALYSIS IN THE LAW* 39 - 116 (2003) [hereinafter *WRITING AND ANALYSIS*].

<sup>14</sup> See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL - LEARNING TO THINK LIKE A LAWYER* (2007); MICHAEL HUNTER SCHWARTZ, *EXPERT LEARNING FOR LAW STUDENTS* (2008). The Mertz book is a scholarly study involving linguistic anthropological analysis. The Schwartz book is a guide for law students.

<sup>15</sup> See Leah M. Christensen, *The Paradox of Legal Expertise*, 2008 BYU EDUC. & L. J. 53 (2008) [hereinafter *Paradox*]; Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603 (2006) [hereinafter *Legal Reading*]; Laurel Currie Oates, *Leveling the Playing Field: Helping Students Succeed by Helping Them Learn to Read As Expert Lawyers*, 80 ST. JOHN'S L. REV. 227, 250 (2006) [hereinafter *Playing Field*]; Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted through Alternative Admissions Programs*, 83 IOWA L. REV. 139 (2003) [hereinafter *Beating the Odds*]; James F. Stratman, *When Law Students Read Cases: Exploring Relations between Professional Legal Reasoning Roles and Problem Detection*, 34 DISCOURSE PROCESSES 57 (2002); Dorothy H. Deegan, *Exploring Individual Differences among Novices Reading in a Specific Domain: The Case of Law*, 30 READING RES. Q. 154 (1995); Mary A. Lundberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407 (1987).

<sup>16</sup> Leah M. Christensen, *Legal Reading and Success in Law School: The Reading Strategies of Law Students with Attention Deficit Disorder (ADD)*, 12 SCHOLAR 173 (2010) [hereinafter *Reading Strategies*].

<sup>17</sup> See *supra* note 12.

<sup>18</sup> See Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow*

of the information literacy of incoming law students,<sup>19</sup> articles about legal writing,<sup>20</sup> and an article about law professors making legal analysis skills more explicit to students.<sup>21</sup> Although the literature focuses almost entirely on the opinions and briefs students first see in law school, there are several articles about reading contracts,<sup>22</sup> a topic also briefly mentioned in drafting books<sup>23</sup> and other transaction-focused books, articles and conference presentations.<sup>24</sup> There are of course very large literatures about reading comprehension generally and reading instruction centering on younger students.<sup>25</sup> Finally, a number of the legal reading articles include specific recommendations for legal

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of *Reader and Writer, Text and Content*, 49 J. LEGAL EDUC. 155 (1999); Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. TOL. L. REV. 657 (1999) [hereinafter *Three Suggestions*]; Peter Dewitz, *Legal Education: A Problem of Learning from Text*, 23 N.Y.U. REV. L. & SOC. CHANGE 225, 246 (1997) [hereinafter *Learning from Text*]. See also Kirk W. Junker, *What is Reading in the Practice of Law?*, 9 J. L. SOC'Y 111 (2008); Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 WM. MITCHELL L. REV. 491 (1997); Martin Davies, *Reading Cases*, 50 MODERN L. REV. 409 (1987). Christensen in *Legal Reading* provides a conventional survey of the legal reading literature. See Christensen, *Legal Reading*, *supra* note 15 at 610 – 614; see also *LSAC Report*, *supra* note 12, at 38 (commenting on literature).

<sup>19</sup> Gallacher, *supra* note 11, at 185.

<sup>20</sup> See Anne M. Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students*, 82 ST. JOHN'S L. REV. 609, 670 - 671 (2008). See also Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 179 (1992 – 1993) (discussing relationship of reading to legal writing).

<sup>21</sup> See Nelson P. Miller & Bradley J. Charles, *Meeting the Carnegie Report's Challenge to Make Legal Analysis Explicit: Subsidiary Skills to the IRAC Framework*, 59 J. LEGAL EDUC. 192, 196-199 (2009).

<sup>22</sup> See Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133 (2003) [hereinafter *How to Read*]; Scott J. Burnham, *Critical Reading of Contracts*, 23 LEGAL. STUD. F. 391 (1991).

<sup>23</sup> See, e.g., LENNE EIDSON ESPENSCHIED, *CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE* 7-8 (2010).

<sup>24</sup> See, e.g., DAVID ZARFES & MICHAEL L. BLOOM, *CONTRACTS AND COMMERCIAL TRANSACTIONS* xxv (2011) (observing that “before one can hope to draft a contract with any deftness or comfort, one must understand how to read a contract; one must understand the ‘language of contracts’ – their provisions, their conventions, and their structure”); Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 U. TOL. L. REV. 705, 706 (2003) (noting that prerequisite to drafting is developing “competency in reading and understanding contracts at a macro level, as well as reading and understanding clauses at a micro level”). Cf. W. David East, *Teaching Transactional Skills and Tasks other than Contract Drafting: Opinions*, 12 TRANSACTIONS: TENN. J. BUS. L. 218, 222 (Special Report 2011)(conference presentation describing exercise in which students review and mark-up opinion letter); Michael Hunter Schwartz, *Teaching Contracts from a Transactional Perspective*, 12 TRANSACTIONS: TENN. J. BUS. L. 77, 81-82 (Special Report 2011) (conference presentation describing how he “teach[es] students to read a contract” in his contracts class).

<sup>25</sup> A concise, accessible, and recent review of the comprehension and instructional literature is found in Neil K. Duke, et. al, *Essential Elements of Fostering and Teaching Reading Comprehension*, WHAT RESEARCH HAS TO SAY ABOUT READING INSTRUCTION 51 (S. Jay Samuels and Alan E. Farstrup, eds. 2011) [hereinafter *Essential Elements*].



educators.<sup>26</sup> In brief, the reading scholars argue that law professors should not assume that general reading skills readily transfer to the reading of legal texts, but instead explicitly address reading and do more to help students learn to read legal texts. The balance of this Part I describes core observations and assertions of the scholarly literature about the reading process and about the differences between expert and novice legal readers, and summarizes the reading scholars' recommendations to law teachers.

*A. The Reading Process: An Example from Practice*

An example from corporate practice provides a vehicle for discussing the legal reading literature. Consider how an experienced corporate lawyer reads a document. A company wishes to buy assets from another business. The company asks Amy, its outside counsel, to review its secured credit agreement, to make sure the company can complete the acquisition without violating any provisions of the contract. The credit agreement is 110 pages long. Amy asks the company for more information about the proposed transaction, including details about the assets to be acquired, liabilities to be assumed, and post-transaction organizational structure. She wants to know about the projected impact of the transaction on the company's financial position and performance, about other initiatives and transactions the company is considering, and about how the company is getting along generally with the bank.

Amy makes a quick sketch of the transaction. She retrieves not only the main agreement but also the related security agreement and other materials included in the deal binder. She reflects upon the company's financial situation at the time it entered into the contracts. Amy scans the entire collection. She then glances at the table of contents in the credit agreement but does not begin reading at the beginning of the document; instead, she goes immediately to the definitions section. Amy highlights several passages, makes some notes, and then turns to specific provisions in the "negative covenants" section of the contract. She finds herself repeatedly flipping back and forth between those provisions and the definitions. She wonders to herself why X is covered but Y is not, jots down several more questions she wants to explore, and, after checking similar agreements for several other clients, grumbles about the imprecision of language in a relevant provision. Amy then looks at sections captioned "events of default" and "representations and warranties." She turns to the boilerplate provisions in the back, to make sure those provisions don't contain any-

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<sup>26</sup> See *infra* notes 54 - 63.

thing surprising, and concludes with a focused review of the security agreement and other materials. There a few additional factual points she wants to double-check with the client, but Amy has come to a tentative conclusion in an efficient way.

Consider how Eric the summer associate might respond to the same question from the client. Eric would be dismayed, and probably downright intimidated, by a 110-page contract with 35 pages of definitions that is coupled with 50 pages of related “ancillary” agreements, reporting forms, and disclosure schedules. Eric opens the credit agreement on his netbook and begins reading on page one. He finds, fairly quickly, that he doesn’t know the meaning of many terms used in the document. What in the world is a “consolidated EBITDA,” “negative pledge,” or “leverage ratio?” He notes that the text is terribly dense; it’s difficult for him to maintain concentration. Eric struggles through the first 20 pages, all of which seem to involve arcane rules about interest rate computations. Eric decides to try a new strategy; he starts searching for key words such as “acquisition” and “consent,” highlights some passages, and makes notes about what various provisions seem to say. He’s been at it for awhile now, and he’s starting to get anxious. Reading this document is not like reading casebooks or briefs or, for that matter, anything he read during the year he worked between college and law school.

Amy is demonstrating what the reading scholars would describe as expert reading practices. In the language of the literature and as developed in Part II.B, Amy reads for a *purpose* in *context*, *engages actively* with the text, brings *domain knowledge* to bear on the task, understands the terminology, sentence structure and conventions of the document to build a *textbase*, recognizes the organization or *text structure* of the contracts, and, through her note-taking, picture-drawing, re-reading, questioning, and evaluating, employs multiple *reading strategies*. Eric’s experience, on the other hand, reflects the reading practices of a novice. He is not entirely sure what he is looking for, lacks background knowledge, doesn’t understand all the words or how the document is organized, and focuses on what the document says rather than what it means. These differences between expert and novice reading, and the unpacking of the reading process provided in the literature, should be of interest to the clinical instructor; presumably, our task includes helping our Eric’s learn to read like Amy.

## B. Reading Process in More Detail

### 1. Purpose and Context

Amy is reading the credit agreement for a reason. She wants to find out if her client can do the deal without breaching the agreement

or needing to obtain consent from the bank. Amy wants to make sure the company is doing the necessary financial modeling to determine the impact of the transaction on compliance with the financial covenants in the agreement. She wants to know what reporting and other actions may be required under the agreement if the deal is completed. Amy's reading reflects the purposeful nature of expert reading. "Experts. . . read consistently with a purpose. They . . . use the purpose of their task to engage with the text and seek out relevant information more effectively."<sup>27</sup> Experts have a "particular instrumentalist purpose in mind" when they read a document.<sup>28</sup> A lawyer reading a case wants to see "what impact a case will have on [her] client."<sup>29</sup> Amy knows the questions she needs to answer; she reads the document for those purposes.<sup>30</sup>

## 2. Active Engagement

Amy is actively engaged with the credit agreement. She jumps from section to section, draws pictures, checks other documents, reflects on the company's financial performance and relationship with the bank, thinks about the future, and reads passages multiple times. Amy is bringing "physical and psychological energy" to the task.<sup>31</sup> Burnham's characterization of contract reading is illustrative of Amy's effort:

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<sup>27</sup> Christensen, *Paradox*, *supra* note 15, at 85.

<sup>28</sup> Baker, *supra* note 18, at 504.

<sup>29</sup> WRITING AND ANALYSIS, *supra* note 13, at 40.

<sup>30</sup> Reading scholars call out the importance of purpose in reading comprehension. In discussing the research design for a study of student case reading and reasoning abilities, the researchers noted:

In real-world law practice, no one reads a case just to read it, but normally does so in response to some larger legal problem or exigency. Consequently, a test of law students' case reading and reasoning skill should not simply be a test of the students' retention of the 'content' of the case *apart from* any larger purpose or exigency, but also a test of students' ability to focus upon content appropriate for a given purpose. The conventional term for students' understanding of the purpose for which they read is their 'task representation,' and thus in developing our prototype we assume that a competent case reading must be one that is *responsive to* this representation. Experimental research investigating the relationships between task representation and text comprehension shows fairly consistently that that readers' text comprehension can be improved or degraded depending on the nature of the task representation that such readers are assigned. (emphasis in the original) (citations omitted)

*LSAC Report*, *supra* note 12, at 2. Cf. Christensen, *Reading Strategies*, *supra* note 16, at 209 (describing importance of "connecting to a purpose" and noting that "when students [in study] internalized a purpose for reading other than simply reading the case in preparation for class, they read differently. . . [they] read the facts of the opinion more closely. . . they noted case details more accurately. . . and they noted the procedural posture of the case more consistently").

<sup>31</sup> MCKINNEY, *supra* note 13, at 62.

Contract reading is nonlinear, imaginative, nonliteral, transformative, and iterative. Contract reading is *nonlinear* because you do not begin at the beginning and end at the end. You must move around from place to place as you gather information and perceive relationships between the parts of the contract. It is an *imaginative* process because, even though contracts are written in the present, they govern the future. You must use your imagination to consider what the future might bring in order to determine whether the contract provides for it. Contract reading is *nonliteral* because you must supply text that does not appear on the page. The rules of contract law, applicable regulations, and custom and usage all provide additional text that you must consider. Contract reading is *transformative* because the text is not always static. You may have the opportunity to change the text through redrafting or negotiation. Most importantly, contract reading is *iterative*. . . [Y]ou will not be able to grasp the significance of every term in one reading. Whether you are reading the contract before or after the fact and no matter what your goal, reading the contract involves exploring the text many times for different purposes. (emphasis in the original)<sup>32</sup>

Amy, notwithstanding the length and density of the document, reads with determination, stamina, and a certain enthusiasm;<sup>33</sup> she is enjoying solving the puzzle as well as responding to the extrinsic need to give an answer to her client.<sup>34</sup>

### 3. *Textbase and Text Structure*

Amy knows her way around the contract. She is familiar with its structure and organization: definitions full of substance, business terms, representations and warranties, affirmative and negative covenants, events of default, boilerplate. Amy knows how these compo-

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<sup>32</sup> Burnham, *How to Read*, *supra* note 22, at 134 - 135.

<sup>33</sup> MCKINNEY, *supra* note 13, at 61 (finding that “reading specialists are unanimous in their observation that skilled readers — readers who understand what they read at a more sophisticated level than their peers — engage with the text they are reading and read with enthusiasm. . . . the more experience the reader has in the field. . . . the more enthusiasm the reader exhibits”).

<sup>34</sup> Miller and Charles note that expert reading practices demand “substantial energy and motivation” and distinguish between intrinsic and extrinsic motivations for reading:

Internal motivation includes reading for curiosity, interest, inspiration, knowledge, education, and advocacy. External motivation [for a student] includes reading for grades, passing the bar exam, getting a job, or out of fear that the student will be embarrassed when called on to recite.

They suggest that students who “exhibit greater internal motivation generally outperform students who exhibit greater external motivation,” and may be “more satisfied and less anxious.” Miller & Charles, *supra* note 21, at 199. It seems unlikely that even an experienced lawyer reads a credit agreement for inspiration but certainly the challenge of assessing, under time constraints and deal pressure, the implications of a set of complex contractual documents for the design and execution of a complex transaction, can be intellectually engaging and motivating.

nents relate to one another. She knows the meaning of the words used in the document. She understands the conventions of the agreement: the heavy use of defined terms including use of defined terms within defined terms, multiple cross-references, and covenant mechanics that bar X action except for specific types of X, plus other types of X subject to specified financial and temporal limitations and the borrower's compliance with the rest of the contract.

Amy has built what the reading scholars call a "textbase," and she has what they call "text structure" knowledge. Textbase development includes recognizing words, using "knowledge of how language and text work" to make "local inferences required to connect the sentences to one another" and establish "logical connections among ideas or events in the text," and "getting the key ideas from the text into working memory."<sup>35</sup> She has built a "mental representation of what the text means," and then integrates that "textbase" with her existing knowledge.<sup>36</sup> Text structure means the organization of, and conventions used, in a document. A contract, for example, may "appear monolithic — a giant wall that does not admit of easy entrance. But when you get to know the document, you may see that it has a structure, a pattern that allows you to make distinctions."<sup>37</sup> Familiarity with the text structure of contracts, judicial opinions, statutes, and other legal texts enables a reader to read more efficiently and purposively.<sup>38</sup> Amy know where to look, and, based on what she finds, where else to look.

#### 4. Domain Knowledge

Amy reads the credit agreement with an understanding of contract and debtor-creditor principles, market practice, and commercial activity. She has represented both borrowers and lenders, and has seen these deals and documents before. She knows the likely impact of an acquisition on a business, the issues it may create under a typical credit agreement, and how a lender would likely view the situation. Amy has "domain knowledge," knowledge of the subject matter or discipline. The reading scholars make the commonsensical observation that domain knowledge is the most critical factor affecting com-

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<sup>35</sup> *Essential Elements*, *supra* note 25, at 53 - 54.

<sup>36</sup> *Id.* See also, Dewitz, *Learning from Text*, *supra* note 18, at 225.

<sup>37</sup> Burnham, *How to Read*, *supra* note 22, at 143.

<sup>38</sup> See Berger, *supra* note 18, at 170 (observing that "expert legal readers use their superior knowledge of text structure and conventions to read more flexibly and efficiently, varying both the order of their reading and the time allotted to different sections. . ."). Cf. McKINNEY, *supra* note 13, at 219 (advising students that "your ability to read statutes effectively will improve as you become more familiar with the layout common to most statutes.")

prehension of legal texts; the “amount of related domain or world knowledge that a reader brings to a text significantly affects that reader’s comprehension of that text.”<sup>39</sup> As one reading scholar notes:

Reading is a constructive process, in which the reader builds an interpretation of a text based on information provided by the author and knowledge that the reader possesses. What readers know determines what they will comprehend. Lacking knowledge in a given domain, the reader cannot make sense of the new information. Studies in areas other than law document that differences in reading comprehension among adult readers can be largely explained by differences in domain knowledge.<sup>40</sup>

These assertions are not surprising. A constitutional law scholar, with knowledge of precedent and principles of interpretation, reads Supreme Court opinions in a more sophisticated way than a geologist (or corporate lawyer), and one would expect an employment lawyer to have a harder time than an environmental lawyer reading Clean Air Act regulations. Amy, unlike Eric, brings knowledge to the task.

##### 5. *Reading Strategies*

Amy, in her active engagement with the document, highlights passages and makes notes in the margin. But she also has a running conversation in her mind, considering the document for multiple purposes, asking questions, circling back to points she doesn’t understand, re-reading passages, trying out different interpretations of ambiguous text, criticizing the drafting. Amy is using what the reading scholars call reading strategies. One strategy, called in the literature the *default* or *summarizing* strategy, involves underlining, summarizing and paraphrasing text. A second strategy is called the *problem formation* or *reflective* strategy; the reader “monitors her understanding of the text by asking questions, making predictions, and hypothesizing, moving forward and backward as she reads.”<sup>41</sup> The reader recognizes her comprehension difficulties and works to address them.<sup>42</sup> A

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<sup>39</sup> *Essential Elements*, *supra* note 25, at 56 – 57 (citations omitted). *Cf.* Dewitz, *Three Suggestions*, *supra* note 18, at 657 (noting that “to comprehend legal text requires knowledge of case law, jurisprudence, legal theory”).

<sup>40</sup> Dewitz, *Learning from Text*, *supra* note 18, at 226.

<sup>41</sup> Berger, *supra* note 18, at 171. *See also* MCKINNEY, *supra* note 13, at 52 (noting that expert readers make predictions, “ask questions in their mind as they read,” summarize as they read, “continually check to make sure their reading is making sense,” and “think about ways to organize what they’re learning and to apply what they’re learning to new situations”).

<sup>42</sup> Dewitz notes that:

Good readers constantly monitor their reading, noting when comprehension is proceeding smoothly and when difficulties occur. When comprehension breaks down, readers attempt to repair their problems. . . . Metacognition, or thinking about thinking, is critical to a reader’s success especially when reading challenging text.”

third strategy is the *rhetorical* strategy: the reader “goes beyond the text and interjects her own comments and evaluation,” including evaluating both the ideas expressed and the quality of the expression.<sup>43</sup> Experts like Amy, say the reading scholars, routinely use problematizing and rhetorical strategies, and their metacognitive “monitoring of comprehension and repair of comprehension breakdown” are essential to their success as readers.<sup>44</sup>

#### 6. *Comparison with Novice Reading*

Now consider Eric’s experience. Eric does not fully appreciate the purpose or context of the inquiry; he has never represented a client party to a credit agreement or asked a lender for anything except a student loan. His classroom work may have involved some exposure to real-world contracts, but most of his experience with such documents arises from reading (or not) his apartment lease. He has had minimal exposure to commercial and financial matters generally. Eric doesn’t understand the terminology. He doesn’t know how the document is organized, or the different functions of the various components of the contract, or how those components relate to one another, or the internal mechanics within each of them, or how the main agreement relates to the other agreements. He doesn’t appreciate that credit agreements include provisions relating to debtor structure, financial performance, and material transactions. To the extent he is thinking about his own understanding of the document, he sees mostly a blur. The reading skills that have served Eric well up to now did not prepare him for this document. Eric knows how to read but he doesn’t know how to start reading, much less read and understand, this legal text.

Eric’s travails are consistent with observations by the reading scholars about law students. As a “novice reader of law, [he] simply lacks the background knowledge to comprehend what [he] reads.”<sup>45</sup> He lacks intellectual filters to discern what is important from what is not important.<sup>46</sup> As with a first-year student confronting judicial opinions, statutes and other legal documents for the first time, Eric finds that the credit agreement contains terms he doesn’t understand and that it “present[s] new text structures and challenges for [a] just-graduated college student[ ] who ha[s] spent four years reading narra-

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Dewitz, *Learning from Text*, *supra* note 18, at 229.

<sup>43</sup> Berger, *supra* note 18, at 171.

<sup>44</sup> Dewitz, *Learning from Text*, *supra* note 18, at 229. *See also infra* note 65.

<sup>45</sup> Dewitz, *Three Suggestions*, *supra* note 18 at 661

<sup>46</sup> *Id.*, at 661 - 662 (noting that “for knowledgeable readers, background knowledge acts as a screen or filter for what they read. . . [t]he novice reader, lacking extensive background knowledge, will find it difficult to determine importance in legal [documents]”).

tives.”<sup>47</sup> His use of highlighting and note-taking is characteristic of novices; they “are more likely to use ‘summarizing’ strategies; that is, strategies that try to get at what the text ‘is about’ such as paraphrasing or keeping track.”<sup>48</sup> His lack of domain and text structure knowledge contributes to a somewhat passive and superficial approach. Eric’s reading practices are different than Amy’s. He’s not having any fun, and he’s starting to wonder whether he is cut out for corporate work.<sup>49</sup>

### 7. *Summing Up Expert Reading*

Amy’s performance exemplified expert reading. She “look[ed] over the material before [she] began” and “searched her mind for what [she] already [knew] about the topic.”<sup>50</sup> She paid attention to context, “both the context within which [she was] reading and the context in which” the document was written, used the context to provide her “with a concrete purpose” for reading, employed her “superior knowledge of text structure and conventions to read more flexibly and efficiently,” and used default, problem formation, and rhetorical strategies to synthesize, question, and evaluate the agreement.<sup>51</sup> Amy took advantage of her considerable “stores of knowledge, including language knowledge (e.g., vocabulary, of complex syntax or grammar), textual knowledge (e.g., of text structures and textual devices), and world knowledge (e.g., disciplinary, interpersonal),” and was

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<sup>47</sup> Dewitz, *Three Suggestions*, *supra* note 18, at 658. See also WRITING AND ANALYSIS, *supra* note 13, at 40 (noting that “[f]or a beginner, reading law is hard. The cases may contain legal terms that are foreign to [the beginner] and they may have an unfathomable structure. . . . [U]nfamiliarity with the subject matter may make it difficult to recognize and separate complicated procedural issues from complicated substantive law issues, or main points from minor arguments, or holding from dicta”); Berger, *supra* note 18, at 170 (observing that “without knowledge of case structures and conventions, students read judicial opinions inflexibly, from beginning to end and at the same rate of time and attention.”)

<sup>48</sup> *Id.*, at 171. See also Christensen, *Legal Reading*, *supra* note 15, at 608 (“[n]ovice readers approaching a new type of text for the first time make use of several basic strategies, including underlining, making notes, highlighting and questioning text”); Christensen, *Paradox*, *supra* note 15, at 85 (noting that “expert legal readers use different reading strategies than novice readers. . . . experts used rhetorical reading strategies more often than novice readers and used default reading strategies less often”). Baker notes that “students. . . misapprehend the rhetorical purposes of legal interpretation and legal discourse as involving passive summary and comment strategies, instead of more active transformation strategies.” Baker, *supra* note 18, at 498.

<sup>49</sup> Eric is not alone in his experience or his discouragement. A study found that a group of graduate students, all of whom had master’s degrees, had difficulty reading cases. The study noted that the students, all “good readers in their own disciplines, seemed adversely affected by the confusion they experienced reading law. . . . [they] showed their discomfort verbally through statements attributing their comprehension failures to defects in themselves.” Lundberg, *supra* note 15, at 416. See also *infra* note 63.

<sup>50</sup> MCKINNEY, *supra* note 13, at 63.

<sup>51</sup> Berger, *supra* note 18, at 170 – 171 (citations omitted).



“readily able to integrate broader arrays of relevant elements from the text base and bring wider and deeper knowledge to the task”<sup>52</sup> of understanding the agreement. Her skillful reading led to the desired and demanded result: informed, comprehensive, responsive, and responsible advice to her client.

### C. Recommendations from the Reading Scholars

The reading scholars caution legal educators not to assume that reading skills developed in academic and employment settings prior to law school translate readily to the reading of legal texts.<sup>53</sup> Expert readers of novels or economics papers are not automatically competent and efficient readers of legal documents. Law professors, the scholars argue, should do more to help their students learn to read as lawyers.<sup>54</sup> The scholars offer a number of specific recommendations. Professors should explicitly address reading and the challenges it presents,<sup>55</sup> describe reading strategies<sup>56</sup>, and then model expert read-

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<sup>52</sup> *Essential Elements*, *supra* note 25, at 55.

<sup>53</sup> Deegan, who performed a study of law student reading, noted that:

Prior to conducting this research, I asked six law professors what factors they believed contributed to different performance among law students; none mentioned reading. When asked to entertain such a notion, one commented, “Well, of course they can *read*.” Stratman (1990) refers to this attitude as the “skills deployment assumption.” It is assumed, he argues, that students do, or should, enter law school with intact literacy skills, and that those skills can be readily transferred to the texts of law. Stratman points out these assumptions are based on no empirical grounds, and calls for researchers to investigate the literacy behaviors and needs of law students. Indeed, the verbal protocols collected by Lundeberg (1987) demonstrate the extent of the problems highly proficient readers in nonlaw disciplines can have in reading legal cases. (emphasis in the original)

Deegan, *supra* note 15, at 157. See also Taylor, *et.al.*, *supra* note 11, at 127 (noting that “students who have developed good generic skills of reading and thinking often have difficulty transferring these skills to legal texts”); Christensen, *Legal Reading*, *supra* note 15, at 603-604 (observing that “we [law teachers] assume our students are good legal readers upon entering law school. However, legal reading is a challenging task for a new law student”).

<sup>54</sup> Berger, *supra* note 18, at 171 (arguing that teachers should “introduce[e] [students] to a “context-driven reading process as well as encouraging [them] to use more reflective and rhetorical reading strategies”); Oates, *Beating the Odds*, *supra* note 15, at 160 (arguing that “law schools need to ‘teach’ legal reading by familiarizing students with the ways lawyers read opinions”); Oates, *Playing Field*, *supra* note 15, at 250 (finding that “research suggests that teaching legal reading is more important than it was ten, twenty or thirty years ago” due to changes in student reading experiences); Dewitz, *Learning from Text*, *supra* note 18, at 246 (noting that “from comprehension theory we know that activating prior knowledge and highlighting text structure will improve the comprehension of many students”). Cf. Junker, *supra* note 18, at 113 (noting that “when one considers that legal education demands that a student reads thousands of pages of text, we clearly ought to be responsive to recent learning about how student learning takes place”).

<sup>55</sup> See Oates, *Playing Field*, *supra* note 15, at 251 (explaining that “I explicitly explain the differences between other types of reading and legal reading. . .I explain the differences between reading textbooks and the cases in casebooks, I walk students through [the

ing practices.<sup>57</sup> They should, for example, walk through a judicial opinion or statute, draw attention to its organization, and describe how they read such materials. Law teachers should provide brief introductions to substantive considerations, contextual or doctrinal, associated with specific legal texts, before asking students to read those texts.<sup>58</sup> Teachers should encourage the use of diagrams, timelines, flow charts, and other visuals as tools for understanding and analyzing legal documents.<sup>59</sup> Professors should develop checklists and short exercises for students to use as they work through unfamiliar materials,<sup>60</sup> and try to integrate reading and writing experiences<sup>61</sup> such as having stu-

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reading studies], and I provide students with a list of strategies they can use to improve their reading.”) (citations omitted).

<sup>56</sup> See Dewitz, *Three Suggestions*, *supra* note 18, at 659, 672 (noting that “with relatively small dose of direct explanation, beginning law students can learn about the structure of legal texts and the strategies for reading them”).

<sup>57</sup> The explicitness about development of reading skills echoes in some measure the argument that legal educators should do more to teach academic as well as lawyering skills. See Deborah Zalesne & David Nadvorney, *Why Don't They Get It? Academic Intelligence and the Under-Prepared Student as "Other,"* 61 J. LEGAL EDUC. 264, 271 – 272 (2011) (observing that professors “hardly ever explicitly name [skills they demonstrate in class] as part of the subject matter for the day. . .the key to our approach is to incorporate academic and legal reasoning skills directly into the syllabus either by name only or with a short notation, and then to teach those skills explicitly, along with the substance of the course. Students are directed to pay particular attention to a reading assignment not just for the doctrine, but also for its illustration of the skills we expect them to learn.”). Cf. ROY STUCKEY, ET.AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 21 (2007)[hereinafter BEST PRACTICES] (faculty in discussing cases “often model important ways of ‘thinking about thinking’ particularly with regard to testing one’s own knowledge and understanding, but rarely cue students explicitly about what they are doing or elaborate on the importance of such skills”) (citation omitted). As described in Part IV, a clinical instructor can call attention to reading in a variety of ways, beginning with syllabus identification of reading skills development as an objective of the course.

<sup>58</sup> See Dewitz, *Three Suggestions*, *supra* note 18, at 666.

<sup>59</sup> See Burnham, *How to Read*, *supra* note 22, at 157 (“[b]ecause the terms of the contract are related, a graphic can help you visualize those relationships. Sometimes a timeline or a flow chart will help you visualize who has to do what, when they have to do it, and what events condition the performance”); Dewitz, *Three Suggestions*, *supra* note 18, at 666-668 (recommending use of graphic organizers and other visual tools). Cf. Arlene Barry, *Reading Strategies Teachers Say They Use*, 42.6 JOURNAL OF ADOLESCENT & ADULT LITERACY 132, 138 (2002) (reporting extensive use by reading teachers of visual aids and graphic organizers). Making a sketch is how Amy started her reading project.

<sup>60</sup> See Dewitz, *Three Suggestions*, *supra* note 18, at 671 (recommending use of guidelines and self-test questions). McKinney’s book includes beginning and advanced case reading checklists. See MCKINNEY, *supra* note 13, at 271-281. See also Oates, *Playing Field*, *supra* note 15 at 254 (recommending use of “exercises designed to walk students through the process of reading a case as a lawyer would read it”).

<sup>61</sup> See Oates, *Beating the Odds*, *supra* note 15, at 160 (recommending “teaching methodologies that provide students with the opportunity to read judicial opinions in context and for a specific purpose. . .[such as writing] a brief”). See also *Essential Elements*, *supra* note 25, at 76, 79 (noting that “current understanding in the field of literacy dictates that reading and writing mutually reinforce one another and rely on some of the same cognitive processes. . .[I]t may well be that revisiting and re-representing important ideas in many

dents write memos or responses to short-answer questions as they work through a set of judicial opinions. In doing these things, the scholars argue, law teachers can not only introduce students to expert practices but also improve academic performance,<sup>62</sup> and reduce the inefficiency, and anxiety, that may come with learning law.<sup>63</sup> The reading scholars are largely calling out to doctrinal teachers but, as outlined in Part III, the clinical instructor, whose mission is to introduce students to expert performance and help students develop professional disciplines and values, and who teaches in a setting that involves initial and consequential student experiences in reading a range of materials, may well want to listen.

### III. READING IN THE CLINIC

Some of the descriptions and characterizations in the legal reading literature are familiar to the clinical instructor. The depiction of expert lawyers using context to provide them “with a concrete pur-

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modes in what matters most”); STEVE GRAHAM & MICHAEL HEBERT, *WRITING TO READ – EVIDENCE FOR HOW WRITING CAN IMPROVE READING* (2010), available at [http://carnegie.org/fileadmin/Media/Publications/WritingToRead\\_01.pdf](http://carnegie.org/fileadmin/Media/Publications/WritingToRead_01.pdf) (reporting that meta-analysis of reading instruction literature concluded that adolescent student reading is improved when students write about the texts they read, receive instruction in writing skills, and increase the amount of their writing).

<sup>62</sup> As noted, several of the legal reading articles explore the relationship of reading practices to academic performance. Not surprisingly, according to these studies students who read more like experts do better in the classroom. See Christensen, *Legal Reading*, *supra* note 15, at 604 (noting that the “more successful law students read judicial opinions differently from those students are who less successful”); Oates, *Beating the Odds*, *supra* note 15, at 144 (comparing reading strategies of law students and finding that the most successful students, as reflected in first-year grades, better employed strategic skills akin to those used by experts than did less successful students); Christensen, *Paradox*, *supra* note 15, at 70 (finding that law students’ use of problematizing and rhetorical strategies to help comprehend legal texts correlated with law school success); Deegan, *supra* note 15, at 166 (noting that “a difference in cognitive processing, specifically effective use of the problematizing strategy, appeared in this study to be a better predictor of first-year academic performance than either LSAT scores or undergraduate GPAs. . .”); Berger, *supra* note 18, at 171 (finding that “compared with poorer students, stronger student readers spend more time engaged in ‘reflective’ strategies, monitoring their understanding and interpretation of the text as they read”). Cf. Enquist, *supra* note 20, at 670 – 671 (relating reading practices to student success in legal writing courses).

<sup>63</sup> See Dewitz, *Three Suggestions*, *supra* note 18, at 672 (observing that “[b]y explaining to novice law students how to use the strategies of experts and successful students, we take some of the mystery out of reading and learning the law and make their tasks easier”). The author of an article about law student mental health touches upon student experiences reading legal documents. She argues that a “great deal of wasted time, pain and failure could be avoided if professors would take the time to teach law students to read carefully and critically from the beginning,” and includes “teaching students to read like lawyers” as one of a number of actions law schools should take to improve the mental health of their students. Jennifer Jolly-Ryan, *Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers*, 48 U. LOUISVILLE L. REV. 95, 127 (2009).

pose that is reflected in the way they read” reminds of case theory; the lawyer reads and evaluates documents in the context of the theory of the case. That students sometimes struggle with new documents, and that reading as a lawyer involves reviewing a document multiple times for different purposes and active questioning, criticism, and evaluation with a certain gritted-teeth ferocity, is readily observed in the clinic. It is revealed in instructor and peer engagements with students about factual investigation activities and written work-product. That domain knowledge and contextual understanding are central to comprehension reminds that instruction in substantive law is necessarily limited in the clinic but that immersion in context is a reality and principal benefit of the clinical experience.<sup>64</sup> That expert readers are metacognitive, that they “constantly monitor their reading, noting when comprehension is proceeding smoothly and when difficulties occur. . .[and] attempt to repair their problems,” is another example of the self-awareness and regulation in learning and task execution considered essential to expert practice and a concept central to clinical and professional education generally.<sup>65</sup>

A clinical teacher may find utility in the nomenclature and framework provided by the reading literature. “Text structure” is a useful term for someone engaging students with the highly-constructed, driven-by-convention materials regularly found in multiple practice areas. Working with a student to understand a technical document may involve learning terminology and exploring how sentences and passages fit together (textbase), recognizing and taking advantage of document design (text structure), exploring client objectives and environment (context), deploying background legal knowledge (domain knowledge), developing questions about the document (problem formation strategy), and evaluating the text (rhetorical strategy). One-by-one identification of the many purposes for which lawyers read documents may demystify the task in some measure. The reading model, and the notion of multi-purpose, layered reading, provide a framework for breaking down, for “freeze-framing,” document study in a concise and understandable manner. One can choose whether or

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<sup>64</sup> Cf. Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 CLINICAL L. REV. 149 (2004); Mark Neal Aaronson & Stefan H. Krieger, *Teaching Problem-Solving Lawyering: An Exchange of Ideas*, 11 CLINICAL L. REV. 485 (2005) (discussing relationship of doctrinal knowledge to ability to learn, in clinic, methods of problem solving and good practice).

<sup>65</sup> See, e.g., WILLIAM M. SULLIVAN, ET.AL., *EDUCATING LAWYERS* 173 (2007) [hereinafter *CARNEGIE REPORT*] (noting that “the essential goal of professional schools must be to form practitioners who are aware of what it takes to become competent in their chosen domain and to equip them with the reflective capacity and motivation to pursue genuine expertise. They must become ‘metacognitive’ about their own learning. . .”).

not to use jargon such as “textbase” and “problem formation strategy,” but these characterizations offer tools for talking about documents, both in the first instance and in trouble-shooting comprehension and drafting difficulties.<sup>66</sup>

The rigor of Amy’s reading suggests that reading can be a platform for carrying out a central function of the clinic: helping students learn about professional values and expectations. The difficulty of many documents, and the fact that clients and employers rely on a lawyer’s reading ability, suggests the importance of diligence and care. Dealing actively and effectively with long, abstract, and complex documents requires physical stamina and patience as well as intellectual effort.<sup>67</sup> Dealing responsibly with legal documents means reading everything even if the text looks commonplace, as Amy did with the boilerplate.<sup>68</sup> Simple phrases, such as those seen in formal legal opinions and certificates delivered at transaction closings, can carry great weight.<sup>69</sup> Document aesthetics are important; it matters how documents look, the expectations for execution are exceedingly high, and unattractive documents create impressions about the author’s care and competence.<sup>70</sup> These are valuable and, for many students, new, messages about practice. Moreover, a clinician might wonder if serious engagement with reading may contribute to development of pro-

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<sup>66</sup> A simple exercise provides a platform for introducing the reading model. Imagine a group read and think-aloud exercise involving a liability waiver. The students ask about the purpose for reading the document, inquire about the underlying activity, try out their knowledge of tort and contract law, wonder about the meaning of certain phrases (“hold harmless?”), restate in colloquial terms the document’s function, note the use of all caps and spaces for initials, question the absence of a consent to medical treatment, and express a view about enforceability (as well as user-friendliness). In other words, they consider context, use domain knowledge, decode words, recognize text structure, paraphrase content, raise questions, check their understanding, and evaluate the text.

<sup>67</sup> Cf. TINA M. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 3 (2007) (noting that in contract drafting “it helps to have formidable powers of concentration, physical stamina, mental acuity, tenacity, the ability to multitask and a sense of humor”).

<sup>68</sup> See Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Class*, 36 ARIZ. ST. L. J. 257, 268 (2004) (noting that lawyers “go over the boilerplate carefully, even if they’ve read the same tedious clauses a hundred times before”).

<sup>69</sup> Phrases in legal opinions are understood as having specific meanings and as reflecting customary diligence activities. Karl S. Okamoto describes a simulation class exercise involving opinions: “I wanted [the students] to witness a lawyering task which is facially very simple, almost mindless, but which actually involves enormous effort and meticulous attention both in factual investigation and in understanding applicable legal rules.” Karl S. Okamoto, *Learning by Doing and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 4 J. LEGAL EDUC. 498, 505 (1995).

<sup>70</sup> Espenschied observes that “regardless of how perfect the language is, if the contract does not have a professional appearance, the audience is going to be suspicious of it.” ESPENSCHIED, *supra* note 23, at 10.

professional identification. As students begin to read documents in a more sophisticated way, they may develop a greater sense of respect for the work and the effort required to do it well, and better appreciate the products of their trade.

Finally, the instructor may conclude that the clinic seems like an especially good place to call out and build reading skills. A second-year student may find an initial and perhaps isolated encounter in the clinic with a technical document such as a contract, regulatory study or school policy more jarring than his exposure during the first year to judicial opinions, a story-telling narrative form that students read in volume in every class. Moreover, the reading occurs in an authentic environment, a factor that reading scholars argue improves performance.<sup>71</sup> From a pragmatic point of view, time is short in the clinic; greater speed in getting up to speed may be a good thing. These considerations, together with the obvious but helpful reminder in the literature that students are novice readers, may prompt reflection about how one engages students, at a practical level, with the documents observed in the practice. A teacher may find herself asking: Have I actually thought about these documents (that I've been reading for ten years), and what it must be like to see them for the first time? Do I provide introductions before asking students to read the relevant materials? Should I expressly acknowledge reading challenges? Should I present the reading model and use its concepts and terminology? Am I doing enough to help students build vocabulary and text structure knowledge? Do I effectively model expert reading practices, and recognize and reinforce them when I see them in a student? Do I recognize that part of the sharing of expert practice that occurs in the clinic involves the fundamental activity of reading, even if not so expressly labeled?

Choices about project development and deliverable design, regular encounters with client documents, and exercises and discussions in the seminar, all provide opportunities for practice in, and reflection about, reading documents as a lawyer. Part IV of this article, and the summary table attached as Appendix A, describe some "reading" activities tried in the transactional clinic I direct at Stanford. A number of the practices described reflect recommendations of the reading scholars, and some or all of them no doubt are carried out in other

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<sup>71</sup> Duke *et al.* observe that motivation is highly correlated with comprehension and that motivation is enhanced by "providing contexts, materials or tasks that catch students' spontaneous attention or situational interest. Instruction that includes . . . opportunities to engage in reading for authentic purposes, and . . . [that involve] vivid, concrete examples, is associated with motivated engagement and, subsequently, better recall and learning." ESSENTIAL ELEMENTS, *supra* note 25, at 60 (citations omitted).

clinics and classrooms as well; the transactional skills literature, for example, identifies a variety of ways teachers engage students in reading commercial documents. The ideas underlying these activities are largely suggestive and incremental in nature; there is no call for big change. Rather, the notion here is that clinical teachers can contribute to development of professional competence and habits of mind by bringing an awareness of novice reading challenges, and a general reading development sensibility and explicitness about reading, to the everyday work in the clinic.

#### IV. A FEW IDEAS FOR THE CLINIC

*Explicitness.* The reading scholars suggest that law professors expressly acknowledge the challenge of reading legal documents.<sup>72</sup> To that end, our syllabus and course plan identifies “close reading” as one of five core learning objectives, and includes a rubric for student and instructor assessment of student performance. We ask students to complete a simple online survey about prior exposure to corporate and commercial documents. We share the results with the class and ask students to talk about their initial experiences in law school reading cases and statutes. In later sessions and informal interactions the instructors relate their own stories of terrifying encounters with legal documents. We devote part of a bootcamp session to explicit discussion of reading and the reading model, and do brief reading exercises.<sup>73</sup> The goals of these activities are multiple: call attention to the topic in order to create self-awareness; convey that reading is a central professional activity, and is different from students’ prior academic, employment and personal reading experiences; acknowledge that these documents are unfamiliar to almost everyone and that, in the clinic, it is okay to be a novice reader; and remind students that they have experience in mastering other texts of the profession. In a nutshell: we are all Eric.<sup>74</sup>

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<sup>72</sup> See *supra* note 55.

<sup>73</sup> For example, on the first day of class, we ask students to read the syllabus, and to comment, in writing, about whether it is an effective piece of business communication and a “good document” should it be produced in a malpractice or breach of ethics claim against the clinic. This activity provides, among other things, opportunities to read for a concrete purpose as a lawyer and to evaluate a business document from the perspective of how it might be viewed by another reader. Cf. Jonathan Bush & Leah A. Zuidema, *Professional Writing in the English Classroom*, 100.4 ENGLISH JOURNAL 86 (2011) (describing “ugly syllabus” exercise in which students in English class review and improve poorly designed syllabus). We do a similar bootcamp exercise in which we ask students to compare a model nonprofit conflict of interest policy with the clinic form of such policy, and offer criticisms of, and suggestions for, our policy.

<sup>74</sup> Such a welcome may be welcomed by students. Gallacher notes that:

[A]fter conducting a review of law student reading strategies, one researcher ob-

*Vocabulary.* Reading documents involves recognizing words. Legal texts and other documents seen in practice are full of technical words and phrases unfamiliar to many students. We try to approach that knowledge gap head-on, through overt work on vocabulary. We do four or five short ungraded quizzes during the term; true/false, fill-in-the-blank and multiple-choice questions are useful for driving retention and quick recall of new words and basic concepts. Quizzes are also useful for reinforcing exposures to document content and text structures.<sup>75</sup> We do the quizzes at the beginning of a seminar session and then move quickly through the answers, an approach that minimizes the time devoted to the exercise, enables a student to assess his or her own understanding, and provides a platform for generating some energy at the start of class.<sup>76</sup>

*Orientation.* The reading scholars recommend that teachers provide students with brief substantive introductions before students take on a legal text. We try to orient students to core documents on both substantive and “document” dimensions. At the most general level, we ask students to talk about how corporate documents differ from litigation documents.<sup>77</sup> We look for client engagements that require students to read (and give us an opportunity to talk about) a range of materials.<sup>78</sup> We include in the seminar curriculum occasional expo-

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served that ‘debriefing interviews revealed a deep insecurity and anxiety about reading.’ And the same researcher noted that ‘[it] was interesting that when asked why they volunteered for this study, many of the participants replied that they thought they might be able to talk to someone who understood their perceived, unvoiced, but very real concerns about reading.’

Gallacher, *supra* note 11, at 185 (quoting Deegan, *supra* note 15).

<sup>75</sup> For example, a quiz can include questions such as “where would you expect X to be addressed in the contract?” and “what corporate and tax law principles are reflected in a conflict of interest policy?”.

<sup>76</sup> Stuckey notes in BEST PRACTICES that “virtually no experiential education courses give written tests or otherwise try to find out if students are acquiring the knowledge and understandings that the courses purport to teach.” BEST PRACTICES, *supra* note 57, at 239. The quizzes, together with the periodic and culminating self-assessments we do, are a modest step in that direction.

<sup>77</sup> For one thing, corporate documents, which embody commercial relationships, frame legal entities, describe transaction mechanics, carry out regulatory mandates, and convey information and advice, are often directed to readers other than lawyers: directors, investors, lenders, customers, suppliers, employees, and so on. They tend to reflect law, not describe it, and, unlike, say, discovery motions, they can have a long and sometimes public life.

<sup>78</sup> An example is a corporate governance review, a project that involves study of by-laws, board committee charters, operating policies, website and tax return disclosures, and other materials, and review of diverse governance authorities and other sources. Students learn “where things come from” in working with these materials. Review and updating of documents nonprofit organizations use in their operations, such as housing programs involving counseling and residential components, or education programs involving classroom training and fieldwork, require students to immerse themselves in multiple, related documents that will be read and used by audiences of varying nature.



sure to and short writing assignments about commercial documents students will not encounter in the clinic but may well see in law firm practice. These activities provide opportunities to learn about document purpose, terminology, text structures and conventions, to read closely for consistency and relationships among documents, to experience the deceptive difficulty of reading and using forms,<sup>79</sup> and to learn about substantive and contextual aspects of the documents.<sup>80</sup> Eric would have benefited from such discussions.

*Cheat Sheets and Graphics.* The reading scholars encourage the use of checklists and graphics in helping students learn their way around legal texts.<sup>81</sup> The clinic is a particularly good venue for using such tools because it provides opportunities for students to create them as client deliverables as well as internal pieces for their own use. For example, we try to find opportunities to prepare contract and business process summaries, checklists, and graphics for clients. Developing a cheat sheet for a contract that contemplates multiple events requiring a response by a specified time, multiple activities requiring measurement and reporting, and multiple milestone and trigger developments with different and meaningful consequences, demands hard reading and helps sensitize students to document content of tremendous importance. A table setting out approval requirements for corporate actions, or process maps or timelines capturing operating protocols, have similar close reading (as well as client delight) value.<sup>82</sup> We think these sorts of activities not only facilitate reading but also

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<sup>79</sup> Cf. Stachen, *supra* note 4, at 262 – 265.

<sup>80</sup> We try to approach substance by asking common sense questions and predicting content. One need only imagine loaning money to another person, leasing an apartment, or letting someone else use one's name, to understand the core concerns and functionality of a loan, lease or license agreement, and to begin to see how those concerns are reflected in the document. We think these kinds of discussions can not only increase uptake on initial reading but, when coupled with exposure to varied documents, also provide a platform for use of more sophisticated reading strategies. A lawyer can better question and evaluate a document if the lawyer has a sense of recurring concerns and common solutions. This in some ways is a less-sophisticated echo of the approach taken in "Deals" courses and other sources that equip students with broad frameworks for understanding commercial documents. In Deals courses, for example, the class studies economic problems, such as asymmetrical information and moral hazard, inherent in commercial relationships, and the contract devices that respond to those problems. See Michael Klausner, Course Description, Deals I, Stanford Law School Course No. 273-0-01 <http://lawreg.stanford.edu/stanford/prereg/CourseDetails.asp?cClschedid=+25314> (last visited January 22, 2012). Stark offers a five-prong framework for understanding "business issue[s] that appear in almost every transaction" that provides a tool for recognizing and understanding contract attributes and (through a rhetorical reading strategy) evaluating the author's success in addressing those attributes. STARK, *supra* note 67, at 303 – 310.

<sup>81</sup> See *supra* note 59.

<sup>82</sup> Internally, we sometimes set up contract and other document outlines horizontally, not vertically, to help students see the ordering and "chronology" of the arrangements, and to recognize conventional text structures.

provide real practical value to the client and represent a productive and authentic way to integrate reading and writing experiences.

*Layers.* We talk in the bootcamp about the notion of reading for technical quality and, more generally, the multi-layered nature of legal reading. We do exercises in which students read several short contracts with a variety of defects and then call out the flaws, an occasionally raucous warm-up for one aspect of legal reading. Reading for quality also provides another opportunity for use of simple checklists. We give the students a short checklist, in both electronic and sticky note printed form, that set out a number of questions about technical quality. We then ask them to complete the checklist before submitting drafts of substantial work-products to instructors.<sup>83</sup> Student compliance with (and instructor enforcement of) this requirement is mixed, but we see the piece as having more symbolic than quality control value; it helps illustrate that we lawyers read for everything, and that the standards for close reading are exacting. In Carnegian terms, a simple tool like this, and the reading model and multipurpose notions discussed earlier, may perhaps represent small-bore ways of describing “important features of good performance [though] conceptual models and representations. . . [that] can be employed to guide the learner in mastering complex knowledge by small steps.”<sup>84</sup>

## V. CONCLUDING OBSERVATIONS

Lawyers read a lot, and a lot of different things. Reading is a threshold professional activity. Clinicians are tasked with helping students develop lawyer skills and habits of mind, and with making features of expert performance explicit. A body of scholarly literature suggests that reading the materials encountered in legal practice comes harder for students than we might expect, and offers ideas to teachers for helping students learn to read as lawyers. This article sug-

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<sup>83</sup> The checklist includes questions such as “Do cross-references match the correct section?” and “Do section and paragraph captions reflect the related text?”

<sup>84</sup> CARNEGIE REPORT, *supra* note 65, at 98. We have not at this stage tried to measure, through a reading comprehension test or other formal instrument, the impact on student learning of these modest measures. Anecdotal evidence, in the form of student self-evaluation papers at the end of the term, other student reflections, and comments from both current students and former students now in practice, suggests that the explicitness about reading has helped create awareness of the need for deep, disciplined, and active engagement with legal materials, useful practice and habit-building in multi-layered reading, and a confidence-building familiarity with characteristic text structures, conventions, and terminology. One student noted in his self-assessment that he read a contract multiple times – “once to understand the basic nature of the relationship between sponsor and project, one to spot inconsistencies and language needing clarification, once to consider how we could add provisions to address [the client’s] concerns, and a few more times to compare it with precedent agreements.”

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gests that clinicians stop and think about reading as a professional activity. It encourages them to reflect upon the recommendations of the reading scholars, the clinician's own experiences in the clinic with novice readers, the qualities of the clinic as a venue for improving reading skills, and the opportunities for incremental refinements in client and seminar work. Reading is an everyday activity for a lawyer, and it seems sensible to bring a reading development sensibility to the everyday work in the clinic.

*Appendix A*  
*Reading Development Opportunities*

<i>Practice</i>	<i>Rationale</i>
syllabus identifies reading as a core point of emphasis and includes reading in evaluation rubric	call attention to reading as a central professional activity and topic of learning in the clinic
students complete survey about prior exposure to contracts, bylaws, financial statements, and other corporate documents; results shared with class	acknowledge reading challenges, convey that documents are unfamiliar to almost everyone, create a safe place for asking questions, remind students that they have experience in mastering other legal texts, and provide experiences in reading for a purpose
students discuss initial experiences in law school reading cases and statutes, and compare those materials with corporate documents	
students complete short read-and-write exercises	
students take true/false, fill-in-the-blank, and multiple-choice quizzes focused on vocabulary; answers quickly reviewed in seminar	develop textbase knowledge (word recognition); useful in driving retention and quick recall of new words and basic concepts; provides opportunity for self-assessment
client engagements and seminar assignments that require review/drafting of multiple documents and use of multiple sources of authority	orient and demystify often intimidating documents
client engagements requiring review and rebuilding of existing client templates	develop textbase knowledge (learning new words and how to make “local inferences” and “logical connections” among words, sentences, and ideas in new categories of documents)
client documents and seminar exercises used as basis for exploring document purpose, organization, components, mechanics, and conventions (e.g., use of definitions, internal relationships, and characteristic organizational schemes)	develop text structure knowledge (learning characteristic document structures and organizational schemes)
	build habits through reinforcing methodical nature of legal reading; provide experience working with multiple documents, moving back and forth within single document, and among multiple documents

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students develop summaries and other practical tools for client (e.g., cheat sheet for a complex contract; table setting our approval requirements under bylaws; checklist for policy or rules compliance)	clinic a good venue for use of such tools because it provides opportunities for students to create tools for clients as well as themselves (and clients really value them)
students develop graphics to illuminate document architecture, deal structure, or decision-making process	checklists and graphics useful in helping students learn their way around legal texts  preparation requires close reading and helps sensitize students to document content of tremendous relevance to lawyer understanding and to client comprehension and compliance; authentic way to integrate reading and writing experiences
group review and think-aloud exercise involving client document (e.g., simple liability waiver)	provide opportunity to break down legal reading process in an understandable manner  create classroom nomenclature for approaching documents, both in first instance and in troubleshooting comprehension difficulties.  supplement other approaches to encouraging metacognition
class review of new document prefaced by discussion of underlying arrangement in common sense terms	provide brief and graspable substantive introduction before students take on a new legal text  provide platform for broader consideration of legal documents (e.g., recurring concerns and themes, use of common solutions)  demystify documents
students use reading-for-execution checklists or questionnaires when reviewing own or third party document	build good habits; checklists make more concrete, and regular use may help students begin to internalize, systematic, and disciplined nature of professional reading

